ADVISORY COMMITTEE
ON
CRIMINAL RULES

May 11, 2021

AGENDA
Meeting of the Advisory Committee on Criminal Rules
May 11, 2021

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10. Next Meeting: November 4, 2021 (San Diego, CA)

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair	Reporter
Honorable Raymond M. Kethledge United States Court of Appeals Federal Building 200 East Liberty Street Ann Arbor, MI 48104	Professor Sara Sun Beale Duke Law School 210 Science Drive Durham, NC 27708-0360

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203-1181

Members

Honorable Timothy Burgess
United States District Court
Federal Building and U.S. Courthouse
222 West 7th Avenue, Box 33
Anchorage, AK 99513-9513

Professor Roger A. Fairfax
George Washington University Law School
2000 H Street, NW
Washington, DC 20052

Lisa Hay, Esq.
Federal Public Defender
One Main Place
101 Southwest Main Street
Portland, OR 97204

Honorable Lewis A. Kaplan
United States District Court
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable Nicholas L. McQuaid
Acting Assistant Attorney General (ex officio)
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Honorable James C. Dever III
United States District Court
Terry Sanford Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1418

Honorable Michael J. Garcia
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Honorable Denise P. Hood
United States District Court
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard
Detroit, MI 48226

Honorable Bruce J. McGiverin
United States District Court
Federico Degetau Federal Building
150 Carlos Chardon Avenue
San Juan, PR 00918-1767

Honorable Jacqueline H. Nguyen
United States Court of Appeals
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, CA 91105-1621

Members (continued)

Catherine M. Recker, Esq.
Welsh & Recker PC
2000 Market Street
Philadelphia, PA 19103

Susan M. Robinson, Esq.
Thomas Combs & Spann PLLC
P. O. Box 3824
Charleston, WV 25338

Liaisons

Honorable Jesse M. Furman
(*Standing*)
United States District Court
Thurgood Marshall U.S. Courthouse
40 Centre Street
New York, NY 10007-1501

Clerk of Court Representative

James N. Hatten
Clerk
United States District Court
Richard B. Russell Federal Building
75 Spring Street, SW
Atlanta, GA 30303-3309

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Raymond M. Kethledge Chair	C	Sixth Circuit	Member: 2013 Chair: 2019	---- 2022
Timothy Burgess	D	Alaska	2021	2023
James C. Dever III	D	North Carolina (Eastern)	2014	2021
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2022
Michael J. Garcia	JUST	New York	2018	2021
Lisa Hay	FPD	Oregon	2020	2022
Denise P. Hood	D	Michigan (Eastern)	2015	2021
Lewis A. Kaplan	D	New York (Southern)	2015	2021
Bruce J. McGiverin	M	Puerto Rico	2017	2023
Nicholas L. McQuaid*	DOJ	Washington, DC	----	Open
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2022
Catherine M. Recker	ESQ	Pennsylvania	2018	2021
Susan M. Robinson	ESQ	West Virginia	2018	2021
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

Principal Staff: Julie Wilson 202-502-3678

* Ex-officio - Acting Assistant Attorney General, Criminal Division

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

Administrative Office of the U.S. Courts
Office of General Counsel – Rules Committee Staff
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Julie Wilson, Esq.
Acting Chief Counsel
(Civil, Criminal, Standing)

Bridget M. Healy, Esq.
Counsel
(Appellate, Bankruptcy, Evidence)

S. Scott Myers, Esq.
Counsel
(Bankruptcy, Standing)

Brittany Bunting
Administrative Analyst

Shelly Cox
Management Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 6-100
Washington, DC 20544

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

S. Kenneth Lee, Esq.
Research Associate
(Bankruptcy)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

Item 1A will be an oral report.

TAB 1B

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 may include 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.

TAB 1C

MINUTES (APRIL 1, 2021 DRAFT)
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on January 5, 2021. The following members participated in the meeting:

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

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

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

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

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); Dr. Emery G. Lee and Dr. Tim Reagan, Senior Research Associates at the FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue. Andrew Goldsmith and Jonathan Wroblewski were also present on behalf of the DOJ.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He began by reviewing the technical procedures by which this virtual meeting would operate. He next acknowledged recent changes in the leadership of the Rules Committees. Judge Bates introduced himself, acknowledging that this was his first Standing Committee meeting as Chair, and thanked Judge David Campbell for his wonderful leadership and insight. Judge Bates next recognized new Advisory Committee Chairs: Judge Robert Dow is the new Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee is the new Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz is the new Chair of the Advisory Committee on Evidence Rules. Judge Bates noted next that Rebecca Womeldorf, Secretary to the Standing Committee, would be leaving the Rules Committee Staff to work as the Reporter of Decisions to the Supreme Court. Judge Bates thanked Ms. Womeldorf for her friendship and years of work with the Rules Committees.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the June 23, 2020 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2020. Also included are the rules approved by the Judicial Conference in September 2020 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2021, provided the Supreme Court approves them and Congress takes no action to the contrary. Other rules included in the chart are currently out for public comment. Julie Wilson of the Rules Committee Staff explained that a hearing on the proposed Supplemental Rules for Social Security Review Actions currently out for comment is scheduled for January 22, 2021.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 91, which has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He began by highlighting the fact that Chief Justice Roberts had recognized the role of the Rules Committees in his end of the year address on the state of the federal courts. The Chief Justice complimented their efforts thus far, particularly those members who had worked on the videoconferencing provisions included in the CARES Act. Judge Bates also thanked everyone who has worked on this project for their superb efforts. He noted the particular efforts of Professor Capra in coordinating the project across committees and of both him and Professor Struve in preparing the presentation of the advisory committees' suggestions for today's meeting.

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the

Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In the intervening months, each advisory committee – except for the Evidence Rules Committee – developed draft rules for discussion at this Standing Committee meeting. The goal at this meeting was to present the draft rules and to seek initial feedback from the Standing Committee. Comments on details are welcomed, but the focus would primarily be on broader issues. Overarching questions for the members to keep in mind included what degree of uniformity across rules would be desirable and who should have authority to declare an emergency or enact emergency rules. At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

Professor Struve began the presentation of the emergency rules proposals. She echoed Judge Bates's thanks to all those who have brought the project to this stage, especially the advisory committee chairs, reporters, relevant subcommittee members, and Professor Capra. She explained the structure by which the day's discussion would proceed. The discussion would be segmented by topic. Professors Struve and Capra would introduce each topic and then advisory committees' reporters would be invited to summarize their committees' views on that topic. The topic would then be opened for general discussion among the Standing Committee members.

Professor Capra thanked the advisory committee members and reporters and described the history of the project. He explained that the Evidence Rules Committee would not be presenting a proposal. Its members determined early in the process that there was no need for an emergency rule because the Evidence Rules are already sufficiently flexible to accommodate emergencies.

"Who Decides" Issue. This first topic concerns what actor or actors decide whether an emergency is declared. The advisory committees' subcommittees decided early in the process that a rules emergency should not be tied to a declaration of a presidential emergency. Although the CARES Act relies on a presidential declaration of emergency, and instructed the Rules Committees to consider emergency rules in that context, the advisory committees all agreed that the judiciary would benefit from being able to respond to a broader set of emergencies, and that limiting the emergency rules to only a presidentially declared emergency would not make sense. The advisory committees agreed that the Judicial Conference should have the authority to declare a rules emergency, but they were not in agreement on whether other actors should share this authority. The draft amendment to Appellate Rule 2 grants such authority to "the court" as well, and provides that the chief circuit judge can exercise the same authority unless the court orders otherwise. Draft Bankruptcy Rule 9038 grants the authority first to the Judicial Conference either for all federal courts or for one or more courts, second to the chief circuit judge for one or more courts within the circuit, and third to the chief bankruptcy judge for one or more locations in the district.

Professor Gibson and Judge Dennis Dow summarized the position of the Bankruptcy Rules Committee. Professor Gibson explained that the Advisory Committee thought there could be emergencies of different scope – some might be on a national scale like the COVID-19 pandemic, others might be confined to a circuit, a state, or to one district or part of a district within a state. The Advisory Committee thought it was more efficient for local actors to be able to declare an emergency and to act more quickly to respond to a localized emergency. She noted that the Advisory Committee was not concerned that overeager judges would be too quick to declare an emergency, and pointed out that paragraph (b)(4) of draft Bankruptcy Rule 9038 would allow the Judicial Conference to review and revise any declaration. A majority of the Advisory Committee favored giving actors at all three levels the authority to declare an emergency. Judge Dow explained that his committee thought that in the case of a localized emergency, decisionmaking should be at the local level, where the effects of the situation would be felt. He thought this was similar to the proposal put forward by the Appellate Rules Committee. He emphasized the stakes of the issue – draft Rule 9038 only deals with procedural issues, not substantive rights. Finally, he noted that the bankruptcy draft rule balances the need for rapid response with the opportunity for modification after the fact by the Judicial Conference. Professor Capra added that because the draft rule allows a number of actors to declare an emergency, it had to be drafted differently from the other advisory committees' proposals, which introduced some additional lack of conformity.

Judge Bybee and Professor Hartnett explained the Appellate Rules Committee's proposal. Judge Bybee began by noting that Appellate Rule 2 already allows a court of appeals to "suspend any provision of" the appellate rules "in a particular case." The proposed appellate emergency rule would amend Appellate Rule 2 to allow the courts of appeals to make these kinds of changes across all cases. The Appellate Rules Committee thought it was important to allow the chief judge of a circuit or a court to make these changes. Most of the appellate rules, like the bankruptcy rules, are procedural, limiting any impact on substantive rights when the rules are suspended. Jurisdiction, for example, would never be affected. Further, Judge Bybee explained the Advisory Committee's view that courts of appeals are accustomed to having to deal collegially. This would provide a check on the judgment of a chief judge. He added that the Advisory Committee preserved the backup option of allowing the Judicial Conference authority to exercise the same rule-suspending powers. Professor Hartnett noted the long history of flexibility in the appellate rules. Rule 2 has existed since the Appellate Rules were first promulgated and the circuit courts' authority to suspend their rules predates the Appellate Rules. The nature of a court of appeals is that it speaks with one voice and its procedures are designed to that end. Finally, Professor Hartnett addressed the dignity of the courts of appeals, explaining that there is no right of appeal from these courts. They are courts of last resort and courts with that authority ought to be able to suspend the rules.

Judge Kethledge and Professors Beale and King spoke on behalf of the Criminal Rules Committee. That committee determined that the Judicial Conference was the ideal body to make emergency declarations because it has input from around the country and authority to act. The Criminal Rules Committee has long been the recipient of suggestions that the Criminal Rules be amended to allow for greater use of remote proceedings. The Criminal Rules Committee has historically resisted allowing virtual proceedings. Professor Beale noted the critical differences between the kinds of emergency rules being considered by each advisory committee. The need for gatekeeping is much greater when it comes to criminal proceedings because constitutional issues are implicated most directly by changes to the Criminal Rules. This makes it more important to

exercise restraint when suspending any rules. The Judicial Conference is better positioned to act in this manner. The Criminal Rules Committee believed there was no reason to think the Judicial Conference would suffer from a lack of information or that the Judicial Conference and its Executive Committee could not act with appropriate speed. Given the nature of the emergency rules and the values they protect, the Advisory Committee believed it was preferable to have a single gatekeeper deciding when to declare an emergency. Professor King added that the Advisory Committee had considered the concerns – expressed by other committees – that an emergency might be localized, but that their proposal accounted for this possibility. It requires the Judicial Conference to consider moving proceedings to another district or another courthouse before emergency rules can be enacted. Because there is always an obligation to move proceedings and to remain under the normal rules, there is less reason to think that a local decisionmaker is needed or that the Judicial Conference is not well situated to make the necessary decisions.

Judge Robert Dow and Professors Cooper and Marcus spoke on behalf of the Civil Rules Committee. Professor Cooper explained that their committee arrived at the same conclusion as the Criminal Rules Committee. The Civil Rules already allow broad discretion to the trial courts and they seem to be functioning well during the pandemic. Professor Marcus added that confusion could result if two courts or districts located near one another were both affected by the same emergency but chose to respond in different ways. The Judicial Conference would be able to coordinate efforts across districts and could better achieve consistency.

The discussion was then opened to the members of the Standing Committee. Judge Bates spoke first. Moving away from the particular proposals, he reminded the members of the overall goal of uniformity. To the extent that decisionmaking is dispersed, there would be a potential for undermining this uniformity in a way that is undesirable even in an emergency context. The CARES Act had envisioned emergency rules relating to a presidential emergency and some committees were now looking at very localized actors like a small district. The scale of the departure from what Congress originally suggested was worth keeping in mind. Judge Bates's understanding was that the Judicial Conference, and particularly its Executive Committee, was able to act quickly when necessary. He also suggested that he saw little reason to think that the speed of the emergency declaration would matter more for any one set of rules than for another. Speed is equally important for each type of rules and court proceedings. In response to the Appellate Rules Committee's suggestion that the courts of appeals can and should "speak with one voice," Judge Bates thought this could be an argument for keeping the authority at that level rather than at the district level, but did not think it was an argument against giving the authority to the Judicial Conference.

