ADVISORY COMMITTEE
ON
CRIMINAL RULES

November 2, 2020

AGENDA
Meeting of the Advisory Committee on Criminal Rules
November 2, 2020

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7. Next Meeting

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Roger A. Fairfax, Jr.	ACAD	Washington, DC		2019	2022
Gary Feinerman	D	Illinois (Northern)		2014	2020
Michael J. Garcia	JUST	New York		2018	2021
Lisa Hay	FPD	Oregon		2020	2022
Denise Page Hood	D	Michigan (Eastern)		2015	2021
Lewis A. Kaplan	D	New York (Southern)		2015	2021
Bruce J. McGiverin	M	Puerto Rico		2017	2020
Jacqueline H. Nguyen	C	Ninth Circuit		2019	2022
Brian C. Rabbitt*	DOJ	Washington, DC		----	Open
Catherine M. Recker	ESQ	Pennsylvania		2018	2021
Susan M. Robinson	ESQ	West Virginia		2018	2021
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Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
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TAB 1

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TAB 1A

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Item 1A will be an oral report.

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TAB 1B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
May 5, 2020

Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met by video teleconference on May 5, 2020. The following members, liaison members, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge James C. Dever
Professor Roger A. Fairfax, Jr.
Judge Gary S. Feinerman
Judge Michael J. Garcia
Andrew Goldsmith, Esq.[1]
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Bruce McGivern
Judge Jacqueline H. Nguyen
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Standing Committee Reporter
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Allison Bruff, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center

Ms. Donna Elm, Esq., a former member, was in attendance. And the following attended as observers:

Patrick Eagan, from the American College of Trial Lawyers
Peter Goldberger, from the National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16

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

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Opening Business

Judge Kethledge observed that it was the first meeting for Judge Nguyen and Professor Fairfax, and he noted that this was Judge Campbell's last Criminal Rules meeting as chair of the Standing Committee. He thanked Judge Campbell for his outstanding contributions to the advisory committee's work, particularly his suggestion of the miniconferences that were critical to the development of the Rule 16 and 16.1 proposals. Judge Kethledge also noted that the terms of Judge Dever and Judge Feinerman were expiring, and he thanked them for their service.

Judge Kethledge thanked Ms. Elm for joining the meeting. After making significant contributions at the Committee's Rule 16.1 miniconference, Ms. Elm joined the advisory committee as the representative from the Federal Public Defender world. Although she retired from the committee after our fall meeting, Ms. Elm had been asked to continue in an informal capacity to provide her perspective until her replacement has been named.

Judge Kethledge presented the Rules Committee Staff report, referring members to the agenda book materials. He added that the Supreme Court transmitted newly adopted rules to Congress on April 27 (though there were no Criminal Rules included), and that the CARES Act (included in the legislation chart) would be discussed later in meeting.

The minutes were unanimously approved with two changes:

Page 36 – third bullet should read "defendant states" and not "government states"
Page 37 – fourth paragraph contains the word "allegations" when it should read "obligations."

Rule 16

Judge Kethledge moved to item 2 on the agenda, the proposed amendment to Criminal Rule 16. After summarizing the history of the advisory committee's effort to amend the expert disclosure provisions of Rule 16, he turned to two concerns that were raised during the Standing Committee's discussion of the draft proposal at its January meeting.

Defendant's "case-in-chief"; government rebuttal witnesses. At the Standing Committee meeting, Judge Campbell asked the advisory committee to examine further its decision to change the scope of the defense disclosure from that in the current rule – testimony the defense intends to present as "evidence at trial" – to testimony it intends to present "in its case-in-chief." He suggested that if the rule should be reciprocal, perhaps each party should disclose expert testimony intended as "evidence at trial." The reporters examined this suggestion in their memorandum to the subcommittee (Tab 2B, p. 101 of the agenda book), and the subcommittee discussed it at length.

Ultimately, Judge Kethledge explained, the subcommittee decided to (1) retain the case-in-chief term for both the government and defense disclosures and (2) add new language regarding the government's obligation to disclose certain rebuttal expert witnesses. The new

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language, suggested by Judge Feinerman and approved unanimously by the subcommittee, appears on lines 12 through 14 of the proposed amendments to the rule, on page 131. It requires disclosure of evidence the government intends to use at trial "during its case in chief or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." In the subcommittee's view, this is a sensible addition and is needed to provide adequate notice to the defendant of expert testimony that the government knew – before trial – that it would be using at trial. But it was limited to government experts intended to rebut an expert the defendant had already disclosed in a timely manner prior to trial. To explain this addition, language in the note was added at lines 15-17 on p 125.

Mr. Wroblewski commented that he had concerns about how this process would actually work in practice, noting that in the Department's experience most of this happens very close to trial and not, as in civil cases, months and months before trial. The Department requested the language in the note that would alert the trial judge that there needs to be sufficient time between each of these disclosures to allow the other side time to respond, including allowing the government to respond to the defendant's disclosure. Despite the reservations, for the time being the Department supports it and thinks it is a sensible, orderly process, he said. He will circulate this proposal around the Department and might come back with some suggested changes later on.

Mr. Goldsmith agreed that this is a fair and reasonable solution, but he was concerned about what would occur when a defense expert pops up during or just before trial. He suggested the note could make it clearer that the government's obligation is not triggered unless the defense has done what it supposed to do under the Rules. In practice these rules most of the time are going to be applied against the government. Judges rarely preclude the defense from putting on an expert because of its failure to comply with Rule 16. This is potentially a trap for prosecutors if they attempt to have an expert respond to a defense expert that popped up at the last minute, since it requires an understanding that the government has a pretrial disclosure obligation only if it got the timely defense disclosure prior to trial. So, in Mr. Goldsmith's opinion, this is a good solution, but he wondered if there were a way to make it clearer that when the defense has not made the required pretrial disclosure, the government's obligation does not kick in.

Judge Campbell said the additional language was a good change, and it addressed the issue he had raised. Mr. Goldsmith's concern is addressed to some degree by the language that will now be in 16(b)(1)(C)(ii), p. 136, lines 82-84, which says that the time for the defense disclosure must be sufficiently *before* trial to provide a fair opportunity for the government to meet the defendant's evidence. The way the government meets the defendant's evidence is with another expert. This is clearly required in the rule and seems fairly obvious. Judge Campbell also suggested adding something in the note that says the judge should keep in mind that the government may need to identify an expert after the defense disclosures and should take that into account in deciding when everybody's disclosures are due. When Professor King drew his attention to the note language on page 125 of the agenda book, lines 24-27 ("Deadlines should

accommodate the time . . . the government would need to find a witness to rebut an expert disclosed by the defense."), Judge Campbell said that it addressed his concern.

Speaking to Mr. Goldsmith's concern, Professor Beale said she thought the rule was clear. It says in response to "timely disclosure" and specifies when the defense must disclose. If the defense makes an untimely disclosure, then presumably the judge is not going to penalize the government for its failure to disclose in response.

Mr. Goldsmith expressed concern that people would stop reading at line 17 of the note and not read the next paragraph. It would be helpful to have something on line 17 that refers to the language that follows. He also suggested that because government rebuttal witnesses are more likely to come up as a result of what happens at trial, rather than as a result of what happens pretrial, to make it clear that this is contemplated in the pretrial context, this part of the note could read "disclosed pretrial under (b)(1)(C)." Professor Beale asked how district judges' orders address something that pops up during the middle of trial.

Judge Campbell responded that he could not imagine a judge would preclude the government from using an expert who was needed for rebuttal only because of testimony from a defense expert that had not been disclosed before trial. That is not going to happen. It is implicit in line 17 that we are talking about pretrial disclosures. He did not share the concern that the government will be trapped when the defense disclosure comes so late. Several other members expressed agreement with Judge Campbell's comments. One also pointed to subsection (b)(1)(C)(ii), which tells the court that it must set the time for the defendant to make a disclosure, and that time must be sufficiently "before trial" for the government to meet the defendant's evidence. Another explained that most district judges would consider whether the late defense disclosure was gamesmanship or was triggered by the way the government presented its case-in-chief. This member also suggested that the word "timely" adequately protects the government.

Mr. Goldsmith said the language in (b)(1)(C)(ii) requiring that the disclosure must be sufficiently before trial allayed his concern. He added that the concern is not only that a previously undisclosed expert appears. It is also when an expert takes the stand and strays into a different area. The concern is adequately addressed, and he appreciated the Committee's indulgence on this tangent.

Delayed disclosure of expert witness identity. Judge Kethledge noted that a second issue about the draft amendments, raised by Judge Furman at the Standing Committee meeting, concerned situations where the government knows it will put on an expert on a certain subject, but might not know in advance who that person will be. This might be, for example, a firearms forensic expert who would give a generic kind of testimony. Judge Furman had suggested adding something to the note to encourage district courts to have some flexibility with regard to the timing of the government's disclosure of the identity of such an expert. After discussion in its March call, the subcommittee decided to revise the note but not the rule.

The purpose of the amendment is to address the lack of a clear timeline for disclosures and the lack of specificity about what each party must disclose with respect to its experts, Judge

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Kethledge explained. The subcommittee did not want to undermine the amendment by allowing parties to delay identifying their witness unless there is a very good reason for that delay. If the party receiving the disclosure doesn't know who the witness is, then it will not receive a lot of the information we are trying to convey. The subcommittee thought that we ought to retain as a default that the party wishing to put on an expert must disclose that expert's identity. If for some reason that presents a hardship, then the party should seek a modified deadline from the district court for the disclosure of the identity. The subcommittee added language in the note about the possibility that a party could change the identity, through a supplementation. Judge Kethledge stated that the government's feet would not be in cement with an expert it disclosed up front. It can supplement with the name of a different person. But the default is important, and it should apply to all experts unless somebody has a reason why they cannot reasonably give the identity first.

Judge Furman noted there are often experts who are generic, such as a firearms expert who testifies that DNA was not found on the gun. In such cases, the government can easily disclose, by whatever early deadline the court sets, that it anticipates presenting that testimony. But it is not in a position at that time to say who the examiner will be because it won't know when trial will be scheduled and who would be available. The concern was that there be enough flexibility that it wouldn't prevent the government from calling someone in those circumstances. He thought the committee went a good distance to address the concern in lines 75-78, p. 127 (accounting for the possibility of "change in the identity of the expert"). But this presumes that a person was identified in the first instance, and a judge could conceivably read this not to allow for partial disclosure of the early part and then later supplementation, which is routine when the identity of the person in those cases is not critical. He suggested adding another sentence like "It is also intended to address situations in which a party is able to make only a partial disclosure in the first instance, for example where a party intends to use expert testimony on a particular subject but is not in a position to identify the witness until closer to trial." He did not want to dilute the virtue of setting the early deadline, but was trying to find a way to leave room for flexibility.

Professor Beale said that when either party knows it is going to have an expert but doesn't know who that will be, that is a Rule 16(d) issue where you ask to delay the disclosure of the identity. If the testimony is generic and the defense is not concerned, then they won't object. But the defense may say, "No, this is important. We want to see if they have any publications. We think that you need to designate the identity and here's why we think it's important." The default ought to be that you get everything the rule requires, so that you can examine what the expert has done before, etc. There may be a class of cases where the government or the defendant can persuasively explain why there wouldn't be any detriment to the other side, and they will have plenty of chance to prepare. But if it is just the convenience of the government, that shouldn't outweigh an important interest of the defendant in getting the witness's name, prior testimony, and publications.

A member noted that ATF agents, or the gas chromatograph person, most of those things don't matter too much, and a lot of times the defense will stipulate. Often the defense has lived just fine with knowing that somebody is going to come in and say that the gun was manufactured in another state. It is not a material issue. The only area where the defense tends to have a problem is the cop as expert, where they say we will have somebody come in and say this was a drug transaction. In that situation, the defense really needs to know the name and other information required by the amendment.

Judge Furman agreed that the key is to ferret these things out early so that if something is material, defense counsel can ask the court to either order the government to disclose or the parties can discuss it. His concern was that the note, as written, does not reflect that. He asked that the note spell out that where the identity is not particularly critical and where the government does not want to lock itself into to a particular expert, it can either get a protective order under 16(d) or disclose. The defense counsel can raise it with the judge if they need more information.

Professor Beale noted the language on lines 48-51 discusses a similar situation, so if it would be unduly burdensome to provide the name of a specific expert, under 16(d) the government should say, we can give you the substance but we want to give you the name of the person later. Any new language should go in that part of the note. It is the same idea that the court can modify these obligations if something is unduly burdensome.

Judge Furman said that the text of the rule and the note presume that a person is identified by the deadline and does not describe the scenario he was concerned about it. He suggested adding: "If the identity of the expert is not critical and it is not practicable to identify the expert early . . . ."

Judge Kethledge commented that this is something the government could talk about in the meet and confer, and the parties could get that sorted out before they come to the district judge and offer something that reflects a reasonable accommodation. He asked Judge Furman if he would accept that the court would have to take some action to allow the delay, and Judge Furman agreed.

Mr. Wroblewski said that the Department agreed that the rule ought to require that the substance of what the expert is going to testify about should be disclosed regardless of whether the identity of the actual human being who will testify can be identified. There is consensus on making sure the parties are informed as to what will be testified to and on allowing the other party to prepare. He discussed this with some of the government's experts and AUSAs, and they read the language as requiring some placeholder name that could be changed later. That seems like an artificial way to deal with it, and not one consistent with actual practice. So he supported the additional sentence that Judge Furman suggested. The substance must be disclosed ahead of time so that the other party has an opportunity to prepare, but if the offering party goes to the judge and says they are not going to be able to identify the actual human being for a while, that is

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contemplated and permissible. The government was fine with a requirement that it must go to the court and ask for that.

Mr. Goldsmith suggested that judicial approval need not be required if the parties agree. Most of the time this will be noncontroversial, and to have to run this through the district court seems like an unnecessary step.

Judge Kethledge commented that the note currently contemplates (lines 36-38) that the parties will meet and confer under Rule 16.1 and share the results of that meeting before the district court sets the deadline. His sense was that if the parties do agree that the government can disclose the identity of a government expert witness later than the timing of the other expert disclosures, then the district courts' timing order itself could reflect that.

Judge Kethledge said he would ask the reporters to work on Judge Furman's proposed addition to the note over a break.

Having covered the principal concerns raised in the Standing Committee's meeting, he asked for any other comments regarding the rule text. Although the members approved most of the text during the last meeting, Judge Kethledge asked if they had additional thoughts or comments. No one had anything to add.

Note language summary. Judge Kethledge then asked the reporters to review changes in the note since the last meeting. Professor Beale said the order of the paragraphs had been reorganized to follow the flow of the rule itself. There were no significant changes in the first paragraph. In the second paragraph there was some modification of the way in which the note refers to the various subsections of the rule.

Lines 9-12 include the reference to the defendant's "case-in-chief" that was discussed earlier. Judge Campbell and others suggested that it was very important for the note to give the history and the rationale for the change. As the reporters' memo explains, somewhere along the line the text was changed from "case-in-chief" to "evidence at trial," seeming to expand the scope of the defense obligation. How or why that language was added is still a mystery. Our memo notes that if the defense disclosure obligations were broader than the government's, we think that would be a constitutional problem. The subcommittee worked through this and did not believe it is a change in practice to use the term "case-in-chief."

We discussed earlier the new language on lines 15-17 that refers to the government's disclosure of particular rebuttal witnesses. This requires the government to disclose a rebuttal witness only if that witness will be called in response to a timely pretrial disclosure by the defense. As members noted, the timely disclosure is in time for the government to prepare for trial. This three-stage process is like the trial: government's witnesses, the defense case-in-chief, then government rebuttal.

Professor King added that because language about the disclosure of rebuttal witnesses was added to the government's disclosure provisions but no similar language about defense

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disclosure of rebuttal witnesses was added to (b)(1)(C), it was necessary to add the word "generally" before the words "mirror one another" on line 9.

In the fourth paragraph, she continued, the only new addition is on lines 26-27. The new clause reads "or the time the government would need to find a witness to rebut a disclosure by the defense." Judge Campbell and another member suggested the cross references here and elsewhere be more complete, and the reporters agreed to do so.

Professor Beale noted that in the next paragraph, at lines 34-35, the subcommittee had unanimously approved a member's suggestion that because the Speedy Trial Act does not grant authority to change discovery deadlines, the note should read ". . . discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines . . . ."

Professor King noted the language on lines 36-38 reflected the Committee's position at its last meeting that the judge should take into account the Rule 16.1 meeting in deciding when to set the disclosure deadlines. There was some concern that that the new rule could be read to require the judge to announce the deadlines at a particular time, and the note states the judge retains discretion and suggests only that the judge consider the parties' recommendations.

Professor Beale added that at the spring meeting the Committee recognized that the rule never set any timing requirements for announcing the deadlines, but that there had been concern that somehow people would read them in.

Professor King pointed out that two sentences had been removed from the end of the next paragraph. There was a concern at the last Committee meeting that practitioners and judges would read the new amendments as incorporating jot by jot all of Rule 26's requirements, so there was language about this added to the note. The subcommittee decided, however, that the added language was more trouble than it is worth and recommended it be deleted. The language that was removed is in the reporters' memo on page 97 of the agenda book. It had appeared after the sentence that read "Although the language of some of these provisions . . . . Which differ in many cases."

Lines 48-51 of the draft note contain the language discussed earlier, stating a party could seek a modification under Rule 16(d) should there be an expert who testifies so often that is too burdensome to catalogue all of that person's prior testimony. Professor Beale noted that this is the place where we may decide to put new language that will address the situation in which identifying the person who will testify might be too burdensome.

Professor King moved to lines 52-57, which refer to the situation where a party may have disclosed a report that already included much of the information that would be required in the expert witness disclosure. The one change that was made to this paragraph after the Committee's earlier meeting is the parenthetical on line 54 "(including accompanying documents)." The Department of Justice was concerned that some people may think that the report does not include those accompanying documents, and suggested this addition, which the subcommittee approved.

The last paragraph on page 126 concerns the signature requirement. The amended provisions recognize two exceptions. The first is when a party cannot obtain the signature despite reasonable efforts to do so; it gives an example of a witness who is not retained or employed specifically to give the testimony. The second exception is on page 127. No signature is required if "a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided" to the defendant. This essentially carves the disclosure into two pieces as far as the signature is concerned. One piece that definitely has to be signed by the expert is the opinions, bases, and reasons. In the specific situation where a report has already provided this information, there is no need for the expert to sign the representation of publications, qualifications, and prior testimony. It is enough if that information comes from the attorney, when all of the opinions and the bases and reasons for those opinions were set forth in a report that was signed by the expert and disclosed to the defense.

Professor Beale said that second exception was intended to respond to the government's concern that under the new protocols many of its experts must abide by, if they had to sign anything more than the report they'd already produced, they would have to run everything through the review process again. It would be difficult to get them to do that, and provide no real value. You might think it wouldn't be that hard to get an expert to sign something saying these are my credentials, my publications, and my prior testimony and everything else is in my report. But for some experts, the Department told us, that would trigger the requirement to run the whole thing back again through their review process. This is an effort to make the process work better for certain experts.

The reporters also noted that the last paragraph of the note, concerning supplementation and correction, has the added language about change in identity mentioned before.

Judge Kethledge solicited comments or questions on the note language.

Distinguishing Civil Rule 26. Judge Campbell expressed continued concern about the issue at lines 45-47. The note says that we are not intending to replicate all aspects of the civil rule but does not say which we are and which we aren't. He was concerned that we are adding language taken verbatim from Civil Rule 26 into Rule 16, requiring that the disclosure "must contain a complete statement of all opinions." As he had mentioned before, the Committee Note to Rule 26 says that the expert "must prepare a detailed complete written report stating the testimony the witness is expected to present during direct examination," and many trial judges, himself included, really hold parties to that. It has to be almost a verbatim statement of the testimony that is going to be given in a civil trial. Part of the intent of the 1993 amendment to the Civil Rules was to eliminate the need to depose experts because you know everything that they are going to say. Since we are carrying over the exact same wording ("a complete statement of all opinions"), a judge reading the language on lines 45-47 would think obviously one thing the Committee did intend to bring over is the requirement that this be a verbatim statement of the opinions. He did not think that is what this Committee intended. If it is, fine. But if it is not, he suggested two possible changes.

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The first was to change the use of the word "testimony" in the note at line 5. Replacing "testimony" with "opinions," not intended to be an actual statement of the "opinions," might help. There are about ten places in the note where it says testimony. That would help. The second change would be to add a sentence at line 47 that addresses this head on, and says "The amendment requires a complete statement of all the opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial." This would make it clear we are not carrying over that obligation of the civil rules even though it is a more robust disclosure than we had before.

Judge Kethledge said this was helpful and asked for reactions to those suggestions.

One member said that as a defender she liked the word "testimony." She thought the word "opinions" is looser, "testimony" is more specific. The defense sometimes gets very vague, nebulous notice, and the word "testimony" tends to pin that down. Perhaps a compromise would be adding Judge Campbell's language to the end of that paragraph without changing the word "testimony" throughout.

Another member stated he thought Judge Campbell had put his finger on something important, and he supported the suggestion. When asked about whether to cure this by an express statement at the end of line 47 that the disclosure need not be a verbatim recitation of the testimony as opposed to change "testimony" to "opinions" elsewhere, this member expressed the view that "testimony" is more nebulous than "opinions." "Opinions" gives the defense a better position than it has under "testimony." He commented that it would never occur to him that it is necessary to have a report that states *in haec verba* everything the witness is going to say.

Judge Campbell stated that he was not concerned about changing the word "testimony" to "opinions" if we do have that clear statement that we are not carrying over that concept from the Civil Rules, assuming it is not the Committee's intent to carry over that concept.

Mr. Wroblewski said that the Committee and the subcommittee agree that the complete statement is of the opinions. The rule itself says complete statement of "opinions," not "testimony," and the added sentence that Judge Campbell suggested would be well advised.

Judge Kethledge agreed that unless someone has a specific, concrete reason to change from "testimony" to "opinions" throughout, then we ought to go with the narrower cure, so we don't inadvertently change something with a broader approach. The language that we have now has been vetted repeatedly. Judge Campbell's suggestion to go just with the sentence is the narrower way to do this.

Professor Beale agreed that the targeted sentence seems to do the job without making other changes that might set off broader consequences.

A member moved that the Committee adopt only the sentence Judge Campbell suggested: "The amendment requires a complete statement of all opinions the expert will provide, but does not require verbatim recitation of the testimony the expert will give at trial." The motion was seconded and passed unanimously by voice vote.

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A member returned to the language at lines 45-47 and asked what it adds. Couldn't that be omitted? Professor Beale explained that that sentence was a first step in responding to Judge Campbell's concern that there would be an assumption that everything would be carried over from Civil Rule 26, even if it didn't fit criminal practice. She was inclined to leave it in, particularly along with the new sentence which is the sharpest point of departure from civil practice. It was the judges and the Department that raised this issue because they see many civil cases. Noting that she had never been a civil litigator, she was not sure what all the differences were that would spring to the judicial mind. We certainly don't intend to bring over everything. The sentence at least gives courts a signal that you need to tailor this to fit criminal practice. It is not specific, but Judge Campbell's new sentence would make that one particular point more definite. Are there other specific things we would not want carried over? If not, then the new sentence is enough.

Judge Campbell explained that district judges spend a fair amount of time dealing with expert witnesses in civil cases, addressing it in every case management conference, policing it during pretrial issues, dealing with *Daubert* motions, setting strict rules about what can be done at trial. We live in that world, and this is an important signal that that world is not being carried over. The biggest concern was the notion of the verbatim statement, but there are other practices as well that judges adopt in their own case management orders for civil experts, and we still need to signal that we are not making this a Criminal Rule 26. It is a full disclosure requirement, but it is not intended to pull over all of that other stuff, and we cannot anticipate all of what that might be. Because judges live in that world with their civil practice it is an important signal to send.

