ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
November 2, 2020

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("Committee") met by videoconference on November 2, 2020. The following members, liaisons, 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
James N. Hatten, Esq.
Lisa Hay, Esq.
Judge Lewis A. Kaplan
Judge Bruce McGiverin
Judge Jacqueline H. Nguyen
Brian C. Rabbitt, Esq.[1]
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge John D. Bates, Chair, Standing Committee
Judge Jesse Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Kevin Crenny, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was also in attendance. The following persons attended as observers:

Amy Brogioli, from the American Association for Justice
Alex Dahl, from the Lawyers for Civil Justice

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

Patrick Egan, 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
Sai, a pro se litigant
Laura M. Wait, Assistant General Counsel, D.C. Courts
Aaron Wolf, Fellow, Federal Judicial Center

Opening Business

Judge Kethledge observed that it was the first Criminal Rules Committee meeting for Lisa Hay, Federal Public Defender for the District of Oregon, and Judge John D. Bates, who succeeded Judge Campbell as chair of the Standing Committee. After all members introduced themselves, Judge Kethledge said that it was the last meeting for Judge Feinerman (whose term had been extended until the end of the year), and he thanked Judge Feinerman for his service. Finally, Judge Kethledge announced that Judge Dever's term had been extended, allowing him to continue as chair of the Emergency Rule Subcommittee.

Review and Approval of Minutes

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

Report of the Rules Committee Staff

Ms. Womeldorf reported on the June meeting of the Standing Committee, the September session of the Judicial Conference, and the rules amendments adopted by the Supreme Court and transmitted to Congress on April 27, 2020. She referred members to Tab 1C of the agenda book, which included draft minutes of the Standing Committee meeting and the Standing Committee's report to the Judicial Conference, as well as a chart showing proposed amendments at each stage of the Rules Enabling Act process. Ms. Womeldorf also reported that no comments have yet been submitted on the proposed amendment to Rule 16 (Discovery and Inspection) published for public comment in August. The comment period closes on February 16, 2021.

Ms. Wilson provided a legislative update, drawing the Committee's attention to the chart beginning on page 109 of the agenda book. She noted that the Due Process Protections Act (S. 1380) was signed into law on October 21, 2020. The Act directly amended Rule 5 (Initial Appearance) by adding a requirement that trial judges "[i]n all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present," issue an oral and written order: (1) confirming the prosecutor's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and (2) notifying the prosecution of the possible consequences of violating the order. The amended rule further requires that each judicial council promulgate a model order for use by judges.

Ms. Wilson reminded the Committee that Judge Campbell and Judge Kethledge sent a letter to the House Judiciary Committee in May expressing the Rules Committees' opposition to

amending a rule outside the Rules Enabling Act process. The letter also detailed the Committee's extensive study of this issue in recent years. There was no response to the letter, and the legislation passed. Upon enactment, the Director of the Administrative Office sent a memorandum to all federal judges notifying them that they must immediately comply with the new requirements, and that judicial councils must draft and promulgate a model order implementing this change as soon as practicable. The AO will collect any such orders and make them available on the JNet. Judge Furman registered his disappointment that judges were not provided with advance notice of the legislation so that courts could have been more prepared for the new requirements. Ms. Wilson agreed that advance notice should have been provided and indicated that internal procedures within the AO will be reviewed so this does not happen again.

Report of the Emergency Rule Subcommittee (Draft New Rule 62)

Judge Kethledge asked Judge Dever to present the draft of new Rule 62. Judge Dever began by summarizing the work of the Emergency Rule Subcommittee and the reporters throughout the summer and fall. The subcommittee held a day-long miniconference, and its members participated in many conference calls for the working groups as well as multiple subcommittee calls. In addition, there has been a significant amount of communication with the subcommittees formed by the Appellate, Bankruptcy, and Civil Rules Committees to also consider possible rules for emergency situations. Professor Capra, who had been charged by the Standing Committee with coordinating the emergency rules, summarized the work of the other Advisory Committees and their subcommittees.

Judge Dever began by describing the foundational principles that guided the subcommittee. First, the Criminal Rules were drafted with care and have stood the test of time through numerous national and local emergencies. Second, we should not lightly discard any of the Criminal Rules even in an emergency given that they protect significant constitutional rights. Third, the subcommittee approached the project by working from the bottom up in order to identify and evaluate rules that the current emergency affected and to consider other potential emergencies.

Judge Dever proposed that the Committee proceed section-by-section through the draft rule, and he invited comments about the relevant portions of the draft note as well as the rule. He said that up to this point the subcommittee had been focused on revising the text, rather than the committee note, to which it will turn next, using the input from this meeting.

Before the discussion got underway, a member of the subcommittee expressed his general support for the emergency rule and explained that unfortunately he would be unable to participate in the remainder of the meeting because of a medical procedure.[2]

Beginning the analysis, Judge Dever explained that subdivision (a) sets out the conditions for a "rules emergency," distinguishing it from other more general uses of the term emergency.

[2] The member's comment at this point in the meeting on a portion of the note is included below where the Committee discussed the relevant portion of the rule and note.

Subdivision (a) defines the kinds of conditions that must be present, and it identifies the Judicial Conference as the body charged with determining whether those conditions exist. It requires two findings. First, there must be "extraordinary circumstances relating to public health, or safety, or affecting physical access to a court that substantially impair the court's ability to perform its functions in compliance with the rules." And second, there must be "no feasible alternative measures" that would eliminate the impairment within a reasonable time.

Professor Beale noted that (a)(1)'s definition of the emergency circumstances had been accepted by the Civil and Bankruptcy Rules Committees (though the provisions of the draft Appellate Rule were much more general), but the other committees had declined to adopt a requirement that the Judicial Conference also find there is "no feasible alternative." The Civil and Bankruptcy Rules Committees thought this second finding was unnecessary and potentially burdensome. Our subcommittee disagreed, and it thought this separate finding was very important. The emergency rules are exceptions to the time tested and carefully drafted provisions of the Criminal Rules, many of which protect constitutional and statutory rights. Substituting the less protective provisions in parts (c) and (d) during emergencies should be a last resort. If there are other means of responding to emergency conditions—such as moving proceedings to another district under 28 U.S.C. § 141—the emergency rules should not be invoked. There is an important difference between the emergency rules being considered by the Bankruptcy and Civil Rules Committees, which concern, for example, extensions of filing deadlines and service rules, and the provisions included in our emergency rule. Because of the constitutional and statutory underpinnings of the Criminal Rules and the significant differences between the proposed emergency rules being considered by the other advisory committees, uniformity on this point may not be necessary or desirable.

There was also some disagreement among the advisory committees about the role of the Judicial Conference. Although the Bankruptcy and Civil Rules Committees agreed that the Judicial Conference should be authorized to declare a rules emergency, Bankruptcy's draft rule also authorizes the chief judge of the relevant circuit or the chief bankruptcy judge of the relevant district to declare a rules emergency. This reflected that committee's concern that the Judicial Conference may not respond quickly to more localized emergencies. Our subcommittee thought that the Judicial Conference would be able to gather the necessary information and respond expeditiously to emergencies.

A member who had served on the subcommittee stated that she had dissented from the subcommittee's conclusion that an emergency rule was needed and that the Judicial Conference was the appropriate body to declare rules emergencies. The member opposed the promulgation of an emergency rule because it would, inevitably, normalize less-protective procedures. But if there is to be an emergency rule, Congress, not the courts, should decide that there is an emergency warranting a suspension of normal procedures. This would parallel the Suspension Clause for habeas corpus. The member also noted that the CARES Act directed the Judicial Conference and the Supreme Court to consider emergency rules that would be triggered by a presidential declaration, not by a declaration of the Judicial Conference. The member stated that

she had expressed her position more fully in a letter to the subcommittee that had not been included in the agenda book. At the chair's direction, staff circulated the letter electronically during the meeting, so that to the full Committee could have the benefit of the points made. The online agenda book has been updated to include it.

Several members responded. One expressed interest in the argument that it would be better not to propose an emergency rule, as well as some concerns about the role of the Judicial Conference. She asked whether the Judicial Conference's decisional process would involve consulting with Criminal Justice Act panels for their views. Would the Judicial Conference prioritize criminal cases in an emergency?

Other members thought an emergency rule was needed, and they expressed support for subdivision (a). One stated that while mindful of these valid concerns he was persuaded by the experience during the COVID-19 pandemic that an emergency rule of some kind is needed. In his view, this draft gets the balance right. Another agreed that we need to have an emergency rule, and he favored including (a)(2). Because declaring an emergency should by design be hard to do, he favored making the Judicial Conference the decider. But he did ask whether it would always act quickly.

Several members commented on (a)(2). Although most members agreed with the subcommittee on the importance of including this provision, one member thought that it was unwieldy and confusing. That member also noted that whether there is a "feasible alternative" is a local question. Another suggested that it might be better to place it in subdivision (b).

Judge Dever observed that despite the devastation wrought by the hurricanes in Puerto Rico and Hurricane Katrina, the tools available to the district courts—including the movement of proceedings to other districts under § 141—permitted the courts to function effectively in compliance with the Rules of Criminal Procedure.

Noting the Department of Justice had not had time to formulate its position during the subcommittee deliberations, Judge Dever asked Mr. Rabbitt and Mr. Wroblewski for the Department's views. They responded that the Department was broadly supportive of the need for an emergency rule. It also agreed with the subcommittee's rationale on the need for (a)(2), despite the fact that it might create disuniformity.

There was additional discussion about the role of the Judicial Conference. The Standing Committee's liaison raised a concern about sole reliance on the Judicial Conference to declare a rules emergency. What would happen, for example, if the Judicial Conference were unable to act? Or if its members were unable to communicate with one another, or with the affected courts? Could the Chief Justice declare an emergency for a limited time under such circumstances? That suggested another question: does the Judicial Conference have a quorum requirement?

Professor Coquillette, who served for decades as the Reporter to the Standing Committee, stated that the Judicial Conference has been nimble and responsive, and it can act quickly

through its Executive Committee. Professor Beale noted that some of the questions being raised would be common to all of the advisory committees, and there was general agreement that some topics may be referred to the Rules Law Clerk for research, including the statutory framework of various actors and whether Rules Enabling Act delegates roles to other players.

Judge Bates asked, regarding (a)(2), whether there were any other "feasible alternatives" other than those mentioned in the reporters' memo (delaying proceedings if the emergency will not last long or moving proceedings to another district under 28 U.S.C. § 141)? Could the concept of declaring an emergency only when there is no feasible alternative be addressed in the note, rather than the text? He observed that this rule is being drafted for the use of just one decisionmaker—the Judicial Conference—and that this decisionmaker would understand what's implicit in (a)(1).