An attorney member spoke in favor of uniformity with respect to 'who decides.' This member thought that in creating emergency rules for the first time, it was preferable to be cautious and incremental and to create a single gatekeeper rather than a complex multitiered system. This member also thought that the challenges created during the current emergency were greatest in the criminal context and thought that there was something to be said for choosing the gatekeeper that makes the most sense for that set of rules.

Another attorney member agreed that uniformity in 'who decides' makes sense. If the reasons for decentralization are increased nimbleness and ability to accommodate geographical

differences, and the reasons for centralization are the substantive issues raised by the Criminal Rules Committee, then substantive issues should win out. This is particularly so if the Judicial Conference can act with sufficient nimbleness and precision.

One judge member noted that, by definition, an emergency creates an atmosphere of unease. Having the authority to declare an emergency reside in one place – with the Judicial Conference – suggests authority and promotes trust. It makes sense to focus on a single identifiable body that is designed to be sensitive to lots of issues. A member agreed that substantive protections are most important. This member thought that the authority to declare an emergency should be tailored to the kind of nationwide issue – like the pandemic – that Congress had in mind when it suggested emergency rules. Local issues, like floods, hurricanes, or power outages, have been dealt with in the past without an emergency rule and have not prompted Congressional action.

Another judge member also spoke in favor of uniformity and argued that the benefits of uniformity outweigh those of localization.

Another judge member noted that the consideration of emergency rules happens infrequently and that we should consider the types of emergencies that are possible. This member suggested that a situation where the country's communications infrastructure is damaged might make it infeasible to communicate nationally and might make local control desirable.

One judge member expressed that she was impressed with the drafts and had originally been comfortable with different decisionmakers for different sets of rules, but was now thinking that uniformity was more desirable in light of the scope of the proposed changes. As an alternative means of balancing the values at stake, this member suggested that perhaps the Judicial Conference could be the default decisionmaker but that others could be permitted to determine that the Judicial Conference is unreachable and – in those situations – to act on their own.

Professor Coquillette echoed Judge Bates's view that the Executive Committee of the Judicial Conference can act very quickly and has done so in the past.

A judge member asked about the extent to which the bankruptcy rules are already sufficiently flexible to allow judges to toll and extend deadlines in particular cases. Professor Gibson responded that there is already a rule that allows flexibility with regard to some deadlines (Bankruptcy Rule 9006(b)), but that, because there are limits on the authority granted and some deadlines are exempt, the subcommittee thought an emergency rule would be helpful. This same committee member then explained his view that although the Bankruptcy Rules Committee's reasons for allowing emergency declarations at the bankruptcy court level made sense, the other committees' arguments to the contrary were also compelling. This member also suggested that there was an appearance benefit favoring an Article III over an Article I decisionmaker that might tilt the balance in favor of giving the Judicial Conference sole authority.

Another judge member supported having a different decisionmaker for the appellate rules, but found today's arguments in favor of uniformity compelling. This member thought that the courts of appeals were very different from trial courts – there are fewer substantive rights at stake and they are sufficiently nimble. Circuit-wide orders have been used in the past in order to

immediately protect rights when, for example, major weather events necessitate the extension of filing deadlines.

An attorney member thought that perceptions of what constitutes an emergency may vary throughout the country and was initially inclined to favor some devolution of power to regional courts. However, he was persuaded by the flexibility of the existing rules and the need for uniformity and now favored keeping the decisionmaking power in the Judicial Conference, and thought it was important that a uniform federal authority be identifiable in emergencies.

Definition of a Rules Emergency. Professor Capra introduced questions concerning what ought to qualify as a "rules emergency." There was at least some uniformity across advisory committees on this issue. The advisory committees agreed there must be "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court" which "substantially impair[s] the court's ability to perform its functions in compliance with the[] rules." One early issue was whether there should be a requirement that the parties, as well as the courts, are unable to operate under the normal rules. This possibility was rejected because the courts, and particularly the Judicial Conference, would be unlikely to have information about the parties' access. Further, a problem for the parties is necessarily a problem for the courts so – to the extent the information is available – it makes no difference. The remaining point of inconsistency across committees is that the Criminal Rules Committee, and no other committee, included a requirement (in draft Criminal Rule 62(a)(2)) that before the Judicial Conference declares a Criminal Rules emergency it must determine that "no feasible alternative measures would eliminate the impairment within a reasonable time."

Judge Kethledge explained this additional requirement. First, he explained that the "extraordinary circumstances" finding under paragraph (a)(1) of the proposed criminal rule – the finding the other committees also require – is a substantive impairment requirement. The additional requirement in paragraph (a)(2) is an exhaustion requirement. These are not redundant. Judge Kethledge emphasized that the committees have thought about different kinds of proceedings and have focused on different things. Procedurally, the Criminal Rules are the only rules the CARES Act directly amended. The Criminal Rules Committee gave intensive consideration to how the rules ought to be abrogated in light of this kind of emergency. They thought it was important that the rules not be abrogated unless doing so proves absolutely necessary. The Criminal Rules protect core substantive interests with a long history in the law. Given how carefully these rules have been crafted in the first place, all feasible alternatives should be explored before any rules are suspended. There might be ways of adapting that cannot be foreseen right now but which the Judicial Conference might be able to learn about in the moment from local actors on the ground. Judge Kethledge thought any remaining disuniformity was worth allowing. Professor Beale added that uniformity on this point was not essential – the Criminal Rules Committee was not asking the other advisory committees to adopt the additional exhaustion requirement. She suggested that it might be fine for a Bankruptcy Rules emergency to be declared at the local level while extra protections are afforded the substantive rights at issue in the criminal context. Professor King agreed that the Criminal Rules Committee feels very strongly about including the exhaustion requirement.

Professor Cooper spoke on behalf of the Civil Rules Committee. That committee was comfortable with the "no feasible alternative" requirement being included in a criminal emergency rule but not in the civil rule. It did not think it was necessary for the Civil Rules and, in light of the different rights being protected in the criminal context, was not concerned with the disuniformity. Professor Marcus agreed that Civil and Criminal Rules are very different so having a difference on this point made sense.

Professor Gibson said the Bankruptcy Rules Committee felt similarly to the Civil Rules Committee and had decided against including the "no feasible alternative" language. They were not concerned with the disuniformity.

Judge Bybee observed that the only "friction points" for the courts of appeals in an emergency were the filing of briefs and the holding of oral arguments. Neither of these implicated the kinds of values at stake in the Criminal Rules, and the Appellate Rules Committee was therefore also not concerned by the possibility of allowing the additional requirement in the proposed criminal rule to remain in place.

Judge Bates thought the Criminal Rules Committee made a strong argument but he had two points to add. First, he wanted to be sure that the exhaustion requirement was not redundant. He asked whether it might be said that before it could find a "substantial impairment" the Judicial Conference would necessarily have to have considered alternatives? Second, if the Judicial Conference were put in the position of declaring a rules emergency across all the rules sets, was there anything to be said for having the same standard for all the rules? If the rule were to state that declaring a Criminal Rules emergency required consideration of feasible alternatives, might this imply that there was no obligation to consider alternatives outside of the criminal context? What would be the implications of leaving the requirement out for the other sets of rules?

A judge member reminded the Committee of the existing authority of the courts of appeal under Appellate Rule 2 to suspend the Appellate Rules in particular cases and asked whether the proposed amendment to Appellate Rule 2 could be seen as constraining this existing authority to a narrower set of circumstances. This member noted that courts of appeal have been able to respond to emergencies in the past and would not want to see their existing power limited.

An attorney member suggested adding "or set of cases" to Appellate Rule 2(a) in order to avoid constraining the current authority of the courts of appeals. This would make it clear that the courts of appeal could issue suspensions of rules across cases without declaring an emergency. Professor Hartnett thought the Appellate Rules Committee would be receptive to such a change because they did not want the existing authority of the courts of appeals to be constrained. Professor Capra asked whether the issuance of orders under such an authority might start to look like local rulemaking. Professor Hartnett responded that the language "a set of cases" would imply that orders suspending rules cannot be applied to all cases. Professor Struve asked for clarification on the suggestion that subdivision (a) be modified in a way that would apply even outside of emergency situations.

A judge member thought the higher standard for declaring a Criminal Rules emergency was appropriate. Although the inclusion of the higher standard in only one of four emergency rules

would imply that alternatives did not need to be considered in other contexts, this member did not think the drawbacks of this implication outweighed the benefits of the heightened standard for a Criminal Rules emergency.

Another judge member asked whether this language was added in response to any particular situation that had come to the Criminal Rules Committee's attention. Professor King explained that the Criminal Rules' Emergency Rules Subcommittee had held a miniconference and consulted with a broad group of actors. The input received through these avenues influenced the Criminal Rules Committee's thinking. One circumstance that distinguished its approach was the possibility of a hurricane or other major catastrophe rendering all the courthouses in a district not useable. Other advisory committees would consider this a substantial impairment but history had shown – in Puerto Rico and Louisiana – that criminal proceedings could be moved to a different courthouse in another area. Judge Kethledge added that the Emergency Rules Subcommittee had canvassed chief judges around the country. In response to Judge Bates's questions, Judge Kethledge thought that the required determinations were not redundant because paragraph (a)(1) of draft Criminal Rule 62 only looked for an impairment and did not imply any evaluation of alternatives. In a situation like the aftermath of Hurricane Katrina, court proceedings were moved pursuant to 28 U.S.C. § 141. If an option like this is available, courts would be obligated to use it to hold criminal proceedings under the existing rules while an emergency might be declared under the Appellate, Bankruptcy, and Civil rules.

An attorney member said that he had been somewhat confused by the language because it seemed that the "substantial impairment" finding would take into account the possibility of moving court functions. However, this member now thought that a court moving its functions would be "substantially impaired" because relocated proceedings do not constitute normal court operations. The member suggested that it might be worth adding an adverb to modify "eliminate" in paragraph (a)(2) – possibly "sufficiently." This would indicate that the alternative must be sufficiently effective to mitigate the disruption of court operations.

Ms. Shapiro expressed the DOJ's support for Judge Kethledge's reasoning and for including the additional requirement for the Criminal Rules.

Judge Bates suggested that while the Criminal Rules Committee's reasoning was compelling, it might be worth reevaluating the value of uniformity. He also wanted to be sure that, just as the Criminal Rules Committee had considered dropping the requirement, the other advisory committees had considered adopting it.

Open-ended Appellate Rule Structure. Professor Capra explained that the proposed appellate emergency rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency. Nor does it state what the substitute rule (if any) must be when a rule is suspended. The appellate emergency rule proposal does not specify what provisions need to be included in an emergency rules declaration. It imposes no particular time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules.

Judge Bybee reiterated that the two "friction points" for the courts of appeal operating under emergency situations are filing deadlines and oral argument scheduling. Given the flexibility

already available under the current Appellate Rules, the Appellate Rules Committee did not think it made sense to have a more detailed rule for adjusting the timing of these events during emergencies. The Advisory Committee would prefer having no emergency rule to adding more constraints to their proposal because without an emergency rule the courts of appeal can just rely on the flexibility they already have.

Professor Hartnett added that the current Appellate Rule 2 can be thought of as the Appellate Rules' equivalent to Civil Rule 1, which states that the Civil Rules should be interpreted to preserve justice and efficiency. Professor Hartnett understood that the proposed amendment to Appellate Rule 2 was particularly open-ended and did not identify alternative rules but noted that rule-suspension provisions during the pandemic have often not provided alternatives. For example, an order waiving a paper-filing requirement does not have to include all the details of online filing. Professor Hartnett also suggested that subdivision (a) – the current Appellate Rule 2 – would carry over into an appellate rules emergency and would then authorize courts to create whatever alternatives they might need to operate. In addition, the Appellate Rules Committee did not set timing deadlines for emergency declarations, opting instead for the open-ended instruction that the emergency-declarer "must end the suspension" of rules "when the rules emergency no longer exists." Finally, he noted that he was not aware of anyone having suggested that Rule 2 had been abused historically.

Judge Bates suggested that the courts of appeals' normal modification of deadlines and oral argument timing was not quite comparable to the suspension of rules during an emergency. The ability to alter deadlines and scheduling is not unique to the courts of appeal. The distinguishing feature of the courts of appeals might be that there is not much at stake when deadlines and schedules are changed. He said it did not seem to him that this was what the committees were concerned with here. Judge Bates also asked whether there is a downside to not setting out replacement rules. If nothing is set out, it will be left to someone – the chief circuit judge, a panel, the circuit as a whole – to describe specifics.

Judge Bates then pointed out that subdivision (a) says the court "may suspend and order proceedings as it directs" while subdivision (b), the emergency rule, only says the court "may suspend" and does not mention ordering proceedings. He asked whether paragraph (b) needs something about the authority to order proceedings, or whether the omission was intentional. Professor Hartnett explained that the Appellate Rules Committee had assumed that the authority in paragraph (a) was implicit in (b), but he agreed that it should probably be made explicit.

A judge member made a similar drafting note. In paragraph (b)(2) the suspension of rules within a circuit is allowed, but sometimes the rule only needs to be suspended in part of a circuit. The member suggested that perhaps the rule should refer to "all or part of that circuit."

Another judge member did not think it was a problem for the courts of appeals to have a different structure to their emergency rules, but this member thought that a sunset provision – maybe ninety days – would be an appropriate and important safeguard. Professor Capra added that if the Judicial Conference was, ultimately, the only authority declaring emergencies across all the rule sets, it would be particularly odd for there to be a time limit on the other three types of rules emergencies but not on an appellate rules emergency.