Mr. Wroblewski agreed and added that this effort began when Judges Rakoff and Grimm in separate proposals both suggested bringing over all of Civil Rule 26 and the Committee quickly realized that was not a good idea. Without that sentence, especially in light of the legislative history of where this began, there will be confusion. We had very long discussions about this because Civil Rule 26 doesn't only require the verbatim disclosure, it has a whole structure that we are not bringing in, which differentiates between retained witnesses with verbatim testimony and witnesses who are not retained – who must provide a summary. This rule is different. We are not going to have the word summary in there, but we are not going to bring in the verbatim requirement. This sentence is important along with Judge Campbell's additional sentence to make the Committee's intent clear.

Judge Kethledge agreed that this sentence arises from a context where judges are inhabiting one world of civil expert disclosure, and it reminds them they can't bring all of those assumptions over. He asked the member if this discussion addresses her concerns and she said yes, noting that as a criminal practitioner, she is not familiar with that Rule 26 world. This could be a signal for people who are.

Publications. Judge Campbell asked the Department of Justice representatives if there was any ambiguity as to the word "publications." Many witnesses who testify may have created reports and papers for Department purposes. Is "publications" clear that it will not include those things? Or maybe it is intended to include those.

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Mr. Wroblewski responded that there was no sense of ambiguity about the word "publications" when the language was circulated earlier. Most people thought they understood what it did and didn't mean. But after the rule is published for public comment the Department will bring this to the attention to both its forensic folks and its AUSAs to see if they have any concerns.

Returning to note language about delayed disclosure of identity. With no more comments on the text or note language, Judge Kethledge recessed the meeting for a break while he and the reporters worked with Judge Furman's proposed note language regarding delaying the disclosure of the identity of the expert.

After the break, Professor Beale reported that the draft language, to be inserted on line 29 of the note after the sentence that started "On occasion," currently read as follows: "Alternatively, it may be possible to provide a complete statement of an expert's opinions, the bases and reasons for them, but not practicable to identify the proposed witness until closer to trial, and the identity of the witness may not be critical to provide the other party with a fair opportunity to meet the evidence." That ensures, she said, that the complete statement of opinions, basis and reasons for them are provided on time. Even if you can't give prior testimony and publications of the expert, it is important to give the substance. It also has the idea that it is not critical to know the identity in the case. Under those circumstances it says a party may go to the judge to modify or delay discovery for that witness.

Judge Campbell asked whether it needed to say this was a narrow window, adding "in limited circumstances" or "in rare circumstances." Professor Beale responded this had been debated earlier in the Committee. The initial language was "in rare cases." We changed it in response to the Department's concerns to "on occasion." That suggests this is not a giant loophole that everyone can drive through, but there are cases where this is needed. It would be common as to certain types of testimony. Judge Furman added that the concern is handled by Rule 16(d) requiring good cause.[2]

The reporters' redrafted insert was shared on the screen: "Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial."

Judge Furman agreed this did the job.

Delayed identification and the signature requirement. A member asked how this provision correlated with the signature requirement. If there is no named expert there can't be a signature for the opinion. Professor Beale said that there is an exception to the signature

[2] After members offered several different suggestions for modifying the draft sentence, Judge Kethledge moved on to other items on the agenda while the reporters worked further on the language. The Committee's discussion of these agenda items appears below following the discussion regarding Rule 16.

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requirement if obtaining the signature was not possible with reasonable efforts; then the party could ask for a modification. That would be the case when they don't know who the witness is. The member was concerned that it may undermine the need for the signature to say in some situations the identity of the witness is not critical. Judge Kethledge said he didn't think either the court or the opposing party is going to adopt lightly the idea that the witnesses' identity is not critical or is not important. As to the signature requirement itself, he said it has an impeachment purpose not a disclosure purpose, and it seems that so long as the witness signs the disclosure before trial, that purpose is served. If there is a delayed identification, it will not impair any interest served by the signature provision. The member reiterated she didn't want to water down the signature requirement by saying two different things.

Procuring an order modifying discovery. Several members were concerned about the language following the proposed insert: "In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d)." One member said the language is contrary to what we've been doing with the electronically stored information protocol, which is that you don't go in to seek an order if you can work it out individually. She suggested adding "unless the parties have agreed to delay identification of the testifying expert," to that sentence so we don't have to go to the court when everybody agrees. Professor Beale pointed out that the sentence about seeking an order applies to both delayed identification and the situation where the expert is not under the party's control, so you can't limit it to only one of the two. Judge Kethledge added the delayed identification might also be captured in the first instance after the Rule 16.1 meet and confer, so that it is in the initial timing order.

Another member observed that in his district the parties would write up their agreement into a stipulation submitted for the judge's signature and that would be an order modifying discovery. Yet another member asked if the language, "at any scheduling conference or by motion," is necessary. It doesn't matter how you seek the order. Are we limiting it to scheduling conference or a motion? Professor Beale said that clause was requested by the Department of Justice because they were concerned that their prosecutors wouldn't know that they could raise it early and would not have to file a separate motion. Mr. Goldsmith agreed that the clause was intended to convey that it would not require some formal filing of a motion, and a party could raise it verbally during the conference. It is helpful to signal that it doesn't have to be quite as formal as a motion. When a member protested that the language would seem to preclude the parties from jointly signing a stipulation and sending it to chambers for signature, Judge Kethledge agreed it may be too prescriptive, stating we ought to trust the common sense of the parties and the court so they can do this when both parties have agreed. There was a motion to delete the clause within commas, so that it reads "In such circumstances, the party who wishes to call the expert may~~, at any scheduling conference or by motion,~~ seek an order modifying discovery under Rule 16(d)." The motion was seconded and passed unanimously by voice vote.

Motions to approve the proposed text amendments to Rule 16 and the note, as revised, and to transmit them to the Standing Committee were seconded and passed unanimously by voice vote.

Judge Kethledge thanked the members of the Committee, and he thanked Judge Campbell for his leadership and guidance which had been essential to getting to this point. He also expressed his appreciation to the Department of Justice for its good faith and reasonableness in considering this proposal, and also to the defense side in being measured and reasonable regarding what they were willing to agree to in this rule as well.

Erroneous Statutory Reference to Rule 41

Judge Kethledge turned to the suggestion by Judge Barksdale to amend the committee note to Rule 41 (Tab 4). She observed that 18 U.S.C. § 981(b)(3) includes a now-mistaken reference to Rule 41. It refers to 41(a) but the rule was amended and the provision is now in Rule 41(b). Judge Barksdale suggested that the Committee add language to the committee note that would alert the reader to the fact that the statutory reference is misplaced. Unfortunately, we are unable to do that. We can only add language to the note when we amend the rule. Here there is no reason to amend the rule, and we can't change the statute.

We learned from the Office of the Law Revision Counsel for the House of Representatives that when this sort of thing happens, they add a footnote to the code provision stating that there is a mistaken reference and pointing readers to the correct part of the criminal rule. So there is something they can do on the legislative side to fix this, as opposed to us doing something.

Judge Kethledge stated that he shared to reporters' recommendation that we not convene a subcommittee or take any action on this. There was no disagreement.

Waiver in Rules 49.1 and 59

Judge Kethledge moved to the suggestion by Judge Chagares under Tab 6 regarding the use of the term "waiver" in Rules 49.1 and 59. Judge Chagares pointed out that appellate courts have emphasized a distinction between waiver and forfeiture. Waiver is a voluntary relinquishment. It is not an oversight, but rather a decision to abandon a certain right or position in a case. Forfeiture occurs when you don't raise something in a timely fashion, typically it is more of an omission. On appeal, the courts can review forfeited issues for plain error, whereas when a party has affirmatively waived the question or the argument there will be no review. Judge Chagares observed that these two criminal rules use the term "waive" or "waiver," but might more accurately say "forfeit" or "forfeiture" instead.

The reporters recommended that we not take up this issue at the present time. The terms "waive" or "waiver" appear in additional places in the Criminal Rules and in other rules as well. So if we are going to change it here, we are going to have to change it in many places. Also, this would require action by the other advisory committees, because the relevant Criminal Rules have parallel provisions. "Waiver" has a broader usage and may be accurate in some contexts but not

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in others. It is almost a term of art in some narrow contexts. This would be a broad scale project, and Judge Kethledge was inclined to think it is not substantively necessary. Professor Beale added that the reporters are very concerned about opening this up.

Judge Kethledge asked if anyone wanted to take up the suggestion. When no one indicated they did, he said he would convey the Committee's decision to Judge Chagares.

Permanent Rules for Emergencies

Judge Kethledge introduced agenda item 3, Permanent Rules for Emergencies. The CARES Act included provisions that allowed various events to take place by video and telephone conference, upon findings being made by the Joint Conference, by the chief district judge, and – with respect to sentencing – by the sentencing judge. The Act asks us to consider rules changes that would address future emergency situations. Judge Campbell worked extremely hard on the legislation, spent a great deal of time working with members of Congress and the staff, some of the judiciary committees. It was a very, very busy week or ten days for many of us, but especially so for Judge Campbell. He asked Judge Campbell if he had any remarks before we get into the project they have given us.

Judge Campbell said he wanted to thank Judge Kethledge, the reporters, Judge Furman, Judge Kaplan, and many others who contributed to what went into the legislation. In his district, the provisions in the CARES Act are working well. Defendants are consenting to video and teleconference where appropriate. Important sentencings are being put off if they are going to be more than time served so they can eventually be in person. But it has been a great relief for his court (and he thought for most courts) to be able to do things remotely rather than to simply postpone them.

As we look at this directive from Congress, Judge Campbell said, the final statute left out something Judge Kaplan had recommended. Instead of saying that the committee should study what rules should be adopted if a national emergency is declared, it should be written more broadly to refer to rules for any future emergency situations. Judge Campbell expressed the view that the statute does not preclude this Committee from writing whatever proposed amendments would be appropriate for whatever emergency situations might call for them. There was a collaborative effort that seemed to have been helpful during this emergency, and now the issue is what should become a permanent part of the rules.

Judge Kethledge emphasized that the legislative process was unavoidably rushed, and the provisions in the CARES Act were not adopted in the manner that the Rules Committees adopt amendments to rules. Our Committee has a bottom-up process where we gather data from the people who are involved in the particular issue on the ground. We have seen that most fruitfully in the miniconferences we had for the Rule 16 amendments. So rather than dictate from the top down what a rule should be, we try to get the input of people who are actually dealing with that issue, then build up from that input. And as our discussion of the one sentence in the note for Rule 16 illustrates, ours is a very deliberative process. The rules process is slow and deliberate, but that is part of the reason it has been so successful and part of the reason the rules have stood

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the test of time. Another reason that the rules have stood the test of time is that they have enough flexibility to allow district judges and lawyers to adapt to most circumstances within the confines of those rules without us having to change things. He was not questioning the need for different procedures for emergencies, but he was saying that the rules have shown a resilience as a result of the parties' ability to adapt to the particular circumstances that they face, which may not be the same in every district.

Judge Kethledge continued: Because of the nature of the legislative process, particularly a rushed process like we had, our Committee was not able to provide its advice in the way it normally would. It is important for our Committee to approach this project with a clean slate. What we hear about how the CARES Act is doing in the field is very useful data. But, he suggested, we should not regard the CARES Act as a default position or a presumptive answer to some of these problems. Our committee should bring its own independent judgment through that bottom-up process and see where we get with that. There are many other bodies in the process that would consider our advice. His point was that we need to give our advice, and we have not had a chance to do that yet, unavoidably, because of the press of this particular emergency. A subcommittee for this project will be chaired by Judge Dever, with members Judge Kaplan, Judge McGiverin, Ms. Recker, Ms. Elm on an interim basis, and Mr. Wroblewski. Judge Kethledge and the reporters will also participate.

Judge Dever commented that the Committee had a great example of the bottom-up process in committee that Judge Kaplan ultimately chaired in connection with cooperator issues. There we systematically looked at the rules, received a lot of information about cooperator issues, and thought critically about how they potentially affected each rule. We'll have an opportunity to do that in connection with this mandate, and he looked forward to working on this project with the members of the subcommittee.

Judge Kethledge said the first thing we need to do is identify the issues and the rules that our committee and the subcommittee need to think about with respect to whether they should be changed or addressed in the event of an emergency. We also need to think about the different kinds of emergencies that might arise. We are dealing with a national emergency now, and we need to consider other kinds of national emergencies. There may also be emergencies that are more local or regional. It will be necessary to hold at least one miniconference, maybe by video. And then we need to hammer out actual concrete proposals, with the idea of coming to the full Committee in our October meeting with proposed emergency procedures that would be adopted as part of the Criminal Rules. He asked Judge Campbell to share the timeline he proposed for the process.

Judge Campbell prefaced his comments by emphasizing that if this schedule turns out to be too compressed to get the job done, then we should extend it. Congress has told us do this, and they will be watching what we do. If we were to have a set of proposed rules for discussion in October, they could be reworked and considered by this Committee in the spring of 2021. Then those rules could be considered for publication by the Standing Committee in the summer of 2021, and the publication process would end in February of 2022. This Committee in its

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spring meeting of 2022 could make a final decision on rules. Any rules that were approved by the Standing Committee in the early summer of 2022 could go to the Judicial Conference in September of 2022, to the Supreme Court in the fall of 2022, to Congress in May of 2023, and then become law in December of 2023. So if the Committee is able to develop draft rules in two meetings before publication, they wouldn't go into effect until December of 2023. That's fast by Rules Committee standards, but he thought it would look very, very slow from the perspective of Congress and others. We should to try to meet that schedule if we can. It would still give us an opportunity for full public comment but would condense our work in getting these rules ready for publication to two meetings, this fall and the following spring. That is an aspirational schedule. The other committees have been asked to do the same thing. But he concluded by saying Judge Kethledge is right: this needs to be done correctly, rather than quickly, and if it turns out that is too quick, we deal with it as we go forward.

Judge Kethledge said the Committee would make every effort to work on the schedule Judge Campbell proposed, and he opened discussion.

A member asked the Committee to consider adjusting Rule 53. She noted we have the ability to have really good public access, as we've seen in the Ninth Circuit. If she had been able to relax Rule 53, people could have had public access that is not very dissimilar to what they would have had by coming into a courtroom on a day-to-day basis. Providing some authority to relax a rule while we were in a crisis that would have been very helpful. They would have relaxed Rule 53, and then returned to the rule when deemed appropriate. The member wanted to consider whether there are rules that could be relaxed for a period of time then brought back on when it is important – particularly those that deal with what happens when courthouses have to be closed down, and especially with respect to criminal defendants. We have technology that easily helps us, but we can't use it because of Rule 53. This member also asked if that the Committee could consider if there is an even more aggressive timeline to use for amendments, even if temporarily, if this virus strikes again next year. Some reports are that this virus is going to hit again next fall, or next spring, and when it does we still won't necessarily have the capability to adjust the rules that we now see could be changed to more effectively deal with the public and their access to the courts. We know what would work better, and we might as well go ahead and attempt to have that happen in some way. Is there anything that can hasten us addressing this before 2023?

Judge Kethledge said the Rule 53 point is very well taken. It is something we will be looking at because public access must continue constitutionally.

Judge Kaplan said it was a privilege to have a small part helping Judge Campbell, Judge Kethledge, Judge Furman, and others involved in the CARES Act legislation. It was a fantastic performance and has worked wonderfully so far. He identified four questions that the subcommittee needs to approach.

First, how should we define the kinds of circumstances that would give some person or entity the ability to vary the normal rules? Initially, we have two fundamental obligations. One is

to ensure the ability of the courts to continue operations no matter what happens, and to do so independently. The scope of the kinds of impactful emergencies is very broad. We are dealing with this infectious disease now, and we all have that in mind. But in the past, we've had Hurricane Sandy, 9/11 (which shut down two districts in New York 20 years ago for quite some time), Hurricane Katrina (which shut down E.D. La. and other places). We've had floods, disease, and an external attack on the country. We can imagine circumstances where one or more courthouses could be put out of action by domestic strife. We had that in Oklahoma City years ago when the courthouse was blown up. Judge Kaplan noted he was probably just touching the surface. Emergency ought to be defined in relation to the impairment of the ability of the courts to perform their constitutional functions. Not something else.

Second is a whole complex of issues about who decides. The CARES Act had a formulation that he was pretty comfortable with, the Judicial Conference of the United States. That happened overnight, and now we ought to think about it and make sure whatever we come up with is as apolitical and as unbiased as it can be.

Third, and reflected to some degree in the CARES Act, is we have to consider that what could trigger some relaxation might be quite local or regional. We have to determine whether the decision-making process is different in those kinds of situations.

And finally, once we've decided what is an emergency, who decides that, and how extensive it is, we must consider what does it authorize and how do we turn it off when the emergency ends?

Mr. Wroblewski agreed that the CARES Act really was a wonderful collaboration among all three branches of government and both houses of Congress. It was terrific work and a great collaboration. He stated that collaboration is continuing. There were a number of issues not resolved by the CARES Act. In addition to an issue mentioned earlier, there is the grand jury and how long the grand jury can be suspended. The Department has had a number of discussions with folks at the Administrative Office of the U.S. Courts, and with a special COVID-19 task force that the Judiciary has put together. It has made some suggestions about how grand juries may be reconstituted, and he knew that Director Duff has issued some guidance. The Department appreciates the opportunity to make suggestions. The U.S. Attorneys are working with corresponding chief judges around the country in many districts to try to find ways to safely reconvene grand juries at some point. They are being reconvened in some districts, not in a majority of them. In addition, there is already work beginning on how to reconvene jury trials. He knew there was some thinking about that going on in the Southern District of New York and on the COVID-19 task force, and they have started work within the Department to examine a variety of issues. To the comment that jury trials remain public, he noted that the Third Circuit District Court in Michigan issued an order that they are going to broadcast trials on YouTube. He was not sure that is exactly what we want to do, but that is one of the issues we will have to look at.

Over the course of the last seven or eight weeks the Department has found a lot of wonderful expertise and a lot of serious and rigorous thinking out in the field. Some of that is being funneled into the Judiciary's COVID-19 task force. Some he learned from talking to different judges. For example, Judge Lee Rosenthal, former chair of the Standing Committee, shared a number of orders and scripts they are using there on the border. He recommended that all kinds of judges be brought into the process to share their experiences because there is no one size that fits all. Local courts must have authority to address the particular problems in the particular way that is appropriate for that locality. He added we are so blessed to have Judge Kaplan as part of the subcommittee. He's already developed the framework.

A member added that when she heard that the Third Judicial Circuit Court in Michigan was putting their proceedings on YouTube she called to ask if she could borrow their technology, and if they could tell her how to get it done. The county courts deserve thanks because they have all let us use their platforms to get in. But they don't have Rule 53. The judges in her district could just push a button and create public access, but they are prohibited from doing so because there is no relaxation of Rule 53. Technology by 2023 will be far beyond what we know now. We have to be prepared for what the future might offer us and how we might provide access to all the people.

A member said he agreed with what Mr. Wroblewski said about trials. In the member's district (and he was sure it's the same in many districts), they have been able to handle initial appearances, custody hearings, and changes of plea when necessary and consistent with the CARES Act, and sentencings. But they have been unable to do jury trials. Because the latest order in the member's district put a pause on jury trials through the end of June, they are considering resuming trials in early July at the earliest. With guidance from the Administrative Office, his district imposed a blanket exclusion of time under the Speedy Trial Act through the end of June. That is not ideal, particularly for the criminal defendants who have asked to be released, have not been released, and would have gone to trial but for the pandemic. The member had not seen yet an argument from one of these defendants that the Constitution's Speedy Trial Clause provides protections that are greater than the Speedy Trial Act. Perhaps this is a problem that just can't get fixed, particularly in a pandemic-like situation. And how do you get 12 people in a building and 35-40 people for voir dire at a time like this? Maybe it can't be fixed, but hopefully it is something you can look at and try to crack that nut.

Professor Coquillette said that universities are doing a great deal of work that could be helpful to the courts. Often law school classes are close to 35 or 40 people, and we are trying to find rooms where people could be socially distanced, but still be accommodated. For example, we have learned that a group of 35-40 could gather in a room that accommodates 135 and still have reasonable safety. Some of this may help with jury trials.

A member commented that now a defendant has only one shot at bond, at release. If there is going to be a delay in trials, she suggested that there should be a second shot at release pending trials.

Judge Campbell added that in the process of looking at a number of issues the members will undoubtedly will come across some that cannot be solved by a rule amendment, and he suggested that the subcommittee maintain a separate list of potential recommendations that could be given to the Administrative Office, to the Department of Justice – and perhaps even to Congress or the Judicial Conference – of other steps to address emergencies that we ought to consider. This Committee may end up conducting the most thorough examination of these issues, and it may be very valuable for it to keep a list of things that might help.

Mr. Wroblewski followed up by stating that if anything comes up that needs the Department's attention now, you can send it along to the Department now. We are meeting every other week with the Criminal Law Committee of the Judicial Conference. He is meeting with representative from the Deputy Attorney General's office, the General Counsel for the Bureau of Prisons (BOP), and other officials from the BOP. So if issues do arise, members should feel free to email them to him or to Judge Martinez, who chairs the Criminal Law Committee. Other people including Judge St. Eve from the Standing Committee are on that call every other week, along with the BOP, probation, and a COVID-task force representative. So if any emergency situation comes up, people should feel free to contact them, because there are efforts being made now. There are enormous numbers of technical, legal, and other problems that need to be addressed sooner rather than later.

Judge Kethledge urged Mr. Wroblewski to solicit the input of his colleagues post haste, in terms of what the Department would be worried about in these situations, what changes would it want to have, so that the government would not seek changes on a midnight basis. He asked Mr. Wroblewski to do everything he could to get as much information from the Department as possible on the front end so that we can process and address those concerns, and share them with the defense bar as we go forward.

A member noted from the perspective of the Criminal Justice Act (CJA) panel attorneys there has been a tremendous response from the courts over the past 6-8 weeks, but it has been different from jurisdiction to jurisdiction. And panel representatives are not always included in many of the decisions about how to conduct the hearings and how to represent incarcerated clients you can't get in to see. You can consent to having proceedings occur by video, but how do you contact and get in to see your client and have those communications with clients to even inform them as to their options? These problems might not be addressed by amendments to the rules. But it will be great to have some uniformity, and also to understand that each jurisdiction has different capabilities and different technology. So it varies from jurisdiction to jurisdiction how much CJA panel attorneys can do on behalf of their clients.

Another member said she hoped the subcommittee will bring in expertise that is not just legal. The more we become dependent on technology to fill the gaps when courtrooms can't be open, the more vulnerable we are to cyberattack or other malfunctions of what we are all relying on now for communication. Judge Kethledge agreed technology does create some vulnerability.

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Mr. Hatten observed that often the execution of these changes creates difficulties. What the CARES Act provided for our judges really facilitated operations. But some of the platforms available to conduct those proceedings, and the infrastructure that the BOP has available to facilitate appearances, those things all cramped what could have been a better experience. In addition to rules as to what's going to be allowed, it is also important to address the infrastructure that is necessary to facilitate those. He witnessed test after test of Skype conferencing, and knows a lot of courts are fond of Zoom because of better functionality. But Zoom doesn't appear to be accepted by the Judicial Conference. Paying attention to the means we'll be using to execute these other procedures would be helpful.