Judge Kethledge responded that determining whether there is an impairment and determining how such an impairment might be remedied are two different issues. It is important to separate these issues in (a)(1) and (2), requiring consideration of the second issue in (a)(2). He also pointed out that the emergency rule might later be interpreted by multiple decision makers if there were challenges to the use of the emergency procedures. However, since many of the draft provisions require the consent of the defendant, he agreed that such challenges might be rare.

A motion was made to approve subdivision (a) as set out in the agenda book. The motion passed with two "no" votes. One of these members stated that she voted this way because of the reliance on the Judicial Conference to make the declaration, not because of concerns about (a)(2).

Following a break for lunch, Judge Dever began the discussion of subdivision (b), governing the contents of emergency declarations by the Judicial Conference, as well as additional declarations and termination, particularly with respect to proceedings that may have begun under the emergency rule. He thanked the reporters for their excellent memo, and asked if they had any comments before opening discussion.

Professor Beale noted that (b)(2), lines 16-17—which states that a court may not exercise authority under subdivisions (c) and (d) unless an emergency declaration by the Judicial Conference includes that court—is not included in the rules drafted by the other advisory committees. The other committees thought this point was implicit because (b)(1) requires the declaration to identify the court or courts affected. Our draft (b)(2) makes explicit what some people think is implicit. It prevents any possible interpretation that a court not included in an emergency declaration could say "we have these emergency circumstances and we can go ahead and employ these procedures." She asked for discussion of this provision, because the other advisory committees have not been persuaded that (b)(2) should be included.

Judge Dever then asked each Committee member to state his or her views on subdivisions (b) and (e), which describes the effect of a termination under (b). Several members

stated that they agreed with (b) in its entirety. Others raised questions or issues concerning particular aspects of the draft.

One member expressed a concern about (e), which allows a particular proceeding begun under the authority of (c) and (d) to continue after the emergency declaration terminates. How would this affect constitutional rights, such as the right to a public trial? If there is no longer an emergency, shouldn't the defendant automatically have the right to an in-person courtroom setting where the public has full access, as opposed as to whatever arrangement was in place during the emergency? He understood that for efficiency purposes it may make sense to allow a particular proceeding to continue as if an emergency were still in effect, but he wondered if that might open up certain proceedings to challenge. Once you have declared that the emergency is over, any burden on rights—like the right to a public trial—may need to give way.

Professor Beale pointed out that subdivision (e) only allows the proceeding to continue with the emergency procedures if the court finds that it would be infeasible or work an injustice not to continue under the emergency procedure. In the member's public trial scenario, what if seating in the courtroom had been limited and the public had been provided alternative access under (c)(1), watching a live broadcast in an adjacent courtroom? This limited access could only be continued if the court found that it would be "infeasible or work an injustice" to provide normal public access to remainder of the trial. She explained that the subcommittee drafted (e) to respond to something like a multi-day hearing being conducted by videoconference, when the emergency declaration was terminated in the middle of the hearing. The goal was to avoid having to start the hearing over to do it in person if it would not be feasible to bring far-flung participants into the courtroom on short notice to complete the hearing. The member's concern is that continuing such a procedure might violate a constitutional right. Since the draft rule requires the defendant's consent to most of the procedures, she asked, might that take care of the problem?

The member was not sure what the impact would be of any prior consent to an alternative procedure or proceeding and the emergency state. He suggested that the subcommittee might consider these issues, and said he would be happy to contribute to that effort, including reading an article that had been mentioned earlier. Professor Beale agreed to continue this discussion with the member after the meeting to determine whether there were any scenarios that might raise a constitutional concern.

Another member stated that he had no concern about (b), though he noted the interplay between (a)(2) and (b)(1)(B), which allows the Judicial Conference to restrict the emergency authority otherwise available under (c) and (d). He emphasized the need to be very careful in relaxing the Criminal Rules, and the possibility that there might be an emergency that would require some of the emergency authority, but not all of the procedures. The member thought it was hard to separate this question completely from the no feasible alternative enquiry under (a)(2). When the Judicial Conference is looking at the question whether to authorize certain procedures under (c) or (d) but not others, would that have been a preliminary decision made under (a)(2)? Noting he understood the example in the note concerning the unavailability of

electronic communication, the member thought that it still might be useful to give a little more thought to this interplay with (a)(2).

The Standing Committee's liaison raised two issues concerning (b)(3). First, with regard to additional declarations, he thought it was critical to state the determination that emergency conditions change or persist must meet the same criteria as (a). Second, because the emergency procedures should be reserved for absolutely necessary circumstances, shouldn't the rule require, not merely permit, termination of the declaration upon a finding that the triggering conditions no longer exist? The draft is permissive, but not mandatory. He was inclined to state that if the Judicial Conference finds that the triggering conditions are no longer in effect, it must terminate these emergency rules and go back to the standard procedures.

Professor Capra raised two additional issues concerning subdivision (b) based on the drafts from the other Advisory Committees. First, (b)(1)(A) requires the Judicial Conference to identify the "the court or courts affected." The Bankruptcy Rules Committee's draft rule says the court or "locations" affected. In a pandemic perhaps we are concerned with locations as opposed to specific courts. And in the Civil Rules Committee's draft rule, renewals of emergency declarations are limited to the same 90-day period as initial declarations. The 90-day limit is not in the draft of new Rule 62.

Professor Beale stated that the draft assumed all emergency declarations are subject to the same limitations. So 90 days would be the limitation. If that is not going to be clear we could state it again, but it's an additional "declaration," a term defined by the rule. It's not called a renewal, and it's not somehow a different thing from the declarations in (a).

Professor Capra responded that may be implicit, but the Civil Rules Committee has made it explicit. It states a renewal must be for 90 days or less.

The Standing Committee's liaison recognized this may be implicit. But no matter what, the conditions of subdivision (a) would have to be met. We don't want to suggest in any way, shape, or form that an additional declaration could be made if circumstances change and it's no longer the circumstances that satisfy (a). He thought perhaps the problem would be solved if, as he had suggested, (b)(3)(B) were revised to make it mandatory to terminate the emergency authority if those conditions are no longer met. Then obviously you can't change or extend.

Professor Beale suggested subparagraph (b)(3)(A), at line 20 in the draft, could be revised to read "additional declarations under (a)." That would make it absolutely clear that you have to go through all the requirements in (a). We could also add the period up to 90 days here, if we wanted to do so. Professor Capra responded that he did not think adding a reference to (a) would necessarily include the 90-day limitation, which is in (b), not (a).

With regard to the suggestion that the rule provide that the Judicial Conference "must" terminate an emergency declaration, Professor Beale explained that earlier drafts had separate

sections for additional declarations and early terminations. The style consultants merged these sections for our rule (but apparently not for the other rules), and we don't really know why. With separate sections, you could easily have "may" for additional declarations and "must" for early terminations.

Judge Dever responded to Professor Capra's comment about the "location" language that the Bankruptcy Rules Committee introduced. What is a location? What would adding that word do beyond the reference to a "court"? Is it surplusage? He was not aware of the use of that term elsewhere in the Criminal Rules. Professor Beale commented that there are divisions in some courts, but the Bankruptcy rule does not use that language. Judge Dever agreed about divisions, but reiterated that the term location was unfamiliar. Hearing no support for the inclusion of the term "location," Professor Capra said he would report that reaction to the Bankruptcy Rules Committee. Professor Beale noted that an upcoming call among all of the reporters would provide an opportunity to relay the Committee's reaction and ask whether location is a term that is understood under the Bankruptcy Rules.

Judge Dever summed up the discussion about the Standing Committee's liaison's suggestion, which was to modify line 20 to read "may issue additional declarations under (a) if emergency conditions change or persist, and on line 21 revise to state "must terminate a declaration" if emergency conditions no longer exist. "May" would be deleted from line 19.

Judge Dever asked Judge Bates for his views. Judge Bates agreed with the need to ensure that an additional declaration cannot be issued unless the extraordinary circumstances in subdivision (a) are met. With regard to (b)(2), the need for this provision in the Criminal Rules has to be balanced against the need for uniformity with the other emergency rules. He could not say what the outcome of that should be or will be. He was not sure that without (b)(2) the limitation was just implicit. Subparagraph (b)(1)(A) says the declaration has to identify the court affected. That's pretty explicit in saying that another court cannot exercise this authority. So he was not sure that there was sufficient uncertainty to require (b)(2). That would be a discussion in terms of uniformity.

Judge Kethledge responded that he had been the proponent of (b)(2). He had been concerned that if a court read (c) and (d) in isolation, it could be confused and think that it could employ these procedures if the findings required by (c) and (d) had been made. Subdivisions (c) and (d) require the chief district judge or district judge to make a series of findings. He thought perhaps we need to make clear that if you're not in a district identified in a Judicial Conference declaration, even if your chief judge makes those findings, you can't employ the procedures in (c) and (d). But he wanted to be uniform where possible, and after hearing everyone he was persuaded that (b)(2) was not necessary.

Professor King suggested that it might be a good idea to move the material in the note describing what (b)(2) says up to the section on (b)(1)(A) to make this point clear. Judge Kethledge and Judge Dever agreed.

Judge Kethledge acknowledged the excellent suggestions the Standing Committee's liaison made concerning lines 19-21. He thought they were points well taken. Unless someone thought differently, he saw no need to vote on them at this time and said the subcommittee would revise accordingly.

No member asked to be recognized at that point to speak to subdivisions (b) or (e) including the suggestions regarding lines 19-21, the deletion of (b)(2) for uniformity with the other advisory committees, and relocating the note discussion that accompanied (b)(2) to the portion of the note accompanying paragraph (b)(1)(A).

Judge Bates observed that when (a) and (b) talk about the court or these courts, they are referring to an entire district. But (c) uses the term court to refer to an individual judge for the most part, referring generally to case-by-case presiding judge specific findings. So the use of the court there is different than the use of the court in (a) and (b). He was not sure whether that was something that that should be clarified somewhere. Judge Dever thanked Judge Bates for that observation.

Judge Dever asked if there was anything further on (b) and (e)? Hearing nothing, he said we would make those revisions with respect to (b). At that point, a member raised one additional point regarding (b), suggesting language to clarify (b)(1)(B) to read "any restrictions on the authority granted in (c) and (d) to modify these rules." Judge Dever and the reporters agreed this was a helpful change. Professor Capra said he thought it was an excellent change, which he would take to the Bankruptcy Rules Committee because of the desire for uniformity.

Professor Capra related a possible complication affecting (e), which allows the court to complete a proceeding begun under the emergency rules that depart from "these rules" if complying with "these rules" would be infeasible to work an injustice. But once the emergency rule is adopted, it would be included in "these rules." Professor Beale responded that the same problem is present in line 6, which defines an emergency when specified extraordinary circumstances "substantially impair the court's ability to perform its functions in compliance with these rules." Professor Capra said he would continue to work on the question of internal consistency, working with the style consultants and the reporters.