An attorney member had a question about language in paragraph (b)(2) that identifies "time limits imposed by statute and described in Rule 26(b)(1)-(2)" as those that cannot be set aside in an emergency and whether this referred to time limits both "imposed by statute" *and* "described in Rule 26" and about the extent to which these categories overlapped. Professors Hartnett and Struve indicated that they were not aware of any time limits in the Appellate Rules imposed by statute but not covered in Rule 26(b), but recommended keeping the references to both because some requirements covered in Rule 26(b) are not set by statute.

Judge Bybee thought it made sense to add "and order proceedings" to subdivision (b) for consistency with subdivision (a), and he did not have any objection to a ninety-day time limit for an emergency declaration. He agreed with Professor Capra's point that this would be a particularly good idea if the Judicial Conference were in the position of declaring rules emergencies across rules sets. He also agreed with the proposal to add "or set of cases" and expressed his view that the Appellate Rules Committee would likely be amenable to these suggestions.

Some relatively brief comments rounded out this discussion. One judge member noted that if a ninety-day sunset provision is introduced there should be an option to extend the emergency past the ninety days. Another judge member thought it would be helpful for paragraph (b)(2) to reference both deadlines imposed by statute and Rule 26(b) because it was helpful to the reader to include both, noting that, in this judge's court, there exists a practice of including sunset provisions when issuing emergency-type orders. Another judge member suggested that paragraph (b)(3) be amended to limit the Judicial Conference's review authority to review of decisions under subdivision (b) as opposed to all of Rule 2, which would include subdivision (a). Judge Bybee pointed out that the draft committee note addressed some issues that had been raised and that he expected the Advisory Committee would be open to including additional clarifications.

Authority. Professor Struve introduced an issue raised in the Appellate Rules Committee meeting, regarding whether rules allowing the Judicial Conference or other actors to declare an emergency might run afoul of the Rules Enabling Act. She framed the issue in this way: a judge presiding over individual cases is generally understood to have authority over her own docket. In the draft emergency rules, the advisory committees give authority to the Judicial Conference. That authority would not be limited to cases on its members' own dockets. Nor does 28 U.S.C. § 331 – which establishes and lays out the powers of the Judicial Conference – give the Judicial Conference the authority to declare emergencies or suspend rules of procedure. Would there be a problem if rules of procedure enacted through the Rules Enabling Act process gave the Judicial Conference such authority?

Professor Struve reported that the general consensus after discussion among the reporters was that there was not an issue under the Rules Enabling Act. One way of thinking about it was that there are a variety of decisionmakers that exist outside of the courts that make determinations that are incorporated by reference to the ways the courts function. For example, a state can declare a legal holiday and have that decision incorporated into a time-counting provision, giving that holiday declaration a legal effect in the rules. In the draft criminal, civil, and bankruptcy rules, the Judicial Conference would choose from a menu of options and could choose to implement some or all of them. There is less structure to the proposed appellate emergency provisions but as

discussed, they already have more flexibility to suspend their rules, and the stakes are somewhat lower.

Professor Capra thought the issue was simple. He pointed out that making a declaration that an existing rule comes into effect is different from making a rule. The rule is preexisting, and triggering it is not rulemaking. Professor Hartnett looked at the question differently. He thought the concern was not that the federal rules cannot incorporate other law by reference, but rather the source of the authority for another body to act in the first place: Where does the Judicial Conference get the authority to declare the emergency? The other way to think about it is that perhaps the rule promulgated under the Rules Enabling Act can itself be the source of the Judicial Conference's authority, but this requires thinking through the implications. Can a rule promulgated under the Rules Enabling Act create authority for a body that did not have such authority already?

Professor Coquillette did not think this presented a practical problem. He added that Congress instructed the Rules Committees to make rules that solve this problem, and he did not think it was likely that anyone would challenge it.

A judge member asked whether paragraph (b)(3) of the draft amendment should refer to a "declaration" under paragraph (b)(1) rather than a "determination," because the word "determination" would seem to suggest that the Judicial Conference can review and revise the rules modifications put in place as well as the emergency declaration. It did not seem to this member that the Judicial Conference should necessarily be reviewing the modifications.

Professor Marcus thought it was very peculiar to suggest that there was an authority problem when Congress had instructed the Rules Committees to do something like this and when Congress would be reviewing the rule before it went into effect.

Professor Cooper thought that it was a very good idea for the Judicial Conference to be the actor empowered to act and that there was therefore likely a way to find authority under either the Rules Enabling Act or 28 U.S.C. § 331.

Professor Beale thought that the Rules Enabling Act provides the necessary authority if such authority did not exist otherwise. If there is a statutory gap – and, in her opinion, one does not appear to exist – she thought that the Rules Enabling Act's supersession could bridge that gap. If the Judicial Conference is the logical place to lodge the power to declare an emergency and if the Rules Committees, the Judicial Conference, the Supreme Court, and Congress affirm that by approving the emergency rules – that ought to be enough to alleviate any lingering concerns.

Professor Gibson noted that although the section of the Rules Enabling Act that applies specifically to Bankruptcy Rules, 28 U.S.C. § 2075, does not include a supersession clause, she nevertheless agreed that it provided sufficient authority.

Professor Cooper said that the Civil Rules had embraced things prescribed by the Judicial Conference in the past. For example, electronic filing was originally permitted according to standards developed by the Judicial Conference. Local rules numbering and the maintenance of district court records were similar examples.

An attorney member asked if there was a gap between the current rule proposals and the CARES Act's focus on presidentially declared emergencies. Is there anything to be pointed to other than the later ratification process? Professor Capra thought that this was only a problem if the CARES Act were relied on for authority to promulgate the emergency rules. Instead the Rules Enabling Act could be relied on as the statutory authority. Judge Bates clarified that the authority question here is different from the statutory authorization.

Criminal Rules Provisions. The next topic for discussion was some of the substantive provisions of draft Criminal Rule 62, particularly subdivisions (c) and (d). Subdivision (c) lays out specific substantive changes for emergency circumstances that were developed based on feedback the committee received from participants in the miniconference. Judge Kethledge and Professors Beale and King invited any thoughts from the Standing Committee on these proposals.

Judge Bates had a question concerning paragraph (c)(3), which would allow the court to conduct a bench trial without the government's consent when it finds that doing so "is necessary to avoid violating the defendant's constitutional rights." He asked why the Criminal Rules Committee had limited this to constitutional rights instead of allowing the same procedure when a statutory right was at stake. Judge Kethledge thought the main reason was to avoid any questions under *Singer v. United States*, 380 U.S. 24 (1965), in which the Supreme Court held that a defendant has no constitutional right to waive trial by jury. Professor Beale noted also that the DOJ was opposed to too much of a deviation from the norm and that the subcommittee had taken these views into account. Originally, the rule would have allowed a bench trial without the government's consent whenever doing so would be "in the interest of justice." The Advisory Committee ultimately determined that this provision should be a narrow one. Judge Kethledge noted that there was division over this provision among advisory committee members and that it had not been put forward with unanimous support.

A judge member questioned the extent to which the situation envisioned by paragraph (c)(3) could ever actually arise. Presumably the constitutional right at issue would be a speedy trial right, and evaluating whether an additional delay would violate that right requires a fairly complicated multi-factor decision. If, under the rule as drafted, a judge has to go through all of that analysis and get it right, subject to an interlocutory appeal by the government, in practice it could be very difficult to ever actually order a bench trial over a government objection. The member was not opposed to the provision though because criminal defendants sitting in jail while proceedings are delayed has been a major problem during the current pandemic. Professor Beale thought that as a practical matter the provision could be used. The member asked whether looking at the statutory speedy trial test rather than the constitutional one might make the provision more likely to actually come into play. Professor King noted that *Singer* concerned the method of trial; it did not involve speedy trial rights. The consensus of the Advisory Committee was to not limit the provision to speedy trial rights because we cannot predict all future emergency circumstances and what constitutional rights they might somehow implicate.

Another judge member expressed the view that this would likely be a null set provision if the government's veto can only be overridden based on constitutional concerns, and that it was not worth writing a rule for a circumstance that would not happen.

A member asked for clarification on whether the rules and statutes normally allow a bench trial without the government's consent. Professor Capra and others confirmed that they do not. This member then asked whether this was a substantive change. Judge Kethledge thought there might be a question there.

An attorney member thought the emergency setting could pit the defendant and government against one another in a new way. In an emergency, the choice between a jury and a bench trial also might implicate a very long incarceration. Judge Kethledge agreed these are serious concerns. Professor King said there had been mixed reports regarding whether the government had been withholding consent to bench trials in situations like these.

Professor Coquillette noted that the Supreme Court routinely approves the Standing Committee's recommendations but that the bench trial provision was the kind of thing that had historically attracted more attention from the Court. Judge Bates agreed. On the other hand, Judge Bates thought members of Congress might want statutory speedy trial rights protected as well as constitutional rights. Accordingly, he thought it important to be very careful.

A judge member appreciated that the proposed rule addressed the issue of extended detention while trials are delayed. This member was not aware of this issue arising but thought there might be a need to think about defendants who want to have a jury trial but are not able to get one for an extended period of time.

Mr. Wroblewski said that the DOJ shared the concerns with delayed trials, especially for detained defendants. It had urged U.S. Attorneys to offer bench trials, and some offices had made blanket offers. Many defendants have not taken this offer. There have been some situations where the government has not consented to a bench trial, but those have been few. While the DOJ does not anticipate that paragraph (c)(3) will have much impact in the end, it is sensitive to concerns about what the Supreme Court will think. It supports the current proposal as a compromise rule.

As a final point on the bench trial issue, a member wondered why this rule was necessary. If constitutional rights are at stake, this member asked, isn't the government always obligated to agree or to drop the case? Frequently the government must choose to prosecute a case in a manner it would not prefer in order to avoid violating a defendant's constitutional rights.

A judge member offered a view on paragraph (c)(1) which, as currently drafted, would establish that "[i]f emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding." This member felt that the word "preclude" was too strong. At times in the past year, public attendance was severely limited but not totally unavailable. It would be better to encourage or require allowing alternative public access when in-person access is seriously limited but not precluded.

Discussion then proceeded to subdivision (d), which addresses remote proceedings. In general, subdivision (d) is more restrictive than the CARES Act's remote proceedings provisions. It carries over some aspects but has additional prerequisites that must be met before proceedings may be held remotely.

Judge Bates asked whether subparagraph (d)(2)(A) should refer to "in-person proceedings" rather than "*an* in-person proceeding." The latter formulation, which is in the current draft, would seem to suggest a case-specific finding, which Judge Bates did not think was the Criminal Rules Committee's intent.

A judge member asked about subparagraph (d)(3)(B), which requires that – in conjunction with other things – a defendant make a written request that proceedings be conducted by videoconference. The member wanted to know what the Criminal Rules Committee had in mind here. Professor King explained that there are two goals behind this requirement. First, it helps guarantee that the gravity of the waiver is well-understood by both the defendant and counsel. Second, it helps to create a record. The Advisory Committee did envision that the required writing would be filed with the court. An additional provision in paragraph (c)(2) provides for obtaining the defendant's signature, written consent, or written waiver under emergency circumstances.

A judge member agreed with Judge Bates about subparagraph (d)(2)(A). This member said that there had been concerns among judges regarding whether one judge in a district holding in-person proceedings undermined findings by other judges that in-person proceedings could not be held. This member also asked about the timing requirement in subparagraph (d)(2)(A) and suggested it be mirrored in subparagraph (d)(3)(A).

Professor Capra asked whether there was inconsistency regarding the use of the word "court," in draft Criminal Rule 62, but he thought it was clear enough in each provision whether the word referred to a single judge or to a court in the sense of a district or courthouse. He observed that the Criminal Rules already use the word "court" in both senses. Professor Beale said this was something each advisory committee should review for consistency and clarity. Professor Garner added that "court" is used to refer to an individual judge throughout the rules and that this was generally not a problem.

Miscellaneous Emergency Rules Issues. Professors Cooper and Marcus briefly explained how the Civil Rules Committee's CARES Act Subcommittee had identified the Civil Rules that might warrant emergency changes. It conducted a thorough review of all the rules and identified only a few that were not sufficiently flexible. These were the rules that are in subdivision (c) of draft Civil Rule 87.

A judge member suggested that if the Judicial Conference is going to be the decisionmaker in all instances, it would be more uniform to rephrase Rule 87 in the same way as the others. Currently draft Bankruptcy Rule 9038 and Criminal Rule 62 default to enacting all the emergency provisions unless the emergency-declarer says otherwise, while draft Civil Rule 87 requires that the emergency-declarer affirmatively identify which emergency rules will go into effect. Professor Capra agreed that consistency would be good here.

Professor Capra next raised the issue of what happens if the Judicial Conference is unable to meet and declare an emergency? Should the rules account for such a situation? He said he didn't think such a provision was needed because if events were so dire that the Judicial Conference or its Executive Committee couldn't communicate for a significant amount of time that the Federal

Rules of Practice and Procedure would not be a particularly high priority. There would be bigger problems to deal with. Further, the Executive Committee of the Judicial Conference is a smaller body and that smaller group is the one that would be deciding. The judge member who had raised this issue in the first place found Professor Capra's reasoning was persuasive.