Mr. Goldsmith said the Department has the expectation that these are not going to be one-size-fits-all fixes. What might be a concentration of issues from the pandemic in the Southern District of New York or the Eastern District of Michigan is not necessarily the same kind of crisis we are seeing in other parts of the country. The Department is approaching everything with the expectation that U.S. Attorneys' Offices will have some amount of latitude. Given the structure of the Justice Department is if anything more top down than the courts, that's probably an important perspective for this effort.

Judge Dever said everyone has their own terrific network, and he asked that members share whatever information they have gathered or receive in the future. He would appreciate learning from everyone about what parts of the CARES Act are working, what parts are not, and what other rules come into play. Judge Campbell's point about other stakeholders is important; even if it is something our committee or subcommittee can't address; it is an opportunity to give voice to the judiciary's perspective on this fundamental idea of keeping our independent judiciary operating whatever the crisis might be.

Judge Campbell said collecting information may best be done through Rebecca Womeldorf and her office, but the one other judicial conference committee that is doing as much thinking and working as criminal rules has done and will do is the CACM committee. The chair, Judge Audrey Fleissig, has been very involved with the legislative issues and the issues that followed. CACM has had a broad look at problems all around the country, and it might be helpful to ask the CACM staff or Judge Fleissig to put together a list of issues the Committee might consider.

Another member said he hoped the subcommittee would be looking at the time for filing issues, noting the deadlines for Rule 33 motions for a new trial, and the one-year deadline for Rule 35 substantial assistance motions. Would any of these emergency situations consider tolling for those sorts of motions?

Judges Kethledge and Dever thanked participants for the helpful suggestions.

Rule 6

Turning to grand jury secrecy, Item 5 on the agenda, Judge Kethledge noted that the Committee received two suggestions to modify amend Rule 6 to allow for greater disclosure of

grand jury material. Rule 6 has a detailed enumeration of circumstances under which the district court can allow disclosure of grand jury material. The default is that grand jury material is confidential. In 2012 the attorney general suggested amending the rule to allow district courts to have greater authority to disclose grand jury material. The Committee concluded at that time there was no need to act upon that suggestion because district courts were already in essence doing what the suggested amendment would permit. Now we have circuit cases saying that district court can't make those disclosures. The D.C. Circuit says that enumeration is exclusive, and the district court does not have inherent authority to order disclosure of grand jury material for reasons other than those enumerated in the rule. The Eleventh Circuit en banc held the same way. We received two proposals to amend Rule 6 to allow district courts to exercise some authority to disclose grand jury material beyond what now is described in the rule. One is from the Public Citizen Litigation Group and the other is from the Reporters Committee for Freedom of the Press and other media groups. The two proposals are different. Public Citizen's has language that requires the district court to find certain pretty concrete criteria before the court could allow disclosure of the information. The other proposal has nine non-exhaustive factors that the district court would need to consider.

Professor Beale added that we also have had two recent judicial invitations to take this issue up. One is from Justice Breyer in a statement regarding denial of certiorari from the D.C. Circuit decision. The Department of Justice's brief in opposition in that case said that there was no reason to take that case because the issue could be solved by Congress or by the Rules Committees. The same suggestion was made in the Eleventh Circuit case, and these judicial suggestions were highlighted in the two proposals.

Judge Campbell added that Chief Judge Srinivasan had also raised this issue and thought it would be an important one for the committee to address. Chief Judge Srinivasan was forthright, saying he was in the majority on the panel that was reversed by the D.C. Circuit. There is now a lot of judicial attention on the issue, and a clear split in the circuits, which typically has been a situation where we have felt we ought to act. This is about as clear an invitation as we could have.

Judge Kethledge said it seemed pretty clear we ought to appoint a subcommittee, but he welcomed thoughts on that as well as on things that we ought to be considering with respect to this project.

Mr. Wroblewski said he had been dealing this issue for ten years, and Betsy Shapiro has as well for a long time. The Department of Justice has consistently taken the position in courts around the country that the list of exceptions to secrecy in Rule 6 is exclusive, and that remains its position. The Department supports having a subcommittee consider the proposal. Under Attorney General Holder the Department supported a proposal to authorize release of historically important grand jury material, and it is prepared to support a proposal now to authorize the release of historically important grand jury material. But Mr. Wroblewski noted that the Department has some differences with both the Holder proposal and with the two current proposals.

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Mr. Wroblewski asked that the subcommittee also consider an additional issue: the courts' authority to authorize delayed disclosure orders through the grand jury. For many years, judges have authorized delayed disclosure of subpoenas ordering grand jury witnesses to testify or produce material. Recently in light of the decisions in the D.C. and Eleventh Circuits, some district judges have said that they have no inherent authority to issue such delayed disclosure orders. The Department hopes the committee could consider whether there ought to be an amendment as well to address those. These orders, which are very important, are authorized as part of the Stored Communications Act. The Department thinks some language addressing that particular issue would be important and should be considered by the subcommittee.

Judge Campbell identified a third issue for the subcommittee: whether the courts have inherent authority to release grand jury materials in situations that are not enumerated in Rule 6. That is a tricky issue, in part because in 2012 this Committee took no action on the Holder proposal, noting that judges have the inherent authority to deal with the historical records suggestion. At least in that respect it appears that the Committee has already taken the position that Rule 6 does not limit a judges' inherent authority. But he raised the question whether the Criminal Rules Committee has the power to foreclose inherent authority with a rule. The Rules Enabling Act says that rules adopted through its procedures have the force of law of a statute. There is an argument that this permits the rules to foreclose inherent authority. Judge Campbell described the one other time that we tried to do that in the 2015 amendment to the Civil Rule 37(e), a pretty comprehensive rule for dealing with the spoliation of electronically stored information. The courts were adopting a wide variety of approaches, and the Civil Rules Committee intended to bring national uniformity for spoliation sanctions. The committee note stated that it was intended to foreclose resort to inherent authority. This was a very deliberate effort by the Civil Rules Committee to say we are making this exclusive. The very first district court to address Rule 37(e) considered that committee note and concluded that the Committee had no power to limit the court's inherent authority. If this Committee is going to come to the view that it wants to limit inherent authority, that's a question that will take some careful study and careful consideration of both whether it can be done and how it can be done to be most effective.

Judge Kethledge agreed that is a really interesting and important point. He expressed doubt that it was within the Committee's purview under the Rules Enabling Act as to offer an opinion as to the scope of a district court's inherent authority, but noted he would not be held to that view. We are talking about Article III. Even if we are able to comment on it, there is the separate question about what the scope of the court's authority *should* be. One possibility would be to take no position on whether the court has inherent authority, and leave that to the Article III metaphysicians. He expressed confidence that our Committee will give it very careful thought.

Judge Kethledge concluded that a subcommittee was clearly needed, and he would appoint one in the near future to begin work on this project.

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Closing Remarks

Judge Kethledge said that the next Committee meeting is scheduled for October 6, 2020, in New Orleans, and that hopefully we would be able to travel there. He thanked everyone for their patience with the video platform, and particularly thanked the Administrative Office staff – Shelly Cox, Brittany Bunting, and Kenneth Wanamaker – for their excellent assistance in ensuring the meeting went well. He also expressed his appreciation for everyone's help, particularly on the Rule 16 issue.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

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OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

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advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

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Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. "Testimony" as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees' response to the CARES Act directive to consider emergency rules.

MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court's decision in *Hall v. Hall*, 138

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S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee's work to determine whether any rule change is needed. This process will take time.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

Action Items

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal "may [be] dismiss[ed]" by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase "if provided by applicable statute" to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as "well taken" but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys' responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word "mere" was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule's statement that a court "must" dismiss. He noted that several circuits' local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit's local rule, for example, requires in criminal cases that a stipulation

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of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a "simple, non-substantive act." Consistent with *Garza*, the proposed amendments seek to simplify an

d make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

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expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an expressio unius conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

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The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that "and limit" be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term "trap" in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding "inadvertently" to the first sentence using the word "trap" in the committee note – thus: "These decisions inadvertently create a trap . . . ." Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

Publication of Proposed Amendment to Rule 25 (Filing and Service). The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public's right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee's mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

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regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

Information Items

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

Suggestion Regarding Decision on Grounds Not Argued. Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

Suggestion Regarding In Forma Pauperis Standards. Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

Suggestion Regarding Rule 4(a)(2). Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

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Suggestion Regarding Rule 43 (Substitution of Parties). Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

Review of Recent Amendments. Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court's electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee's clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge's disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

Action Items

Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims). Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for "insured depository institution[s]." "Insured

depository institution" has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for "insured depository institution" from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines "insured depository institution," in 11 U.S.C. § 101(35), and the Code's definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement). Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from "Corporate Ownership Statement" to "Disclosure Statement." The Advisory Committee received two comments in response to publication. One comment suggested that the word "shall" in Rule 7007.1 be changed to "must." While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to "corporate ownership statement." The comment offered two reasons: (1) "disclosure statement" is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title ("Corporate Ownership Statement") retained and the word "disclosure" in subparagraph (b) changed to "corporate ownership," with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

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Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally). Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee's ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee's revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act's public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1. Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of "debtor" for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from $2,725,625 to $7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most $2,725,625; (2) a debtor with debts over $2,725,625 but not more than $7,500,000; and (3) a debtor that doesn't meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of "current monthly income" in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

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Publication of Restyled Parts I and II of the Bankruptcy Rules. Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

Publication of SBRA Rules and Official Forms. The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

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Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim). Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal). Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

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Information Items

Amendment to Interim Rule 1020. As previously noted, the CARES Act altered the definition of "debtor" under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

Director's Forms for Subchapter V Discharge. The Advisory Committee approved three Director's Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

Actions Items

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

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action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

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Another judge member asked whether subparagraphs (A) and (B) are intended to qualify "file" or "attributed." Professor Cooper responded that the provisions are intended to qualify "attributed." A different member shared concerns about the "or" structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as "if ordered by the court or if an alternative situation applies." He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of "unless the court orders otherwise" earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): "is attributed to that party or intervenor at the time that controls the determination of jurisdiction." Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties' obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding "unless the court orders otherwise." The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify "file" or "attributed." This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify "attributed." A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state "In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule." A second sentence would then state that the disclosure statement must name and identify the "citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court." Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

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Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

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to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – "unless the court orders otherwise" – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

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to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

Publication of Proposed Amendment to Rule 12(a)(4). Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

Information Items

Report of the Subcommittee on Multidistrict Litigation (MDL). Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – "opt outs"

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

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Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases. The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading). The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

Suggestion Regarding Rule 17(d) (Public Officer's Title and Name). The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

Action Items

Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony). Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its "case-in-chief." Following Judge Campbell's suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence "at trial" or in a party's "case-in-chief." The Advisory Committee concluded that "case-in-chief" was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26's much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to "prompt notice" of any "modification, expansion, or contraction" of the party's expert testimony. She suggested that "contraction" might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is "correction." The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the "contraction" language could lead to a party being penalized for disclosing too much. This member recommended removing "contraction" from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word "modification," which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

Information Items

Proposals to Amend Rule 6 (The Grand Jury). The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee's role to provide advisory opinions on what a court's power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to "occupy the field" or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee's intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer's previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

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REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

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whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at $30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

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of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law .... pp. 5-8

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

- Federal Rules of Appellate Procedure .... pp. 4-5
- Federal Rules of Bankruptcy Procedure .... pp. 8-15
- Federal Rules of Civil Procedure .... pp. 15-18
- Federal Rules of Criminal Procedure .... pp. 18-20
- Federal Rules of Evidence .... pp. 20-21
- Other Items .... pp. 21-22

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

Agenda E-19
Rules
September 2020

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

NOTICE
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Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on pending legislation that would affect the rules and the judiciary's response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

Information Items

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word "may" in the current rule with "must.") The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment's effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of title 18, U.S.C., § 3146(a) and (b)" – sections that have been repealed

– with a reference to "the relevant provisions and policies of title 18 U.S.C. § 3142" – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)'s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer." On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matters of Pure Style*. Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee's delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). The instructions to that form currently require that it be filed "if you are an individual and are filing for bankruptcy under Chapter 11." This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002 (Filing Proof of Claim or Interest). Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if "the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim." The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

Rule 5005 (Filing and Transmittal of Papers). The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Rule 7004 (Process; Service of Summons, Complaint). The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," or "Officer" (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the "Managing Agent," "General Agent," or "Agent" (or other similar titles) suffices, whether or not a name is also used or such name is correct.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments' implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

Information Items

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act.

Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of "debtor" for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of "current monthly income" and "disposable" income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee's recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

This project was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

A subcommittee was formed to consider the suggestion. The subcommittee's first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference's study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

Information Items

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would expand the scope of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

Information Item

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

OTHER ITEMS

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

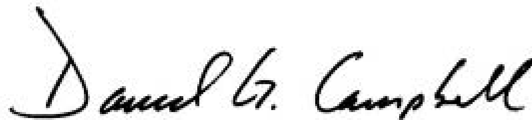
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Jeffrey A. Rosen
William J. Kayatta Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps

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Effective December 1, 2019

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2020

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor’s notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the “general nature” of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase “crimes, wrongs, or other acts” with the original “other crimes, wrongs, or acts.”	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Approved by Judicial Conference (Sept 2020)

REA History:

- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendment to the proposed amendment to Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: introduced in the Senate; referred to Judiciary Committee

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<td>Due Process Protections Act</td>
<td>S. 1380

Sponsor:
Sullivan (R-AK)

Co-Sponsors:
Booker (D-NJ)
Cornyn (R-TX)
Durbin (D-IL)
Lee (R-UT)
Paul (R-KY)
Whitehouse (D-RI)</td>
<td>CR 5</td>
<td>Bill Text:
https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf

Summary:
This bill would amend Criminal Rule 5 (Initial Appearance) by:
1. redesignating subsection (f) as subsection (g); and
2. inserting after subsection (e) the following:
“(f) Reminder Of Prosecutorial Obligation. --
(1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.
(2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.”

Report: None.</td>
<td>• 5/8/19: introduced in the Senate; referred to Judiciary Committee
• 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent
• 5/22/20: received in the House
• 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member
• 9/21/20: passed House without amendment by voice vote
• 10/9/20: presented to President</td>
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Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: introduced in the Senate; referred to Judiciary Committee
	H.R. 3993 *Sponsor:* Johnson (D-GA) *Co-Sponsors:* Cohen (D-TN) Lieu (D-CA)	AP 29	Identical to Senate bill (see above)	• 7/25/19: introduced in the House; referred to Judiciary Committee • 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/15/19: introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security

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<td>Justice in Forensic Algorithms Act of 2019</td>
<td>H.R. 4368

Sponsor:
Takano (D-CA)

Co-Sponsors:
Evans (D-PA)
Johnson (D-GA)</td>
<td></td>
<td>Bill Text:
https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf

Summary:
The stated purpose of the bill is, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings . . . ."

The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H):

• Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if—
(1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and
(2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software.

• Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence.

• Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software,</td>
<td>• 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology
• 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet</td>
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			necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include— (i) the name of the company that developed the software; (ii) the name of the lab where test was run; (iii) the version of the software that was used; (iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs; (v) documentation of procedures followed based on procedures outlined in internal validation; (vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and (vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards. **Report:** None.	

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	• 3/27/20: became Public Law No. 116-136 • Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations
Abuse of the Pardon Prevention Act	**H.R. 7694** *Sponsor:* Schiff (D-CA) *Co-Sponsor:* Nadler (D-NY)	CR 6	**Bill text:** https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf **Summary:** Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with "all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned." Subsection (b) states that "Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section." **Report:** None. **Related Bills:** H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19)	• 7/21/20: introduced in House; referred to Judiciary Committee • 7/23/20: mark-up session held; reported out of Judiciary Committee

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Draft New Rule 62 (Rules Emergency)

DATE: October 14, 2020

Judge Kethledge appointed the Emergency Rules Subcommittee, chaired by Judge Dever, to develop emergency rules in response to the congressional directive in the CARES Act. Section 15002(b)(6) of the CARES Act, Pub. L. 116-136, provides as follows:

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

Since the Committee's spring meeting, the subcommittee has held three teleconferences and a miniconference, as well as six working group teleconference calls. Through a process of editing and revision, these efforts culminated in draft new Rule 62 – version 37 – and the accompanying draft committee note. Most of the subcommittee's efforts have necessarily focused on the text of the rule. The subcommittee members intend to do closer editing of the note once they have received the full Committee's input on the text of the rule and made any necessary adjustments. After the Committee meeting the subcommittee will also turn to the question of whether to recommend an emergency rules provision for the Rules Governing 2254 Proceedings or the Rules Governing 2255 Proceedings, a question deferred while working on draft Rule 62. The subcommittee's goal is to develop a final draft to be submitted at the Committee's spring meeting with a recommendation that it be transmitted to the Standing Committee for publication in August 2021.

This memorandum first summarizes the subcommittee's process and then turns to an explanation for the various aspects of the draft rule.

I. The Subcommittee's Process

Three principles guided the subcommittee's work. First, it recognized that the Federal Rules of Criminal Procedure promulgated under the Rules Enabling Act are the product of careful design and a deliberative process to protect constitutional and statutory rights and other interests. They should not be lightly cast aside. Second, the clear and practical procedures in the rules have been resilient and stood the test of time, despite the changing and disparate circumstances facing different districts. New emergency rules must recognize the adaptability already present in the rules and reflect the diversity of experience that may arise during new emergencies. Third, the subcommittee began its consideration of the effects of emergencies and appropriate responses to those effects with a clean slate, rather than an assumption that any of the

provisions of the CARES Act should be incorporated into the new emergency rule. It employed the Committee's traditional bottom-up process, developing its proposals in consultation with people involved in these issues on the ground.

The subcommittee's first task was gathering information about how a wide range of emergencies might affect the conduct of criminal cases in the federal courts and what changes, if any, might be needed. The reporters provided a detailed and comprehensive analysis of the provisions in each rule and how they might be affected by various emergencies, and the subcommittee and its working groups reviewed and discussed each rule. The subcommittee also considered suggestions solicited from chief judges around the country by Judge Dever, as well as local orders from various districts and reports on federal and state court operations from a variety of sources.

In July, the subcommittee held a miniconference to gather input from judges and practitioners selected to represent a variety of experiences. They included participants from districts where emergencies such as hurricanes had interfered with the courts' functions and districts undergoing especially severe challenges during the current pandemic. The participants in the miniconference were:

Judge Anthony Battaglia, S.D. Cal.

Judge David Campbell, D. Ariz.

Chief Judge Lee Rosenthal, S.D. Tex.

Judge Sarah Vance, E.D. La.

Brian Moran, U.S. Attorney, W.D. Wash.

Louis Franklin U.S. Attorney, M.D. Ala.

Donna Elm, D. Ariz.

Russell M. Aoki, coordinating discovery attorney with national practice

Christina Farley Jackson, Deputy Federal Defender, ND Ill.

Hector Gonzalez, S.D.N.Y.

Douglas Mullkoff, E.D. Mich.

David Patton, Exec. Dir., Federal Defenders of New York, S.D.N.Y. and E.D.N.Y.

Carlos Williams, Exec. Dir., Southern Federal Defender Program, S.D. Ala.

Each participant was asked to identify the rules that caused the most severe challenges during emergencies as well as the most productive procedures and strategies during emergencies. The miniconference was conducted using Zoom, which allowed all participants to see one another and seemed to enhance communication.

After the miniconference, Judge Dever divided the subcommittee into three working groups dealing with the following topics:

- Triggering conditions and process of declaring an emergency
- Rules 1-31

- Rules 32-61 and habeas

In addition to the miniconference, the subcommittee has held three telephone conferences and six working group telephone calls.

There has also been an inter-committee aspect to the subcommittee's process, particularly with regard to defining the common issues: the triggering conditions and the process of declaring rules emergencies. The Civil, Bankruptcy, and Appellate Rules Committees are also considering emergency rules, and the Standing Committee charged Professor Dan Capra, reporter to the Evidence Rules Committee, with coordinating the advisory committees' work. Judge Dever, Judge Kethledge, and the reporters have remained in contact with Professor Capra and their counterparts on those Committees, and Professor Capra participated in several of the subcommittee's calls. Where there are major differences in the treatment of the common issues, we note them below.

II. Defining and Declaring a "Rules Emergency"

The subcommittee coined the phrase "rules emergency" – which has now been adopted by the other advisory committees – in order to distinguish it from the many other kinds of emergencies that may warrant special procedures dealing with the economy, transportation, immigration, or a host of other national laws and policies.

Subdivisions (a) and (b) of Rule 62 define the conditions that may constitute a rules emergency and how a rules emergency may be declared. The requirements in subdivisions (a) and (b) are intended to narrowly restrict the authority to vary from the rules, which, as noted above, have been carefully designed to protect constitutional and statutory rights, as well as other interests.

A. Who Can Declare a Rules Emergency

The CARES Act directs the Judicial Conference and Supreme Court to consider "emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.)." The chairs and reporters of the advisory committees conferred early on as the process of considering emergency measures got underway. All agreed on two points, to which the various subcommittees readily agreed: (1) the new emergency rules should not be limited to national presidential declarations under 50 U.S.C. § 1601; and (2) the authority to declare rules emergencies should be lodged in the judicial branch. A national emergency declared by the President may not always affect the functioning of the courts in a manner that requires invoking emergency rules. And other emergencies that severely affect the functioning of the courts – nationally, regionally, or more locally – may not warrant an emergency declaration under the National Emergencies Act. As a result, all the proposals being considered by the advisory committees lodge the authority to declare a rules emergency in the judicial branch, though they vary in which bodies are authorized to make that declaration.

Subdivision (a) of the draft rule provides that the Judicial Conference of the United States – the governing body of the judicial branch – has the sole authority to declare a rules emergency. The subcommittee considered and rejected suggestions that would also allow this

authority to be exercised at the circuit or district level. Although some rules emergencies may have only a limited geographic effect, allowing a rules emergency to be declared at the circuit or district level is likely to produce disparate responses. One circuit or district might not be as reluctant as the Judicial Conference to declare a rules emergency, or to depart from particular provisions in the rules. The subcommittee considered numerous requests by individual judges for changes that would ignore procedures in the rules that safeguard constitutional protections, as well as conflicting circuit rulings on the scope of certain protections. The subcommittee was unanimously of the view that, at least for criminal proceedings, the stakes are too high to invite individual districts or circuits to adopt significant changes during an emergency without some coordination by the Judicial Conference. The Judicial Conference is in the best position to provide clear and decisive guidance on these matters. Lodging this authority solely in the Judicial Conference will not only avoid conflicting applications, it is also most consistent with the Judicial Conference's central role in the Rules Enabling Act process.

The subcommittee rejected concerns that the Judicial Conference, composed of the chief judge of each circuit and a district judge from each circuit, would be unable to respond quickly in an emergency. Its members provide an immediate source of local information, and it can quickly gather more from sources within the affected courts. As the draft note explains:

> To find that a rules emergency exists, the Judicial Conference will need information about the impact of extraordinary circumstances on the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources. District court clerks, Federal Defender offices, and the Department of Justice may provide relevant knowledge as well.

Other advisory committee drafts take a different approach to the question whether the authority to declare a rules emergency should be lodged solely in the Judicial Conference. Although the Civil Rules Committee's draft places this authority solely in the hands of the Judicial Conference, the Bankruptcy and Appellate Rules Committees' drafts do not. The Bankruptcy Rules Committee's current draft rule allows a declaration to be made at any of three levels: the Judicial Conference of the United States; the chief judge of a circuit for one or more designated courts within the circuit; and the chief judge of a bankruptcy court for one or more designated locations in the district. The draft Appellate Rule provides that the chief circuit judge may suspend any provision of the Appellate Rules in that circuit; it also provides that the "Judicial Conference of the United States may exercise this same power to suspend in one or more circuits, and may review and revise any determination by a Chief Circuit Judge under this [r]ule."