Judge Dever asked for further comments or suggestions about (b) and (e), recognizing Mr. Rabbitt to provide the Department of Justice's views. Mr. Rabbitt responded that the Department had no comments on subdivision (b) that had not already been noted. It supported (b) in its current form and had no issue with the proposed deletion of (b)(2).

Judge Dever then moved on to the discussion of (c), which deals with the authority to employ certain procedures that depart from the Criminal Rules after a declaration. He explained that (c) was developed after the subcommittee's comprehensive review of all of the rules, its miniconference, and responses from all the chief judges, who had solicited comments from their

judges. He acknowledged the tremendous contribution of the participants in the miniconference, who are listed on page 122 of the agenda book.

Judge Dever added that some subcommittee members had volunteered to get additional information about the need for (c)(3), which would authorize the court to issue a summons, rather than an arrest warrant, under certain circumstances. The current rules give the Department of Justice the authority to determine whether the court issues a summons or a warrant. In an emergency, perhaps public health related concerns might warrant at least allowing a judge to make that decision, with the ability of the government to demonstrate good cause for issuing a warrant instead of a summons.

A subcommittee member said she had circulated the proposal to magistrate judges she knew as well as some district court judges to find out what they thought. She talked with judges in Oregon, the Western District of Washington, the Northern District of California, and Massachusetts, and was expecting some additional comments as well. The response from those judges was unanimous support for this rule. Many of them stated they wished they had had this authority during the current pandemic. She understood one judge had been issuing both a summons and a warrant sometimes. The rule requires the judge to issue a warrant, but issuing a summons too allowed the marshals to decide which one to use, taking the decision away from the Department of Justice. Although not necessarily within the rule, that was how one judge decided to handle this problem of sometimes bringing potentially ill people into the courtroom.

The member described one example from Michigan where five people were arrested together, one of whom became ill. Because they had been shackled together and held for two days in a detention center awaiting a hearing, all five as well as the marshals had to be quarantined. It was later determined that all five were actually releasable, and need not have been in custody. This example disturbed the magistrate judge, who would have preferred to have issued a summons if the defendants were likely to have shown up if served by a summons. That would have avoided a situation where the other defendants and deputy U.S. marshals were exposed. She heard many other examples. She acknowledged that it does take some effort to consider whether a warrant or summons is needed in a case. And as we know, an arrest can be a dangerous moment for both the defendant and for the deputy U.S. marshals. An arrest is a pretty serious thing. It is humiliating, uncomfortable, time-consuming, and disruptive, and it may result in the loss of property and sometimes pets or children are left unattended. The U.S. Attorney's office already considers whether a warrant or a summons should issue. When there's an emergency, this rule asks that they present that information to the magistrate judge, who can take public health or safety risks into consideration and suggest a summons.

The judges she consulted thought that if a judge questioned whether there should be a warrant or summons in a particular case, the U.S Attorney's Office would be able to answer orally or in a short memo. The presumption would still be a warrant if the U.S. Attorney sought one, but the court could ask follow-up questions. The court wouldn't need to have all the

information available to the grand jury about probable cause, because it's not a probable cause question. It's a question about whether this person is at flight risk or a danger. So in the majority of cases involving a crime of violence or someone who is considered to be dangerous, a warrant likely would be the right call. But when the crime itself is not ordinarily considered violent, the magistrate might question whether there's any further risk to bringing the defendant into the courthouse and should we consider summons. The U.S. Attorney would likely have that information and be able to answer.

The judges the member consulted were very much in favor of it, but she acknowledged it would be necessary to work out the details of exactly how it would be implemented. She stressed that these rules are just for emergencies, not to be used all the time. But this would be one more way to allow the court to control its docket and keep some of the safety risks out of the courthouse. This could also apply in non-pandemic emergencies, such as an earthquake that cut off one part of a district or made it dangerous for the marshals to enter a district to make arrests. They might want to ask, does this person live in that district, do we need to do this arrest now or could we do a summons? But of course the pandemic is the primary concern right now. In summary, this is a pretty limited proposal. It allows the Department to show good cause for a warrant, but the judge could ask about a summons and would have the authority to issue a summons rather than a warrant if the Department doesn't show good cause.

Another subcommittee member said he had reached out to the Rules Committee of the Federal Magistrate Judges Association (FMJA) and had held a Zoom videoconference meeting with members of that committee. The member shared the working draft of the note addressing (c)(2) and got the informal comments of those who responded and participated, which he stressed were not the official views of the FMJA. There was a difference of opinion. There was general agreement with the laudable purpose of the proposal as cogently expressed in the draft note for this paragraph. But the majority of those who participated, by perhaps a ratio of 2 to 1, thought that (c)(2) is not advisable or needed. First, during the pandemic this group's experience was that AUSAs are considering the situation, including the health and safety of the marshals, the people they arrest, and court personnel. The majority group had not seen any abuse of this power by the Department of Justice. Second, there was a real concern about whether magistrate judges have sufficient information to decide whether a summons should issue. When an indictment is returned, the magistrate judge does not really know anything about the case. It might be a little different if it's a criminal complaint, where there might be an affidavit and a magistrate judge might know a little bit more. But the prosecutors know a lot more about the situation than the magistrate judges. The member himself did not know how he would make initial determination about health and safety concerns for a particular case and a particular defendant. The government would have to provide that information up front. And the final point from what the member called the majority group was that when issues do arise there are pretty easy ways to handle the situation. The magistrate judge simply talks to the agent or the AUSA and says, "don't you think summons might be better idea here?"

What the member called the minority position from the FMJA judges raised many of the same points made by the previous member. The minority thought that magistrate judges would use this power extremely sparingly, but it might be useful when a particular U.S. Attorney or a particular U.S. Attorney's Office did not seem to appreciate the health or safety risks in a situation. These judges did not think it would require the government to make an overly burdensome showing. Once the magistrate judge has said, "Look, we need a summons," the government could include the argument there is good cause for an arrest warrant in the main response at the return of an indictment or in its response to questions that a magistrate judge might pose. Or this information could be just simply a paragraph in an affidavit of a criminal complaint or in some written filing, saying why in this particular situation they need a warrant. The judges did not think a full-blown hearing on that issue would be needed.

A third subcommittee member reported that she had also circulated the draft summons provision among district court judges and magistrate judges. She got feedback that was somewhat supportive, but most of the judges felt that they wouldn't be in a position to have sufficient information to evaluate the public risk. As to the example of the five defendants arrested together in Michigan, she stated that no one would have been in a position to evaluate the risk if one defendant was carrying the virus but not yet showing symptoms. Although the judges to whom this member spoke with were willing to think about the proposal, they were unsure how effectively the case would be made to them that there was a risk of harming defendants, harming marshals, and so forth, so that they could effectively evaluate it.

Judge Dever asked for the views of the Department of Justice. Mr. Rabbitt said that the Department had circulated the proposal within the Criminal Division and the U.S. Attorney community, and it raised some significant questions and concerns. These concerns echoed those from the FMJA judges about who is in the best position to assess the danger and flight risk posed by a particular defendant. That concern is particularly acute in a case proceeding under Rule 9, where there isn't the same paperwork that accompanies a complaint and you are proceeding from an indictment. The feedback that the Department got internally was that it was better positioned to make that evaluation, and questioned how well positioned the bench would be to make that determination in the first instance based on the information available to them. Mr. Rabbitt also mentioned the self-regulatory aspect of this for the Department of Justice, which has no desire to take people into custody unnecessarily in emergency circumstances. The Department tries to be judicious because of the danger that's presented to the government's own personnel and the burdens put on the Department, the Bureau of Prisons, and the U.S. Marshals Service in terms of housing those people. He drew attention to the Attorney General's memorandum from early in the pandemic that directed U.S. Attorneys and prosecutors across the country to be judicious in terms of detention positions. Based on all of that, the Department's preference would be to keep the decision with the Department. Mr. Rabbitt asked Mr. Wroblewski to comment as well.

Mr. Wroblewski said that most of the concerns raised within the Department when they first circulated this proposal were quite practical. Other members had talked about the question of who is actually in best position to be able to weigh all of the risks. Mr. Wroblewski noted that

although the rule focuses on the public health or safety risks, as the Committee was aware, many factors go into the decision whether to issue a summons or a warrant. In most situations the magistrate judge will not have sufficient information to weigh all of those factors and to make a judgment. Moreover, it is not obvious at this stage that we're talking about an adversarial proceeding. Of course, if someone is arrested and they're brought in within hours, or certainly within a day or two, they will be brought before a judge in a more adversarial proceeding. So, as a practical matter, this is a relatively small period of time. In the case of the Michigan example, if the Department had known that one of the defendants was sick, obviously the marshals don't want to get sick, they don't want to get everybody else sick, and precautions could have been taken. But as just mentioned, that wasn't known to everybody at the time. So again, Mr. Wroblewski thought it was mostly the practical concerns of weighing all the information. And in this pandemic, there have been efforts to use pretrial detention in a much more careful way. That was laid out in the Attorney General's memo, which is public.

The member who had described the Michigan example asked to say a little more about it. First, she corrected herself to say the example occurred in Massachusetts, not Michigan. Although they didn't know the person was infected by COVID-19 when they made the arrest, they did determine afterwards that all five who were arrested were eminently releasable, and maybe didn't need to be subjected to that danger. There are known risks from COVID-19. We know that if you put strangers together in close quarters, shackled together for a long period, you could be exposing them, when we are supposed to observe social distancing. Even without knowing that one person was infected, it was questionable to arrest all five. When there is a known public health and safety condition requiring social distancing, there is a heightened urgency to look at whether people should be arrested. She appreciated that the proposed summons authority might be used sparingly in many districts, where people are making reasonable accommodations, and that the Department of Justice had instructed that. But since the U.S. Attorneys have been instructed by the Attorney General to make this assessment anyway, it's not too much to ask in an emergency that the government explain the assessment to the magistrate judge if the judge has a question.

The member who solicited the information from the FMJA added one more point. The magistrate judges do know the crimes with which individuals who would be arrested or summoned are being charged, and that is an important piece of information. If the charge is social security fraud, or something like that, and the magistrate judge sees the government is seeking an arrest warrant during a pandemic, he might want to ask why a summons would not be sufficient. But if it is a hundred-person drug case, which is common in Puerto Rico, he would not have any information about these individuals other than the changes. He would not have very much information about them.