Another judge member thought it was worth considering an emergency in which communications are seriously disrupted. This member suggested that a judge or chief judge who cannot communicate with the Judicial Conference should be able to act. This member thought the fact that the situation was extreme did not mean it was not worth considering.

Finally, Professor Capra raised the issue of the termination of a declared rules emergency. Draft Bankruptcy Rule 9038, Civil Rule 87, and Criminal Rule 62 say that if the emergency situation on the ground ends before the declared rules emergency ends, there is a provision by which the rules emergency may be terminated. The Bankruptcy and Civil Rules Committees' draft rules provide that the rules emergency "may" be terminated; the Criminal Rules Committee's proposal said that it "must" be terminated. Professor Capra suggested that the termination should be permissive, not mandatory because imposing a mandate on the Judicial Conference seems extreme.

One judge member disagreed and thought that the mandatory language was preferable. These emergency rules should be preserved for extreme situations where there are no alternatives. The sunset provisions limit the damage somewhat but still if the emergency is resolved it is important to return to normal court operations. This member was not concerned about the possibility that someone would have a cause of action if the Judicial Conference was required to terminate the emergency but failed to do so. Professor Capra asked whether this would mean the initial emergency-declaring authority should also say "must" instead of "may." This member did not think so, and Professor Capra agreed.

An attorney member agreed that any rules emergency should not last any longer than the actual emergency, but this member thought that it was necessary to allow discretion. The relevant question at the end of an emergency would be how to terminate, not whether to terminate. Suggesting a mandatory obligation at the instant the emergency ends could distort the discussion because, at the end of the day, the Judicial Conference would have to determine the reasonable means of winding down the emergency operations.

A member expressed concern about writing a rule that forces the Judicial Conference to do anything. If – as it seemed – any mandatory language would not be enforceable, then maybe precatory language of some kind would be sufficient.

Judge Bates had one final question concerning proposed draft Bankruptcy Rule 9038. As currently drafted, paragraph (c)(1) provides that certain actions could be taken district-wide "[w]hen an emergency is declared" but paragraph (c)(2) which addresses actions that could be taken in a specific case or proceeding did not include that same phrase. Judge Bates asked whether paragraph (c)(2) should also say "when an emergency is declared." Professor Gibson explained that the style consultants had thought the current phrasing was clear – that yes, paragraph (c)(2)

also requires that an emergency must have been declared, but she and Judge Bates agreed that perhaps it did need to be clarified.

Other Matters Involving Joint Subcommittees

Judge Bates briefly addressed two ongoing joint subcommittee projects: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on October 20, 2020. The Advisory Committee presented four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 195.

Information Items

Proposed Amendments Published for Public Comment. Judge Bybee explained that at the June 2020 Standing Committee meeting the Appellate Rules Committee had received some feedback concerning proposed Rule 42, which would address voluntary dismissals. The committee addressed the concern and would be seeking final approval of this proposed rule change in the spring of 2021. There was no present action to be taken. Professor Hartnett noted that the concerns raised at the Standing Committee related to how the requirement that parties agree to dismissal of an appeal might interact with local rules requiring the defendant's consent before dismissal. Judge Bates, who had raised this concern, stated that he was happy with the adjustments that the Appellate Rules Committee had made to proposed Rule 42.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). The Appellate Rules Committee is still considering combining Rules 35 and 40. It was thought that consolidating these rules might eliminate some confusion in the Appellate Rules. This issue remains under careful study.

Suggestions Related to In Forma Pauperis *Relief.* Various suggestions relating to *in forma pauperis* relief had been submitted to the Appellate Rules Committee. Judge Bybee explained that it was not clear that the problems identified were problems with the Appellate Rules. The issues are under consideration, but may be put off.

Relation Forward of Notices of Appeal. The relation forward of notices of appeal was still under discussion by the committee.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Bankruptcy Rules Advisory Committee, which last met via videoconference on September 22, 2020. The Advisory Committee presented four action items and two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 241.

Action Items

Retroactive Approval of Official Form 309A–I (Notice of Bankruptcy Case). Judge Dow explained this action item concerning a series of forms that are used to notify recipients of the time and place of the first meeting of creditors and certain other deadlines. The information on these forms includes the web address of the PACER system. This web address had been changed, so the forms needed to be updated to reflect the new address. The change has already been made pursuant to the Bankruptcy Rules Advisory Committee's authority to make technical changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, and the Advisory Committee now sought that retroactive approval. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the changes to the Official Form 309A–309I.**

Proposed Amendments for Publication. An amendment to Rule 3011(Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases), was brought up in connection with a project on unclaimed funds and is intended to reduce the amount of such funds and clerks' offices' liabilities with regard to them. The Bankruptcy Rules Advisory Committee asked for a modification of Rule 3011 in order to achieve a wider circulation of information about unclaimed funds. The modification proposed by the Bankruptcy Rules Committee would add a new subdivision (b) that would require court clerks to provide searchable access on court websites to data about unclaimed funds on deposit with the clerk. The Bankruptcy Rules Committee added a proviso that would allow the clerk to limit access to this information in specific cases for cause shown (e.g., to protect sealed information). The Advisory Committee sought publication of this proposed amendment.

Related Amendments to Bankruptcy Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Form 417A (Notice of Appeal and Statement of Election) were proposed in order to maintain uniformity with recent amendments to the Federal Rules of Appellate Procedure. Rule 8003 would be amended to conform to pending amendments to Appellate Rule 3. The amendments would clarify that the designation in a notice of appeal of a particular interlocutory order does not preclude appellate review of all other orders that merge into that judgment or order. Form 417A, the Bankruptcy Notice of Appeal Form, would be amended to conform to the wording changes in Rule 8003. Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendments to Rule 3011, Rule 8003, and Form 417A.**

Information Items

Changes to Instructions for Official Form 410A (Proof of Claim, Attachment A). Judge Dow explained that a bankruptcy judge had pointed out a problem with Form 410A to the Bankruptcy Rules Committee. The Form is an attachment to a Proof of Claim Form that is filed in bankruptcy cases for mortgage-related claims. The problem related to how total debt is calculated when the underlying mortgage claim has been reduced to judgment and has merged into that judgment. A question can arise as to what governs the claim at that point in jurisdictions that have judicial foreclosure. Judge Dow said that the Advisory Committee added a paragraph to the instructions to Form 410A clarifying that the "principal balance" in this situation is the amount due on the judgment along with any other charges that may have been added to the claim by applicable law. Judge Dow explained that because only the instructions were changed, and not the form itself, that no Standing Committee action was required.

Bankruptcy Rules Restyling. Professor Bartell explained that the style consultants have been doing great work making the rules more comprehensible. Parts one and two of the restyled rules had been published, consideration of parts three and four were proceeding on schedule, and the style consultants had just given the committee a draft of part five. An official draft of part six was scheduled to be ready in February. Professors Garner and Kimble expressed their appreciation to the Bankruptcy Rules Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Civil Rules Committee, which last met via videoconference on October 16, 2020. The Advisory Committee presented three action items and four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Action Items

Proposed Amendment to Rule 7.1 (Disclosure Statement). The Civil Rules Committee first sought final approval of a proposed amendment to Rule 7.1 which was presented at the Standing Committee's June 2020 meeting and remanded to the Civil Rules Committee for further consideration in light of the feedback provided by the Standing Committee. Proposed paragraph (a)(1) and subdivision (b) have not changed since the June 2020 meeting. These provisions deal with adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. Proposed paragraph (a)(2) has been revised since the June 2020 meeting.

Proposed Rule 7.1(a)(2) seeks to require timely disclosure of information necessary to determine diversity of citizenship for jurisdictional purposes. Often this is not complicated, and citizenship is settled when the case is initially filed in federal court or removed from state court. However, determining citizenship is complicated in a number of cases, especially considering the proliferation of LLCs. The Civil Rules Committee thought it was worth amending Rule 7.1 because the consequences of failing to spot a jurisdictional problem early can be severe. As the committee's report explains, the committee came up with two ways to address the issues raised by

the Standing Committee at the June meeting – one more detailed than the other. The Advisory Committee prefers the more detailed version but presented an alternative version for the Standing Committee's consideration.

Professor Cooper described the alternatives. As published, the rule would have required disclosure of citizenship at the time the action was filed in federal court, with the idea that this would apply equally to cases removed from state court because the time at which the case is removed is the time at which it is first filed in federal court. Public comments suggested that the rule would be clearer if it referred to the time at which an action is "filed in or removed." Proposed subparagraph (a)(2)(A) was revised and now reflects these suggestions. In committee discussion, it was noted that diversity may need to be evaluated at other times as well. Subparagraph (a)(2)(B) was added to account for this and required filing "at another time that may be relevant to determining the court's jurisdiction." Last June, some Standing Committee members were concerned that the language of this subparagraph was too open-ended. The proposal was remanded to the Advisory Committee for further consideration.

After extensive discussion, the Advisory Committee concluded again that it would be worthwhile to draw judges' and practitioners' attention to the complexity of the diversity rules and to the fact that diversity jurisdiction is not permanently fixed at the moment when the case first arrives in federal court. This led to the proposed revision of subparagraph (a)(2)(B)'s language presented at this meeting. The proposal would now require the filing of disclosures when "any subsequent event occurs that could affect the court's jurisdiction." The Advisory Committee recognized that this was still somewhat nonspecific, but felt that the alternative of trying to spell out all the events that could affect diversity jurisdiction as an action progresses was simply not feasible. The Advisory Committee also suggested that the Standing Committee could approve a version that simply omits subparagraphs (a)(2)(A) and (B) (and dropping the word "when" from the end of paragraph (a)(2)), but Professor Cooper explained that the Advisory Committee did not recommend this course of action.

Judge Bates wondered whether there was still ambiguity in the word "when" in paragraph (a)(2). He was concerned that someone could be confused as to whether this refers to the time for filing or the time the citizenship is attributed. Professor Cooper said that, in the Civil Rules, the word "when" is often used to mean "at the time." He said that it was possible to add a few more words if it would help to clarify, but the Advisory Committee believed it was not necessary and was better to avoid unnecessary verbiage. Judge Bates noted that the second alternative proposed would avoid the problem by dropping subparagraphs (A) and (B).

A judge member offered a number of suggested alterations to the text of the proposed amendment. First, this member noted that no matter whether "when" or "at the time" was used, it was unlikely that practitioners would assume that the filing had to be made immediately. It might be helpful to provide a time limit to ensure prompt filing. This particular suggestion was later withdrawn. The member also asked whether the word "or" might be preferable to "and" at the end of subparagraph (A). Professor Cooper explained that "and" was used because the filing under subparagraph (A) would have to be made in every case and would often be sufficient to resolve questions. If something happens after that, having fulfilled the subparagraph (A) requirement in the past does not make the subparagraph (B) filing unnecessary. The member then suggested

moving the word "when" from before the colon to, instead, the start of both of subparagraphs (A) and (B). This same member suggested that the reference to a party that "seeks to intervene" in paragraph (a)(1) ought to be reflected in paragraph (a)(2) which currently refers only to an "intervenor." Professor Cooper did not recall this issue having been raised before the Advisory Committee. For paragraph (2), though, Professor Cooper thought it might make sense to wait for intervention to be granted under some circumstances. Judge Bates noted that, if implemented in paragraph (a)(2), this change should also be made in subdivision (b). The committee member also suggested subparagraph (2)(B)'s reference to "any subsequent event . . . that could affect the court's jurisdiction," might be too broad. If, for example, a case arguably became moot, this would be an event that could affect the court's jurisdiction. But this is not a circumstance where the re-filing of disclosures would be necessary or desirable. Professor Cooper agreed that an amendment to narrow the filing requirement could be added.

Professor Kimble said that although moving the word "when" to both (A) and (B) would not change the meaning, the current draft was consistent with what the style consultants would typically recommend. He said that the style consultants would typically change "at that time" to "when."

Professor Hartnett asked if it would be helpful to break paragraph (a)(2) into two sentences. (". . . a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must . . . .") Professor Cooper thought this was a good idea. Judge Dow wondered whether "intervenor or proposed intervenor" would be an appropriate way to refer to the party seeking to intervene, and he endorsed the suggestion that (a)(2) be split into two sentences.

Another attorney member asked why paragraph (a)(1) referred to "*A* nongovernmental corporate party" but to "*any* nongovernmental corporation that seeks to intervene," rather than using "any" in both places. Professor Cooper thought it should be changed to whichever conforms to the Appellate and Bankruptcy Rules, and Judge Bates agreed. Professor Garner suggested that the style consultants would normally change "any" to "a" and that if other rules were phrased differently, those rules were inconsistent with the style guidelines.

Judge Bates reviewed and summarized the changes under consideration. A judge member pointed out that revisions to the committee note might also be necessary. Judge Bates determined that it was better to circulate the proposed amendment incorporating the changes made during the meeting via email, with an opportunity for discussion, followed by a vote by email. This was done later in the week. There was no call for discussion and, upon a motion that was seconded, the Standing Committee voted unanimously to **recommend for approval the proposed amendment to Rule 7.1.** The agenda book has been updated to reflect the final version of the proposed amendment that the committee approved.