If the advisory committees continue to disagree on this point after discussion at each committee's fall meeting, we expect that issue will be discussed at the January meeting of the Standing Committee.

B. The Conditions for a Rules Emergency

Subdivision (a) provides that the Judicial Conference can declare a rules emergency only after making two key findings.

First, the Judicial Conference must find that there are "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court" that "substantially impair the court's ability to perform its functions in compliance with these rules." This first finding is intended to limit judicial emergencies to truly extraordinary circumstances and to require a direct impact on the federal courts: the emergency circumstances must substantially impair the ability of one or more courts to perform their functions in compliance with the Federal Rules of Criminal Procedure. This definition is flexible, and it includes not only a national emergency like the COVID-19 pandemic, but also more local or regional emergencies that may result from disasters such as hurricanes, flooding, or wildfires. It also includes other possible emergencies such as an attack on the electronic grid that might disable the CM/ECF system. The other advisory committees have adopted this definition of a rules emergency.

Second, the Judicial Conference must find that "no feasible alternative measures would eliminate the impairment within a reasonable time." The subcommittee added this second requirement to ensure that rules emergencies could be declared only when departures from the rules were really necessary. If there are other feasible alternatives for compliance with the rules, such as delaying proceedings when conditions will not last long, or moving proceedings to another district under 28 U.S.C. § 141, there is no proper basis for failure to comply with the finely calibrated Federal Rules of Criminal Procedure, many of which are designed to protect constitutional rights

The other advisory committees have rejected the second requirement that the Judicial Conference find there are no feasible alternatives. The Civil Rules Committee's subcommittee concluded that this provision was "an unnecessary complication" and that "[r]equiring the Judicial Conference to identify and evaluate possible alternative measures and their inadequacies would be an onerous task."[1] That thinking also seems to have carried the day in the Bankruptcy Rules Committee's subcommittee. The Civil Rules Committee's subcommittee did note, however, that uniformity between advisory committees on this point may not be necessary. It recognized that "the structure, traditions, and sources of the Criminal Rules are markedly different from the structure, traditions, and sources of the Civil Rules."[2] The agenda book for the Appellate Rules Committee reflects a similar recognition of the differences between the Criminal Rules and the Appellate Rules – which already provide, in Rule 2 that "a court of appeals – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."[3]

Particularly in light of the interest in uniformity among the different advisory committees in the triggering conditions for emergency rules, it would be helpful to have the Committee's input on the importance of including this provision in Rule 62.

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[1] Advisory Committee on Civil Rules, Agenda Book, October 16, 2020, at 209.
[2] *Id.*
[3] Advisory Committee on Appellate Rules, Agenda Book, October 20, 2020, at 115-16.

C. The Contents of the Declaration

Subparagraph (b)(1)(A) requires that the declaration identify the court or courts that are affected. As noted, the rule is applicable not only when there is a national emergency, but also when emergency conditions affect only one or a few courts. Similar provisions are included in the draft Civil Rule and draft Bankruptcy Rule. No similar language appears in the draft Appellate Rule draft because the declarations can be made in each circuit by the chief judge.

Subparagraph (b)(1)(B) allows the Judicial Conference to restrict the emergency authority, including some but not all of the authority that would otherwise be available under subdivisions (c) and (d). For example, in the case of an attack on the electronic grid, there would be no reason to authorize the video proceedings covered by subdivision (d). There is some variation on this point in the current drafts being considered by the other advisory committees. The Bankruptcy Rules subcommittee's draft includes the same language as in draft Rule(b)(1)(B), but the draft Civil Rule states the same idea differently, providing that a declaration "may authorize only one or more of the Emergency Rules provided by Rule 87(c)." Because of the very general nature of the declarations authorized by the Appellate Rules subcommittee's draft, no parallel provision is included.

Subparagraph (b)(1)(C) requires each declaration to state the date on which it will terminate, and provides that the maximum term is 90 days. The subcommittee considered 90 days an appropriate period, sufficiently long to accommodate the types of emergency conditions that a court might not be able to address with continuances or other temporary measures. It is also a time period familiar to courts operating under the CARES Act, which requires review every 90 days. Parallel provisions are found in the current drafts of the Civil and Bankruptcy Rules subcommittees. The draft Appellate Rule includes no termination provision. It states only "The Chief Circuit Judge must end the suspension when the substantial impairment no longer exists."

Paragraph (b)(2) makes explicit the point that only courts included in a Judicial Conference declaration under subdivision (a) may exercise the emergency authority provided in subdivisions (c) and (d). Although this provision is not in the current draft rules under consideration by the other advisory committees, the subcommittee concluded that it was important to make this point clearly and explicitly.

Subparagraph (b)(3)(A) deals with the possibility that circumstances may change and require declarations to be altered. If emergency conditions persist beyond 90 days or they affect additional courts, subparagraph (b)(3)(A) allows the Judicial Conference to make "additional declarations." It is vitally important not to allow emergency declarations to continue or extend unless conditions meet the criteria set forth in subdivision (a). Accordingly, this section requires the Judicial Conference to make "additional declarations," rather than providing for a lesser standard for an extension of the original declaration. Similar but not identical provisions are under consideration by the Civil and Appellate Advisory Committees.[4]

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[4] The draft Bankruptcy Rule provides that the individuals and bodies that are authorized to make declarations may "issue additional declarations under (b) if emergency conditions change or persist." Advisory Committee on Bankruptcy Rules, Agenda Book, September 22, 2020, at 327. The draft Civil

Subparagraph (b)(3)(B) allows the Judicial Conference to terminate a rules emergency before the date originally set if the Conference finds that the rules emergency affecting those courts no longer exists. This ensures that the authority to depart from general procedures set forth by the Federal Rules of Criminal Procedure lasts no longer than the emergency upon which the declaration was based.

III. Subdivision (c) – Defining the Emergency Authority to Depart from the Rules

Subdivisions (c) and (d) define authority to depart from the rules. The provisions governing the authority to use video and teleconferencing are quite lengthy, and we placed them in their own subdivision, (d). Because the provisions of the Bankruptcy, Civil, and Appellate Rules embody different policies and vary substantially from one another and from the Criminal Rules, no effort was made to harmonize (c) and (d) with the other draft emergency rules.

Paragraph (c)(1) reflects the subcommittee's view that in light of Rule 53's prohibition of "broadcasting of judicial proceedings" the emergency rule should address the courts' constitutional obligation to provide public access when emergency conditions restrict that access. It provides: "If emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding."

Given the longstanding policy reasons to avoid "broadcasting" criminal proceedings, the draft is narrowly focused only on situations where the emergency has entirely precluded in-person public access to a "public proceeding." This would include not only circumstances that preclude anyone from attending in person, but also circumstances in which participants in the proceeding could attend in person, but social distancing for safety would prohibit physical access by any spectators.[5]

The phrase "public proceeding" was intended to capture hearings required "in open court," the proceedings to which a victim must be provided access,[6] and proceedings that must be open to the public under the First and Sixth Amendments, as the draft note explains.

When emergency conditions "preclude in-person access by the public," the draft rule states that the courts must provide "reasonable alternative access to that proceeding." Although there was some support for requiring that access be "real time" or "contemporaneous," the subcommittee decided not to include that requirement, preferring to allow the courts to determine what is feasible in a variety of circumstances that cannot be foreseen. The word "reasonable" also provides some flexibility in addressing this issue.

Rule provides that a declaration "may be renewed through additional declarations of the Judicial Conference for successive periods of no more than 90 days [each] . . . ." Advisory Committee on Civil Rules, Agenda Book, October 16, 2020, at 200.

[5] The draft specifies that "emergency conditions" must preclude in-person access. The draft rule would not mandate the provision of reasonable alternative access when other reasons justify closure.

[6] Rule 60 uses the phrase "public court proceeding."

The amendment does not address the question how such access must be provided, recognizing that there are a variety of virtual platforms and settings, which will inevitably change over time. Problems that have arisen on some platforms during the current pandemic[7] may very well be eliminated, and perhaps replaced by different problems, in the future. Attempting to anticipate such technological developments in a rule seems unwise.

Paragraph (c)(2) addresses the situation where a third-party signs for the defendant, and it specifies that the authority is available only when "emergency conditions limit a defendant's ability to sign." Members and participants in the miniconference described the difficulty in obtaining the defendant's physical signature when, for example, COVID-19 health restrictions limited counsel's ability to meet with the defendant in person, and when proceedings that would ordinarily be conducted in open court must be conducted by video or teleconferencing. The subcommittee learned that practices in various courts, some embodied in local rules, were permitting substitute signatures.

Whenever the rules "require a defendant's signature, written consent, or written waiver," the draft authorizes defense counsel to sign with the defendant's consent. In order to ensure that the record reflects the defendant's consent, the draft provides that unless the consent is given "on the record," defense counsel must file an affidavit attesting to the defendant's consent to this procedure.

Because pro se defendants are, by definition, not represented by counsel, the draft allows the court, with the pro se defendant's consent given on the record, to sign on behalf of such a defendant.

Paragraph (c)(3) provides limited judicial authority to issue a summons, rather than an arrest warrant. It limits this authority to situations in which the court finds that "because of the emergency conditions, the use of a warrant would create a significant risk to [public] health or safety—unless the government demonstrates good cause for a warrant instead."

The amendment allows the court flexibility to respond to emergency conditions. For example, during a pandemic issuing a summons rather than an arrest warrant could promote safety by reducing unnecessary physical encounters and potential transmission of disease. The process of arrest creates risks of transmission not present with service of a summons. For example, a defendant who is arrested must be brought to the courthouse for an initial appearance "without unnecessary delay." In contrast, when a defendant is served with a summons, the court and the parties can schedule the initial appearance to avoid situations that might spread disease. Greater use of summonses would also reduce the number of defendants held in custody before trial in facilities where social distancing may be difficult, as well as reduce exposure during transportation of in-custody defendants.

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[7] We understand, for example, that in some recent cases allowing Zoom access to hundreds of public participants became a problem when they were able to use the chat function.

On line 34 of the draft rule we placed the word "public" in brackets. Discussion at the last subcommittee call drew attention to the point that risks to health and safety that should be considered should include not only general public health, but the health of the defendant, court personnel, the lawyers, the marshals, etc. Although this change was made after the call, we believe it would be helpful to ensure that these risks are considered if the word public was removed.

The subcommittee recognized that Rules 4(a) and 9(a) currently vest the decision whether to use a summons instead of a warrant in the government, rather than the court. Moreover, in 1975, a proposal to amend Rule 4 to place the discretionary decision whether to use a warrant or a summons in the court, rather than the government, failed after opposition in Congress. Proposed paragraph (c)(3) in the emergency rule is drafted narrowly to restrict judicial discretion to override the government's preference for a warrant to situations in which the court finds – on a case-by-case basis – that "use of a warrant would create a significant risk to [public] health or safety." Moreover, even when such a showing has been made, the court must consider whether the government has nonetheless shown good cause for the issuance of a warrant.

The subcommittee was divided on the question whether there is a need for such a provision, and, if so, whether the draft provision is sufficiently tailored to that need and how burdensome it would be to implement. Mr. Wroblewski reported that this proposal had generated many questions and concerns within the Department. For example, would either federal prosecutors or magistrate judges know enough about the defendants in individual cases to be able to assess the risk to their health? Would the problems be greater when the prosecutor proceeds under Rule 9(a) after obtaining an indictment, since the court would not have been involved in the grand jury proceeding? Other members raised the question whether there was any reason to think that such a provision was needed. For example, during the current pandemic, have prosecutors voluntarily opted to proceed by summons rather than arrest warrant to minimize risks to health and safety? Other members thought that it would be helpful to provide courts with this flexibility, or suggested that the concerns might be addressed by limiting the provision to Rule 4, excluding Rule 9, or that prosecutors could easily include with each warrant application a statement of reasons why a summons would be inappropriate.

After discussion, the subcommittee concluded that it would be appropriate to include the provision in the current draft and to get further information on these issues before making a decision on whether to include it in the proposed rule. Subcommittee members are soliciting additional views on these issues.

Paragraph (c)(4) allows narrow authority for a court to conduct a bench trial, without the government's consent, if several criteria are met. Presently, Rule 23(a) requires the government to consent to a bench trial, even if the defendant waives a jury and the court approves. The proposed provision carves out a tightly limited exception to this general policy for emergencies.

As required by Rule 23(a)(1), the defendant must waive the right to a jury in writing. Paragraph (c)(4) adds two additional requirements before a court affected by a rules emergency declaration may order a bench trial over the government's objection. First, the court must provide an opportunity for the parties to be heard on the issue. Second, the court may conduct a bench trial only if it finds that doing so "is necessary to avoid a violation of the defendant's constitutional rights." An earlier draft limited the amendment to the defendant's rights under the Sixth Amendment, which would include the constitutional right to a speedy trial, the right to be present, as well as other jury related rights such as the right to a jury drawn from a cross section of the community and the vicinage requirement, but the subcommittee preferred the more general phrase.

The draft committee note recognizes the importance of the jury trial, and it stresses how narrow this authority is, stating: "The Committee recognizes that the public's interest in a jury trial continues even in an emergency, and this provision should be invoked only when no alternative venue or other mechanism to hold a jury trial is feasible."

The subcommittee discussed the question whether there would be any impediment to the proposed amendment. In *Singer v. United States*, 380 U.S. 24 (1965), the Supreme Court addressed the constitutional status of Rule 23(a), holding that a defendant has no constitutional right to waive trial by jury, and rejecting the argument that "to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process." *Id*. at 36. The Court stated:

> A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the Government's interest as a litigant has an analogy in Rule 24(b) of the federal rules, which permits the Government to challenge jurors peremptorily.

Id. The Court found it unnecessary to decide in the case before it "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Id.* at 37. It also had no occasion to address the situation that might arise if the delay in conducting jury trials due to emergency conditions would result in a violation of the defendant's speedy trial rights.

The subcommittee thought the proposal presented the strongest case for overriding the government, allowing the court to do so only when it is necessary to avoid violating the defendant's constitutional rights. The subcommittee thought it would be helpful to have additional research done on the constitutional issues, and Kevin Crenny, the new Rules Law Clerk, prepared the memorandum included *infra* Tab B.

Paragraph (c)(5) allows the court to empanel more than six alternative jurors, providing flexibility that might be particularly useful for a long trial conducted under circumstances, such as a pandemic, that might increase the chances that original jurors would be unable to complete the trial. Since it is not possible to anticipate all the situations in which this authority might be employed, the draft leaves to the discretion of the trial court the question whether to empanel more alternates, and if so, how many.

Subcommittee members noted that increasing the number of alternates would raise the question whether to increase the number of peremptory challenges as well. Some members suggested that the committee note include further direction regarding the need to increase the number of peremptory challenges when the number of alternate jurors exceeds six, proportional to the increases included in Rule 24(c)(4)(A), (B), and (C). We did not include this specific directive in the draft note. Rule 24(c)(4) provides the minimum number of peremptory challenges that courts must provide for alternate jurors. It does not *limit* the court from providing *more* peremptory challenges, in its discretion, if more than six alternates are impaneled. Uncertainty about how emergency conditions will affect jury trials counsels against dictating specific number of additional alternates; that same uncertainty cautions against suggesting how many additional peremptory challenges, if any, a court should provide. Instead, the draft note encourages the court to consider the issue of additional peremptory challenges, but leaves it, like the issue of additional alternates, to the court's discretion in individual cases: "If more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 23(c)(4)."

Paragraph (c)(6) addresses extensions of time, but only the deadlines for correcting or reducing sentences. Rule 45(b) presently gives the court general authority to extend the time for filings on its own or when the parties show "good cause" to do so. The subcommittee concluded there was no need to state the obvious point that in making that determination courts should consider emergency situations. To be completely clear, that point was included in the draft committee note, which states: "The rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown."

But Rule 45(b)(2) carves out motions correct or reduce a sentence under Rule 35, and bars extensions for those specific motions. The subcommittee concluded that the emergency rule should give the courts limited authority to extend these deadlines "if emergency conditions

provide good cause for extending the time." As the draft committee note explains: "The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance."

Paragraph (c)(6) tightly restricts the authority to extend the under Rule 35 deadlines. The good cause must be provided by emergency conditions, and the draft ties the length of extensions to the emergency conditions by stating that "the time may be extended as reasonably necessary."

Subcommittee discussion of the committee note will continue, and will address, inter alia, the Department's proposal to add to the note: "Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence."

IV. Subdivision (d) – Videoconferencing and Teleconferencing

Subdivision (d) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants or observers at criminal proceedings. Although the CARES Act provided the emergency authority under which courts now use video and teleconferencing during the COVID-19 pandemic, the subcommittee examined these issues de novo.

Proposed section (d) is flexible, designed to accommodate any emergency – including a deadly contagion or other disaster – that curtails physical presence at criminal proceedings but leaves electronic communication intact. The subcommittee concluded that given the constitutional interests involved, any authority to substitute virtual for physical presence must be narrowly tailored and extend no farther than necessary. Moreover, unlike the CARES Act, which was drafted in the early days of the pandemic, the subcommittee's draft rule incorporates lessons learned over the past six months of experience with virtual proceedings. The subcommittee considered input from subcommittee members, reports on court operations from various sources, local orders, suggestions solicited from chief judges around the country by Judge Dever, and the valuable insights of practitioners who attended the miniconference in late July. As a result, the proposed rule differs from the CARES Act in several respects, each carefully and deliberately considered by two working groups and twice by the entire subcommittee. Many of those differences are reviewed in this memo. For a chart comparing the conferencing provisions of the CARES Act with those in subdivision (d) of the draft rule *infra* Tab B.

A. Structure and Scope of Subdivision (d)

Like the CARES Act, subdivision (d) is arranged by type of proceeding. Proceedings with the fewest restrictions on the use of conferencing appear first, followed by proceedings with more stringent prerequisites, also like the CARES Act. The draft rule separates proceedings into three groups, each with a different set of requirements. This differs from the CARES Act, which provides separate requirements for only two groups of proceedings – the first consisting of an enumerated list of pre- and post-trial proceedings, and the other limited to plea and sentencing proceedings under Rules 11 and 32.

The first set of proceedings in the new rule are those that courts may conduct by videoconference with the defendant's consent under existing – initial appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2). The second section regulates proceedings that are defined not by an enumerated list, but instead by the more inclusive specification that the proceeding be one at which the defendant has a right to be present (other than proceedings addressed in the first and third sections and trial). The third and final section addresses pleas and sentencings, where use of conferencing is most restricted, as under the CARES Act.

The subcommittee defined the second category by reference to whether the defendant has a right to be present for three reasons. First, it thought the rule should provide guidance on the use of conferencing technology during some proceedings that were not included in the enumerated list in the CARES Act, such as suppression hearings. Second, the subcommittee concluded that the primary concern raised by conferencing technology was its impact on the defendant's right to be physically present. There was no need to address the use of conferencing technology at proceedings where the defendant had no right to be present and no existing rule prohibited the use of conferencing technology without the defendant's consent. Finally, attempting to enumerate each proceeding at which a defendant might have a right to be present would have been complicated, because the constitutional analysis of the right to presence may depend upon the circumstances of a particular proceeding. Thus, it made more sense to define this middle category by referencing the right to presence itself. The draft committee note includes the following explanation: "Subdivision (d) does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to the use of videoconferencing or teleconferencing for proceedings at which the defendant has no right to be present."

As the new rule is limited to situations not already authorized by the rules, it also does not speak to the use of conferencing technology when a defendant is removed from a proceeding for misconduct. *See* Rule 43(c)(1)(C) (providing a defendant waives the right to be present by persisting in disruptive behavior after a warning of removal). The draft note includes the following explanation: "The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct."

Finally, the working groups rejected earlier versions of the rule adding limited authority for teleconferencing each of the first three sections. Instead, the authority for teleconferencing appears at the end in paragraph (d)(4).

B. <u>Ensuring Confidential Communication Between Lawyer and Client</u>

When describing their experiences during this pandemic, participants in the miniconference and subcommittee members all focused on a persistent problem: the inability of counsel to consult with clients. When emergency conditions preclude in-person proceedings, counsel will not have the usual physical proximity to the defendant during the proceeding, nor ordinary access to the defendant before and after the proceeding.

To address this, the subcommittee added a requirement to *all* emergency video and teleconferencing authority granted by the new rule: *in each case*, the judge must find that there

will be an adequate opportunity for confidential consultation before and during conferenced proceedings. The draft note explains that the "requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients," and it states that "it was essential to include this prerequisite for conferencing," "in order to safeguard the defendant's right to counsel."

During the pandemic courts have attempted to address the need for client-counsel communication *during* virtual proceedings in a number of ways, including allowing the defendant to halt a proceeding in order to confer with counsel, providing a private phone line or other electronic connection with counsel, using electronic "breakout rooms" during a videoconference, "muting the incoming sound at the courtroom control panel such that only the inmate, defense counsel, and interpreter can be heard,"[8] even permitting counsel to text or message with a client who has access to a device with that capability.[9] The new rule also recognizes that consultation *prior* to a proceeding is as essential as consultation during that proceeding. An adequate opportunity to consult confidentially before proceedings may entail more flexible and generous scheduling options for counsel to "meet" with incarcerated clients via phone or video.[10]

The technology that could ensure an adequate opportunity for confidential consultation undoubtedly will evolve, and what options are reasonably available to a court in a given case will vary. The subcommittee therefore opted not to specify, even by example, how the requirement might be met.

C. General Prerequisites for Substituting Conferencing for Physical Presence

Under the CARES Act, a court has no authority to use the videoconferencing in the Act's provisions without an "application of the Attorney General or the designee of the Attorney General, or . . . motion of the judge or justice." Pub. L. 116-136 § 15002(b)(1), (2). The subcommittee saw no need to encumber the court's authority in this way. The new rule provides simply that the "court may" use videoconferencing (or teleconferencing under paragraph (d)(4)), and lists other specific requirements for its use.

Many of those specific requirements in the new rule do not appear in the CARES Act. Under the CARES Act, for enumerated proceedings other than pleas or sentencings, videoconferencing is authorized throughout a district once the chief judge (or chief judge's alternate) authorizes the use of this technology, without any specific finding. Only pleas and

[8] Fourth Revised Video-Conferencing Plan, 4-5 (S.D. Miss. July 31, 2020), https://www.mssd.uscourts.gov/sites/mssd/files/Fourth%20Revised%20Video%20Conferencing%20Plan%
20REV%207-31-2020.pdf

[9] Interim Safety Protocols for In-Person Court Proceedings, Order No. 29, 3 (S.D. Cal. June 10, 2020), https://www.casd.uscourts.gov/_assets/pdf/rules/Order%20of%20the%20Chief%20Judge%2029.pdf ("Judges will accommodate counsels' need to confer with their clients while court is in session and considering social distancing requirements by, for example, permitting counsel and clients to text, rather than verbally confer or pass notes back and forth while court is in session.").

[10] *See, e.g.*, S.D. Miss. Plan, *supra* n.8.

sentencings require specific findings under the CARES Act: a district-wide finding by the chief judge as well as a case-specific finding by the court before videoconferencing is allowed. By contrast, as noted above, the draft rule conditions the new emergency authority to use videoconferencing on a court's finding that there will be an adequate opportunity for confidential consultation between client and counsel before and during each proceeding, in every case, even for videoconferencing under Rules 5, 10, 40 and 43(b)(2) if emergency conditions significantly impair the defendant's opportunity to consult with counsel. Additional prerequisites and their rationale are detailed in the section by section analysis below.