Judge Dever added that the summons proposal was unusual in one respect, because this issue was not raised by the participants at the miniconference or when the subcommittee solicited input from the chief judges. Unlike the other provisions in new Rule 62, the summons proposal percolated up from within the subcommittee itself, and he complimented the members who had

gathered additional information and presented the arguments very cogently and persuasively on each side.

Turning to the bench trial provision in (c)(4), Judge Dever asked the representatives from the Department whether they had any additional information or comments. Mr. Wroblewski said that the Department had little additional information. As he stated on the subcommittee call, the issue had come up in a handful of situations where judges have wanted to proceed by bench trial, but the Department did not consent. He thought the case from Eastern District of New York, which had been in the press recently, had been resolved, and the litigation or the threat of litigation ended. A number of U.S. Attorneys have offered bench trials to any defendant who wants one, but have gotten very few takers.

Judge Dever asked to hear from the other members of the Committee, and he expressed particular interest in the views of members from different districts in which the stakeholders, as part of this pandemic process were getting together and talking about issues like pretrial detention and working these things out while recognizing that the Department of Justice has the authority under the way the rule was drafted. Hearing no comments from the subcommittee or reporters, Judge Dever asked other members for their views on (c).

A member began with (c)(3) regarding the summons. He had the same thoughts about institutional competence previously mentioned, which is the government, the FBI, ATF, or whoever it is will have a much better sense of the safety concerns with arrest or lockup than that the judge will. Although ordinarily the member did not do this work himself, there was about a two-month period early in the pandemic where the magistrate judges were not coming into his building and the member and three other district judges were handling all the arrests. Thinking back, the member thought perhaps he could have made reasonably intelligent "balls and strikes" calls on summons versus warrants on his own accord, but he was not sure. Following up on the earlier comment about incentives, the member thought the people going out to make arrests have an incentive to be as safe as possible. If there are concerns like COVID-19, it seems they would be the first ones to say maybe we ought not do an arrest here. Maybe we ought to do a summons. So he tended to agree that (c)(3) is not needed. But if it were retained, he would delete the word "public" on line 34, so that the provision would be broad enough to encompass a concern about the safety of particular arresting officers or people working the lockup, court clerks and the like.

Turning to (c)(4), the member supported it as written. He agreed with the Rules Law Clerk's memo on page 155 of the agenda book, which concludes that the government does not have a constitutional right to a jury trial. He understood that at least some U.S. Attorney's Offices might have reticence about proceeding to a bench trial at least in some situations. He had heard from his colleagues there were situations where the defendant consented and the government did not, and patterns emerged when the government consented and when it did not, at least in his district, He thought on balance that the defendant's interest—particularly the defendants who are in pretrial detention—should prevail in situations where it is not possible to impanel a jury. It's a particularly acute problem for defendants in those districts that aren't

holding criminal jury trials. His district held no criminal jury trials until the beginning of August. They did criminal jury trials in person August through October, and he held a jury trial in a two-defendant armed robbery case. But with the spike in cases, his chief judge just shut down criminal jury trials again, and he thought it likely the same was true in many districts around the country. If the defendant is willing to do a bench, you don't have to bring 35 or 40 people to the courthouse. It's much safer to do a bench trial. In his district they are currently allowed to do bench trials if a defendant wants to do it and the court thinks it's appropriate. He thought on balance that ought to be allowed even if the government does not consent. He did note one concern. When either defendants or defense counsel express a desire for quick jury trial, and he must tell them that's not possible, it is tempting to say "but if only you would consent to a bench trial we can get you in next week or in two weeks." He has been careful not to do that, to avoid putting any kind of pressure on a criminal defendant to waive the jury trial right. He raised this as something that might be added to the committee note to remind judges that they ought not to do that, unless the point is so obvious that it wouldn't be necessary.

The member supported (c)(1), and asked whether the note could provide some examples of alternative access. Given the concern that was laid out in the reporters' memo that we don't know what technology will be available in the future, it would not be definitive or exclusive. But in cases done by video or by phone his court allows any member of the public to dial in and listen. They had not yet figured out a way to get the public into the video, but if there is a video hearing, members of the public can access the audio. The note might also mention the use of an overflow courtroom as another possible example. In his jury trial, socially distancing the jury took up half of the courtroom, and in the remaining area they allowed only two or three people per bench. The demand for seats exceeded the supply, so they set up an overflow courtroom where there was contemporaneous a video transmission of the trial. Finally, he was aware that the subcommittee decided against including a requirement that the alternate public access be contemporaneous. Without knowing what the subcommittee's rationale was, the member was mildly in favor of having a requirement at least when reasonably feasible that the transmission be contemporaneous.

Finally, on (c)(2), the member raised a drafting issue. This provision applies if the rules require a defendant's signature, written consent, or written waiver. That's three things. But (c)(2) refers to only one of them: it says when emergency conditions limit the defendant's ability to sign, defense counsel may sign for the defendant. What about defense counsel's ability endorse a written consent or a written waiver on the defendant's behalf? Should (c)(2) mention this as well?

Judge Dever responded that the subcommittee had an extensive discussion about whether the alternative public access must be contemporaneous in (c)(1). And it did discuss different alternative measures to provide public access, including some that member had just raised. Judge Dever said he had used an overflow courtroom, and during jury selection where we couldn't have public in the courtroom with the jury. He acknowledged the suggestion that we add examples to the note. He then invited the remaining members to comment on subdivision (c).

The next member to speak had comments about several of the provisions in (c).

On (c)(1), he agreed that it would be helpful to lay out a non-exhaustive list of examples in the note of ways in which a reasonable access could be granted.

On (c)(2), the language refers to the emergency "conditions limit[ing] a defendant's ability to sign." In the member's experience often (particularly for detained defendants) their ability to sign is limited by many factors even in ordinary circumstances. So he wondered if the focus of (c)(2) is that the emergency conditions are making it *infeasible* for the defendant to sign, just to distinguish from what is typically the case.

The member thought particularly for detained defendants there had been a rich discussion on (c)(3), including the argument around incentives, which the member found compelling. But he observed that we all have COVID-19 on the mind right now, and this rule would apply much more broadly. Not everybody appreciates the same baseline health risks in a given situation. That may in some ways undercut the argument that the government already has an incentive to use a summons to avoid health risks. If you don't believe that violating social distancing, not wearing a mask, etc. will jeopardize your health, then the incentive argument is not as powerful as it would be if there was complete agreement about the relevant health risks. Despite not having any particular expertise and perhaps no particular insight as to the health risks in a particular situation, the court at least has the ability to get at the issue, whether it's through a hearing or asking the government to make a showing. And that showing could go to the question of the risk, or for instance, coming back to COVID-19 situation, whether the detention center has adequate PPE available for detainees. The court could also consider the seriousness of the charge and perhaps even the likelihood that someone would be released if in fact they were brought in.

The member added that there seemed to be two typos in the note. On line 190, it should read "alternate" instead of "alternative." On line 198, that should be a reference to Rule 24(c)(4). And more substantively on that point, the committee note says that the court should consider permitting each party to have additional peremptory challenges, consistent with Rule 24(c)(4). The member thought there was a compelling explanation of that decision in the in the memo, and some of that discussion may need to be included in the committee note. It is not obvious why a court wouldn't follow the same pattern that is set forth in Rule 24(c)(4) if it is adding alternate jurors over and above the threshold of six. It would be useful to include an explanation in the note.

The next member's comments focused exclusively on (c)(3) and (4). Noting there had already been an extensive discussion of (3), he commented that he had serious reservations along the lines of what's been expressed so far to changing the approach in magistrates' courts to this extent. There are ways for the government to address these concerns, such as negotiating surrender in appropriate cases. He thought it would be very difficult to consider releasability at the stage when an arrest warrant or summons is served. In most cases, the arguments on pretrial

release are made later, after you have a report and you go into court in in front of the judge with more information other than just the charges. In most cases, common sense and supervision by the magistrate judge could work out any problems. So he would be very hesitant to include (c)(3), and he was not sure how much of an effect it would really have on detention before trial.

On the bench trial provision, the member was not sure there was a need for what seemed to be a very big shift in approach, notwithstanding the case from the Eastern District of New York. Is it sufficiently serious to justify making a finding on the record that unless the government has consented to a bench trial, we're going to be violating the defendant's right? That would be on the record as a finding, and then what happens if you cannot have the bench trial for some reason? Looking at the history and the materials that were provided—which were excellent—it seems a big change for a problem that doesn't seem to have arisen all that much. He thought it was not apt to compare it to *Batson* violations, where government conduct forfeits its ability to exercise a peremptory challenge. The right is the right to have that trial jury. He did not know if the Supreme Court would have some issues with that. But he acknowledged that he had not experienced the trial courtroom in this pandemic as others had, and he deferred to their experience. But the proposal concerned him.

Another member stated that she shared many of the concerns about issuing a summons. For the reasons the Department of Justice representatives and another member had articulated, it seemed unnecessary. We're talking about a situation where an emergency has been declared and already it's a limited duration that's been declared by the Judicial Conference as extraordinary. So she thought that under those circumstances, the stakeholders involved, including the agents, the U.S. Marshals Service, and the Department of Justice, would be very sensitive to having arrest warrants when a summons would do under circumstances that really impact all of the stakeholders' health and safety. So the system already has its own checks and balances, Requiring the judges to make the same sort of findings and balancing as the judge would do during an initial appearance—assessing flight risk and safety to the community in terms of the offense and the criminal history of the defendant—versus public health and safety concerns can be very complex. The member thought it did not seem practical or necessary to do that up front at the time of the issuance of a warrant or summons. So the proposed rule did give her pause, but the member thought that if the rule were to be implemented, the Department's response would be to do some sort of written presentation demonstrating good cause for a warrant. That would essentially go through the factors they would present to the judge at an initial detention hearing. So the rule could work if implemented, but she did not think was necessary.

The member also agreed with the previous speaker that the government declining to consent to bench trials is not a huge problem. Although some examples were cited in the agenda book, in the member's experience the Department does not often oppose a defendant's waiver of a jury trial. So the member was not sure (c)(4) was needed, but she felt less strongly on that point than on the summons issue.

Regarding (c)(2), the member wondered why it was necessary to provide for defense counsel signing for the defendant and the judge sign for pro se defendants when you're already

going to secure the consent of the litigant on the record. You are talking about a situation where the rules required the defendant's signature. If such a defendant consents on the record, because his signature is difficult to obtain, would that be sufficient? So there's an extra step here of actually affirmatively having somebody sign on behalf of the defendant and having the judge sign on behalf of the per se defendant. Having not attended the miniconference or heard the subcommittee discussion, the member felt she did not have enough background to understand the thinking about requiring that extra step, requiring more paperwork. Why isn't the consent on the record good enough?