Proposed Amendment to Rule 15(a)(1). Judge Dow presented a proposed amendment to Rule 15(a)(1), with a request that it be approved for publication for public comment. The proposed amendment is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than." **The Committee approved for publication the proposed amendment to Rule 15(a)(1).**

Proposed Amendment to Rule 72(b)(1). Judge Dow next presented a proposed amendment to Rule 72(b)(1), with a request that it be published for public comment. The rule currently directs that the clerk "must promptly mail a copy" of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means.

The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be "immediately served" on the parties as provided in Rule 5(b). In determining how to amend the rule to bring it in line with current practice, the Advisory Committee referred to Rule 77(d)(1) which was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment "as provided in Rule 5(b)." In addition, Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: "The clerk must immediately serve copies on all parties." Criminal Rule 49, like Civil Rule 5, contemplates service by electronic means. Professor Kimble asked why the word "promptly" had been changed to "immediately." Professor Cooper said this change was made for conformity with Criminal Rule 59(b)(1). Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 72(b)(1).**

Information Items

Subcommittee on Multidistrict Litigation. Judge Dow provided the report of the Multidistrict Litigation (MDL) Subcommittee. The first topic, formerly called "early vetting" is now called "initial census." In three of the largest MDLs going on right now, a form of initial census has occurred over the past year. Judge Dow had spoken with the judges overseeing two of these three cases. Rather than have lengthy fact sheets, the judges in these cases have relied on the basic information on the first few pages of the fact sheets. The judges in these cases have used this basic information to organize the plaintiffs' steering committee, to organize discovery, and to dismiss certain plaintiffs. The subcommittee has been very happy with how this has been developing in the big MDLs. It remains on the study agenda because a rule may be helpful, but it is also possible that these practices may just be circulated as best practices and could belong in the *Manual on Complex Litigation* or spread as a model by discussion at conferences. A rule may not be necessary.

An attorney member wanted to share their view. In this member's experience, courts and the plaintiffs' bar think there is little need for change and the defense bar does think there is a need

for change. This makes rulemaking difficult. On paper, the rules seem to suggest that defendants could have a number of cases that they might want to join together into an MDL. In practice, though, the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining – and in fact the plaintiffs' bar wants more plaintiffs. Additionally, MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle. This member understood that the Advisory Committee was not inclined toward allowing interlocutory appeals, but thought that it was worth looking at the initial census option as a way of avoiding the multiplicity problem.

Another attorney member thought there might be an opportunity to craft a flexible rule that would allow the courts to craft an initial census tailored to the particular case. Judge Dow agreed that this was what the Advisory Committee had in mind – something prompting the lawyers and the judge to consider an initial census in every case.

Judge Dow next explained that the subcommittee had also been very focused on interlocutory appeals. The subcommittee had held a conference of judges and lawyers working on MDLs, including a particularly good representation of non–mass tort MDLs. The conference had had a large influence on the subcommittee's thinking and in the recommendation that an interlocutory appeal rule should not be pursued at this time. Some feel that the current interlocutory appeal options (and mandamus) are sufficient. Other interested persons think that even if there are some gaps, there is no need for new rules or rules amendments because the current rules are good enough and any delays caused by interlocutory appeals would not be worth it. As an example of one problem that could arise if interlocutory appeals were permitted, Judge Dow explained that state courts might not be willing to wait around while a federal Court of Appeals takes up a case. At the end of the day, the members of the subcommittee all thought that an interlocutory appeal rule was not worth pursuing at this time. Professor Marcus added that there had also been definitional issues concerning what kinds of cases to which such a rule would apply.

Finally, Judge Dow explained that equity and fairness and the role of the court in the endgame of settlements of large MDLs was the area that the subcommittee would likely be focused on in the near term. There are obvious similarities between MDLs and class actions, and for class actions the rules require that courts approve settlements. This is not the case for MDLs unless they are resolved through a class action mechanism. Questions can arise about whether all parties are treated the same and about what the court's role should be. Professor Cooper drafted a memo on these issues. At the last subcommittee meeting it was resolved that a conference convening stakeholders would be useful to help determine whether action should be taken on this issue.

An attorney member thought that it might be worth considering whether the attorneys with the most clients or client with the largest interest ought to be lead counsel, or at least whether this ought to be a factor in determining lead counsel. One criticism of MDLs is that they are lawyer-driven litigation and hinging lead counsel assignments on characteristics of the clients might ameliorate this somewhat (as opposed to giving prominence to the lawyer who files first or who is best-known in the district).

Another judge member suggested that in preparation for the conference, it might be worth asking the Federal Judicial Center to survey clients who received settlements in MDLs. An

attorney member said he feared the proposal of rewarding the lawyers who aggregated the most clients. This would incentivize lawyers to form coalitions and would undermine the courts' control overall. In securities litigation, there are policy reasons to put institutional shareholders in the lead, but those reasons don't necessarily carry over to MDLs across all kinds of subject areas. This member agreed it was worth investigating what happens with money that ends up in common benefit funds. Lawyers applying to be lead counsel could be questioned regarding what has happened to funds they have won or overseen in the past. The member cautioned these issues might not be appropriately resolved through a civil rule.

Items Carried Forward or Removed from the Advisory Committee's Agenda. Judge Dow briefly summarized items on the Advisory Committee's agenda. He explained that the Civil Rules Committee is continuing to consider an amendment to Rule 12(a) that would clarify the time to file where a statute sets time to serve responsive pleadings but that the Advisory Committee had not yet come to an agreement on that issue. The Advisory Committee was also interested in investigating a potential ambiguity lurking in Rule 4(c)(3)'s provision for service by a U.S. Marshal in *in forma pauperis* cases. This investigation had not proceeded recently because the Marshals Service had been preoccupied with pandemic-related security concerns and the committee did not want to bother them at this time. There had been suggestions that the Advisory Committee look into amending Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege. The Civil Rules Committee plans to create a new Discovery Subcommittee to look into these issues. An Advisory Committee member submitted a suggestion to amend Rule 9(b), on pleading special matters – this would be discussed at the Advisory Committee's next meeting. Finally, Judge Dow explained that the Advisory Committee had removed from its agenda suggestions to amend Rule 17(d) (regarding the naming of defendants in suits against officers in their official capacity) and Rule 45 (concerning nationwide subpoena service).

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge presented the report of the Criminal Rules Committee, which met via videoconference on November 2, 2020. The Advisory Committee presented two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 395.

Information Items

Rule 6 Subcommittee. Judge Kethledge reported that the Advisory Committee was continuing to consider suggestions to amend the grand jury secrecy provisions in Rule 6. Since the last meeting, the Advisory Committee has received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances. The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the

authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers). The Advisory Committee anticipates having more to report at the June 2021 meeting.

Items Removed from the Advisory Committee's Agenda. A number of items had been removed from the Advisory Committee's agenda. Discussion of these items is in the committee's report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on November 13, 2020. The Advisory Committee presented three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 441.

Information Items

Amendment to Rule 702 (Testimony by Expert Witnesses). Judge Schiltz explained that the committee was looking at two issues relating to testimony by expert witnesses. The first was what standard a judge should apply when considering whether to allow expert testimony. It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. The requirements are that the testimony will assist the trier of fact, that it is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reasonably applied those principles and methods to the facts at hand. It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a reasonable jury *could* find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met. This would not be a change in the law, but rather would consolidate information available in two different rules and two Supreme Court opinions.

The second expert testimony issue being considered by the Evidence Rules Committee is the problem of overstatement. Judge Schiltz explained that this refers to the problem of experts overstating the strength of the conclusions that can reasonably be drawn by the application of their methods to the facts. For example, an expert will testify that a fingerprint "was the defendant's" or that a bullet did come from a gun, with no qualification or equivocation. Experts will make these claims with certainty when the science does not support such strong conclusions. The defense bar has been asking for an amendment that would not permit such overstatements. The Evidence Rules Committee was divided on this suggestion from the defense bar. Only the DOJ, however, was opposed to a more modest proposed amendment that would draw attention to the need for every expert conclusion to meet the standard set under Rule 702. Judge Schiltz anticipates that the Advisory Committee will present something related to Rule 702 at the Standing Committee's June 2021 meeting, once he has received input from new members who recently joined the Advisory Committee.

Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). The "rule of completeness" requires that if at trial one party introduces part of a writing or recorded statement, the opposing party can introduce other parts of that statement if in fairness those other parts should also be considered. Judge Schiltz explained that there are a couple of problems with this rule in practice. One is that the circuits are split on whether the "completing portion" can be excluded as hearsay. This can arise, for example, when a prosecutor misleadingly introduces only part of a statement and the defendant wants the jury to hear the completing portion. Some courts will exclude the completing portion under the hearsay rule out of a concern that the jury will overweight it. Other courts will allow the completing portion in but will instruct the jury not to consider it for the truth of the matter but only as providing context. Other courts just let it all in with no limit. The Evidence Rules Committee plans to draft an amendment to Rule 106 that would say that a judge cannot exclude the completing portion for hearsay, but that a judge may issue a limiting instruction.

Another problem with Rule 106 is that it only applies to written or recorded statements. If the statement was made orally, the common law governs and there is a lot of inconsistency in how it is applied. This is one of few areas of evidence law where the Evidence Rules are not considered to preempt the field. It is an odd area for that to be the case because generally this issue arises at trial and must be addressed on the fly, with minimal time for a judge to research the common law. The Evidence Rules Committee plans to draft an amendment rule that would apply to oral statements and supersede the common law.

The Evidence Rules Committee agreed to proceed with both changes to Rule 106. The Department of Justice opposed both changes.

Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz explained that Rule 615 is, on its face, quite simple. It says that a judge must exclude witnesses from the courtroom during trial if the opposing side asks the judge to do so. These requests are common. There is confusion, though, over whether the ruling granting such a request only keeps the witness out of the courtroom or whether it also implies that the witness may not learn about what has been said in court – through conversations, reading a transcript, reading a newspaper, etc. Some circuits have said that the order automatically prevents the excluded witness from learning through these other avenues, while other circuits view the order as only effecting the physical exclusion. Because of this confusion, it can be very easy for witnesses to accidentally violate the order and find themselves in contempt of court. The Evidence Rules Committee unanimously agreed to draft an amendment retaining the part of Rule 615 that requires the court to exclude witnesses if any party asks but making clear that courts can also go further to prevent witnesses from learning about in court testimony. This should clarify that any additional restrictions must be made explicit.

A judge member noted that it was worth thinking about the implications of Rule 615 during trials held over videoconference or otherwise remotely. Additionally, this member noted that in bench trials direct testimony can be taken by affidavit and that it might be worth referring to that sort of testimony in the rule as well. Professor Capra thought the rule would help with these situations because it draws attention to methods of hearing about other witnesses' testimony beyond simply sitting in the courtroom while the witness testifies.

OTHER COMMITTEE BUSINESS

The meeting concluded with a series of reports on other committee business. First Judge Bates addressed the 2020 *Strategic Plan for the Federal Judiciary*. The agenda book contains material concerning the strategic plan, beginning at page 471. Judge Bates explained that the Judicial Conference committees – including this one – were asked to provide input on what strategies and goals reflected in the *Plan* should receive priority in the next two years. Those recommendations would be reviewed at the upcoming meeting of the Executive Committee of the Judicial Conference. Committee members were instructed to send any suggestions to Judge Bates and to Shelly Cox of the Rules Committee Staff.

Julie Wilson delivered a report on the Judiciary's Response to the COVID-19 pandemic. Judge Campbell had discussed this at the Standing Committee's June meeting. The Administrative Office's COVID-19 Task Force was established early last year and continues to meet bi-weekly. The Task Force remains focused on safely expanding face-to-face operations at the AO and in the courts. Notably, the Task Force has formed a Virtual Judiciary Operations Subgroup, which will recommend technical standards along with policies and procedures regarding the operation of remote communications, including with defendants in detention. Another big part of their work will be to standardize virtual operations throughout the judiciary. In the Administrative Office, guidelines, data, and information are being posted regularly on the JNet website, including information about the resumption of jury proceedings. These materials are available to judges and their staff. The only Judicial Conference activity relating to COVID-19 that has occurred since the last meeting was the extension of the CJRA reporting period from September 30 to November 30.

Ms. Wilson also delivered a legislative report. She explained that the Administrative Office had requested supplemental appropriations from Congress to address various needs within the judiciary due to the pandemic. These appropriations were not made. The Administrative Office also submitted 17 legislative proposals. These were not taken up by the recently concluded 116th Congress. One notable law enacted last year was the Due Process Protections Act. This was introduced in the Senate in May 2019 and had been tracked by the Rules Committee Staff. It was passed quickly and unanimously in 2020. The Act statutorily amended Criminal Rule 5 (Initial Appearance) to require that judges issue an oral and written order confirming prosecutors' disclosure obligations under *Brady* and its progeny. The Act required the creation of model orders for each district. Judge Campbell and Judge Kethledge had sent a letter to the leadership of the House Judiciary Committee expressing the Rules Committees' preference for amending the rules through the Rules Enabling Act process, but the Act passed regardless. The 117th Congress was sworn in on January 3, 2021, just a few days before the Committee met. Some legislation that has been of interest to the Rules Committees in the past had already been reintroduced. Representative Andy Biggs reintroduced the Protect the Gig Economy Act. It would expand Civil Rule 23 to require that the prerequisites for a class action be amended to include a requirement that the claim does not concern misclassification of workers as independent contractors as opposed to employees. Representative Biggs also introduced the Injunctive Authority Clarification Act. This would prohibit the issuance of nationwide injunctions. Other familiar pieces of legislation will likely also be introduced in the coming weeks. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 22, 2021. The hope is that the meeting will be in person in Washington, D.C. if doing so is safe and feasible at that time.