D. Terminology

The draft rule abandons the two-word term "video teleconferencing" that is used in the existing rules and the CARES Act, in favor of the term "videoconferencing." It also uses the term "teleconferencing" instead of the two-word term "telephone conferencing" used in the CARES Act. Several subcommittee members noted that the existing terminology was confusing. The draft note includes the following explanation: "The term 'videoconferencing' is used throughout, rather than the term 'video teleconferencing' (which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from 'teleconferencing' with audio only."

E. Section-by-Section Summary

1. *Videoconferencing for proceedings under Rules 5, 10, 40 and 43(b)(2)*

Paragraph (d)(1) leads off addressing proceedings for which videoconferencing is already authorized under the rules with the defendant's consent. Initial drafts omitted this, on the assumption that emergency conditions would require no change to this authority. Two reasons led the subcommittee to reject that assumption and add (d)(1). First, the absence of a clear statement at the beginning of subdivision (d) about virtual proceedings under Rules 5, 10, 40, and 43(b)(2) generated confusion among members about if and how various parts of the new rule – especially paragraph (d)(2) addressing proceedings at which a defendant has the right to be present – applied to these proceedings. Clear guidance was required.

Second, the subcommittee concluded that emergency conditions could differ in important ways from the ordinary conditions under which videoconferencing is already authorized. Ordinarily, counsel has unfettered access to visit or speak with clients. But experience revealed that during this pandemic, counsel's contact with incarcerated clients has been dramatically curtailed.

As a result, paragraph (d)(1) clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, with one exception. When emergency conditions significantly impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

2. *Certain proceedings at which the defendant has a right to be present*

Subsection (d)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present," other than trial and the proceedings under (d)(1) and (3). The draft note adds that this right to presence might be based on the Constitution, statute or rule, and lists a few examples, namely revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). As noted in Part A of this memo, on occasion, it may not be obvious whether a defendant has the right to be present at a particular proceeding. The amendment leaves to courts to decide whether the defendant has a right to be present at certain proceedings, leaving that the courts to determine if and when such issues arise.

During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met. First, subsection (d)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge has found that emergency conditions "may preclude holding" or "substantially impair a court's ability to hold" proceedings in person within a reasonable time. These phrases are shown in brackets in the current draft, because the subcommittee has not yet determined what phrasing it prefers. Like the CARES Act, the rule provides that if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court may act instead.

The draft note explains that mandating some finding of need for virtual proceedings recognizes the important policy concerns that animate the existing limitations on virtual proceedings in Rule 43, even with the defendant's consent. The draft note adds: "[T]his district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court must hold it in person."

The other two prerequisites for the use of videoconferencing at a proceeding where the defendant has a right to be presents are (1) a finding by the court regarding an adequate opportunity for confidential consultation discussed earlier (see (d)(2)(B)), and (2) the defendant's consent. Subsection (d)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. This mirrors the CARES Act. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent from the government or the judge.

The reference to trials in (d)(2), line 52, warrants some explanation. The CARES Act does not mention trials at all. Once the subcommittee decided the rule should regulate videoconferencing in proceedings at which the defendant has a right to be present, however, it became necessary to mention trials. Because a defendant clearly has a right to be present at trial, some exemption was needed.

The subcommittee rejected a suggestion that it include a separate provision in (d) prohibiting a court from conducting a felony trial without the physical presence of the defendant. Aside from the added complication of accounting for removal for misconduct, the subcommittee

was concerned that such a subsection might suggest, by implication, that the rule endorsed the virtual presence of other trial participants or the remote testimony of witnesses at trial.

Rather than inviting debate on these divisive issues, the subcommittee concluded that the simple exemption in (d)(2) was all that was needed. Further explanation was added to the draft note:

> The Committee declined to provide authority to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear by videoconference during an emergency declaration. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when [witnesses][trial participants other than the defendant] may appear by videoconferencing.

3. *Pleas and Sentencings*

Paragraph (d)(3). Like the CARES Act, paragraph (d)(3) provides more restrictions on the use of videoconferencing at pleas and sentencings than on the use of videoconferencing at other proceedings. The draft note explains the subcommittee's rationale for the added restrictions:

> The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in the existing rules. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (d)(2).

For pleas and sentencing the defendant must affirmatively request videoconferencing in writing. It is not sufficient for the defendant to consent, after consultation with counsel. As the draft note states, "The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence." Like the CARES Act, videoconferencing for pleas and sentencings requires *both* a district-wide finding by the chief judge (or the chief judge's alternate) and a case-specific finding by the judge on the case.

Regarding the finding of the chief judge, the draft rule requires the chief judge of the district (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) make a district-wide finding that emergency conditions [may preclude holding] or [substantially impair a court's ability to hold] felony pleas and sentencings in person in that district. The draft note explains:

> This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Indeed, although the finding serves as assurance that videoconferencing might be necessary in the district, as under (d)(2), it does not preclude an individual court within the district from holding in-person pleas and sentencings, if this can be accomplished safely.

Regarding the finding of the judge on the case, the draft rule requires that the court find "that any further delay in that particular case would cause serious harm to the interests of justice." The draft note adds: "Examples include a guilty plea under Rule 11(c)(1)(C), or pleas and sentencings that will result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings." This finding is quite similar to the finding required by the CARES Act, which requires that "the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice." Anecdotal accounts suggest that under this language district courts are generally limiting the use of videoconferencing in pleas or sentences to the types of cases suggested in the draft note.

4. *Teleconferencing*

Paragraph (d)(4). There are four prerequisites for teleconferencing under subsection (d)(4) of the draft rule.

First, all of the conditions for the use of videoconferencing for the proceeding in question must be met. For example, for a sentencing under Rule 32, videoconferencing requires compliance with (d)(2)(A) as well as (d)(3)(A), (B), and (C). And for a first appearance, videoconferencing requires compliance with (d)(1)(B) and Rule 5(f).

Second, the defendant must consent to teleconferencing, after consultation with counsel. Consent to videoconferencing is not sufficient.

The third and fourth prerequisites are two case-specific findings. The judge must determine that (1) videoconferencing cannot be provided for the proceeding within a reasonable time, and (2) the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding.

The draft note explains the primary reason for these added findings: "videoconferencing allows participants to see as well as hear each other, [and] is a better option than an audio-only conference." The subcommittee wanted to ensure that teleconferencing is used only when videoconferencing is not feasible. The subcommittee also recognized that even when confidential consultation would have been possible with videoconferencing, additional accommodations may have to be made in order to assure confidential consultation for a telephone conference, hence the need for the judge to make that finding.

TAB 2B

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FEDERAL RULES OF CRIMINAL PROCEDURE
DRAFT NEW RULE 62

1 **Rule 62. Rules Emergency**

2 **(a) Conditions for a Rules Emergency**. The Judicial Conference of the United States may
3 declare a rules emergency in one or more courts only when it finds that:

4 (1) extraordinary circumstances relating to public health or safety, or affecting physical
5 or electronic access to a court, substantially impair the court's ability to perform its functions in
6 compliance with these rules; and

7 (2) no feasible alternative measures would eliminate the impairment within a
8 reasonable time.

9 **(b) Declaring a Rules Emergency**.

10 **(1)** ***Content*****.** The declaration must identify:

11 (A) the court or courts affected;

12 (B) any restrictions in addition to those in (c) and (d) on the authority to modify
13 the rules; and

14 (C) a date, no later than 90 days from the date of the declaration, on which it
15 will terminate.

16 **(2)** ***Effect of a Declaration.*** A court may not exercise authority under (c) and (d) unless
17 the Judicial Conference includes the court in its declaration.

18 **(3)** ***Additional Declarations; Early Termination.*** The Judicial Conference of the
19 United States may:

20 (A) issue additional declarations if emergency conditions change or persist; and

21 (B) terminate a declaration for one or more courts before its stated termination
22 date when it finds that a rules emergency affecting those courts no longer exists.

23 **(c) Authority to Depart from These Rules After a Declaration.**

24 **(1)** ***Public Access to Proceedings*.** If emergency conditions preclude in-person attendance
25 by the public at a public proceeding, the court must provide reasonable alternative access to that
26 proceeding.

27 **(2)** ***Signing or Consenting for a Defendant.*** If these rules require a defendant's signature,
28 written consent, or written waiver, and emergency conditions limit a defendant's ability to sign,
29 defense counsel may sign for the defendant if the defendant consents on the record. Otherwise,
30 defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se,
31 the court may sign for the defendant if the defendant consents on the record.

32 **(3)** ***Issuing a Summons*.** When these rules require the court to issue an arrest warrant, it
33 may issue a summons instead if it finds that, because of the emergency conditions, the use of a warrant
34 would create a significant risk to [public] health or safety—unless the government demonstrates good
35 cause for a warrant instead.

36 **(4)** ***Bench Trial*.** If a defendant waives a jury trial in writing, the court may conduct a
37 bench trial without government consent if, after providing an opportunity for the parties to be heard,
38 the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights.

39 **(5)** ***Alternate Jurors*.** The court may impanel more than 6 alternate jurors.

40 **(6)** ***Correcting or Reducing a Sentence*.** Despite Rule 45(b)(2), if emergency conditions
41 provide good cause for extending the time to take action under Rule 35, it may be extended as
42 reasonably necessary.

43 **(d) Authority to Use Videoconferencing and Teleconferencing After a Declaration.**

44 **(1)** ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule
45 does not modify the court's authority to use videoconferencing for a proceeding under Rules 5, 10,

46 40, or 43(b)(2). But if emergency conditions significantly impair the defendant's opportunity to
47 consult with counsel, the court must ensure that the defendant will have an adequate opportunity to
48 do so confidentially before and during those proceedings.

49 **(2)** ***Videoconferencing for Certain Proceedings at Which the Defendant Has a Right to***
50 ***Be Present.*** Except for felony trials and as otherwise provided under (d)(1) and (3), for a proceeding
51 at which a defendant has a right to be present, the court may use videoconferencing if:

52 (A) the chief judge of the district (or, if the chief judge is unavailable, the most
53 senior available active judge of the court or the chief judge or circuit justice of the circuit that includes
54 the district court) finds that emergency conditions in the district [may preclude holding] [substantially
55 impair a court's ability to hold] an in-person proceeding within a reasonable time;

56 (B) the court finds that the defendant will have an adequate opportunity to consult
57 confidentially with counsel before and during the proceeding; and

58 (C) the defendant consents after consulting with counsel.

59 **(3)** ***Videoconferencing for Felony Pleas and Sentencings.*** For a felony proceeding under
60 Rule 11 or 32, the court may use videoconferencing only if, in addition to the requirements in (2)(A):

61 (A) the chief judge of the district (or, if the chief judge is unavailable, the most
62 senior available active judge of the court or the chief judge or circuit justice of the circuit that includes
63 the district court) finds that emergency conditions [may preclude holding] [substantially impair a
64 court's ability to hold] felony pleas and sentencings in person in that district;

65 (B) the defendant, after consulting with counsel, requests in writing that the
66 proceeding be conducted by videoconferencing, and

67 (C) the court finds that any further delay in that particular case would cause serious
68 harm to the interests of justice.

69 **(4)** ***Teleconferencing*****.** When videoconferencing is authorized under this rule [or Rule 5,
70 10, 40, or 43(b)(2)], the court may conduct the proceeding by teleconferencing if:
71 (A) the court finds that:
72 (i) videoconferencing cannot be provided for the proceeding within a
73 reasonable time; and
74 (ii) the defendant will have an adequate opportunity to consult
75 confidentially with counsel before and during the proceeding; and
76 (B) the defendant consents after consulting with counsel.
77 **(e) Effect of a Termination.** Terminating a declaration for a court ends its authority under (c)
78 and (d) to depart from these rules. But if a particular proceeding is already underway and complying
79 with these rules for the rest of the proceeding would be infeasible or work an injustice, it may be
80 completed as if the declaration had not terminated.

81 **Committee Note**

82 **Subdivision (a).** This rule defines the conditions for a rules emergency that may be the
83 basis for a declaration authorizing a court to depart from one or more of these rules, and who may
84 declare that a rules emergency exists. The Rules of Criminal Procedure have been promulgated
85 under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights
86 and other interests. Compliance with rules cannot be cast aside because of cost or convenience, or
87 without consideration of alternatives that would permit compliance with the rules to continue. Any
88 authority to depart from the rules must be strictly limited. Subdivision (a) narrowly restricts the
89 type of [emergencies/situations] that would permit such authority.

90 First, paragraph (a)(1) requires circumstances that are both extraordinary and that relate to
91 public health or safety or affect physical or electronic access to a court. These requirements are
92 intended to prohibit the use of this emergency rule to respond to other challenges, such as those
93 arising from staffing or budget issues. Second, those extraordinary circumstances must
94 substantially impair the ability of a court to perform its functions in compliance with these rules.

95 Second, paragraph (a)(2) requires that no feasible alternative measures would allow the
96 affected court to perform its functions in compliance with the rules within a reasonable time.

97 Subdivision (a) also recognizes that emergency circumstances may affect only one or a
98 small number of courts – familiar examples include hurricanes, floods, explosions, or terroristic
99 threats – or may have widespread impact, such as a pandemic or a regional disruption of electronic
100 communications. The rule provides a uniform procedure that is sufficiently flexible to
101 accommodate different types of emergency conditions with local, regional, or nationwide impact.

102 Subdivision (a) also specifies that the power to declare a rules emergency rests solely with
103 the Judicial Conference of the United States, the governing body of the judicial branch. To find
104 that a rules emergency exists, the Judicial Conference will need information about the impact of
105 extraordinary circumstances on the ability of affected courts to comply with the rules, as well as
106 the existence of reasonable alternatives to continue court functions in compliance with the rules.
107 The judicial council of a circuit, for example, may be able to provide helpful information it has
108 received from judges within the circuit regarding local conditions and available resources. District
109 court clerks, Federal Defender offices, and the Department of Justice may provide relevant
110 knowledge as well.

111 **Paragraph (b)(1).** Subparagraph (b)(1)(A) requires that each declaration of a rules
112 emergency identify the court or courts affected by the rules emergency as defined in (a). Some
113 emergencies may affect all courts, some will be local or regional. The declaration must be no
114 broader than the rules emergency. That is, every court identified in a declaration must be one in
115 which extraordinary circumstances that relate to public health or safety or that affect physical or
116 electronic access to the court are substantially impairing its ability to perform its functions in
117 compliance with these rules, and in which compliance with the rules cannot be achieved within a
118 reasonable time by alternative measures.

119 Under (b)(1)(B), the Judicial Conference's declaration of a rules emergency may restrict
120 the range of rule departures to only some of those authorized by subdivisions (c) and (d). For
121 example, if the emergency arises from a disruption in electronic communications, there may be no

122 reason to authorize video teleconferencing for proceedings in which the rules require in-person
123 appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond
124 those authorized by subdivisions (c) and (d).

125 Under (b)(1)(C), each declaration must state when it will terminate, which may not exceed
126 90 days from the date of the declaration. This sunset clause is included to ensure that these
127 extraordinary deviations from the rules last no longer than [absolutely] necessary.

128 **Paragraph (b)(2)** provides that a court may not exercise authority under (c) and (d) if
129 unless the Judicial Conference includes the court in its declaration, and then only in a manner
130 consistent with that declaration, including any limits imposed under (b)(1)(B).

131 **Subparagraph (b)(3)(A)** provides that when emergency conditions persist beyond the
132 term of a declaration, or they affect fewer or additional courts, the Judicial Conference may issue
133 additional declarations. Each declaration requires a finding of conditions under (a), and must
134 include the contents required by (b)(1). This provision recognizes the conditions that justified the
135 declaration of an emergency may continue beyond the term of the declaration. The conditions may
136 also change, affecting a larger or a smaller number of districts, or shifting in nature. An example
137 might be a flood that leads to contagious disease outbreak. Subparagraph (b)(3)(B) gives the
138 Judicial Conference the authority to respond to such changes by issuing additional declarations.
139 As with an initial declaration, the Committee expects that in the event of a potential rules
140 emergency the Judicial Conference will be in close communication with the affected courts, and
141 the circuit judicial councils may choose to request that the Judicial Conference make additional
142 declarations.

143 **Subparagraph (b)(3)(B)**. If emergency conditions end before the termination date of the
144 declaration, (b)(3)(B) authorizes Judicial Conference to terminate the declaration before the stated
145 termination date. The early termination may apply to some or all of the courts included in the
146 declaration. This provision allows the Judicial Conference to ensure that any authority to depart
147 from the rules lasts no longer than necessary.

148 **Subdivisions (c) and (d)** describe the authority to depart from the rules after a declaration.

149 **Paragraph (c)(1)** addresses the courts' obligation to provide alternative access when
150 emergency conditions have precluded in-person attendance by the public to public proceedings.
151 The phrase "public proceeding" was intended to capture proceedings that the rules require to be
152 conducted "in open court," proceedings to which a victim must be provided access, and
153 proceedings that must be open to the public under the First and Sixth Amendments. The rule
154 creates a duty to provide the public with "reasonable alternative access," notwithstanding
155 Rule 53's ban on the "broadcasting of judicial proceedings."

156 The duty arises only when the preclusion of in-person access by the public is caused by
157 emergency conditions. The rule does not apply when other reasons justify closure. The duty arises
158 not only when emergency conditions preclude anyone from attending a public proceeding in
159 person, but also when conditions would allow participants but not spectators to attend, as when
160 capacity must be restricted to prevent contagion.

161 **Paragraph (c)(2)** recognizes that emergency conditions may disrupt compliance with rules
162 that require the defendant's signature, written consent, or written waiver. If emergency situations

163 limit the defendant's ability to sign, (c)(2) provides an alternative, allowing defense counsel to
164 sign if the defendant consents. To ensure that there is a record of the defendant's consent to this
165 procedure, the amendment provides that unless this consent is given on the record, defense counsel
166 must file an affidavit attesting to the defendant's consent to the procedure. The court may sign for
167 a pro se defendant, if that defendant consents on the record.

168 **Paragraph (c)(3)** authorizes the court to issue a summons, rather than an arrest warrant,
169 notwithstanding Rules 4 and 9, if the court finds that because of emergency conditions use of a
170 warrant would create a significant risk to health and safety. Although (c)(3) does not require the
171 government's consent, the court may not issue a summons if the government "demonstrates good
172 cause for a warrant." The amendment is intended to allow the court flexibility to respond to
173 emergency conditions. For example, during a pandemic issuing a summons rather than an arrest
174 warrant could promote safety by reducing unnecessary physical encounters and potential
175 transmission of disease. The process of arrest presents risks of transmission not present with
176 service of a summons, and defendants who are arrested must also be brought to the courthouse for
177 an initial appearance "without unnecessary delay." When a defendant is served with a summons,
178 the court and the parties can schedule the initial appearance to avoid situations that might spread
179 disease. Greater use of summonses would also reduce the number of defendants taken and held in
180 custody before trial, reducing crowding in transportation and in facilities where social distancing
181 may be difficult.

182 **Paragraph (c)(4)** creates an emergency exception to Rule 23(a)(2), which requires the
183 consent of the government before the court may conduct a bench trial. The amendment provides
184 authority to hold a bench trial without the consent of the government, if the defendant waives the
185 right to trial by jury in writing, and, after providing an opportunity for the parties to be heard, the
186 court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights.
187 The Committee recognizes that the public's interest in a jury trial continues even in an emergency,
188 and this provision should be invoked only when no alternative venue or other mechanism to hold
189 a jury trial is feasible.

190 **Paragraph (c)(5)** allows the court to impanel more than six alternative jurors, creating an
191 emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly
192 useful for a long trial conducted under emergency conditions, such as a pandemic, that increase
193 the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate
194 all of the situations in which this authority might be employed, the amendment leaves to the
195 discretion of the district court the questions whether to impanel more alternates, and if so, how
196 many. If more than six alternates are impaneled and emergency conditions allow, the court should
197 consider permitting each party one or more additional peremptory challenges, consistent with the
198 policy in Rule 23(c)(4).

199 **Paragraph (c)(6)** provides an emergency exception to Rule 45(b)(2), which prohibits the
200 court from extending the time to take action under Rule 35 "except as stated in that rule." When
201 emergency conditions provide good cause for extending the time to take action under Rule 35, the
202 amendment allows the court to extend the time for taking action "as reasonably necessary." The
203 amendment allows the court to extend the 14-day period for correcting a clear error in the sentence
204 under Rule 35(a) and the one-year period for government motions for sentence reductions based
205 on substantial assistance. [DOJ proposed adding: "Nothing in this provision is intended to expand

206 the authority to correct a sentence, which is intended to be very narrow and to extend only to those
207 cases in which an obvious error or mistake has occurred in the sentence."]

208 The rule does not address the extension of other time limits because Rule 45(b)(1) already
209 provides the necessary flexibility for courts to consider emergency circumstances. It allows the
210 court to extend the time for taking other actions on its own or on a party's motion for good cause
211 shown.

212 **Subdivision (d)** provides authority for a court to use videoconferencing or
213 teleconferencing under specified circumstances after the declaration of a rules emergency. The
214 term "videoconferencing" is used throughout, rather than the term "videoteleconferencing" (which
215 appears elsewhere in the rules) to more clearly distinguish conferencing with visual images from
216 "teleconferencing" with audio only. The first three subsections describe a court's authority to use
217 videoconferencing, depending upon the type of proceeding, while the last subsection describes a
218 court's authority to use teleconferencing when videoconferencing is not available. The defendant's
219 consent to the use of conferencing technology is required for all proceedings addressed by
220 subdivision (d).

221 Subdivision (d) does not regulate the use of video and teleconferencing technology for all
222 possible proceedings in a criminal case. It does not speak to the use of videoconferencing or
223 teleconferencing for proceedings at which the defendant has no right to be present. Instead, it
224 addresses three groups of proceedings: (1) proceedings for which the rules already authorize
225 videoconferencing; (2) certain other proceedings at which a defendant has the right to be present,
226 excluding felony trials; and (3) felony pleas and sentencings. The Committee declined to provide
227 authority in the rule to conduct felony trials without the physical presence of the defendant, even
228 if the defendant wishes to appear by videoconference during an emergency declaration. The new
229 rule does not address the use of technology to maintain communication with a defendant who has
230 been removed from a proceeding for misconduct.

231 **Paragraph (d)(1)** addresses first appearances, arraignments, and certain misdemeanor
232 proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for
233 videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written
234 consent). This subdivision was included to eliminate any confusion about the interaction between
235 existing videoconferencing authority and new Rule 62(d). It clarifies that the new rule does not
236 change the court's existing authority to use videoconferencing for these proceedings, except that
237 it requires the court to address emergency conditions that significantly impair the defendant's
238 opportunity to consult with counsel. In that situation, the court must ensure that the defendant will
239 have an adequate opportunity for confidential consultation before and during videoconference
240 proceedings under Rules 5, 10, 40, and 43(b)(2). Later subsections apply this requirement to all
241 emergency video and teleconferencing authority granted by the rule after a declaration.

242 The requirement is based upon experience during the COVID-19 pandemic, when
243 conditions dramatically limited the ability of counsel to meet or even speak with clients. The
244 Committee believed it was essential to include this prerequisite for conferencing under Rules 5,
245 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs
246 (d)(2), (3), and (4), in order to safeguard the defendant's right to counsel. The rule does not specify
247 any particular means of providing an adequate opportunity for private communication.

248 **Paragraph (d)(2)** addresses videoconferencing authority for proceedings "at which a
249 defendant has a right to be present," under the Constitution, statute or rule, excluding felony trials
250 and proceedings addressed in either (d)(1) or (d)(3). Such proceedings include, for example,
251 revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of
252 indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for
253 these proceedings, but only if the three circumstances are met.