On the last point, Judge Dever said that the subcommittee discussed situations where the defense lawyer has been unable to gain access to the defendant, even though the proceeding has taken place virtually and the defendant isn't there with the counsel in the courtroom. Many hypotheticals were discussed, particularly among our defense practitioners and the magistrate judges about having that ability. And he agreed there was a proof-related component if someone consents on the record and there's also a signature requirement. Then there's that extra piece of evidence to the extent someone later says, "I didn't really consent, or the judge misunderstood me" or something, which it raises issues again. There may need to be an evidentiary hearing.

Professor King agreed. This was suggested by defense attorneys at the miniconference, and they explained this is what they had seen judges do to satisfy the requirement of the rule that there be a defendant signature. And we didn't have any pushback in the subcommittee from the judges that this would be burdensome or unnecessary. So that's why it's drafted this way.

Professor Beale added that to the subcommittee was also following a local rule provided by one of the members. She thought if the rule now generally requires something be in writing, it will be useful to have the thing in writing. The rest of the provision put extra checks in. So there has to be the attestation of the lawyer that the lawyer was allowed to sign, which we understand is going on now as we learned at the miniconference and from members in various districts. And then subcommittee members raised the question of pro se defendants, where there are no lawyers to sign for them. At that point that we put in the judge. And then a member said it should be on the record that the defendant consented to the judge signing it on the record. So the proposed rule did develop step by step. She thought it was workable. What she heard the member suggest is perhaps we could pare it back. Although perhaps it does not have to be this way, she thought it would work and it apparently is working this way in some districts.

The next member said she would take the provisions in (c) in order one-by-one. On (c)(1), she thought it would be useful to mention in the note, either here or in the later provisions regarding sentencing, the need to take into consideration the victim's rights to be present and speak and so forth. The public right of access is very, very important, but for sentencing, there are specific requirements for victim participation.

On (c)(2) (signing or consenting for a defendant), the member shared that in her district, defense counsel can't get into the jails to get their clients' signatures. Counsel are lucky if they can talk to them on the telephone privately, and even luckier if they can talk to them by

videoconference. And most of the judges in the district have required that any motion for proceeding by videoconference includes the written consent of the defendant in making that motion. So without the ability to get to the client for a signature, the defense motion does not satisfy that requirement. The member assumed that (c)(2) means that the defendant consents on record either subsequent to the writing or contemporaneous with the proceeding. She asked if there needs to be some clarity as to when the defendant consents. Is it okay if the defendant does so subsequently on record or during the proceeding?

Judge Dever responded that the member's experience sounded similar to what we heard in the miniconference: there would be an explanation to the defendant about proceeding by videoconference, and then a confirmation of that consent on the record, with the lawyers explaining that they cannot not get into the jail to get the defendant's signature and cannot supply a written consent. The participants wanted to see a rule that expressly let them sign for the defendant saying that we talked with him and he consented.

Turning to (c)(3), the member favored keeping the draft provision on summons intact. There are no two sides when there is an indictment, but there are already conditions that affect public health and safety or access. The member endorsed a default that the magistrate judge must issue summonses unless the government has evidence that a warrant is needed in that particular case. Far too many people are being detained, and the pretrial detention periods are longer than ever with this pandemic. The member had a client who has spent two months shuffled by the U.S. Marshals Service from Ohio and is now in Utah, with three other facilities in between, and a lockdown after each transfer. She noted there had been uniform policies requiring AUSAs to move for detention, even when they don't think detention is needed. It would not be unreasonable to have the default of a summons, because the government can always present evidence that the defendant is a danger, or a flight risk, and someone who should be detained pretrial.

Regarding (c)(5), the member asked whether the government must still make the motion under Rule 35. Judge Dever confirmed that the amendment would not change that. It only eliminates Rule 45's carveout that prohibits extensions of time for Rule 35 motions, allowing the general good cause analysis in Rule 45 to apply. The subcommittee recognized how much work Rule 45(b)(1) was doing, but there was a carveout for Rule 35. The miniconference participants and subcommittee members thought this would be needed because there may be reasons that the emergency conditions would supply good cause for extending the time for Rule 35 motions.

The Standing Committee's liaison stated he did not favor (c)(3) because these problems are better worked out by stakeholders than by rule, and he agreed with an earlier speaker that arrests by warrant or surrender by summons present a separate issue from pretrial detention. Those two issues should not be conflated. On the bench trial, he agreed with prior speakers that this provision may not be necessary. If there is a genuine danger that the constitutional rights of the defendant may be violated, the government is likely to consent to a bench trial because any conviction would be jeopardized by the violation. And in an emergency, the speedy trial test is sufficiently flexible. It is not clear that in a genuine emergency you would ever get to the point

where defendants' constitutional speedy trial rights have been violated. So this is almost a null set, and he would omit that provision.

He was concerned, however, about the term "preclude" in the provision on public access. "Preclude" is too restrictive. He shared the other member's concern about victims. Even resumed in-person proceedings cannot accommodate everyone and some consider it too risky to come.

On the signature provision in (c)(2), he agreed some provision is necessary, but asked why not allow the judge to sign on the defendant's behalf in all cases if consent is on the record and the defendant has had a chance to consult with counsel? That has been the practice in the Southern District of New York under a standing order. He thought this was better than the proposal, because if he'd been required to have something written and signed by the defense lawyer, he would not have been able to proceed. He did not know why judges shouldn't have that authority, and he expressed concern that the rule could be read to exclude standing orders like the one in his own district.

Professor Beale responded that the subcommittee thought it made sense to have the lawyer do it, and they didn't really discuss or hear that it might be a problem to have the lawyer do it. There was no opposition to having the judge do it when the lawyer couldn't. Instead the concern was that the lawyer couldn't get to the client, and ought to have the ability to sign for the client.

Judge Dever added that there was a concern that the judge might get in between that relationship, and that having the lawyer sign was better than allowing the judge to say "you consent—don't you—and I'm going to sign for you"?

Judge Kethledge said that although there are reasonable arguments on both sides of (c)(3) and (4), there was not much of an empirical basis for the need for them. We didn't hear about either of these issues at the miniconference, and he agreed with the members who had expressed concern about them. With regard to (c)(3), Congress rejected a proposed rule allowing the court to issue a summons in the mid-1970s. We don't know why they did that and whether that opposition would carry forward. As to (c)(4), he agreed with the comment that it could be a null set of cases that would satisfy the triggering conditions for it. And we would be somewhat answering the question the Court posed in dicta in the *Singer* case where it said essentially, "Though we are upholding the requirement of government consent, we are not saying there could never be a case where the government need not consent." We are getting ahead of the Court and saying we have found such a case. He expressed concern when the emergency rule goes up to the Supreme Court, they might reject it on the grounds that we should not get ahead of the Court's precedent.

Judge Bates said he agreed there are some concerns about (c)(3), but he wanted to pose a different question. The draft Civil Rule is specific in setting out the substitute rule in an emergency. The appellate rule approach is to extend a general authority to suspend rules. Proposed (c)(1) says the court "must" take certain actions, but the rest of the provisions say the court "may." It says an individual judge "may," giving the discretion and authority to decide

whether to depart from the rules. Have you discussed that not all judges would do it, leading to disuniformity in a single district? One judge might say in all my cases I'm going to change the time for Rule 35(a) motions to 45 days, another might do that on a case-by-case basis, and another judge might give everyone 15 more days. This is also possible with (c)(1) and (4), if not court-wide, there may be judge by judge differences. Has the subcommittee discussed that possibility?

Judge Dever stated that there has been a recognition that the judge would have the authority to decide.

Professor King said that the idea was to encourage to the extent possible the least departure from the rules. Judge Bates's question may assume that there could be a rule that would cover all the different circumstances that occur in different cases. But the subcommittee thought the judge had to have the discretion to try to comply before departing. That becomes clearer with the videoconferencing provisions. If the chief judge makes a finding that there is difficulty in providing in-person plea and sentencing proceedings in the district, that does not mean that every judge is required to start doing pleas and sentencing by videoconference. A judge may think with the number of people involved in a particular proceeding, we can do it in person in my courtroom. The premise is that we want to encourage judges to try to comply. Another issue that came up is that the rule does not forbid district or division orders. Local orders are fine, except when the rule requires a case-by-case specific finding of need, as with the videoconferencing. Local orders are still allowed under the rule to provide that uniformity if that's desired. It's a balance of these ideas: let's not require uniformity if we don't have to and we can't anticipate all of the circumstances in every case, and we only going to require case-by-case findings for these serious intrusions on the right to presence.

Professor Beale commented that there are "mays" and "musts" in this rule. The "must" in (c)(1) requires each judge to give alternative access, but there was a lot of discussion about not saying exactly what judges had to do. But the rule does state an obligation, putting front and center the First and Sixth amendment requirements of public access. On the use of the word "preclude" in (c)(1), the subcommittee was concerned that if you get to the point where there is no public access, then the court must make alternative provisions. But the subcommittee did not want to override accommodations such as overflow courtrooms and extra seating, though a local rule to take care of this is also possible. And (c)(6) puts Rule 35 into the case-by-case finding under Rule 45, which allows extensions of time depending on the circumstances. So it depends on what provision you are looking at. Some of them clearly are intended to be case-by-case. Similarly, with alternate jurors there was no desire to have a strict rule that applied whenever there was an emergency. The subcommittee thought judges would be able to determine how long a particular case was going to run, how high the local infection rates were, and determine the likelihood of losing so many jurors that it would be necessary to add some alternates.

Judge Bates commented that it looked like paragraphs (2), (3), (4), and (5) would all be case-by-case. There couldn't be a general rule, because it depends on the defendant's consent or

the defendant's constitutional rights, or the issuance of a warrant in a specific case. So you could have court-wide determinations with respect to (c)(1) and (6). If so, do you want to say that?

The reporters responded. Professor Beale said the subcommittee intended to have a case-by-case assessment of public access as well, for example, how many people can we fit into a certain courtroom. Professor King clarified that court-wide orders could standardize what factors to consider or which conditions would be sufficient. But it would still be up to the individual judge to apply. She asked if Judge Bates was concerned that it should not be. Judge Bates responded he was not sure, and was just trying to find out if the subcommittee had talked about it.

Judge Kethledge said the subcommittee had discussed it. For example, in pleas and sentencing, all face the same conditions, but some judges choose to hold pleas and sentencing in person and others don't. The subcommittee's thought was if there are judges who believe they can follow the standard Criminal Rules, we ought to let them do that. If there are other judges who don't think they can, we'll let them opt out under certain circumstances. He did not know how you could do a court-wide determination with the bench trial; this is a case-by-case determination. Yes, we did contemplate variation within a district, variation in favor of greater compliance rather than less. Professor Beale agreed, and added that one judge may be high risk and may not be able to come in and do a proceeding in person, but other judges could do so.