Agenda E-19 (Summary)
Rules
March 2021

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Approve the proposed amendment to Civil Rule 7.1 and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 9-10

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

- Impact of the COVID-19 Pandemic on Jury Operations..... pp. 2-3
- Emergency Rules..... pp. 3-6
- Federal Rules of Appellate Procedure .....p. 6
- Federal Rules of Bankruptcy Procedure..... pp. 6-9
- Federal Rules of Civil Procedure..... pp. 10-12
- Federal Rules of Criminal Procedure..... pp. 13-14
- Federal Rules of Evidence .....p. 14
- Other Items .....p. 15

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

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

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

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

IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

EMERGENCY RULES

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:
(1) identifying rules that might need to be amended to account for emergency situations; and
(2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts' ability to function under the existing rules.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably

practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term "rules emergency" is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee's style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee's discussion addressed the advisory committees' request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that "no feasible alternative measures would eliminate the impairment within a reasonable time." As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

Official Form 417A (Notice of Appeal and Statement of Election)

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from pacer.gov to pacer.uscourts.gov. Because the PACER address is incorporated in several places on the eleven versions of the "Meeting of Creditors" forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff's concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

Information Item

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently

provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

The difficulty lies in the use of the word "within." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period *does not commence until* the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word "within" with "no later than."

Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

Information Item

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee's ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a "census" approach that employs a simplified version of a plaintiff fact sheet;

2. Interlocutory appellate review of district court orders in MDL proceedings; and

3. Settlement review, attorney's fees, and common benefit funds.

At the Advisory Committee's meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)'s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee's recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Item

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee's draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

Judiciary, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the lower court's decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

FEDERAL RULES OF EVIDENCE

Information Items

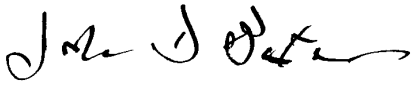
The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements) to exempt the "completing" portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit "overstatement" by forensic experts.

OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

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

Respectfully submitted,



John D. Bates, Chair

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

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

Effective December 1, 2020

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

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

Revised April 23, 2021

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

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

Revised April 23, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

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

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/2021 • Introduced in Senate; referred to Judiciary Committee

To prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes.	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV (new rules) CR 16	**Notes:** **Bill text is not yet available; however, this legislation was also introduced in the last Congress.** The stated purpose of that bill was, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings. . . ." The bill introduced in the last Congress would have: 1. Added two new Evidence Rules a. Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software. b. Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence; and 2. Added a new paragraph (H) to Criminal Rule 16(a)(1): Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology

			the software, necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include— (i) the name of the company that developed the software; (ii) the name of the lab where test was run; (iii) the version of the software that was used; (iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs; (v) documentation of procedures followed based on procedures outlined in internal validation; (vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and (vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards.	

TAB 2

TAB 2A

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

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

RE: **Rule 16 – Proposed Amendment Governing Expert Disclosures**

DATE: **April 21, 2021**

The Advisory Committee's proposed amendment to Rule 16 was published for public comment in August 2020, and the Rule 16 Subcommittee has considered the comments. It recommends the amendment be approved for transmission to the Standing Committee with the text as published and with one clarifying change to the committee note.

This memorandum provides a brief description of the origins of the proposal before turning to the subcommittee's consideration of the comments and its recommendations on each of the issues.

I. The Origins of the Proposal

The Advisory Committee received three suggestions that it consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* Suggestions 17-CR-B (Judge Jed Rakoff); 19-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). To aid in its consideration of these proposals, the full Advisory Committee received a briefing from the Department of Justice concerning its development and implementation of new policies governing disclosure of forensic evidence, and the subcommittee held a miniconference bringing together experienced prosecutors and defense lawyers.

The Advisory Committee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Because the Advisory Committee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Advisory Committee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended paragraphs (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) generally mirror one another.

II. The Public Comments and the Subcommittee's Recommendations

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, four suggested changes. As described more fully below, after considering these suggestions, the subcommittee determined that no changes should be made in the text. It added one sentence to the committee note for clarification. With that one change, the subcommittee recommends that the proposed amendment be transmitted to the Standing Committee.

In addition to the discussion below, a brief summary of each comment is included at Tab 2B.

A. Setting a Default Time for Disclosures

The Advisory Committee's approach to the time for disclosures drew the most attention and criticism. Rather than setting a default date for disclosures, items (a)(1)(G)(ii) and (b)(1)(C)(ii) specify that the disclosure must be made "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Although the California Lawyers Association supported this approach, the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the New York City Bar Association (NYC Bar) all urged the Advisory Committee to include a default deadline, though they did not agree on what that deadline should be.

The NYC Bar did not specify a preferred deadline. Noting the variety of deadlines set in other jurisdictions (ranging from 60 days to 21 days before trial), it urged that setting some default date would provide helpful certainty to the parties while allowing the courts discretion to increase or decrease the time period on particular cases. It added that some members took the view that default dates should not be set "too far in advance of trial," so that that the government would not have to undertake such discovery in smaller cases that were unlikely to go to trial.

The FMJA commented that busy trial judges contending with large caseloads and the demands of the Speedy Trial Act would "appreciate the guidance" of a default deadline, and they suggested a default of 21 days before trial, as well as a requirement that rebuttal experts be disclosed 7 days before trial. Finally, the FMJA commented that some (though not all) of its members expressed concern about allowing deadlines to be set by local rules, which could be a trap for defense lawyers unfamiliar with a court's local rules.

NACDL agreed that the rule should set a default date for expert disclosures, but it supported earlier default deadlines: no later than 30 days before trial for the initial disclosures, and 14 days before trial for reciprocal disclosures. It argued that these earlier deadlines are needed "to minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare." Further, NACDL argued that the rule should require the court to set a case-specific deadline in writing, in order to minimize any risk of confusion or misunderstanding.

During the drafting process the Advisory Committee carefully considered whether to include a default deadline, and it declined to do so. The proposed amendment seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule *must* set a specific time for each party to make its disclosure of expert testimony to the other party. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the proposed amendment does not itself set a specific time for the disclosures by the

government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Under Rule 16.1, the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures in individual cases should consider the parties' recommendations.

Many members initially favored a specific deadline as the best way to ensure that the parties have sufficient time to prepare for trial. However, after extensive consideration and discussion, the reporters and the subcommittee were unable to come up with specific times that they thought would fit every case and comply with the Speedy Trial Act. Given the enormous variation in cases and caseloads, the subcommittee (and later the full Advisory Committee) concluded unanimously that it was preferable to adopt a flexible and functional standard focused on the ultimate goal of ensuring that the parties have adequate time to prepare, rather than a default standard. As noted in the minutes from the fall 2020 meeting, some defense members who had initially pressed for default deadlines came to the view that the defense might be benefitted by this flexible approach. Some members also suggested that the functional approach would be more efficient since it would avoid the need for motions to adjust the default deadlines in individual cases. Finally, there was significant support for recognizing in the text that individual districts might adopt local rules setting default deadlines.

After considering the NYC Bar, FMJA, and NACDL comments, the subcommittee rejected the suggestion that it set a default deadline and reaffirmed its support for the amendment's flexible and functional approach. Responding to the concern expressed by some FMJA members and NACDL that local rules setting disclosure deadlines would create unnecessary confusion or be an unfair trap for unwary counsel, members concluded it was reasonable to expect counsel to consult the local rules. Indeed, the amendment itself puts readers on notice that they should check the local rules. Proposed (a)(1)(G)(ii) and (b)(1)(C)(ii) state "The court, by order *or local rule*, must set a time for the government to make the disclosure." (emphasis added).

B. Deleting the Requirement that the Parties Disclose a "Complete" Statement of the Expert's Opinions

The parallel requirements of (a)(1)(G)(iii) and (b)(1)(C)(iii) require the parties to provide "a complete statement of all opinions" the party will elicit from any expert in its case in chief. In order to "underscore" the difference between this requirement and that imposed by the Civil Rule 26, the California Lawyers Association urged the Advisory Committee to remove the word "complete." As the Association observed, the committee note states that "the amendment is not intended to replicate the practice in civil cases, which of course differs in many ways from criminal cases."

The Advisory Committee had an extensive discussion of the requirement of a "complete statement" and the comparison to the requirements under Civil Rule 26 at its meeting in September 2019. After a discussion of the possibility that district judges would mistakenly assume that the

amended rule in all respects adopts Civil Rule 26, the Advisory Committee decided to retain the phrase "complete statement" as well as the current statement in the committee note.

The proposed amendment is intended to respond to the problem of insufficient pretrial disclosure of expert witnesses and to move criminal discovery closer to civil discovery, though without replicating civil discovery in all respects. As published, the amended rule reflects four critical decisions requiring compromises to reach agreement on a proposal that received unanimous support. First, the amendment requires a "complete statement" of the expert's opinions in order to clearly signal the need for more complete disclosures. The Advisory Committee decided not to require a "report," which some members felt would suggest an unduly onerous requirement. Instead, the amendment defines the required disclosures by the specific requirements set forth in (a)(1)(G)(iii) and (b)(1)(C)(iii). And, finally, the committee note states that the amendment does not "replicate the practice in civil cases, which of course differs in many ways from criminal cases." Additional language intended to spell out some of the differences was deleted during the drafting process.

After discussing the California Lawyers Association's comment, the subcommittee rejected the suggestion that it delete the requirement for disclosure of a "complete" statement, which is critical to addressing the problem of insufficiently complete disclosures under the current rule.

C. Enlarging the Required Disclosures

NACDL urged that the Advisory Committee expand the required disclosures to include two additional elements:

- Transcripts in the party's possession of any testimony by the witness in the past four years; and
- Any information in the government's possession favorable to the defense on the subject of the expert's testimony or opinion or any information casting doubt on the opinion or conclusions.

Additionally, NACDL urged that the proposal be revised to require the same disclosures at other stages in the proceedings, including preliminary matters and sentencing.

The subcommittee rejected these suggestions for two main reasons. First, the inclusion of some or all of these proposed changes would require further study and republication to obtain public comments, slowing the process by at least one year. Some elements of the proposal would likely be controversial.[1] Second, expanding the scope of the amendment by including additional elements might imperil the consensus enjoyed by the current narrowly targeted proposal.

[1] Indeed, NACDL implicitly recognizes that its proposal would be in conflict with the Jencks Act, 18 U.S.C. § 3500 and Rule 26.2, and specifies that the proposed disclosure would be required notwithstanding Rule 26.2 and any contrary statute.

D. Additional Note Language

The subcommittee also discussed three other suggestions regarding the committee note.

1. The FMJA Proposal

The FMJA urged the addition of note language. It expressed concern that the specific limitations for government disclosures in (a)(1)(G)(iii) concerning publications within the past 10 years and testimony within the past 4 years "could be misconstrued as defining the scope of disclosures required by the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland,* 373 U.S. 83 (1962)."

The subcommittee concluded that these concerns did not warrant revisions to the committee note. Members viewed it as unlikely that readers would mistakenly believe that the amendment sought to govern the constitutional obligation imposed by *Brady v. Maryland*, or to define the scope of disclosures required by the Jencks Act, now supplemented by Rule 26.2. Indeed, Rule 26.2, which govern *midtrial* disclosures after a witness has testified, includes in paragraph (f) a detailed description of a statement *for purposes of that rule*.

2. The NACDL Proposal

On pages 2-3 of its comments, NACDL described a Tenth Circuit decision, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), ruling that a defendant's expert disclosure must, on its face, be sufficient to withstand *Daubert/Kumho Tire* challenge. NACDL proposed language stating that the amendment

> should not be read as requiring that the disclosure must be sufficient to allow the expert's option to pass must under [*Daubert* and/or *Kumho Tire*] or otherwise conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see, e.g.*, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert's opinion, so as to permit the party to file an appropriate motion, if it so chooses.

For a variety of reasons the subcommittee concluded it would not be desirable to include this language in the note. First, the Advisory Committee previously decided not to detail the differences between civil and criminal discovery in the committee note. Second, as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the amendment and accompanying note go into effect. Finally, the reporters expressed concern that the *Nacchio* case was not really on point, and they urged the subcommittee not to include this citation.

3. The Department of Justice

Mr. Wroblewski relayed a concern from the Drug Enforcement Administration (DEA) regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. DEA expressed concern that this language might be interpreted "to require the government to identify every publication, regardless of relevance, including

sensitive intelligence documents published within a law enforcement component, within DOJ or within the executive branch, including classified scientific papers provided to the White House or CIA could conceivably be included." In research to explore this concern, Mr. Wroblewski found little case law defining the term "publication" under the Civil or Criminal Rules. The few cases that did address the definition of "publication" focused on disclosure of the information to the public, and the common meaning of the term "publication" seems to exclude internal materials not available to the public.[2]

DEA's concerns arise from the common use of the term "publication" to refer to the circulation of internal documents within the executive branch. Although it seems unlikely that courts would adopt this interpretation in construing Rule 16, Mr. Wroblewski suggested the following language to reassure government entities that use the term "publication" to refer to internal circulation: "A 'publication' is a document released to the general public, and does not include internal [government] memoranda, briefings, or other material."