254 First, subparagraph (d)(2)(A) restricts videoconferencing authority to affected districts in
255 which the chief judge (or, if the chief judge is unavailable, the most senior available active judge
256 of the court or the chief judge or circuit justice of the circuit that includes the district court) has
257 found that emergency conditions [may preclude holding] [substantially impair a court's ability to
258 hold] proceedings in person within a reasonable time. Recognizing that important policy concerns
259 animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent,
260 this district-wide finding is not an invitation to substitute virtual conferencing for in-person
261 proceedings without regard to conditions in a particular division, courthouse, or case. If a
262 proceeding can be conducted safely in-person within a reasonable time, a court must hold it in
263 person.

264 Second, subparagraph (d)(2)(B) conditions videoconferencing upon the court's finding that
265 the defendant will have an adequate opportunity to consult confidentially with counsel before and
266 during the proceeding. If emergency conditions preclude an in-person proceeding, and
267 videoconferencing is employed as a substitute, counsel will not have the usual physical proximity
268 to the defendant during the proceeding and may not have ordinary access to the defendant before
269 and after the proceeding.

270 Third, subparagraph (d)(2)(C) requires that the defendant consent to videoconferencing
271 after consulting with counsel. Insisting on consultation with counsel before consent assures that
272 the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It
273 also provides some protection against potential pressure to consent, from the government or the
274 judge.

275 The Committee declined to provide authority in the rule to conduct felony trials without
276 the physical presence of the defendant, even if the defendant wishes to appear by videoconference
277 during an emergency declaration. The new rule does not address the use of technology to maintain
278 communication with a defendant who has been removed from a proceeding for misconduct. Nor
279 does it address if or when [witnesses][trial participants other than the defendant] may appear by
280 videoconferencing.

281 **Paragraph (d)(3)** addresses the use of videoconferencing for a third set of proceedings:
282 felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant
283 together in the courtroom with the judge and counsel is a critical part of any plea or sentencing
284 proceeding. Other than trial itself, in no other context does the communication between the judge
285 and the defendant consistently carry such profound consequences. The importance of defendant's
286 physical presence at plea and sentence is reflected in the existing rules. The Committee's intent
287 was to carve out emergency authority to substitute virtual presence for physical presence at plea
288 or sentence only as a last resort, in cases where the defendant would likely be harmed by further
289 delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence

290 include three circumstances in addition to those required for the use of videoconferencing under
291 (d)(2).

292 **Subparagraph (d)(3)(A)** requires that the chief judge of the district (or, if the chief judge
293 is unavailable, the most senior available active judge of the court or the chief judge or circuit justice
294 of the circuit that includes the district court) make a district-wide finding that emergency
295 conditions [may preclude holding] [substantially impair a court's ability to hold] felony pleas and
296 sentencings in person in that district. This finding serves as assurance that videoconferencing may
297 be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings
298 when in-person proceedings might be manageable with patience or adaptation. Indeed, although
299 the finding serves as assurance that videoconferencing might be necessary in the district, as under
300 (d)(2), it does not preclude an individual court within the district from holding in-person pleas and
301 sentencings, if this can be accomplished safely.

302 **Subparagraph (d)(3)(B)** states that the defendant must request in writing that the
303 proceeding be conducted by videoconferencing, after consultation with counsel. The substitution
304 of "request" for "consent" was deliberate, as an additional protection against undue pressure to
305 waive physical presence.

306 **Subparagraph (d)(3)(C)** requires that before a court may conduct a plea or sentencing
307 proceeding by videoconference, it must find that the proceeding in that particular case cannot be
308 further delayed without serious harm to the interests of justice. Examples include a guilty plea
309 under Rule 11(c)(1)(C), or pleas and sentencings that will result in immediate release, home
310 confinement, probation, or a sentence shorter than the time expected before conditions would allow
311 in-person proceedings.

312 **Paragraph (d)(4)** details conditions for the use of teleconferencing to conduct proceedings
313 for which videoconferencing is authorized. There are four prerequisites. The first is that all of the
314 conditions for the use of videoconferencing for that proceeding must be met. For example, for a
315 sentencing under Rule 32, videoconferencing requires compliance with (d)(2)(A) and (d)(3)(A),
316 (B), and (C). For a first appearance, teleconferencing requires compliance with (d)(1)(B) and Rule
317 5(f).

318 Because videoconferencing allows participants to see as well as hear each other, it is a
319 better option than an audio-only conference. To ensure that teleconferencing is used only when
320 videoconferencing is not feasible, subparagraph (d)(4)(A) requires the court to find that
321 videoconferencing cannot be provided for the proceeding within a reasonable time. It also provides
322 that the court must find the defendant will have an adequate opportunity to consult confidentially
323 with counsel before and during the teleconferenced proceeding, as opportunities for confidential
324 consultation may be more limited with teleconferencing than they are with videoconferencing.
325 Recognizing the differences between videoconferencing and teleconferencing, subparagraph
326 (d)(4)(B) provides that the defendant must consent to teleconferencing after consultation with
327 counsel, even if the defendant requested or consented to videoconferencing.

328 **Subdivision (e).** In general, when a declaration of emergency terminates, all authority to
329 depart from the other Federal Rules of Criminal Procedure that govern proceedings will cease.
330 Subdivision (e) carves out a narrow exception for proceedings commenced under a declaration of
331 emergency but not completed before the declaration terminates. If the court finds, in an individual

332 case, that a proceeding commenced before a declaration terminates cannot be completed in
333 compliance with the rules or that compliance with the rules would work an injustice, the court may
334 complete that proceeding using procedures authorized by the emergency rule. Subdivision (e)
335 recognizes the need for some accommodation and flexibility during the transition period, but also
336 the importance of returning promptly to the rules to protect the defendant's rights and other
337 interests.

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Comparison of draft 62(d) (v.37) with CARES Act

Topic	**CARES ACT**	**DRAFT Rule 62(d): Authority During Emergency Declarations**
overall authorization	JCUS finding that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. §1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the federal courts generally or a particular district court of the United States).	The JCUS may declare a rules emergency in one or more courts only when it finds that: (1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and (2) no feasible alternative measures would eliminate the impairment within a reasonable time.
terminology	Video teleconferencing/ telephone conferencing	Videoconferencing (VC)/ teleconferencing (TC)
juvenile defendants, hearings under 18 USC 3142 or 1348	Included in VC/TC authorization	Not addressed
Communication between defendant and counsel	Not addressed	Adds a prerequisite for <u>all</u> VC and TC: court must find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding
Consent by defendant to videoconferencing or teleconferencing	Consent of the defendant, after consultation with counsel, required for all use of VC and TC under the Act	Same, for proceedings other than felony plea or sentence. For felony plea or sentence, defendant, after consulting with counsel, *requests in writing* that the proceeding be conducted by videoconferencing
Prerequisites for VC in proceedings under Rules 5, 10, 40, and 43(b)(2)	Upon application of the Attorney General or designee, or on motion of the judge or justice, Chief judge (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) may authorize VC for district.	No application or motion required. "[T]he court may" leaves it to judge's discretion. Provides no modification to existing authority to use videoconferencing for a proceeding under Rules 5, 10, 20, or 43(b)(2), but adds: "But if emergency conditions significantly impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to consult confidentially with counsel before and during those proceedings."

Prerequisites for VC for proceedings under Rules 5.1, 7(b), 32.1.	Same as above (application of AG or motion of judge plus authorization by chief judge or alternate)	No motion or application required. "[T]he court may" leaves it to judge's discretion. In a proceeding at which a defendant has a right to be present, the court may use videoconferencing if the chief judge of the district (or CJ's alternate) finds that emergency conditions in the district [may preclude holding] [substantially impair a court's ability to hold] an in-person proceeding within a reasonable time
Other proceedings at which a defendant has a rt to be present	Not addressed	See above
Prerequisites for VC for proceedings under Rules 11 and 32	Upon application of the Attorney General or designee, or on motion of the judge or justice, if Chief Judge (or CJ's alternate) specifically finds that felony pleas under Rule 11 and felony sentencings under Rule 32 cannot be conducted in person without seriously jeopardizing public health and safety, and The district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice	No motion or application required. "[T]he court may" leaves it to judge's discretion. Chief judge of the district (or CJ's alternate) finds that emergency conditions [may preclude holding] [substantially impair a court's ability to hold] felony pleas and sentencings in person in that district; Defendant, after consulting with counsel, requests in writing that the proceeding be conducted by VC Court must find any further delay in that particular case would cause serious harm to the interests of justice.
Trial	Not mentioned	Exempted from provisions addressing proceedings at which the defendant has a right to be present
Teleconferencing instead of videoconferencing.	Chief Judge (or CJ's alternate) may authorize telephone conferencing, district-wide, for the ten categories of proceedings enumerated in the Act if "video teleconferencing is not reasonably available." A plea or sentencing proceeding can be conducted by phone if case-specific findings for video teleconferencing are made and "video teleconferencing is not reasonably available"	Does not permit a Chief Judge (or alternate) to authorize proceedings by TC district wide. Instead, use of TC authorized only if (1) prerequisites for VC met, and (2) court makes a case-specific finding that VC cannot be provided for the proceeding within a reasonable time.

MEMORANDUM

To: Professor Sara Sun Beale, Professor Nancy King, Rebecca Wolmendorf

From: Kevin Crenny, Rules Law Clerk

Date: October 7, 2020

Re: Constitutionality of bench trial without prosecution's consent

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This memo is primarily aimed at addressing the constitutionality of paragraph (c)(4) of Draft Rule 62, which would allow a court to conduct a bench trial without the government's consent if the defendant has waived a jury trial and the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights. The memo is divided into four parts. Part One addresses the history of Rule 23(a), the existing rule concerning nonjury trials, which does require the government's consent before a bench trial can be held. Part Two surveys the history of the jury requirement over time and reviews some of the major Supreme Court precedents that might relate to the constitutionality of Draft Rule 62(c)(4). Part Three directly addresses the constitutionality of the Draft Rule's bench trial provision, concluding that it is unlikely to be struck down. Part Four reviews arguments that have been made by the Department of Justice concerning the constitutionality of a bench trial being held over the government's objection.

I. History of Rule 23(a)

From its earliest drafts in 1941, the procedural rule that would become Fed. R. Crim. P. 23(a) recognized a right to waive trial by jury but also required the consent or approval of the government and the Court.[1] When the Supreme Court first reviewed the draft rules in 1942, it asked whether parties could consent to trial by less than twelve jurors, but raised no questions concerning the government consent requirement.[2] The preliminary drafts that were circulated more widely in 1942 and 1943 did prompt criticisms of the government consent requirement.[3] Commenters suggested:

> The Constitution ought not to be construed as guaranteeing trial by jury to the Government, for the right to such a trial is exclusively in the defendant. Moreover, the defendant may waive the right to counsel, to a speedy trial, to compulsory process, and to confrontation of witnesses. Since all these safeguards are

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[1] *See* Lester B. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L. J. 29, 66–68 (describing early drafts, the first of which "provided that the right to a jury trial as declared by the Constitution or as given or recognized by a statute was to be preserved to the defendant and to the Government," *id.* at 67).

[2] *Id.* at 68.

[3] *Id.* at 69–70.

> enumerated in the same section of the Constitution as the right to jury trial, why require consent of the Government as to the latter and not as to the former?[4]

Others noted that "[a]n Illinois statute requiring consent of the prosecutor was repealed after some experience with the statute" and that " the absolute right of a defendant to waive jury trial had worked very well in the state courts of Maryland."[5] No changes were made in response to these comments and the rule was enacted in roughly its current form.

The Committee has considered the issue of government consent to bench trials one time since then, in the 1960s. In 1963, the Advisory Committee on Criminal Rules received a suggestion that government consent should not be required for a defendant to waive a jury trial.[6] One member of the Committee argued that government represents the public interest in a jury trial, while another member suggested that the judge could adequately represent that interest.[7] The Committee's vote on the issue was tied and it was left for discussion at their next meeting.[8] Again, views were mixed, with one committee member arguing that the government's power to refuse a bench trial was only exercised sparingly but was important.[9] The Committee ultimately voted not to make any change.[10] The Committee reviewed further comments to the same effect the following year—around the time *Singer* was decided—but nothing came of this.[11]

II. Status of the Jury Requirement Over Time

Justice Scalia's partial concurrence in *Neder v. United States*,[12] calls the right to trial by jury "the spinal column of American democracy" and notes the right's origins at the time of the founding and earlier, in English law.[13] The jury requirement was not particularly flexible during the nineteenth century.[14] Examples of a strict application of the jury requirement (or strong protection of the right to a jury) include an 1882 Circuit case "holding that a directed verdict of

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[4] *Id.* at 69 (citing I COMMENTS, RECOMMENDATIONS, AND SUGGESTIONS RECEIVED CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE 137, 473 (1943)).
[5] *Id.* at 69 n. 249, 70.
[6] Minutes of Advisory Committee on the Rules of Criminal Procedure 21 (Oct. 16, 1963), https://www.uscourts.gov/file/15214/download.
[7] *Id.*
[8] Minutes of Advisory Committee on the Rules of Criminal Procedure 15 (Jan. 15, 1964), https://www.uscourts.gov/file/15167/download.
[9] *Id.*
[10] *Id.*
[11] Minutes of Advisory Committee on the Rules of Criminal Procedure 11 (May 4, 1965), https://www.uscourts.gov/file/15186/download.
[12] 527 U.S. 1 (1999).
[13] *Id.* at 30–31 ("The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter." (citing Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 870, 875, n. 44 (1994))) (Scalia, J., concurring in part and dissenting in part)
[14] *See* Orfield, *supra* n. 1 at 56–60.

guilty violated the right to trial by jury" because "[t]his [was] a right which cannot be waived,"[15] and another Circuit case in which the judge noted "very grave doubts about the constitutionality of [a statute concerning petty offenses committed at sea] which provides for trial by the court."[16]

It was not until 1904 in *Schick v. United States*[17] that the Supreme Court held that a bench trial could be permitted for petty offenses.[18] As Professor Lester Orfield noted in a 1962 article, "[t]he decision was not a radical one," because nothing in the Constitution and no act of Congress required trial by jury for this kind of offense."[19] The Court reasoned that since "a defendant can plead guilty . . . and thus dispense with all inquiry by a jury," or waive his right "to be confronted with the witnesses against him," there was no reason he could not consent to trial by the Court.[20] The caselaw was somewhat mixed in the first few decades of the twentieth century, but the general trend up until *Patton* appears to have been that waiver of the jury requirement was sometimes permitted but only in cases involving misdemeanors or petty offenses.[21]

In 1930, *Patton v. United States*[22] established that the Article III jury requirement "is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election."[23] The facts of the case concerned a felony trial in which one of the twelve jurors suffered "severe illness" and could not continue on.[24] The defendant and the government stipulated that they would proceed with only eleven jurors, and the Court consented to this plan.[25] After a guilty verdict, the defendant appealed, arguing that he should not have been permitted to waive his constitutional right to trial by a jury of twelve.[26] Because a common law jury was a jury of twelve, the Court rejected any "distinction . . . between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve."[27] If the defendant had the ability to waive one juror's presence, he necessarily had the ability to waive all of them.

Based on a review of historical materials relating to jury trial, the Court found it "reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused," rather than "as an integral

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[15] *Id.* (quoting *United States v. Taylor*, 11 Fed. 470, 471 (C.C.D. Kan. 1882))
[16] *Id.* at 58 (quoting *In re Smith*, 13 F. 25, 26 (C.C.D. Mass. 1882)).
[17] 195 U.S. 65 (1904).
[18] *Id.* at 71–72.
[19] Orfield, *supra* n. 1 at 60.
[20] *Schick*, 195 U.S. at 71–72 ("When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.").
[21] *See* Orfield *supra* n. 1 at 61–63.
[22] 281 U.S. 278 (1930),
[23] *Id.* at 298.
[24] *Id.* at 286.
[25] *Id.*
[26] *Id.* at 287.
[27] *Id.* at 290.

and inseparable part of the court"—"nothing to [the latter] effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time."[28] The Sixth Amendment, the Court observed, "deals with trial by jury clearly in terms of privilege" and this framing of the purpose of the jury "may be regarded as reflecting the meaning of" the Article III jury requirement given the Amendment's close temporal proximity to ratification.[29] The jury requirement was not jurisdictional.

Following this conclusion, *Patton* then turned to "whether the court is empowered to try the case without a jury," and concluded that courts are so empowered.[30] The Court's reasoning was that Article III and the statutes establishing the federal courts amount to a "broad and comprehensive grant" of authority "to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution."[31] Because the jury can be waived "it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case."[32] The Court noted this was consistent with *Schick*. *Id.* It was also consistent with historical practice, as "in the Colonies . . . a waiver and trial by the court without a jury was by no means unknown," as established by the Solicitor General's brief.[33] The Court saw no public policy reason against allowing waiver, and concluded that the jury could be waived even in felony cases.[34]

Especially relevant to the Draft Rule are the limitations the Court placed on its holding in *Patton*. It wrote that it "d[id] not meant to hold that the waiver must be put into effect at all events."[35] Specifically, "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of government counsel* and the sanction of the court *must be had*, in addition to the express and intelligent consent of the defendant."[36]

Singer v. U.S. followed *Patton* and confirmed the constitutionality of Rule 23(a)'s requirement that the prosecution and court must consent to a criminal bench trial.[37] The Court noted that *Patton* had not suggested any affirmative right to a bench trial, and that *Patton*'s holding had since been reaffirmed.[38] The question boiled down to what restrictions could be

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[28] *Id.* at 297
[29] *Id.* at 298 (quoting *Callan v. Wilson*, 127 U.S. 540, 549 (1888) ("[W]e do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."))
[30] *Id.*
[31] *Id.* at 299.
[32] *Id.*
[33] *Id.* at 306. This brief was drafted in part by Erwin Griswold. His extensive research on the topic appears to have made it into an article published in the Virginia Law Review a few years later. Erwin N. Griswold, *Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934).
[34] *Patton*, 281 U.S. at 307.
[35] *Id.* at 312.
[36] *Id.* (emphasis added).
[37] 380 U.S. 24 (1965).
[38] *Id.* at 34 (citing *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277–78 (1942)).

placed on the defendant's right to waive the jury.[39] As the Court saw it, requiring approval from the court and the prosecution was permissible because there was no precedent suggesting otherwise and because "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[40] The Court recognized "that the States ha[d] adopted a variety of procedures," and that some did not require the consent of the prosecutor, but the Court reasoned that the framers of the federal rules were aware of these alternative and chose not to follow them.[41]

Near the end of *Singer* the Court referenced in dicta and left open the issue currently before the Committee:

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" . . . or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.[42]

This issue was not meaningfully discussed at oral argument in *Singer*.[43]

III. Constitutionality of the Draft Rule

It is unlikely that the government could successfully challenge the proposed emergency rule on the ground that it would be unconstitutional for a court to hold a bench trial over the opposition of the government. The current draft emergency rule concerning bench trials states that "[i]f a defendant waives a jury trial in writing, the court may conduct a bench trial without government consent if, after providing an opportunity for the parties to be heard, the court finds that a bench trial is necessary to avoid violating the defendant's constitutional rights." The dicta in *Singer* concerning "passion, prejudice [or] public feeling" is the closest the Court has come to explicitly stating that there might be some circumstances under which a bench trial might be required notwithstanding the government's opposition. Even without an explicit ruling, there is nothing in the doctrine that suggests the government has any constitutional right to prevent the defendant's waiver of jury trial rights. Further, the draft rule is consistent with the doctrinal logic that applies in the analogous context of peremptory challenges and is also consistent with the reasoning of courts that have allowed bench trials over government objections in the past.

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[39] *See id.*
[40] *Id.* at 34–35.
[41] *Id.* at 36–37 (citing Orfield, *supra* n.1 at 69–72).
[42] *Id.* at 37–38.
[43] *See* Oral Argument, *Singer v. United States* (1964) (No. 64-42), https://www.oyez.org/cases/1964/42.

The draft rule is consistent with Supreme Court doctrine concerning the right to trial by jury and the defendant's right to waive it. *Patton* established that the right to trial by jury, founded in Article III as well as in the Sixth Amendment, is a right belonging to the defendant and which the defendant may choose to waive.[44] The jury requirement is not jurisdictional, so the Court does not need to use a jury in order to exercise its power to hear and decide a case.[45] Nothing in *Patton* or *Singer* suggests that the jury trial exists for the benefit of the prosecution or that it protects the public (through the prosecution). Needless to say it is not a right held by the prosecutor as an individual. Nor is there any suggestion that victims hold any aspect of the right.

Further, the circumstances under which the draft rule would allow a court to disregard a prosecutor's opposition to a bench trial mirror the circumstances under which a court would find the prosecutor exercised peremptory challenges in an unlawful manner. Peremptory challenges make for a useful point of comparison because, like the prosecutor's veto of a jury trial waiver, the exercise of peremptory challenges is a privilege in the trial process to which the prosecution is ordinarily entitled but which is not founded in constitutional protections and which can be exercised in a way that works against the defendant.[46] In *Batson*, the Court said that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[47] *Batson*'s progeny expanded this protection from race to include gender and national origin.[48] These cases can be characterized as establishing limits on the exercise of peremptory challenges very similar to the draft emergency rule's limits on the exercise of the prosecutor's veto of a jury waiver—the prosecution is entitled to exercise this power, so long as doing so does not trample on other constitutional protections.

Courts that have decided to hold a bench trial over the government's objection or opposition have reasoned along these same lines, even in the absence of an emergency rule explicitly permitting them to do so. For instance, this past summer, a court in the Eastern District of New York identified "Conflicting Constitutional Rights" as a factor to be considered when weighing whether to hold a bench trial over the government's objection.[49] In another recent case,

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[44] *See Patton*, 281 U.S. at 298.
[45] *Id.* at 299 ("[S]ince . . . the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case.").
[46] *See Swain v. Alabama*, 380 U.S. 202, 212–13 (1965) (noting that "[t]he peremptory challenge has very old credentials" and discussing its origins in the common law period).
[47] *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (quotation marks and citation omitted); *see also, e.g.*, (reaffirming a "commitment to jury selection procedures that are fair and nondiscriminatory" and holding "that gender, like race, is an unconstitutional proxy for juror competence and impartiality").
[48] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (national origin).
[49] *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945, at *8 (E.D.N.Y. Aug. 26, 2020). The *Cohn* court's analysis of this factor is not particularly compelling. It identifies first the right to a speedy trial, which the court acknowledged was not a sufficient basis under *Singer* for overriding the

a court in the Western District of Wisconsin expressed concern over whether any jury could remain impartial in a particularly challenging child pornography case.[50] Earlier cases relied on similar rationales. In *United States v. Panteleakis* and *United States v. Braunstein*, district courts in Rhode Island and New Jersey allowed bench trials based in part on the fact that inflammatory and prejudicial articles in local newspapers led the lower courts to believe that it would be impossible to draw an impartial jury.[51] In *United States v. Lewis*, a court in the Western District of Michigan held a bench trial in a case concerning defendants with religious beliefs that forbid their being judged by members of the general public rather than by judges, reasoning that I twas necessary to overrule the prosecutor's usual veto in order to protect the defendants' First Amendment rights.[52]

It is thus unlikely that the draft rule would be found unconstitutional. It would encourage courts to hold bench trials without the government's consent under the same sorts of circumstances courts have already been finding it appropriate to do so. That could be an argument against including the rule—if courts are already doing this, why bother?—but it also suggests that the rationale behind the rule is compelling, and that at least some courts are likely to embrace it.