Professor Capra said he would like to take this back to uniformity among the rules. It is true that the Bankruptcy and Civil Rules Committees' draft rules do not have these case-by-case approaches, but that's because the issues they are dealing with are completely different than the issues that the Criminal Rules are dealing with. The Bankruptcy Rules are dealing with definite timelines that get extended, and the Civil Rules are dealing with issues of service. There is no need for any exercise of discretion: you just change the rule if there is an emergency. It is inherent in the nature of what is being addressed here that you are going to have a case-by-case approach. It does result in dis-uniformity at the ground level, but not in the rules structure that we are trying to get to.

A member returned to the summons provision, responding to the statement that there was a slim evidentiary basis. That is true, but we didn't have a U.S. marshal at the miniconference, and she did not think that we raised this question with the participants. There is some evidence from the informal comments of the FMJA magistrate judges who also thought this would be useful and not overly burdensome. If we are trying to create a rule that will help the court during an emergency, we shouldn't rely on the fact that in some areas everything is working well, and the government is already doing this and making a determination for summons instead of warrant. The experience in Oregon is different, and the member had heard from other magistrate judges who said it is different in their districts, too. The marshal was not happy with some of the people he was asked to arrest and had questioned why not a summons. We have more than anecdotal evidence that there are times when the U.S. Attorney's Office may not make the calculus in the same way that other players would. It makes sense to give the magistrate judge more gatekeeping authority in the time of an emergency, and to say, "let's ask again whether a

warrant is needed or whether a summons might work instead." It really would help to protect the safety of the individuals involved, and those in the courthouse, to do that. She agreed with the comments that we should remove the word "public" from (c)(3). If others continue to think (c)(3) is unnecessary, she hoped we could retain it in the proposal and gather more information during the public comment period from those that would be affected by it. We have enough information that some judges think this would be useful, and if what we are hearing is true that U.S. Attorneys are already doing this, we would only be asking them to make that internal consideration of what they are already doing available to the magistrate judge to reassure them that the calculus has been correctly made.

The member also agreed with most of the points that had been made about the other provisions. She would use the word "contemporaneous" in (c)(1): public access should be contemporaneous.

Mr. Wroblewski commented on several issues. On uniformity, he said that the subcommittee had been trying to use these extraordinary rules to the least extent possible, narrowing these provisions as much as possible, and with an assumption that they would apply on a case-by-case basis. The Department initially opposed the (c)(4) provision on bench trials, because it was written quite broadly, suggesting that a bench trial could held without the government's consent based on a finding that the interests of justice warranted it. The subcommittee narrowed (c)(4) down to apply only when a defendant's constitutional rights would be violated, and that's why it has become in some ways unnecessary. The subcommittee also agreed to note language referencing some of the issues Judge Kethledge mentioned.

Mr. Wroblewski expressed some concern about (c)(6), especially after Judge Bates mentioned the possibility of a district-wide order, because Rule 35(a) is only meant to address technical errors that need to be corrected. It is not meant to revisit sentences. The Department suggested some additional note language there. He asked for a vote on (c)(3) and (c)(4) and offered to make a motion to delete them at the appropriate time. And the Department had the additional language it would like to add to the note on (c)(6) to narrow it and assure that the normal Rule 35 criteria would also be applied in an emergency setting. The reporters confirmed the Department's proposed note language was the language included in brackets on lines 205-07 on page 147 of the agenda book.

The Department's motion to delete paragraph (c)(3) was seconded. After asking if there was further discussion, Judge Kethledge took a roll call vote, which was six in favor to four opposed. He stated that if he had voted, he would have voted in favor of the motion, which would have made the vote seven to four.

The Justice Department's motion to delete (c)(4) was seconded. In further discussion, a member agreed it may not be common for a defendant to want a bench trial and the government to refuse consent when it is not possible to empanel a jury for an extended period of time. But in his courthouse, at least anecdotally, certain judges are on a "no fly list" from our U.S. Attorney's Office in terms of consenting to a bench trial. If a defendant whose case is assigned to one of

those judges is detained and wants a trial because it is the only way to get out, that defendant can't get a trial and is basically stuck in a netherworld. The defendant has a Sixth Amendment speedy trial right, but Rule 23(a)(1) requires trial by jury unless the government consents. It would be beneficial to make it clear in the rules that in this circumstance the judge may allow a bench trial without any interference from Rule 23. The member added that he completely understood and had sympathy for the arguments going in the other direction.

Judge Kethledge took a roll call vote on the motion. There were three votes in favor of the motion to delete paragraph (c)(4), and eight opposed.

The Department's third motion concerned the note language on lines 205-207, page 147 of the agenda book, regarding Rule 35. No one objected to or spoke to that addition. Judge Kethledge commented the note was not final at this point and could be revised. Members would have a later opportunity to discuss it further.

Turning to subdivision (d) (on video and teleconferencing), Judge Dever explained that the subcommittee heard a lot about the CARES Act from participants at the miniconference, from subcommittee members, and from input from the chief judges. But we also took seriously the idea that we were not bound to what was in the CARES Act, which had been very quickly drafted. We tried to structure the proposed rule to recognize what the rules already said about videoconferencing with the defendant's consent.

At the miniconference, two overarching themes emerged regarding videoconferencing and teleconferencing. The first was a uniform and consistent recognition of how critical it was for the defense attorney to have access to communicate contemporaneously with his or her client. This wasn't happening in some instances, particularly early in the pandemic, and the rules really needed to address that issue. The second was the issue of the defendant's consent, which also is related: how can the defendant knowingly and voluntarily consent without having had the ability to communicate confidentially with defense counsel? We heard that from just about everybody at the miniconference. So we tried to structure (d) by first recognizing the rules that already permitted videoconferencing with consent, and then address it for certain proceedings at which the defendant has the right to be present. He said that the reporters had prepared materials for the subcommittee identifying all proceedings that are required to take place in open court, and all proceedings at which a defendant has a right to be present, other than a Rule 11 or sentencing hearing. We adopted tiered findings (also found in the CARES Act), where the chief judge makes a finding before the individual judges in particular cases.

Judge Dever drew the Committee's attention to lines 52-54 and lines 61-63, which provide for substitutes if the chief judge is unavailable. He informed the Committee that these alternatives can be omitted. Professor Capra informed us that 28 U.S.C. § 136(e) already provides for the necessary succession, and Judge Dever, Judge Kethledge, and the reporters have agreed with Professor Capra that we don't need this list in the rule. It would be sufficient to add a reference to that statute in the note explaining what would happen if the chief judge is unable to act. This is not yet in the current draft.

Consent and consultation requirements are included in each provision.

And for pleas and sentencing, under (d)(2)(A) and (B), you have to go through successive gates. This Committee has always resisted doing pleas and sentencing by videoconferencing. The subcommittee heard at the miniconference from many folks about cases where because defendants anticipated a Rule 11(c) plea, or a time served sentence, they wanted to get to the sentencing and get the plea done. So we allow them to request in writing. There is a further finding about the interests of justice by the judge.

Paragraph (d)(3) governs teleconferencing. This is a last resort, and we heard that that part of the CARES Act has been important in the pandemic. So if all of the other requirements for videoconferencing were met, but videoconferencing cannot be provided within a reasonable time, and if the defendant has been able to consult confidentially with counsel before consenting, then teleconferencing would be permissible. It is a tougher standard in the proposed rule than in the CARES Act, and that was by design.

Professor King added that the agenda book included a comparison chart, and the subcommittee's decisions were made with the knowledge that some trial judges around the country wish to expand the use of video and teleconferencing in criminal proceedings both during emergency and outside of emergencies. So the subcommittee was aware of the desire of certain trial judges to use this technology more easily than the rule allows. All of these decisions were deliberate. Professor Beale noted that the Committee would see, later on in the Agenda, that a trial judge has requested that videoconferencing should be more widely available—without the defendant's consent—in non-emergency situations. This current of opinion, which keeps coming up to the Committee, is exemplified by that request.

A member said that she thought our miniconference process was effective. We spent a lot of time on this section, and took care to protect the constitutional rights of the defendant. Also the other important rights we heard about in the miniconference are protected here, including the integrity and solemnity of the judicial system, and not using video or teleconferencing when someone could appear in the courtroom. Even if an arraignment may not seem as important as a plea or sentencing, that's a time when a family can see their loved one who has been arrested in court, know that they're not harmed, and is being treated as a real person. The judge can assess a person to see that they are not being coerced or that they have a mental health or a physical issue you might not see on a video.

Even though we can use Zoom today and see pretty well, it doesn't replace being in person in the courtroom. She said the subcommittee heard many examples of that, and she wanted to share that with members who didn't get to hear that from the miniconference speakers. Some talked about how odd it is to be in a proceeding where the defendant is participating through an interpreter. If you are on a videoconference you never hear the defendant's voice because the interpreter speaks on the video and the defendant is muted. But in the courtroom, you would still hear the defendant's voice, speaking the words, and the interpreter would speak afterwards. So there are times when the video does dehumanize the defendant somewhat. The

compromise that we came up with in this rule addresses the need to use video in an emergency, but maintains the defendant's consent, so that we know that if they are giving up those important rights, it is because they've weighed those risks and the defendant himself has made that choice.

Judge Dever pointed out the note language page 49, lines 278-80, had been raised by a member who had to leave the meeting early. We had extensive discussions that the rule does not authorize a trial by videoconference. But we also wanted to recognize that our Committee in the early 2000s proposed a change to Rule 26 that would have permitted live two-way video testimony when a witness is unavailable to testify in court, and the Supreme Court rejected that rule. The member had stated his opposition to the part of the note that describes what the rule does not address. He suggested that on lines 278-80 on page 149, that the Committee strike the sentence, or use "trial participants other than the defendant."

A member commented that the requirement that the defendant have an adequate opportunity to confidentially consult with counsel is very important. Sometimes it is hard to do that. The court may need to take a break and have them call on a separate line and then reconvene. But it is very important, especially because it is so hard to get into detention facilities. On (d)(2)(a) and (d)(3)(a)—"may preclude" versus "substantially impair"—the member was indifferent, but would take out the word "may," because it gives too much wiggle room to allow for videoconferencing when it isn't necessary. (At that point, Judge Dever commented that the member who had left early had also been in favor of the "substantially impair" language.) The member liked the requirement in (d)(3)(B) that the defendant has to make the request in writing. This provides an extra layer of protection that the defendant's arm is not being twisted and that it is truly the defendant's choice. As for (d)(3)(D) (any further delay would cause serious harm to the interests of justice), the note gives some examples. The member suggested adding another example—allowing the defendant to be designated to a more appropriate facility. He had had a number of cases where a defendant was facing a long sentence, and it wasn't going to be time served. But the defense requested video sentencing to get out of the detention facility and go to whatever facilities defendants are designated to after sentencing. So he asked the subcommittee to consider adding that to the note if they agreed that is a good reason to have a video sentencing. That would signal it is an appropriate consideration.