The subcommittee agreed to revise the committee note to add the proposed sentence to address this concern:

> To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications ~~(including a list of publications within the past 10 years),~~ and a list of other cases in which the witness has testified in the past 4 years. The rule provides that the disclosure regarding the witness's qualifications include a list of all publications the witness authored in the previous 10 years. The term "publications" does not include internal government documents.

E. Style Suggestion

The California Lawyers Association suggests that the internal citations in the rule be revised to include prefixes such as "subdivision." The subcommittee agreed this is a matter for the style consultants.

[2] *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "publication" as "the act of declaring or announcing to the public," and in the context of copyright law "offering or distributing copies of a work to the public").

TAB 2B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(G) Expert witnesses.

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the government intends to use at trial under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ during its case-in-chief ~~at trial~~, or during its rebuttal to counter testimony that the

[1] New material is underlined in red; matter to be omitted is lined through.

defendant has timely disclosed under (b)(1)(C). If the government requests discovery under ~~subdivision~~ (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ testimony that the government intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the government to make the disclosure. The time must be

sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure ~~summary provided under this subparagraph~~ must contain:

- a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for ~~those opinions~~ them; ~~and~~

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure in accordance with (c).

* * * * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(C) Expert witnesses.

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the defendant intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence~~ during the defendant's case-in-chief at trial, if~~—~~:

~~(i)~~ ● the defendant requests disclosure under ~~subdivision~~ (a)(1)(G) and the government complies; or

~~(ii)~~ ● the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. ~~This~~The ~~summary~~ disclosure must contain:

● a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness in the defendant's case-in-chief;

- the bases and reasons for them~~those opinions~~; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition~~[~~.~~]~~

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

* * * * *

Committee Note

The amendment addresses two shortcomings of the prior provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) generally mirror one another. The amendment to (b)(1)(C) includes the limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the disclosure obligation to testimony the defendant will use in the defendant's "case-in-chief." Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C), this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current practice in this respect is intended.

The amendment to (a)(1)(G) also clarifies that the government's disclosure obligation includes not only the testimony it intends to use in its case-in-chief, but also testimony it intends to use to rebut testimony timely disclosed by the defense under (b)(1)(C).

To ensure enforceable deadlines that the prior provisions lacked, items (a)(1)(G)(ii) and (b)(1)(C)(ii)

provide that the court, by order or local rule, must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party. Deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order.

Items (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leave to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, items (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications, and a list of other cases in which the witness has testified in the past 4 years. The rule provides that the disclosure regarding the witness's qualifications include a list of all publications the witness authored in the previous 10 years. The term "publications" does not include internal government documents. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Items (a)(1)(G)(iv) and (b)(1)(C)(iv) also recognize that, in some situations, information that a party must disclose about opinions and the bases and reasons for those opinions may have been provided previously in a report (including accompanying documents) of an examination or test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be repeated in the expert disclosure, if the expert disclosure clearly identifies the information and the prior report in which it was provided.

Items (a)(1)(G)(v) and (b)(1)(C)(v) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize two exceptions to this requirement. First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts. Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications,

publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

Items (a)(1)(G)(vi) and (b)(1)(C)(vi) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that, if there is any modification of a party's expert testimony or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that correction or modification.

SUMMARY OF PUBLIC COMMMENTS
Proposed Amendment to Rule 16

- **Jean Publiee (CR-2020-0004-003).** Urges that all rules should be made simpler and fully explained.

- **Yvette Chevalier (CR-2020-0004-005).** Comments that "specification of information sharing is great," and "[g]ood changes."

- **Federal Magistrate Judges Association (CR-2020-0004-007).** Supports the disclosure obligations and suggests three changes:
    - Set the default time for disclosure at 21 days before trial in the rule;
    - Do not permit courts to set the time for disclosure in local rules; and
    - Add note language stating that nothing in the rule is intended to limit the government's obligations under 18 U.S.C. § 3500 or *Brady v. Maryland*, 373 U.S. 83 (1963).

- **New York City Bar Association (CR-2020-0004-008).** Calls proposal "long overdue" and "a welcome development," endorses reciprocity, but supports setting a default deadline for disclosure subject to modification by the court for good cause, noting that the time should not be too far in advance of trial.

- **National Association of Criminal Defense Lawyers (CR-2020-0004-009).** Generally supports the amendment but proposes several changes:
    - Requiring the court—in a written order—to set a case specific deadline for disclosure no later than 30 days before the date set for trial;
    - Adding language to the note stating that it should not be read as requiring the disclosure itself to be sufficient to withstand a *Daubert/Kumho* challenge;
    - Requiring the parties to provide a transcript of the witness's prior testimony in the past 4 years, notwithstanding Rule 26.2 and any contrary statute;
    - Adding a requirement that the government disclose any information in its possession favorable to the defense on the subject of the expert witness's testimony or opinion or any information casting doubt on the opinions or conclusions; and
    - Making the disclosures applicable to other stages in the proceedings, including preliminary matters and sentencing.

- **California Lawyers Association (CR-2020-0004-0010).** Supports the proposal for reciprocal disclosure sufficiently before trial, but proposes that the amendment require only a "statement"—not a "complete statement"—to avoid ambiguity and underscore the point that the amendment does not replicate the requirements of Civil Rule 26. Also suggests changing the form of internal cross references.

TAB 3

TAB 3A

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

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

RE: **Proposed New Rule 62 (Criminal Rules Emergency) (for Publication)**

DATE: **April 21, 2021**

This memorandum presents for the Advisory Committee's consideration the proposed draft of new Rule 62 and accompanying committee note that the Emergency Rule Subcommittee recommends be transmitted to the Standing Committee for publication and comment. The subcommittee also recommends that no emergency rule be pursued for either the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings.

The Advisory Committee reviewed at its fall meeting an earlier draft of proposed Rule 62 and committee note. That extended discussion is detailed in the draft minutes of the fall meeting included in this agenda book at Tab 1B. The Standing Committee also reviewed a draft of the proposed rule in January. The subcommittee met several times to discuss changes prompted by this feedback, as well as changes negotiated with the style consultants, the reporters from the Appellate, Bankruptcy, and Civil Rules Committees, and Professor Capra.

This memorandum begins with a description of the changes in the text of proposed Rule 62, and then describes changes to the committee note.

A. Substantive Changes to the Text of Proposed Rule 62

1. Changes to Subdivisions (a) and (b) – the Uniform Provisions.

The reporters of the various advisory committees have, with Professor Capra's guidance, carefully coordinated the exact language in subdivisions (a) and (b) to be consistent in the proposed rules from each committee. Subdivisions (a) and (b) have been restyled, and unnecessary language omitted.[1] Some of the provisions in (b) were reordered or combined.

[1] Language omitted included the phrase "to modify the rules" from (b)(1)(B). This did not accurately describe our rule, which authorizes *departures* from the rules, not modifications to them. The meaning is clear without it. Also deleted was the phrase "if it determines that a rules emergency no longer affects those courts" from (b)(2) because attempting to specify in the rule the conditions under which the Judicial Conference could terminate a declaration was not needed. The language "if emergency conditions change or persist" was removed from (b)(3)—it did not limit or expand the requirements already in (a) or (b) so stating "under this rule" was sufficient.

There is one substantive change of note. At the Standing Committee meeting, a member asked that our committee consider revising (a)(2) to require whether any feasible alternative could "sufficiently address" rather than "eliminate" the impairment creating an emergency. The subcommittee agreed. Because the Advisory Committee seeks to prevent unnecessary declarations of rules emergencies, it would be preferable to preclude declarations whenever other available measures sufficiently address the impairments arising from the emergency circumstances, even if they do not eliminate them entirely.

2. Changes to Subdivision (c) – the "Soft Landing" Provision

To help clarify that the term "these rules" in this provision refers to all the Criminal Rules other than Rule 62, the subcommittee approved two changes in the rule text. First, the provision was moved up from its former location at the end of the rule, to become subdivision (c), nearer to the other reference to "these rules" in subdivision (a). The subcommittee hoped this positioning would make it less likely that a reader would interpret "these rules" to refer to the provisions in (d) and (e). Second, on line 26, the subcommittee replaced the words "complying with these rules" with "resuming compliance with these rules."

A third change was made to this provision on lines 28-29: adding "with the defendant's consent" as a condition of using the procedures authorized in (d) and (e) to complete a proceeding, after a declaration has ended. This second sentence in subdivision (c) provides an exception to the general rule stated in the first sentence that emergency authority under (d) and (e) ends when a declaration terminates. At the fall meeting, a member raised a concern about finishing a proceeding with emergency procedures, without the defendant's consent, after a declaration has ended. The subcommittee agreed that if resuming full compliance with the rules is not yet feasible for a particular proceeding despite the termination of a declaration, the court should not be permitted to continue with emergency procedures without the defendant's consent. The subcommittee reasoned that this situation would seldom arise, and that the defendant's interests in the protections provided by the rules are more important than the costs of any delay needed to resume compliance with the rules. It concluded that addressing the defendant's consent in the committee note would not be sufficient.

3. Changes to Subdivision (d) [Formerly Subdivision (c)][2]

Paragraph (d)(1). The subcommittee made two substantive changes to the provision on public access, both following concerns raised at the fall meeting. First, it changed the condition triggering a duty to provide alternative access from *preclusion* of in person attendance by the public to *substantial impairment* of such attendance. *See* line 33, replacing "preclude" with "substantially impair." This change, suggested by a member of the Standing Committee, will promote the interests protected by the commitment to open criminal proceedings in the rules and the Constitution. Because the change would not

[2] After a long discussion, the Advisory Committee voted at the fall meeting to delete the provision on the use of summons instead of warrants. See the fall meeting draft minutes.

mandate any particular alternative means of providing public access, and would require alternative access only when "reasonable," the change from "preclude" to "substantially limits" would not unduly restrict trial court discretion. Even when emergency conditions present a compelling reason to limit attendance and the public is not entirely "precluded" from attending the proceeding, the failure to provide reasonably available alternative access to criminal proceedings for members of the public could risk violating the Sixth and First Amendment rights to public access. Additionally, the phrase "substantially impair" also already appears in subdivision (a).

The second substantive change to this provision was to add "contemporaneous if feasible" at the end of the sentence, on line 35. At the fall meeting, the Advisory Committee asked the subcommittee to revisit the absence in the text of some presumption that alternative access be contemporaneous. The subcommittee agreed that adding the words "if feasible" addressed the concerns of those who had earlier expressed reservations about adding a requirement of contemporaneous access to the text.

Paragraph (d)(2). The subcommittee replaced "these rules" with "any rule, including this rule," on lines 36-37. This change makes it clear that (d)(2) is not limited to rules other than Rule 62, and also applies to the requirement of a written request under (e)(3)(B).

Provision on Bench Trials. The Advisory Committee deliberated at length over the proposed provision on bench trials at the fall meeting, and voted to retain the provision. See the draft minutes of the fall meeting. The subcommittee now recommends deleting this provision based on the feedback received at the January meeting of the Standing Committee. Professor Coquillette, who served for decades as the reporter for the Standing Committee, expressed strong reservations about including the bench trial provision. He expressed concern that this provision could be a lightning rod for opposition to Rule 62, and might even result in the Supreme Court disapproving the rule as a whole. Some Standing Committee members also expressed concern about including the bench trial provision, particularly since it would seldom, if ever, be applied. Additionally, some members expressed their belief that judges would be able to evaluate and handle any constitutional issues that may arise without the provision. As a result, Judge Kethledge recommended that the subcommittee delete the provision, and the members agreed.

4. Changes to Subdivision (e) (Formerly Subdivision (d))

Paragraph (e)(2). The parenthetical recognizing who would fill in for an unavailable chief judge was removed and a reference to the succession statute added to the committee note. "[S]ubstantially impair" was selected rather than "preclude" on line 70.

Paragraph (e)(3). There are multiple changes to this provision, none of them particularly controversial. On line 82, "and (B)" was added to ensure both (2)(A) and (B) had been met for videoconferencing a plea or sentence. The parenthetical on chief judge succession was deleted as in (e)(2). On line 84 the subcommittee opted for "substantially

impair" instead of "preclude." And on line 86 "within a reasonable time" added to be consistent with standard in (2)(A).

Paragraph (e)(4). This provision was revised to clear up many questions readers had about its interaction with the other provisions in subdivision (e). For example, the subcommittee added a new subparagraph (A) specifying that the requirements for videoconference for the proceeding must have been met, and added "if held by teleconference" to the end of (B)(ii) to respond to the objection that this provision simply duplicates the requirement in (e)(2)(B). The one substantive change was on lines 99-100, where the subcommittee replaced "cannot be provided for the proceeding within a reasonable time" with "for the proceeding is not reasonably available." This change, suggested by a member of the Standing Committee, provides more flexibility and has proven workable in some districts during the pandemic. Further explanation of "reasonably available" has been added to the committee note. To emphasize that the "not reasonably available" requirement is (like the other parts of this section) proceeding-specific, the subcommittee added on lines 99-100 "for the proceeding" in (B)(i). That should prevent a court from concluding that telephone hearings might be authorized if videoconferencing, in general, is not reasonably available, even if it happens to be available for that particular proceeding.