IV. Government Arguments

As far as I was able to determine, federal and state prosecutors have not taken the position that it would be unconstitutional for a court to hold a bench trial in a criminal case without the prosecution's consent—with one slight exception from 2006. I was able to identify nine criminal cases post-*Singer* in which a Court either decided that it would hold a bench trial without the government's consent or came very close to doing so.[53] Of these, six are over thirty years old. There is nothing in these six opinions that suggest the federal or state governments involved made any constitutional argument regarding their prerogative to veto the choice of a bench trial. I was not able to locate any briefing for these older cases, so it's possible that such an argument was raised but somehow not addressed in an opinion. Of the remaining three cases,

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government veto, *see id.* (citing *Singer*, 380 U.S. at 38), and second the tension between defendant's right to testify in his own defense and his right against self-incrimination, *id.* This tension is implicated by every case that might be tried before a jury, and therefore does not seem like a compelling basis for going against the usual rule.

[50] *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429, at *1–2 (W.D. Wis. Sept. 4, 2020).

[51] *Panteleakis*, 422 F. Supp. at 248; *Braunstein*, 474 F. Supp. at 13 ("All the circumstances involved in [*Panteleakis*] are involved here").

[52] *Lewis*, 638 F. Supp. at 581.

[53] *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429 (W.D. Wis. Sept. 4, 2020); *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945 (E.D.N.Y. Aug. 26, 2020); *U.S. v. U.S. District Court for Eastern District of California*, 464 F.3d 1065 (9th Cir. 2006); *State v. Cruz*, 517 A.2d 237, 244 (R.I. 1986); *United States v. Panteleakis*, 422 F. Supp. 247, 248 (D.R.I. 1976); *U.S. v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968); *United States v. Lewis*, 638 F. Supp. 573, 575, 581 (W.D. Mich. 1986); *Commonwealth v. Wharton*, 435 A.2d 158 (Pa. 1981); *U.S. v. Braunstein*, 474 F. Supp. 1 (D.N.J. 1978).

two are from the past several months and one is from 2006. Each of these warrants further discussion

A. *U.S. v. U.S. District Court for Eastern District of California*, 464 F.3d 1065 (9th Cir. 2006)

I was not able to find the briefs from this case, but I listened to the oral argument recording.[54] In it, the government attorney opened by arguing that the Constitution does not allow a court to hold a bench trial without the prosecution's consent, but he seemed to back away from this claim when pressed on it.

The government characterized *Singer* as having concluded that it was not necessary to evaluate whether a future case might present a set of facts allowing for a bench trial without the government's consent. The government suggested that it was improper for the district court judge to have undertaken a balancing analysis in which he weighed his own ability to judge fairly against the ability of hypothetical jurors to do so. The government's argument was that voir dire and other safeguards like 404(b) were the means by which the defendant can make sure the jury evaluates the case fairly.

One of the judges asked: "What if the court goes through days and days of voir dire and determines it will not be possible to find a fair jury, could the court then overrule the lack of government consent?" (quotation paraphrased). Counsel for the government speculated that the government would probably consent at that point. Pressed on the issue ("What if you didn't?"), he acknowledged that maybe "if it went that far" the court could make a finding that it was *impossible* to find an impartial jury. Government counsel emphasized that this was not what the lower court here had did; the lower court had done an improper balancing test. Nonetheless, the government appears to have agreed when pressed that the court *could* make a finding that an impartial jury was impossible and that in such a case the it could then hold a bench trial without the government's consent.

B. *U.S. v. Cohn*, No. 19-cr-97, 2020 WL 5050945 (E.D.N.Y. Aug. 26, 2020)

In letter briefing in *Cohn*, the U.S. Attorney's Office for the Eastern District of New York took the following position:

> Where, as here, the government does not consent to a nonjury trial, it is not required to "articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver." *Singer*, 380 U.S. at 37. The only exception to the government's right to a jury trial is that its exercise "may not be conditioned or later revoked for a reason that infringes on an individual's constitutional rights," such as to "punish" the defendant for exercising his First Amendment rights. [*United States v. Sun Myung Moon*, 718 F.2d 1210, 1218 (2d Cir. 1983)]. In order

[54] Oral Argument, *U.S. v. U.S. District Court for E.D. Cal.*, 464 F.3d 1065 (9th Cir. 2006), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000024802.

to override the government's consent under this limited exception, a defendant must provide a "factual predicate" to support an allegation that the government's refusal to consent was designed to violate the defendant's constitutional rights. *See id.* [55]

The court did not address this argument in deciding to hold a bench trial over the government's objections. This is perhaps because it is not a strong argument. The government here conflates two different discussions in *Sun Myung Moon* and its description should not be regarded as accurately reflecting the law even in the Second Circuit.

In *Sun Myung Moon*, the Reverend Sun Myung Moon and another defendant faced charges related to false tax returns fired by the Reverend.[56] Defendants requested a bench trial, which the government opposed, and the issue of the denial was raised on appeal.[57] First, the defense argued "that the government's reason for opposing the defendants' request for a bench trial [was] unconstitutional, so that the judge's acceptance of it was error of constitutional dimension mandating reversal."[58] The Reverend had made public statements to the effect that he was being prosecuted because of his religious beliefs, and according to the defense the prosecution had insisted on a jury trial to "defuse the public criticism that had been leveled by Moon."[59] The defense charged that the insistence on a jury trial "had the effect of punishing Moon for exercising his First Amendment right of free speech."[60] In this context the Second Circuit held that a defendant needed a "factual predicate"—in order to demonstrate that the government's *opposition* was itself unconstitutional.[61]

After this discussion of whether the government's insistence on jury trial was punitive, the Second Circuit turned to Moon's second and separate argument, which concerned the *Singer* issue—the "denial of the right to a fair trial."[62] In this discussion the Court stated the rule from *Singer*—that "[o]rdinarily, insisting that a defendant undergo a jury trial against his will does not run afoul of a defendant's right to due process and a fair trial" but that "there might be cases where the circumstances are so compelling" that this would change," and that Moon's was not such a case.[63] The Court suggested that "[t]he validity of" a claim that a fair jury trial is impossible "is properly shown upon a voir dire of prospective jurors,"[64] but said nothing about a "factual predicate" requirement in this context, as the government's characterization in its *Cohn* letter seems to suggest.

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[55] *Cohn*, Letter, ECF No. 95. No. 19-cr-97 (Aug. 13, 2020).
[56] *See Moon*, 718 F.2d at 1215–16.
[57] *See id.* at 1217–19.
[58] *Id.*
[59] *Id.* at 1217.
[60] *Id.*
[61] *Id.* at 1218.
[62] *Id.*
[63] *Id.* (citing *Singer*, 380 U.S. at 34–37).
[64] *Id.*

C. *U.S. v. Donoho*, No. 19-cr-149, 2020 WL 5350429 (W.D. Wis. Sept. 4, 2020)

In this most recent case, the government's brief collected a number of circuit court cases that, it said, "uniformly upheld a trial court's refusal to grant such waivers without governmental consent."[65] At the same time, the government acknowledged that "a few district courts have compelled bench trials after finding 'potential juror prejudice so pervasive or the issues so complicated that the due process clause required a bench trial.'"[66]

Thus, though the government leads with the fact that all these courts of appeals have upheld refusals to grant waivers, the government again conceded in this case that it is not unconstitutional for a court to proceed with a bench trial over the government's objection under certain circumstances. Regarding the collection of cases where that has happened, the government argued not that those courts were wrong but that "[t]his case [*Donoho*] does not present any of the circumstances that other district courts have found compelling enough to warrant a bench trial."[67]

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[65] Gov't Supp. Br. at 4–5, *Donoho*, No. 19-cr-149, 2020 WL 535429 (Aug. 21, 2020), ECF No. 78. The cases collected were: *United States v. Jackson*, 278 F.3d 769, 771 (8th Cir. 2002); *DeLisle v. Rivers*, 161 F.3d 370, 389 (6th Cir. 1998); *United States v. Van Metre*, 150 F.3d 339, 353 (4th Cir. 1998); *United States v. Gabriel*, 125 F.3d 89, 94–95 (2d Cir 1997) (overruled on other grounds by *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705–06 (2005)); *United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991); and *Moon*, 718 F.2d 1210.

[66] Br. at 5 (quoting *U.S. v. Lewis*, 638 F. Supp. 573, 576 (W.D. Mich. 1986) and also citing *United States v. Braunstein*, 474 F. Supp. 1 (D.N.J. 1978); *United States v. Panteleakis*, 422 F. Supp. 247, 248 (D.R.I. 1976); and *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968).

[67] *Id.* at 5.

TAB 3

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

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

RE: **Rule 6 – Grand Jury Secrecy and Delayed Notification of Subpoena (Suggestions 20-CR-B, 20-CR-D, 20-CR-H)**

DATE: **October 9, 2020**

The Committee has now received three suggestions for amendments to Rule 6. The first two suggestions, 20-CR-B and 20-CR-D, propose the creation of a new exception for materials of historical interest. The spring agenda book contains a discussion of those proposals.[1] After initial discussion at the spring meeting, the Committee decided to refer them to a subcommittee for further consideration. Following the meeting, Judge Kethledge appointed the following persons to the Rule 6 Subcommittee:

Judge Michael Garcia, chair
Professor Roger Fairfax
Judge Gary Feinerman
Judge Jacqueline Nguyen
Catherine Recker, Esq.
Jonathan Wroblewski, Esq., representing the Department of Justice

At the spring meeting, Mr. Wroblewski noted that the Department wished to propose an additional issue concerning Rule 6 for consideration: explicit authority for courts to provide for delayed notification of grand jury subpoenas under certain circumstances. The Department has now formally submitted that proposal, *infra* Suggestion 20-CR-H, which has also been referred to the subcommittee.

The subcommittee held two meetings by teleconference to discuss the proposals. It has decided to hold a virtual miniconference to obtain a broad range of opinion on whether any changes to Rule 6 are warranted, and, if so, what limitations should be included.

The subcommittee has begun to sketch out the broad outlines of the miniconference, which it plans to hold online in the early spring. The miniconference will be structured as a series of one-hour panels composed of several speakers presenting their views and then responding to questions from subcommittee members. The subcommittee concluded that this format will work well with the available technology and allow it to hear from speakers representing a wide variety of perspectives. It is now starting to identify speakers with first-hand experience. These will include not only historians, archivists, and journalists who wish to have access to these materials, but also persons who can speak to the interests of victims, witnesses, and prosecutors in cases where grand jury materials have been sought. Finally, the subcommittee will identify participants who can speak to the Department's proposal that the courts be given authority to order that notification of grand jury subpoenas be delayed. These may include, for example, technology companies that favor providing immediate notice to their customers.

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[1] Advisory Committee on Criminal Rules, Agenda Book, May 5, 2020, at 157-60.

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

TO: Judge Michael J. Garcia, Chair
Subcommittee on Rule 6(e)
Advisory Committee on the Criminal Rules

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation
Criminal Division, U.S. Department of Justice

RE: Proposed Amendment to Rule 6(e) Authorizing: (1) the Release of Historically Important Grand Jury Material, and (2) Grand Jury Non-Disclosure Orders

DATE: July 10, 2020

I. Introduction

This is a follow-up to our Subcommittee call of June 30th. We very much appreciate the deliberative course you have set for the Subcommittee, and we look forward to the consideration of the important issues before us. As you requested, this memorandum lays out our current thoughts on these issues.

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As I mentioned on our call, for at least the last several Administrations, the Department of Justice has taken the position – in litigation and in policy debates – that Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of grand jury material unless there is specific authorization for disclosure set out in the Rules. The Department has argued that Rule 6(e) displaces the common law and includes all of the exceptions to grand jury secrecy, and that district courts lack inherent authority to release grand jury material beyond the listed exceptions.

In opposition to a petition for certiorari in *McKeever v. Barr*, the Solicitor General last year argued that "Rule 6(e)'s prohibition on disclosure '[u]nless these rules provide otherwise,' Fed. R. Crim. P. 6(e)(2)(B), makes clear that the circumstances listed in [the Rule] are the only circumstances in which a district court may order disclosure." Brief for Respondent at 10, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020) (No. 19-

307). The Department recognized that the *McKeever* decision created a circuit split among the federal courts of appeals. *Compare In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766-767 (7th Cir. 2016) with *McKeever*, 920 F.3d at 842*; Pitch v. United States*, 953 F.3d 1226 (11th Cir, 2020) (en banc); *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009). Nonetheless, the Solicitor General argued that the petition should be denied "because the question whether and under what circumstances historically significant grand jury materials should be disclosed can be resolved through the rulemaking process, as overseen by this Court under the Rules Enabling Act, 28 U.S.C. 2072." Brief for Respondent at 19, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307). The Solicitor General went on to state that "[r]ulemaking would be a better forum than judicial review to address the policy judgments involved in deciding whether and when grand jury secrecy should expire, including for historically significant records." *Id.* at 20.

In its filing in the Supreme Court, the Solicitor General noted that in 2011, Attorney General Holder proposed amendments to Rule 6(e) that would have "permit[ted] the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." *Id.* at 3. *See also*, Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Crim. Rules (Oct. 18, 2011). The Attorney General explained in the proposal that, although grand jury records of historical significance are catalogued and preserved at the National Archives, no legal mechanism exists for allowing public access to those records. As you know, the Department's 2011 proposal would have authorized release of historically important grand jury material after 30 years, in certain circumstances. *Id.* It would also have granted blanket authority to the Archivist of the United States to release grand jury material 75 years after the relevant case files associated with the grand jury were closed, even without a petition. *Id.*

This past December, the Supreme Court denied the petition for certiorari in *McKeever*. In a statement issued along with the denial, Justice Breyer wrote –

> Whether district courts retain authority to release grand jury material outside of those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.

Statement of Justice Breyer respecting the denial of certiorari, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307).

Following the denial of certiorari, the Advisory Committee received two formal amendment suggestions that Rule 6(e)'s provisions on grand jury secrecy be changed to authorize release of certain grand jury material, including historically important grand jury material. Consistent with the Solicitor General's filing before the Court, we supported the Committee's decision to fully consider such a possible amendment.

II. The Department of Justice Continues to Support a Limited Exception to Grand Jury Secrecy for Historically Important Grand Jury Material

We continue to support an amendment to Rule 6(e) that would preserve the tradition of grand jury secrecy and the exclusivity of the Federal Rules of Criminal Procedure while allowing the release of grand jury records in cases where significant time has elapsed and where the historical value of the records and the interests of the public for their release outweigh any remaining need for continued secrecy.

Rule 6(e) mandates that enumerated categories of individuals maintain grand jury secrecy "unless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). All but two of Rule 6(e)(3)'s exceptions to grand jury secrecy apply to disclosures to a government official. *See* Fed. R. Crim. P. 6(e)(3)(A)-(E). The non-governmental disclosure provisions state:

> (E) The court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter:
>
> (i) preliminarily to or in connection with a judicial proceeding; [and]
>
> (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before a grand jury; . . .

Fed. R. Crim. P. 6(e)(3)(E).

Neither of these provisions – nor any other provision of current law – authorizes a petitioner to access historically significant grand jury information. Nor do the rules provide any authorization for release of grand jury material by the National Archives no matter how much time has passed.

Despite the clear text of Rule 6(e), courts nonetheless have looked beyond the exceptions enumerated in Rule 6(e) and have exercised what they have found to be their "inherent authority" to release grand jury material. These courts have found that "special circumstances" justify disclosure of certain historically significant grand jury materials, even when none of Rule 6(e)'s specific exceptions is satisfied. For example, and as we discussed on our call, in *In re Petition of Craig*, 131 F.3d at 99, the Second Circuit found that historical significance can justify disclosure, while affirming non-disclosure on the particular facts.

That courts have no authority to release grand jury materials outside the specific authorization provided by Rule 6(e) is consistent with the Advisory Committee notes accompanying the rules, which state that "Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that general rule." Fed.R.Civ.P. 6(e), advisory committee notes, 2002 Amendments; *see also*, 1 Wright & Miller, Federal Practice and Procedure Section 106 ("reliance on the inherent powers doctrine is suspect"). But while there is no delineated exception for historically significant grand jury material, we recognize – as have the decisions of the courts that have authorized disclosure of historical grand jury records – that the need for secrecy diminishes with the lengthy passage of time and that an amendment to Rule

6(e) authorizing release of historically significant grand jury material is appropriate in certain limited circumstances.

Of course, not all grand jury material is of historical value, and not all is subject to preservation as permanent archival records. Records of "permanent historical value," as that term is defined in title 44 of the United States Code, are determined through records schedules developed jointly by the Department of Justice and the National Archives and approved by the Archivist of the United States. These records are transferred to the National Archives after a period of time – usually a decade or more – when that material may yet be needed for business purposes by the Department. Under current law, Freedom of Information Act requests for the grand jury records directed to the Archives are denied as contrary to Rule 6(e). *See* 5 U.S.C. §552(b)(3).

We believe an amendment to Rule 6(e) would be appropriate to authorize the release of grand jury records of "exceptional historical significance" in certain circumstances after 50 years. As you know, in 2011 the Department proposed possible disclosure after 30 years. Upon further review, we now think 30 years is too short. The 30-year benchmark in the 2011 proposal was based on 44 U.S.C. § 2108(a), which allows the Archivist to disclose certain agency records that have been in existence for more than 30 years notwithstanding certain permissive, statutory restrictions. But this provision has never been interpreted to overcome grand jury secrecy, and we think there are retention standards more akin to what often is in grand jury material and that are the better benchmark here. For example, investigative records of the House of Representatives which contain information involving personal data relating to a specific living person are closed for 50 years. *See*, House Rule VII. https://www.archives.gov/legislative/research/house-rule-vii.html. Similarly, Senate Resolution 474 from the 96th Congress provides that "investigative files relating to individuals and containing personal data, personnel records, and records of executive nominations" cannot be accessed for 50 years. *See*, https://www.archives.gov/legislative/research/senate-resolution-474.html. A 50-year time period would also correspond to the automatic declassification period for certain classified material under Executive Order No. 13,526, § 3.3(b), (c) (2010).

We also no longer believe that Rule 6(e) materials should ever be presumptively available to the public. Presumptive release raised concern with the Committee in 2012 as too dramatic a departure from the traditional rule of grand jury secrecy. We believe now that providing a presumption of release, even after 75 years, would undermine many of the purposes of grand jury secrecy and would have a detrimental effect on grand jury proceedings. Grand jury secrecy should be preserved except in the most extraordinary cases of historical value. We believe that a third-party movant seeking release of grand jury material should always be required to make some showing of need, even in the case of old, historically significant records. There is no strong justification for an automatic disclosure provision; if materials are of historic import, individuals will have every incentive to request them, and providing for automatic disclosure of records no one has seen fit to request is unnecessary.

As to the specific material that would be authorized for release, because there is no simple formula for determining what constitutes "exceptional historical significance" and whether the historical interest outweighs the interest of secrecy, the analysis we suggest be

required – and codified – must inevitably be contextual rather than based upon a rigid formula. Thus, such an amendment should permit a fact-sensitive judicial analysis. Courts could weigh any number of factors, including the age of the materials, the privacy interests at stake, why disclosure is being sought, the specific information being requested, and more. *See*, *In re Petition of Craig*, 131 F.3d at 106.

As we stated in 2011, by articulating broad guidelines for instructing lower courts on the exercise of discretion on this matter, yet at the same time limiting this discretion to the confines of an explicit exception to Rule 6(e), the Committee can maintain the integrity of the Criminal Rules, recognize the important role of the rulemaking process, and preserve the tradition of grand jury secrecy. An explicit historical significance would do all of this, while allowing for enough judicial discretion and flexibility to make an appropriate assessment of historical significance and the need for disclosure.

Such an amendment would recognize the legitimate interest of historians and others interested in gaining access to records. Although the determination of what qualifies as worthy of disclosure under the historical significance exception is inevitably contextual, there are several critical elements that we believe the Committee should address, including the length of time that must necessarily pass after the grand jury testimony is taken before disclosure is permissible. Similarly, we think disclosure should only be permitted when no living person – witness, accused or otherwise (including living descendants) – would be materially prejudiced by disclosure (or in the alternative that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct), disclosure would not impede any pending government investigation or prosecution, and no other reason exists why the public interest requires continued secrecy.

III. Non-Disclosure Orders

In addition to an amendment to Rule 6(e) authorizing disclosure of historically significant grand jury material in certain circumstances, we believe the rule should simultaneously be amended to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances.

Occasionally, Department prosecutors seek orders temporarily blocking disclosure when subpoenaing business or other records as part of a grand jury investigation, mostly to protect ongoing investigations. These orders have traditionally been issued pursuant to the court's authority over the grand jury or pursuant to the All Writs Act, and the courts of appeals have upheld their use. *See, e.g., In re Grand Jury Proceedings,* 417 F.3d 18, 26 (1st Cir. 2005); *In re Subpoena To Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1563-64 (11th Cir. 1989); *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 (8th Cir.), *cert. dismissed* 479 U.S. 1013 (1986).

In response to the *McKeever* decision, however, some district courts are now stepping back from issuing delayed disclosure orders, pointing out that Rule 6(e) does not explicitly permit such an order, and the courts lack the authority to issue one. *See, e.g.*, *In re Application of USA for an Order Pursuant to 28 U.S.C. § 1651(A) Precluding Notice of a Grand Jury*

Subpoena, Case No. 19-wr-10 (BAH), August 6, 2019. We therefore suggest that an additional amendment to Rule 6 – along with the proposal related to historically important grand jury material – be made that would authorize such delayed disclosure orders after consideration of relevant factors. The need for delayed disclosure orders to protect ongoing investigations has been recognized by Congress and the courts. Congress has authorized delayed disclosure orders in certain circumstances in other contexts, like the Stored Communications Act and the Right to Financial Privacy Act, and the proposal we recommend mirrors those congressional authorizations and the weighing of interests required by them.

IV. Inherent Authority

As I mentioned on our conference call, the Department believes that any amendment to Rule 6 should also contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive. A few days after our call, however, the Supreme Court granted review in *Department of Justice v. House Committee on the Judiciary*, 19-1328 (July 2, 2020), which also involves Rule 6(e) and the scope of disclosure permitted by it. It is possible that the issue of whether or not courts retain authority to release grand jury material beyond the list of exceptions to grand jury secrecy contained in the Rule could be addressed by the Court. As a result, we think the Subcommittee should defer consideration of whether or not to include in any Rule 6 amendment a provision on whether the rule contains the full catalogue of exceptions to grand jury secrecy – or whether courts retain authority to release grand jury material beyond the exception in the rule – until after the Court renders a decision, mostly likely in early 2021.

V. Proposal the Department Could Possibly Support

To assist in the consideration of all of these issues, we set out below the text of an amendment that embodies the elements we suggest. We hope it will be helpful in the Subcommittee's consideration.

a. Definition of "archival grand-jury records" through the addition of a new Rule 6(j), following the existing definition of "Indian Tribe" in Rule 6(i).

(j) "Archival Grand-jury Records Defined. For purposes of this Rule, "archival grand-jury records" means records from grand-jury proceedings, including recordings, transcripts, and exhibits, where those files have been determined to have permanent historical or other value warranting their continued preservation under Title 44, United States Code.

b. Addition to Rule 6(e)(3)(E) to permit district courts to grant petitions for the release of archival grand-jury records that have exceptional historical importance after 50 years in appropriate cases.

(E) The court may authorize disclosure—at a time, and in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

. . .