The member was very uncomfortable with teleconferencing for pleas and sentences. It is bad enough if you are not in the room with the person, but at least with a video the judge can see the body language, the facial expression, and at least some of the things that can be important in deciding whether to accept a plea, or what sentence to impose. He knew there are situations where it is sentencing by phone or nothing, and he had not faced that, perhaps because of the AV capability of all the jails in his area, capability that may not be available in other districts. With that in mind, he suggested changing (d)(4)(B) to require the defendant request teleconferencing in writing just like videoconferencing, to make sure the defendant is really on board with it.

The next member stated he too preferred the "substantially impair" language, and would also favor a request in writing for teleconferencing. He wondered about the interplay with the difficulty of getting a signature, and expressed concern about the judge leaning on the defendant

to consent. Judge Dever responded the subcommittee was concerned about the judge looking at the defendant and saying, "you consent, don't you, we're going to do this today." The subcommittee had an extensive discussion.

Another member agreed with that point and on the "substantially impairs" language and said it looks great.

The next member commended the subcommittee for doing such a fantastic job on this provision. She strongly favored "substantially impairs" over "may preclude." She did not think that the conditions have to completely preclude access. She was troubled by teleconferencing, noting videoconferencing is readily available. iPhone FaceTime is far preferable to not seeing the defendant at all. She hesitated to have that provision in there, and asked if we could give some thought to including the same limitation on teleconferencing that is in (c)(3), a finding of serious harm. Otherwise it is best to delay the proceeding until it can be done in person.

Judge Kethledge responded that he shared the aversion to teleconferencing. He emphasized that the provision allowing teleconferencing applies only if videoconferencing is already authorized under the rule. So the district court must have already made that finding.

The member asked for clarification: is this a fallback situation for somewhere out in the boondocks where they can't find a phone with video? Judge Dever responded that the situation we heard about at the miniconference and from the subcommittee members was that a video sentencing is going on, and just before the judge announces the sentence, the video feed goes out. The defendant doesn't want to go back to the lockup and wait another month to finish the sentencing. There was a uniform view that teleconferencing is an absolute last resort. As to why we didn't have the request in writing, the defendant has already requested videoconferencing in writing, but in the middle of the proceeding it fails. We had a robust discussion about that because so many people have had that experience. With that explanation, the member said she was in total agreement with the proposal.

The next member to speak said she liked this provision. The whole emergency rule addresses a situation where your client has no access to a jury trial, is detained, and has few choices. Local county facilities may not be able to provide videoconferencing for hearings. Initially they were unable to do so, but they have played a lot of catch up. Most have video now, but it has been generally on a court format that defense counsel may not be able to use. The member felt we are clawing back what protections we can. Few defense attorneys would recommend that their clients agree to a guilty plea by telephone or videoconference, or that they be sentenced by teleconference or videoconference, but that's what the clients now desire to better their position overall. They give up important protections. She liked the process here that ensures the consent of the client. It is not just the defendant's lawyer saying it, but the judge hears it and preferably sees it. The member also liked the suggestion that the note broaden the reasons. For example, many clients are in detention facilities where they can't receive credit for drug treatment or education training and credits, and that's another reason they want to be in a different facility. Many of those programs have been suspended during COVID-19, and are

completely unavailable where folks are in lockdown 24/7. So she would like to see the note expanded.

The Standing Committee's liaison said that this provision is elegant and an improvement on the CARES Act architecture. He strongly endorsed the "substantially impair" language rather than "may preclude." Right now we can have in person proceedings, but if the "may preclude" language were in force, the fact that some judges do hold in person hearings could mean that no judges could proceed remotely. And we have rightly concluded that judges should still have that flexibility. There are cases in which lawyers are high risk and don't want to appear, or where defendant emphatically doesn't want to come to court. "Substantially impair" gives a little bit more flexibility. He also endorsed the suggestion to expand the reasons in the interest of justice. Early in the pandemic, judges in his court restricted this to the examples in the current note. But as time has gone by, they have taken a broader view and felt it is important to the system to get people moving and designated.

Though he was not sure it would be wrong, he said that the rule would change the law in the Second Circuit, which currently permits the defendant to waive physical presence at sentencing and consent to proceed by video without doing this in writing. The case is *United States v. Salim*, 690 F.3d 115 (2d Cir. 2012), where the court found error under Rule 43, but indicated that the defendant could agree to appear by video remotely, or agree not to appear at all under Rule 43. He was not sure that's the way to go, so was not averse to abrogating that by this rule. But he thought the rule would effectively do that.

Finally, he had a slightly contrary view on teleconferencing provision. He was not in favor of telephone hearings, and thought they should be absolutely last resort, as in the scenarios described where in the middle of a proceeding, we lose the video and have to resort to the telephone. He agreed that in 2020 one would think that our video platform abilities would be better than they have been, but in the Southern District of New York he had found them to be pretty awful, particularly with respect to detained defendants. Because of the restrictions on BOP facilities, they have struggled with it. And the video options—particularly if you allow public and victim access—are not as easy as you would think and not as easy as this meeting has been. Often telephone ends up being a far better option. For the CARES Act provisions, we recommended and inserted the phrase "reasonably available," and he thought that is better than the current language. Because on the ground, we have a complicated protocol for scheduling videoconference hearings, especially with detained defendants, limited windows to do that. If you have to wait two weeks, can you say video "cannot be provided"? He did not know, and was not sure it should be that restrictive. Something like "videoconferencing is not reasonably available" leaves more flexibility and would be appropriate.

Lastly, for routine conferences or where the defendant's presence is waived, it was not clear to him why we would preclude a judge from holding a teleconference. Not sentencing not pleas, not arraignments, but scheduling type things, something that would fall outside Rule 43 where defendant is not required to be there. It has been a very welcome thing to be able to do those over the telephone over the last 8 months.

Mr. Wroblewski responded that it was his impression—and we discussed this in the subcommittee—that any proceedings at which when the defendant does not have a right to be present can go ahead with by video or teleconference without these findings, which are required only for the proceedings at which the defendant has a right to be present. In regular calls with the Judicial Conference's Criminal Law Committee the biggest issue for seven months has been the availability of audio and video for defendants to communicate with counsel and for court proceedings. In many cases around the country, unfortunately there is a queue, and limited capability, and all the parties want to move forward with teleconferencing in many circumstances.

Judge Dever responded that line 51 limits the provisions governing videoconferencing to those where the defendant has the right to be present. The Standing Committee's liaison commented that it does not necessarily follow from that language that in a proceeding where the defendant has no right to be present that videoconferencing and teleconferencing are permissible. Professor Beale responded that such proceedings are not regulated at all by this rule, nor are those proceedings regulated in non-emergency cases. Professor King added that lines 221-26 of the note make it clear that none of this applies to those.

The liaison said that we could say something more: that the rule doesn't speak to it, doesn't prohibit and shouldn't be read to exclude these options. Judge Dever thought the Committee could probably add some language to the note along those lines.

Judge Bates commented that the addition on line 60 of (2)(B) as well as (2)(A) would need to be added to committee note. Also in the note regarding (3)(C) one of the examples is a guilty plea under Rule 11(c)(1)(C) (line 309). He asked whether it is the Committee's intent to say categorically all Rule 11(c)(1)(C) pleas fall into this? He wondered whether that would be true, yet as written the note seems to say that.

Judge Bates also had two structural questions. As Judge Kethledge pointed out, it says when videoconferencing is authorized, those would already be satisfied. Doesn't that make the provisions about consulting and consent redundant? Why do you need to repeat them? They would have already been found. His other structural question related to (d)(2)(A) and (3)(A). What is the difference between them? And why does one read "in the district" and the other "in that district"?

Judge Kethledge noted that a court's ability to hold those different proceedings may vary.

Professor King explained that the subcommittee thought there should be distinction between plea and sentencing proceedings, and other in-person proceedings at which the defendant is required to be, or has the right to be present. It would be sufficient for the chief judge to make the necessary findings for all other in-person proceedings at which the defendant is required to be, or has the right to be present. Because pleas and sentencings should only be held by videoconferencing as a last resort, the draft requires not only the chief judge's finding that emergency conditions will substantially impair the ability to hold plea and sentencing

proceedings in person in the district, but also an additional finding by the court in a particular case that further delay would impair the interests of justice.

Professor King then turned to a structural question: why does the draft rule concerning teleconferencing repeat the idea of opportunity to confidentially consult with counsel and also to consent? (see lines 56-58 and 65-66). She noted there had been discussion within the subcommittee about the practical aspects of using telephone instead of video. When proceedings are conducted by videoconferencing, defendants often consult privately with counsel on a separate telephone line. But when the video goes down and the only telephone line available to the defendant for consultation is the line used for teleconferencing, it will be necessary to take other steps to provide the opportunity for confidential consultation with counsel. To make sure that would happen, the subcommittee wanted the court to make the additional finding on lines 65-66. The subcommittee recognized that a defendant who consents to videoconference may not consent to teleconference. The defendant may draw the line at video conferencing, thinking "I'll do this if I can see the judge and he can see me, but I'm not going to do it on a cell phone."

Professor King also responded to a question about line 309 of the committee note, which gives Rule 11(c)(1)(C) pleas as an example of the kinds of situations in which the court might find the proceeding could not be delayed without serious harm to the interests of justice. She agreed with a member's comment that not all Rule 11(c)(1)(C) pleas should qualify, noting that line 307 requires the court to make findings "in that particular case" that the preceding cannot be further delayed. But to make that even clearer, the note could be revised to say something like "examples include some guilty pleas under Rule 11(c)(1)(C)." She also thanked the member for pointing out that we will need to change the note to correspond to any changes in the text.

Judge Dever agreed with the observation that not all Rule 11(c)(1)(C) cases would satisfy the requirements of Rule 62(d)(3). For example, if the judge defers the decision whether to accept a Rule 11(c)(1)(C) plea and at the sentencing hearing says "I've read the PSR and I'm not going to accept it," a defendant who had agreed to it up to that point might say "No, I'm not consenting, I'm withdrawing now." So that suggested change is important.

In response to Judge Bates's question about the slight difference in wording between lines 53 ("in the district") and line 64 ("in that district"), Professor King said she did not recall the reason for any difference. The reporters and the subcommittee can look at that again, and it's also a matter for style (which had reviewed the current draft).

A member comparing paragraphs (d)(3), governing videoconferencing, and (d)(4), governing teleconferencing, was concerned that it looks like there's a lesser burden to ask for a telephone conference than there is for a videoconference. Subparagraph (3)(B) says the defendant has to request in writing that the proceeding to be conducted by videoconference. Should teleconferencing also require the defendant's consent to be in writing? Paragraph (4) also repeats paragraph (3)'s requirement for confidential consultation with counsel. If we are incorporating (3)(A), (B), and (C) into (4), but mentioning only (A) and (B)—and not referring

to (C)—this could suggest that (C) ("serious harm to the interests of by justice") is not necessary for plea and sentencing by telephone.

Professor Beale responded that an earlier draft included an explicit statement in paragraph (4) incorporating (3)(A) and (B), but the subcommittee and reporters were persuaded to delete it because it was redundant. The concern is that people will not appreciate the step-by-step structure, which requires that cases under (4) must satisfy all of the requirements of (3) as well as those of (4).

Judge Dever drew attention to lines 312-14 of the committee note on page 150, which states four prerequisites for the use of telephone conferencing, the first of which is that all of the requirements of (3) have been met.

Professors Beale and King remarked that readers had consistently been uncertain about the relationship between the requirements in (3) and (4).

A member suggested clarifying (4) by starting with the phrase "If the requirements for videoconferencing have been met." That would make it clearer those are prerequisites. You first have to meet the requirements for videoconferencing under this rule, before turning to the additional requirements for teleconferencing.

The member also responded to earlier suggestions that the defendant's request for teleconferencing should be in writing. She agreed that it is usually desirable to have defense requests in writing, but the subcommittee focused on the problems that would create in a common scenario (for example, when in the middle of a videoconference, the technology fails and it is necessary to switch to the telephone). The judge then asks whether the defendant (who is on the telephone line), wants to go ahead and whether the defendant wants to talk to talk defense counsel. At that point, the client will sometimes say "I'd rather just go on by phone at this point" when it's close to the end of the proceeding, and they are confident they know where it is going. In that scenario, there wouldn't be time to get written consent. If the rule did require a writing, the lawyer would hand write out "I consent to continue by teleconference" sign on behalf of the client, and file it. But the writing probably wouldn't add much, given the timing and the fact that the defendant would be speaking to the court also. So she did not know that we want to require the request to be in writing.

Finally, the member responded to the concerns about the note. With regard to the reference to Rule 11(c)(1)(C) pleas, she suggested the note might say "examples <u>may include</u> Rule 11(c)(1)(C) pleas" so that way it's not required. To address the possibility that some defendants might want to be sentenced quickly to get out of their district or out of their facility, the note might add "if a plea or sentencing might result in "transfer to a facility preferred by the defense."

Judge Dever thanked this member, and others, for their suggestions, and he invited members to send other suggestions to him or to the reporters, drawing on their experiences, especially recent experiences. He then asked Judge Kethledge for his thoughts.

Judge Kethledge responded that the discussion indicates the need to revise (d)(4) to indicate more clearly that the videoconferencing requirements must be met to allow teleconferencing. He complimented the member who proposed specific language for helpful "on the fly" language suggestions, noting that her suggestion of language for the first line of (d)(4) was very promising.

Professor Beale commented that the Committee could approve the draft with the understanding that additional work is going to be done before it goes into Standing Committee's agenda book. As we did with Rule 16, Judge Kethledge can note that we have not had final approval of some changes in the text and note language.

Judge Dever asked if there was any further discussion on subdivision (d), and a member who had inquired about requiring consent to teleconferencing to be in writing said he now understood why the subcommittee had not required that.

After consulting the reporters, Judge Kethledge said he would like to have a vote on whether the Committee currently approves of the language as revised by our discussion. A motion to approve the language as revised by the discussion was made, seconded, and passed unanimously on a roll call vote.

Concluding that the vote just taken covered all remaining portions of the draft rule, Judge Kethledge reiterated his thanks to Judge Dever, the reporters, and the subcommittee, noting they had spent a great many hours getting to this point. He stated there was still more work to do, and that the Committee will make this the best rule we possibly can for the consideration of the Standing Committee.

Report of the Rule 6 Subcommittee

The next agenda item was Rule 6 (The Grand Jury). The Rule 6 Subcommittee, chaired by Judge Garcia, is considering suggestions to amend the rule to allow greater disclosure of grand jury material under various circumstances. Judge Kethledge called on Judge Garcia to report on developments since our last meeting and what the next steps to be.

Noting that the agenda book included a reporters' update, Judge Garcia thanked the subcommittee for its work so far. In addition to the two suggestions discussed briefly at the spring meeting, we now have an additional proposal from the Department of Justice to authorize delayed notification of grand jury subpoenas in certain circumstances (Suggestion 20-CR-H, on page 169 of the agenda book). We all know how important grand jury secrecy is for a number of different crucial reasons, witness protection, protecting the grand jury from tampering, and protecting targets who may be cleared in the grand jury and would not want the stigmatization that would go with a leak of the grand jury investigation. He said that the subcommittee members bring a terrifically helpful background and experience to examining those issues and this perspective rule changes. We had two calls, we walked through the different aspects of the various proposals and the nuances of those, also the broader issue which Judge Kethledge talked about during the last meeting regarding the district courts' inherent authority. This interesting

and complex issue was mentioned at the Standing Committee's June meeting, as noted in the draft minutes of that meeting included in the agenda book. The Supreme Court has a case on its docket in which it may or may not address some of those inherent authority issues.

The subcommittee has decided to have a mini conference in the early spring, and it is working with the reporters to identify various participants to supplement that viewpoint and the materials that we have already received. He thought that would be very helpful. We want to ensure that this is a very deliberative process given the importance of these issues to all involved. We have begun the process of reaching out and identifying potential speakers for the mini conference. He welcomed any ideas or thoughts from members, and invited them to contact him or the reporters.

Judge Kethledge asked if members had any questions or comments, and a member who is new to the Committee expressed an interest in serving on the Rule 6 Subcommittee. She noted that the Department of Justice proposal discussed the Stored Communications Act. Whether subpoenas under the SCA should be revealed to the people whose cellphone or whose email is being reviewed by the government is a very hot topic in the defense community. The member expressed the hope that the miniconference would include defense practitioners. Judge Kethledge responded that the member would be appointed to the Rule 6 Subcommittee.

Judge Bates asked the Justice Department to clarify the proposal that its memo said it could support. Does the proposal apply to all archival grand jury records, or only a more limited set of archival grand jury records that have exceptional historical importance? Would the archivists determine what constitutes archival grand jury records, and the court determine the exceptional historical importance? Does the Department want the court to make a determination, beyond the fact that they are archival grand jury records, that they have some exceptional historical importance?

Mr. Wroblewski responded that was not the Department's intent in developing the draft that it put forward. As he thought he had explained when a prior proposal came before the Committee, not all grand jury proceedings are archived with the National Archives. The determination of which get archived permanently and which actually get destroyed has to do with their historical significance as determined by a set of processes and standards that are laid out by the National Archives. The Department's intent to piggyback on that determination of what is of historical significance. So no, it's not the intent to require the court to make that determination.

Judge Bates said that answered his question, but if that is the Department's intent it does not seem to be reflected in the language, which has a court finding of exceptional historical importance. He thought the answer Mr. Wroblewski gave would seem to require a revision of that language. Professor Beale commented that the subcommittee had not yet considered this language.

Other New Suggestions

Judge Kethledge then called on the reporters to summarize the remaining suggestions.

Professor Beale presented Suggestion 19-CR-E, the suggestion dealing with imposing time limits in cases enforcing or challenging subpoenas and appealing from rulings, on page 179 of the agenda book. She said that the reporters had intended to include this in the spring agenda book, but had not done so. Because of this delay, we know how the other subcommittees have handled the suggestion. 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 it as a consent item, thinking as you can see that the timelines are extremely short it seems to be really about challenging congressional subpoenas. Indeed, she noted that the suggestion doesn't really seem to have anything to do with this Committee's work. But even if it fell within the Committee's responsibilities, she doubted that the Committee would move forward with a proposal that imposed specific, and very short, time periods. She said that suggestions to impose specific timelines on judges generally have been rejected. The Committee discussed that, for example, in connection with habeas rulings, and decided not to take that type of approach.

Accordingly, the reporters recommended removing the suggestion from the Committee's agenda. Judge Kethledge called for any comments or any concern about not taking this suggestion further. Hearing none, he stated that the Committee would adopt the reporters' recommendation and not take this any further. It would be removed from our agenda.

Professor Beale explained Suggestion 20-CR-F, on page 185 of the agenda book, from Magistrate Judge Barksdale. Judge Barksdale wrote to draw the Civil and Criminal Rules 'Committees' attention to a slight difference in the language about prompt mailing as opposed to immediately serving. The reporters recommended not pursuing this suggestion and removing it from the Committee's agenda. Since Judge Barksdale seemed to like our language better than the language of the Civil Rule, there would be no reason for us to act. And if there is some merit to her suggestion, the disparity falls outside of our jurisdiction because the Civil Rules Committee would have to make the change.

Hearing no concerns or comments regarding that recommendation or the suggestion itself, Judge Kethledge stated we will remove that suggestion from our agenda and follow up accordingly with Judge Barksdale.

Professor Beale then drew the Committee's attention to Suggestion 20-CR-G, on page 191 of the agenda book, from Judge Thomas Parker. He proposed that the rules be amended to authorize videoconferencing for a variety of proceedings on a regular basis, not just in the case of a national emergency. He identified initial appearances, arraignments, detention hearings, and change of plea proceedings. Many state courts use technology for those kinds of proceedings, and it is more efficient. He also recommended that this be done without requiring the consent or approval of either party, though he does recommend that there be certain procedural safeguards such as the availability of private conferencing for the defendant and counsel. Professor Beale

explained the question was whether to table the proposal until completion of the emergency rules, or to remove it from the agenda now. She related that the Committee had considered similar proposals in recent years and refused to extend the availability of videoconferencing in non-emergency circumstances. So unless there was new interest in pursuing this suggestion, the reporters thought it would be better to remove it from the agenda now.

Judge Kethledge responded that the subcommittee and Committee have spent an extraordinary amount of time considering this issue from the opposite point of view: trying to preserve the current in-person procedures. Given the Committee's approval of the draft language that it just discussed, it would make no sense to move ahead with a proposal that we allow videoconferencing for these kinds of proceedings. Hearing no objection, he stated that the proposal would be removed from the Committee's agenda.

Judge Kethledge asked the staff to remind the Committee of the date of its next meeting, which is scheduled for May 11, 2021 in Washington, DC. He then thanked everyone on the Committee as well as our other participants in this meeting for the amount of time and thought that they put into the very important issues we discussed today.

The meeting was adjourned.