(vi) on the petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record by a preponderance of the evidence that:

(a) the petition seeks archival grand-jury records;

(b) the records have exceptional historical importance;

(c) at least 50 years have passed since the relevant case files associated with the grand-jury records have been closed;

(d) no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;

(e) disclosure would not impede any pending government investigation or prosecution; and

(f) no other reason exists why the public interest requires continued secrecy.

An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28.

c. Addition to Rule 6(e)(2) to provide an obligation of secrecy for those persons or entities receiving a court order precluding them from disclosing the existence of a subpoena, warrant or court order issued in relation to grand jury proceedings.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(viii) a person or entity who receives a court order under Rule 6(e)(8) precluding the person or entity from notifying any person of the existence of a grand jury subpoena and related matters occurring before the grand jury.

d. Creation of a new Rule 6(e)(8), specifying the circumstances under which a district court can enter a non-disclosure order and how long such an order should remain in place.

(8) Non-Disclosure Order. The government may apply for a court order delaying disclosure of a grand-jury matter for a period not to exceed ninety days:

(i) if the court determines that there is reason to believe that notification of the existence of the matter may have an adverse result described in paragraph (ii) of this subsection;

(ii) An adverse result for the purposes of paragraph (i) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(iii) Extensions of the delay of notification of up to ninety days each may be granted by the court upon application of the government.

VI. Conclusion

We hope this memorandum and the proposed amendment text are helpful. We look forward to our discussions and the consideration of these issues over the coming months.

cc: Judge Raymond Kethledge
Professor Sara Sun Beale
Professor Nancy King

TAB 4

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

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

RE: **Procedure for Enforcing/Challenging Subpoenas and Appealing from Rulings (Suggestion 19-CR-E)**

DATE: **October 9, 2020**

Although this proposal is expressed in general terms that might be read to address all proceedings to enforce a "subpoena," it appears to be concerned only with providing "a very tight procedure" for enforcing or challenging Congressional subpoenas. It calls for replies in the district court within two days, argument within two days after that, and decision within three days after argument. It also proposes similar timelines in the courts of appeals. The rationale is that absent such expedited proceedings, the executive can simply stonewall and waste time.

The suggestion was addressed to three committees: Appellate Rules, Civil Rules, and Criminal Rules. The Civil and Appellate Rules Committees have removed the suggestion from their agendas, and we suggest that this Committee do the same.

The Appellate Rules Committee treated removal from their agenda as a consent item, and no member requested discussion. A memorandum from the reporter in the spring agenda book recommended no rulemaking action and explained:

> Under current procedures, courts can move very quickly when necessary. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (noting that the "District Court on April 30 issued a preliminary injunction . . . [o]n the same day the Court of Appeals stayed the District Court's injunction [and] we granted certiorari on May 3 and set the cause for argument on May 12"); *Delo v. Stokes*, 495 U.S. 320 (1990) (stay of execution granted by district court on afternoon of May 9, motion to vacate stay denied by panel of court of appeals on morning of May 11, application to vacate stay granted by Supreme Court on May 11). If lower courts do not respond to emergencies in a timely manner, appellate courts have sufficient power under current law to deal with the issue. *See Delo*, 495 U.S. at 323 (Kennedy, J., concurring) ("If the court of appeals fails to act in a manner sufficiently prompt to preserve the jurisdiction of the court and to protect the parties from the consequences of a stay entered without an adequate basis, an injured party may seek relief in this Court pursuant to our jurisdiction under the All Writs Act.").

The Civil Rules Committee discussed the proposal at its spring meeting before deciding not to pursue it, and to remove it from the agenda. A variety of concerns were noted. The proposed timetable would be unworkable, and suggestions to impose time limits on judges have been regularly rejected. Moreover, members observed that courts in fact respond with all deliberate speed, and it would be improvident to attempt to act in this area while the underlying questions of authority have not been authoritatively resolved. To the uncertain extent that the

proposal was also aimed at motions and other independent proceedings to enforce subpoenas, including subpoena-like demands by executive agencies, there was no support for pursuing it. Indeed, the Committee had rather recently devoted years of effort to discovery subpoenas without hearing of any problems of delayed judicial rulings.

From: FRED WILCON <fbjon@aol.com>
Sent: Tuesday, December 24, 2019 10:57 AM
To: RulesCommittee Secretary
Subject: Update the procedure to deal with Subpoenas from Congress and Senate

Dear Sir/Madam
If anything has emerged from the latest episode regarding presidential obstruction, it is that the Courts need to have updated and expedited procedures for dealing with the consideration of and enforcement of subpoenas. The executive department has successfully stonewalled Congressional discovery by using specious arguments and the lack of an enforceable, efficient time standard by the courts to provide any sort of efficient subpoena enforcement. This is a disservice to the country and a perversion of justice.

I suggest that there be a very tight procedure for enforcing/ challenging subpoenas and appealing from rulings so that such matters receive immediate priority,above all other pending cases and docket matters so that from district court through circuit courts and even through the Supreme Court, the whole process can be done in three weeks or less. There is no need for more time The issues are usually very clear, and more often than not, the challenges involve specious arguments that are interposed for no other purpose than delay!! (When will the Courts apply Rule 11 to sanction such conduct?) The procedure should apply to subpoenas for witnesses (whether government employees or not) and for documents.
Once a petition to enforce a subpoena is filed, a reply should be required within 2 days. Argument should take place not more than 2 days from then and judges should be required to rule within not more than 3 days from conclusion of argument! (no time out for weekends or holidays) The whole proceeding should be open to the public except if national security issues are (REALLY involved) and there should be a penalty for a false assertion of such an exemption.)
An appeal must be docketed not more than 48 hours from a ruling, with reply and argument and decision to follow on the 2 and 3 day schedule as in the District Court. (En banc hearing in the Circuit court should occur only in extraordinary circumstances and again, on the expedited schedule suggested above.
Appeal to the US Supreme Court should likewise be mandated to take place on such an expedited schedule for filing appeal or request for certiorari, with immediate reply and hearing and decision required as above. (I do not know what to do about when the Supreme Court is not in session, but it seems to me that this could be dealt with so that the process does not just stop over the vacation term from June to October...which is ridiculous!

Presently, there is absolutely no incentive for the Executive branch or witnesses to cooperate with the subpoena process and as demonstrated by the behavior of the current administration, there is every incentive to stonewall, resist, appeal and argue, even the most ridiculous and far fetched arguments, because their sole objective is to waste time.

This is a very serious matter that requires immediate attention or the judicial branch will find itself reduced to an almost irrelevant branch of government because it cannot and does not act in a manner that is timely to the needs of the system.

Thank you for your consideration. I hope some important changes will be made, and made soon.

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

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

RE: **Disparity between Civil and Criminal Rules (Suggestion 20-CR-F)**

DATE: **October 9, 2020**

Judge Patricia Barksdale has written to draw attention to the following disparity between the Civil and Criminal Rules:

> Fed. R. Civ. P. 72(b), addressing a report and recommendation by a magistrate judge on a dispositive matter states, "The clerk must promptly mail a copy to each party."
>
> The criminal counterpart, Fed. R. Crim. P. 59(b)(1), states, "The clerk must immediately serve copies on all parties."

Addressing the question to both the Civil and Criminal Rules Committees, she asks why these rules are different, and she suggests that the language of Criminal Rule 59(b)(1) is preferable because it brings in the service rules when parties are on CM/ECF. As to Criminal Rule 59, she suggests that it would be better stated in the singular, rather than the plural.

We recommend that Judge Barksdale's suggestion be removed from the Criminal Rules Committee's agenda. Although there may be merit to her suggestion concerning the language of Civil Rule 72(b), that issue falls outside of this Committee's responsibilities. Criminal Rule 59(b)(1) is grammatically correct, and the style concern she identifies is not sufficient to warrant an amendment.

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20-CR-F
20-CV-F

From: Patty Barksdale
Sent: Tuesday, May 05, 2020 11:27 AM
To: Julie Wilson
Cc: Jennie Allen
Subject: Suggested Correction to Fed. R. Civ. P. 72(b)

Hello Ms. Wilson.

I have one other matter for consideration.

Fed. R. Civ. P. 72(b), addressing a report and recommendation by a magistrate judge on a dispositive matter states, "The clerk must promptly mail a copy to each party."

The criminal counterpart, Fed. R. Crim. P. 59(b)(1), states, "The clerk must immediately serve copies on all parties."

Why are the two different? Shouldn't Rule 72(b) be the same as Rule 59(b)(1) to bring in the service rules when parties are on CM/ECF? (And as a picky matter of style, shouldn't Rule 59(b)(1) be in the singular, not the plural?)

Thank you for your consideration of these further rule musings.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

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TAB 6

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

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

RE: **Expanded Use of Videoconferencing (Suggestion 20-CR-G)**

DATE: **October 9, 2020**

Judge Thomas Parker has written to the Committee to suggest that the Criminal Rules be amended to authorize the following proceedings to be conducted by videoconferencing "on a regular basis, not only in the case of a national emergency": initial appearances, arraignments, detention hearings, and change of plea proceedings. Judge Parker notes that conducting initial appearances and arraignments by video technology is common in state courts, and "is a much more cost effective way to proceed."

Judge Parker's proposal would not require the defendant's consent. In his view, "the ability to proceed by video conference should not be contingent on the approval of either party." Judge Parker does recommend certain procedural safeguards, including the availability of private conferencing capability for the defendant and defense counsel.

The question for discussion is whether to remove Judge Parker's proposal from the Committee's agenda, to defer it until the Committee has finished its work on a new Rule 62, which involves similar issues, or to convene a subcommittee to consider it now.

We note that acceptance of Judge Parker's proposal would permit more videoconferencing "on a regular basis" than the current draft of new Rule 62 allows during a rules emergency. The draft of new Rule 62 retains a strong preference for in-person proceedings in open court, and requires the defendant's consent for videoconferencing at initial appearances, arraignments, and change of plea proceedings even in emergency situations.

Given the Committee's current focus on the emergency rules, we recommend against the appointment of a subcommittee now. If there is any interest in pursuing Judge Parker's proposal, we recommend that it be tabled while the Committee is working out its position on the use of videoconferencing in emergency situations. If there is no interest in pursuing the proposal at this time, we recommend that it be removed from the Committee's agenda.

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From: Thomas Parker
Sent: Thursday, May 21, 2020 9:28 AM
To: RulesCommittee Secretary
Subject: proposed rule amendment

Good morning,
I propose the federal criminal rules be amended to authorize initial appearances, arraignments, detention hearings, and change of plea hearings to be conducted by video conference on a regular basis, not only in the case of national emergency. The rules should allow such proceedings in this manner whenever (i) jointly requested by the parties, (ii) upon motion of either party for good cause shown, or (iii) elected by the judicial officer based on a statement of justification (e.g. reduced inmate transportation cost; emergency situation; security concerns). The rules should expressly predicate such use of video proceedings upon: (i) the availability of private conferencing capability for the defendant and counsel before and during the proceedings, (ii) the availability of a facility that allows the defendant to see the other hearing participants directly (e.g. not through a screen or other holding cell barrier). The ability to proceed by video conference should not be contingent upon the approval of either party.

I would note that state courts routinely conduct initial appearances and arraignments by video and have done so for years. It is a much more cost effective way to proceed.

Thank you.

Thomas M. Parker
United States Magistrate Judge
United States District Court
Northern District of Ohio
801 W. Superior Ave.
Cleveland, OH 44113

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Jessica Snyder★
Cassidy R. Rice★

In memoriam
Nancy Bergeson
1951 - 2009

▲ Eugene Office
♦ Medford Office
★ Research/Writing Attorney

VIA EMAIL ONLY

August 11, 2020

Hon. James C. Dever, III
Chair, Emergency Rules Subcommittee
Terry Sanford Federal Building
310 New Bern Avenue, Room 716
Raleigh, NC 27601

Dear Judge Dever:

I write to follow up on the concerns I expressed earlier about the scope of the proposed emergency Rule 62 that is being considered for inclusion in the Federal Rules of Criminal Procedure. As we know, section 15002(b)(6) of the CARES Act directs the Judicial Conference to "consider rule amendments" that "address emergency measures" that may be taken by federal courts "when the President declares a national emergency."[1] The Committee is considering a substantially broader approach, drafting a new, omnibus "emergencies rule," to "possibly avoid the need for urgent legislation in future emergencies."[2] On behalf of the Federal Defender community, I would like to express two overarching concerns about this proposed approach to the implementation of the CARES Act directive.

I. There Is No Pressing Need For An Omnibus "Emergencies Rule."

My first concern is that the proposed omnibus rule appears to be a solution in search of a problem. With the exception of the current pandemic, even the most severe events in modern

[1] Pub. L. No. 116-136, § 15002(b)(6) (Mar. 27, 2020).

[2] *Hearing on Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovations, and Lessons for the Future: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 16 (2020) (statement of the Honorable David G. Campbell) (hereinafter Campbell Statement).

history – hurricanes and terrorist attacks – have resulted in disruptions that were temporary and localized. Hurricane Sandy hit New York City on October 29, 2012; by November 5, the Southern District of New York had resumed operations. After Hurricane Katrina, the Eastern District of Louisiana initially suspended operations for 90 days, but was able to resume operations outside the district just 12 days after the storm. And even after the terrorist attacks of September 11, 2001, the federal courthouse in Manhattan, which is less than half a mile from the World Trade Center, had resumed limited operations by September 18.

This is not to say that these events were not tremendously disruptive. But existing tools – as well as new, targeted ones created in direct response to specific events – have been largely effective in addressing emergencies. Chief among them are the Continuity of Operations Plans (COOPs) in place in every federal courthouse in the country, which take an "all hazards" approach to emergency situations by assuring that personnel, equipment, and funds are in place to respond to any situation that may arise. Chief Judge Loretta Preska of the Southern District of New York has credited her district's COOP with enabling full operations to resume just one week after Hurricane Sandy.[3]

Other crucial tools include legislation enacted in response to Hurricane Katrina that permits special sessions of a district court to be held at locations outside the district "as the nature of the business may require."[4] General orders can also be issued swiftly, as the need arises, to toll deadlines on an ad hoc basis. Certain rules have built-in flexibility based on "extraordinary circumstances" (Rule 5.1(d)) or even "good cause" (Rule 45(b)). These tools have allowed operations to resume quickly – often in a matter of just days – after even the worst disasters in recent history.

Pandemics are different, to be sure. A truly national emergency creates problems that cannot be addressed with location changes and temporary closures. When such hundred-year events occur, however, Congress is likely to step in, as the CARES Act demonstrates. In the present emergency, moreover, the CARES Act has by and large worked well. Defendants have overwhelmingly consented to appearances by video-teleconference, which has allowed a large percentage of criminal cases to be resolved without putting court personnel, defendants, or their attorneys at risk. And while dockets are congested because of the limited availability of IT equipment, cases are also down significantly, and delays have been manageable. Jury trials continue to present a vexing problem during the pandemic, but that problem is largely beyond the scope of the Federal Rules.

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[3] Hon. Loretta Preska, *Lessons from Sandy: Game Plan Before a Crisis Is Critical, Judge Says*, U.S. Courts News (Dec. 20, 2012), *available at* https://www.uscourts.gov/news/2012/12/20/lessons-sandy-game-plan-crisis-critical-judge-says.

[4] 28 U.S.C. § 141(b)(1).

In short, recent and remote experience shows that retooling of the Rules for emergency situations is unnecessary.

II. The Proposed Omnibus Rule Would Raise A Number Of Troubling Concerns.

My second concern is that the omnibus-rule approach would raise a number of troubling issues. In contrast to the focused, urgent-legislation approach exemplified by the CARES Act, the proposed omnibus rule would (i) permanently incorporate an array of emergency measures into the federal rules, allowing potentially sweeping modifications to the operation of those rules to be effectuated (ii) more quickly and efficiently, and (iii) without the participation of Congress – or, perhaps, the President. I believe that each of these aspects of the proposed rule raises worrisome issues.

(i) By permanently enshrining a sweeping emergency framework into the federal rules, the proposed rule would grease what is already a slippery – and perilous – slope. As history abundantly demonstrates, emergency measures have a natural tendency to evolve into permanent, and norm-altering, legal regimes.[5] Indeed, by the mid-1970s, four declared states of emergency had been in effect in the United States for over 40 years, spawning more than 470 pieces of legislation "delegating power to the executive over virtually every facet of American life."[6]

There are intuitive reasons for this phenomenon. Emergency measures initially face little resistance because of the immediate stress of the exigencies they are created to address, and because inherent in their emergency nature is the expectation that they will be temporary. Once in place, however, they can have a "narcotic" effect upon both the government and the governed.[7] The "[g]overnment and its agents grow accustomed to the convenience of emergency powers," while the governed, however resistant they might have been at the outset to the permanent recognition of such powers, gradually begin to accept them as the "new normal."[8] In this way, measures initially adopted "on a plea of necessity" are "afterwards followed on a plea of

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[5] The scholar Oren Gross describes, for example, how the British Parliament enacted emergency martial law-type measures relating to Northern Ireland in 1922 that were intended to expire in one year, but then regularly renewed the law until it was made permanent. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 Yale L.J. 1011, 1074 (2003). He similarly reviews how emergency measures adopted at the founding of the State of Israel still remain. *Id*. at 1073-74.

[6] Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1408 (1989); *see also* Gross, *supra* n.5, at 1074-75; Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. Rev. L. & Soc. Change 459, 462-63 (2005).

[7] Gross, *supra* note 5, at 1093.

[8] *Id*.

convenience."[9] Powers initially authorized to address a particular emergency become the new baseline, from which future emergency measures may justify the addition of still further powers – or, in this context, further encroachments upon procedural rights.

In light of this phenomenon, scholars have cautioned against what the proposed rule would accomplish: the permanent integration of a comprehensive emergency legal regime into the framework of the law. As Professor Oren Gross warns: "By the mere incorporation of a set of extraordinary governmental powers into the legal system, a weakening of that legal system will have already taken place and a dangerous threshold will have been crossed."[10] This is because "[i]f the power 'is there,' it is more likely to be used than when it has first to be put in place" – and it likely will come to be used "in situations that are farther and farther away from a real exigency."[11] The Framers appear to have recognized this danger. As Justice Jackson observed in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[12], they "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation," and "made no express provision for the exercise of extraordinary authority because of a crisis."[13] Indeed, they were so concerned about "executive overreaching" in this manner that they vested the Suspension Clause in Congress, rather than the President, and allowed the quartering of soldiers in private homes only "in a manner to be prescribed by law."[14]

(ii) These insights militate against measures that enhance the ease with which an emergency legal regime may be set in motion. The urgent-legislation method may be less convenient than the contemplated rule, but its very unwieldiness may be a benefit, insofar as it helps to maintain a clear line separating the state of emergency from the state of normalcy. Intuition may suggest that maintaining this separation should be easy – but experience confirms that it is

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[9] *Julliard v. Greenman*, 110 U.S. 421, 458 (1884) (Field, J., dissenting).

[10] Gross, *supra* note 5, at 1052.

[11] *Id.*; *see also* Lobel, *supra* note 6, at 1409 ("[T]he fundamental problem with the effort to codify, systematize, and legalize the exercise of executive emergency authority was its attempt to eliminate the tension between law and necessity that liberal thought presumes. By providing legislation to address every conceivable emergency situation, emergency power inevitably becomes routinized, normal, and by definition, lawful.").

[12] 343 U.S. 579 (1952).

[13] *Id.* at 650 (Jackson, J., concurring); *compare* Lobel, *supra* note 6 at 1387 n.9 (noting that "European and Latin American constitutions often do contain clauses providing for a general suspension of rights and liberties in periods of national emergency.").

[14] U.S. Const. amend. III; Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605, 607 n.6 (2003); *see also Youngstown Sheet & Tube*, 343 U.S. at 644 (Jackson, J., concurring) ("[E]ven in war time, his seizure of needed military housing must be authorized by Congress.").

not.[15] A measure that broadly facilitates the transition from one state to another may have the unintended effect of rendering that distinction harder to maintain, thus accelerating the process by which the "emergency" regime evolves into the "new normal."

(iii) This nation's Constitution and laws strongly favor the direct involvement of Congress in the implementation and continuation of emergency powers and authorities. As noted above, the Framers declined to vest the President with broad emergency powers, and their Constitution insisted upon the involvement of Congress in measures curtailing individual rights – even in respect to the suspension of habeas corpus and the quartering of troops, which come into play *only* in times of crisis.[16] The National Emergencies Act,[17] which represented Congress's reaction to many of the concerns outlined above,[18] gave Congress the responsibility to periodically review Presidential emergency declarations, and to terminate them if neither the President nor the lapse of time did so.[19]

The proposed rule appears to contemplate a departure from this principle. Indeed, a recent draft suggests that the Judiciary could declare an emergency on its own, without the concurrence of *either* of the other branches – which would seem to conflict with the CARES Act's directive to consider rule amendments that may be taken "when the President declares a national emergency,"[20] as well as the separation of powers-based aversion to one branch "arrogat[ing] power to itself."[21] But even if the final version is triggered only upon the President's declaration of an emergency, it would appear to cut Congress out of the process by which such a declaration is translated into potentially sweeping modifications of the operation of federal rules of procedure.

The people's representatives in Congress should not be excluded from a process by which their legal rights and protections may be broadly modified or weakened, even if those alterations are, in theory, temporary. Congress has the ability, which it has often exercised, to provide appropriate authorities to address emergency situations, as it did in enacting the CARES Act. As Justice Jackson observed, "[u]nder this procedure we retain Government by law – special,

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[15] Gross, *supra* note 5, at 1089 (characterizing the "belief in our ability to separate emergency from normalcy" as "misguided and dangerous"); *id.* at 1072 (noting that, without clear separation between emergency and normalcy, "it is but a short step to conflate emergency powers and norms with the 'ordinary' and the 'normal'").

[16] *See supra* at 4 & note 17.

[17] Pub. L. No. 94-412 (Sep. 14, 1976) (*codified at* 50 U.S.C. §§ 1601-1651).

[18] *See* Block, *supra* note 6, at 461-63.

[19] 50 U.S.C. § 1622.

[20] Pub. L. No. 116-136, § 15002(b)(6).

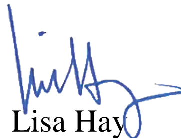
[21] *Loving v. United States*, 517 U.S. 748, 757 (1996).

temporary law, perhaps, but law nonetheless."[22] This mechanism not only prevents encroachment upon our representative democracy, but also provides for clear notice to the public of "the extent and limitations of the powers that can be asserted" during times of emergency.[23] The same cannot be said of a rule-based procedure presided over by judicial-administrative committees housed in Washington, D.C. and various regional circuit courts.

The goal of "avoid[ing] the need for urgent legislation in future emergencies"[24] undoubtedly reflects a good-faith desire to eliminate undue delays and inconveniences in addressing emergency situations. But it overlooks the hard-earned lesson that, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[25] By dealing Congress out of the process of authorizing emergency modifications of federal procedural rules, the proposed omnibus rule would take "a step in th[e] wrong direction."[26]

Thank you for considering these comments. I look forward to working further with you and the rest of the Committee as we review the operation of procedural rules during times of emergency.

Respectfully,



Lisa Hay
Federal Public Defender

LH/jll
cc: Hon. Raymond Kethledge, Chair, Advisory Committee on Criminal Rules
Emergency Rules Subcommittee Members

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[22] *Youngstown Sheet & Tube Co.*, 343 U.S. at 652-53 (Jackson, J., concurring).

[23] *Id.* (Jackson, J., concurring).

[24] Campbell Statement at 16.

[25] *Youngstown Sheet & Tube Co.*, 343 U.S. at 655 (Jackson, J., concurring).

[26] *Id.* at 653 (Jackson, J., concurring).