B. Changes to the Draft Committee Note

Revisions to the draft committee note include explanations of each of the substantive changes above. The note also contains several new points, listed below.

Lines 4-6. Added language addressing potential confusion about the term "these rules":

> Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

Line 19. Deleted a sentence previously included at the end of this paragraph listing a number of other entities that could provide helpful information. The subcommittee decided that rather than attempting to include a more complete list of entities the Judicial Conference might consult (e.g., U.S. Marshals Service, the Bureau of Prisons, state judges, etc.), avoiding such a list entirely was the more prudent course.

Line 92. Added ", including victims," after "the public" to specifically acknowledge the importance of providing victim access to public proceedings.

Lines 99-102. Added options for providing contemporaneous alternative access when emergency conditions have substantially impaired in-person attendance by the public:

> For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided. In a proceeding conducted by videoconference, a court could provide access to the audio transmission if access to the video transmission is not feasible.

Lines 120-23. Added language about the importance of a colloquy with defendant on consent:

> It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

Lines 141-43: Added, at the request of the Department of Justice, a clarifying sentence regarding (d)(4):

> Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence.

Line 237-41. The first new sentence explains that the consent provision in (d)(2) applies to this provision as well. The second sentence discusses the consent colloquy, which the subcommittee believed was an important addition:

> This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Line 261-67. This new language illustrates common scenarios when videoconferencing would not be reasonably available:

> Because it focuses on what is "reasonably available," this requirement is flexible. It precludes the use of teleconferencing if videoconferencing—though generally limited—is available for the particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, teleconferencing is permitted if the video connection fails during a proceeding and audio is the only option for completing that proceeding expeditiously, or if only teleconferencing is feasible because of security concerns at the facility where the defendant is housed.

C. 2254 and 2255 Rules

After consulting experienced petitioners' counsel, states' attorneys, and the Department of Justice, and reviewing research by the reporters and the Rules Law Clerk, the subcommittee determined that an emergency rule was not needed for the rules used in Section 2254 and Section 2255 proceedings. No special difficulties complying with these rules during the pandemic were discovered. The only set deadline in the 2254 or 2255 Rules is the 14-day period for objecting to a magistrate judge's recommendations in Rule 8. This deadline is based on 28 U.S.C. 636(b)(1), which may be—and has been—extended if needed under emergency conditions. *See* Tab 3B, Reporters' Memorandum to the Subcommittee Regarding the 2254 and 2255 Rules (March 2, 2021).

TAB 3B

FEDERAL RULES OF CRIMINAL PROCEDURE
DRAFT NEW RULE 62

Rule 62. Criminal Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:

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

(2) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

(b) Declaring an Emergency.

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

(A) designate the court or courts affected;

(B) state any restrictions on the authority granted in (d) and (e); and

(C) be limited to a stated period of no more than 90 days from the date of the declaration.

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

(3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.

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

(d) Authorized Departures from These Rules After a Declaration.

(1) ***Public Access to a Proceeding*****.** If emergency conditions substantially impair the public's in-person

attendance at a public proceeding, the court must provide reasonable alternative access, contemporaneous if feasible.

(2) ***Signing or Consenting for a Defendant.*** If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

(3) ***Alternate Jurors.*** A court may impanel more than 6 alternate jurors.

(4) ***Correcting or Reducing a Sentence.*** Despite Rule 45(b)(2), if emergency conditions provide good cause, a court may extend the time to take action under Rule 35 as reasonably necessary.

(e) Authorized Use of Videoconferencing and Teleconferencing After a Declaration.

(1) ***Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2).*** This rule does not modify a court's authority to use videoconferencing for a proceeding under Rules 5, 10, 40, or 43(b)(2), except that if emergency conditions substantially impair the defendant's opportunity to consult with counsel, the court must ensure that the defendant will have an adequate opportunity to do so confidentially before and during those proceedings.

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

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person proceedings in the district within a reasonable time;

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

(C) the defendant consents after consulting with counsel.

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

(A) the district's chief judge finds that emergency conditions substantially impair a court's ability to hold in-person felony pleas and sentencings in the district within a reasonable time;

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

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

(4) ***Teleconferencing.*** A court may conduct a proceeding by teleconferencing if:

(A) the requirements under this rule for conducting the proceeding by videoconferencing have been met;

(B) the court finds that:

(i) videoconferencing for the proceeding is not reasonably available; and

(ii) the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding if held by teleconference; and

(C) the defendant consents after consulting with counsel.

Committee Note

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

The rules have been promulgated under the Rules Enabling Act and carefully designed to protect constitutional and statutory rights and other interests. Any authority to depart from the rules must be strictly limited. Compliance with the rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance to continue. Subdivision (a) narrowly restricts the conditions that would permit a declaration granting emergency authority to depart from the rules and defines who may make that declaration.

First, subdivision (a) specifies that the power to declare a rules emergency rests solely with the Judicial Conference of the United States, the governing body of the judicial branch. To find that a rules emergency exists, the Judicial Conference will need information about the ability of affected courts to comply with the rules, as well as the existence of reasonable alternatives to continue court functions in compliance with the rules. The judicial council of a circuit, for example, may be able to provide helpful information it has received from judges within the circuit regarding local conditions and available resources.

Paragraph (a)(1) requires that before declaring a criminal rules emergency, the Judicial Conference must determine that circumstances are extraordinary and that they relate to public health or safety or affect physical or electronic access to a court. These requirements are intended to prohibit the use of this emergency rule to respond to other challenges, such as those arising from staffing or budget issues. Second, those extraordinary circumstances must substantially impair the ability of a court to perform its functions in compliance with the rules.

In addition, paragraph (a)(2) requires that if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a criminal rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for substantial period of time. But there would have been no criminal rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141. Another example might be a situation in which the judges in a district were unable to carry out their duties as a result of an emergency that rendered them unavailable, but courthouses remained safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

Subdivision (a) also recognizes that emergency circumstances may affect only one or a small number of courts – familiar examples include hurricanes, floods, explosions, or terroristic threats – or may have widespread impact, such as a pandemic or a regional disruption of electronic

communications. The rule provides a uniform procedure that is sufficiently flexible to accommodate different types of emergency conditions with local, regional, or nationwide impact.

Paragraph (b)(1). Paragraph (b)(1) specifies what must be included in a declaration of a criminal rules emergency. Subparagraph (A) requires that each declaration of a rules emergency designate the court or courts affected by the rules emergency as defined in (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the rules emergency. That is, every court identified in a declaration must be one in which extraordinary circumstances that relate to public health or safety or that affect physical or electronic access to the court are substantially impairing its ability to perform its functions in compliance with these rules, and in which compliance with the rules cannot be achieved within a reasonable time by alternative measures. A court may not exercise authority under (d) and (e) unless the Judicial Conference includes the court in its declaration, and then only in a manner consistent with that declaration, including any limits imposed under (b)(1)(B).

Subparagraph (b)(1)(B) provides that the Judicial Conference's declaration of a rules emergency must state any restrictions on the authority granted by subdivisions (d) and (e) to depart from the rules. For example, if the emergency arises from a disruption in electronic communications, there may be no reason to authorize videoconferencing for proceedings in which the rules require in-person appearance. But (b)(1)(B) does not allow a declaration to expand departures from the rules beyond those authorized by subdivisions (d) and (e).

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

Paragraph (b)(2). If emergency conditions end before the termination date of the declaration for some or all courts included in that declaration, (b)(2) provides that the Judicial Conference may terminate the declaration for the courts no longer affected. This provision also ensures that any authority to depart from the rules lasts no longer than necessary.

Paragraph (b)(3) recognizes that the conditions that justified the declaration of a criminal rules emergency may continue beyond the term of the declaration. The conditions may also change, shifting in nature or affecting more districts. An example might be a flood that leads to a contagious disease outbreak. Rather than provide for extensions, renewals, or modifications of an initial declaration, paragraph (b)(3) gives the Judicial Conference the authority to respond to such situations by issuing additional declarations. Each additional declaration must meet the requirements of subdivision (a), and must include the contents required by (b)(1).

Subdivision (c). In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. Subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by the emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (e) recognizes the need

for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

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

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

The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.

Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided. In a proceeding conducted by videoconference, a court could provide access to the audio transmission if access to the video transmission is not feasible.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (c)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of defense consent.

The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential protection when the defendant's own signature is not reasonably available because of emergency conditions.

It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

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

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

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a criminal rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (d) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

Paragraph (e)(1) addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written

consent). This subdivision was included to eliminate any confusion about the interaction between existing videoconferencing authority and new Rule 62(e). It clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Later subsections apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

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

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

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.

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

The Committee declined to provide authority in the rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by

videoconference during an emergency declaration. And the new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

Paragraph (e)(3) addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).

Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e) if the chief judge is not available) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

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

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

Paragraph (e)(4) details conditions for the use of teleconferencing to conduct proceedings for which videoconferencing is authorized. Videoconferencing is always a better option than an audio only conference because it allows participants to see as well as hear each other. To ensure that teleconferencing is used only when videoconferencing is not feasible, (d)(4) sets out four prerequisites.

The first, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(2)(A) and (e)(3)(A), (B), and (C). No felony sentencing proceeding may be held by teleconference unless those videoconferencing requirements have been met. Likewise, for a first appearance, teleconferencing requires compliance with (e)(1)(B) and Rule 5(f).

Second, subparagraph (e)(4)(B)(i) requires the court to find that videoconferencing for the proceeding is not reasonably available. Because it focuses on what is "reasonably available," this requirement is flexible. It precludes the use of teleconferencing if videoconferencing—though generally limited—is available for the particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, teleconferencing is permitted if the video connection fails during a proceeding and audio is the only option for completing that proceeding expeditiously, or if only teleconferencing is feasible because of security concerns at the facility where the defendant is housed.

Third, subparagraph (e)(4)(B) provides that the court must find the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding, as opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing.

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding after consultation with counsel, even if the defendant previously requested or consented to videoconferencing.

MEMORANDUM

TO: **Emergency Rule Subcommittee**

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

RE: **Rules Governing Section 2254 and 2255 Proceedings**

DATE: **March 2, 2021**

In this memo, we recommend that the Subcommittee not pursue an emergency rule for either the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings. This recommendation is based on our investigation, detailed below. None of the experienced counsel we consulted on this matter identified any difficulties complying with these rules. Nor do we anticipate any such difficulties in the future, given the flexibility provided by the authority in Rule 12 of each set of rules to apply the Civil and Criminal Rules.

From the petitioner's side, the only problems mentioned concerned (1) *statutory* deadlines, not rules provisions, and (2) that some counsel experienced difficulty signing for clients during the pandemic, both mentioned by Donna Elm at the miniconference. The strict filing deadlines under AEDPA are beyond our Committee's authority, and the signature issue is now addressed by draft Rule 62. Lisa Hay solicited comments from her colleagues on any difficulties with the § 2254 or § 2255 rules and received no suggestions on needed changes. She also recommended we consult with Judy Gallant, a senior attorney advisory at the Administrative Office. Ms. Gallant, in turn consulted with capital habeas experts, namely "Defender Services federal capital habeas resource counsel projects and Lisa Freeland, chair of the Defender Services Advisory Group." Ms. Gallant reported to us by email: "While they all reported that there are severe impediments to meaningful federal capital habeas preparation and review under present circumstances, they do not have any suggestions at this time with respect to the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings."

From the states' side, at the recommendation of Judge Morrison England (whose district has a heavy caseload of prisoner cases) we contacted Monica Anderson in the California Attorney General's office. Ms. Anderson forwarded our request for information to Tami M. Krenzin, Supervising Deputy Attorney General, California State Department of Justice. We asked her to identify any difficulties generally, as well as whether litigants have had any difficulty obtaining extensions of the only set deadline in these rules, the 14-day deadline for responding to proposed findings of fact and recommendations by Magistrate Judges. See Rule 8. This deadline is based on a statutory provision requiring objections within 14 days, 28 U.S.C. § 636(b)(1).[1] Ms. Krenzin responded to us by email, reporting, very helpfully, the following:

> Overall, the existing § 2254 Rules have not caused our Office any significant problems because the federal judges have been granting our requests for extensions of time. We have had delays in obtaining state court documents to comply with

[1] The time period in the statute and the rules was changed from ten to fourteen days in 2009.

Rule 5 because of state court closures and limited court staffing. Rule 5(d)'s requirement that all state court briefing (regardless of any relevancy to the claims raised in federal court) be lodged with the answer to a petition has resulted in filing delays that seem unnecessary.

As for the pro se habeas petitioners, they have been requesting extensions of time for various filing deadlines because of limited access to the law library during the pandemic. The federal judges generally have been granting those requests too. We have also seen requests for equitable tolling of the federal statute of limitations because of the pandemic (some with merit) and anticipate more in the future.

I am not aware of any federal judges who have taken the position that there is no authority to extend the 14-day period for objections to a magistrate judge's findings and recommendations. I have only encountered one magistrate judge who has denied extensions for objections to both our office and prisoners, but it did not appear that he believed he did not have the authority to do so.

The federal judges routinely grant extensions of time for good cause, and the pandemic has certainly provided good cause to extend most habeas deadlines.

Although not specific to the pandemic, my only additional comment is that the habeas deadlines with short turnarounds do have the potential to create issues for pro se petitioners as well as our office. Specifically, the seven-day deadline for a reply, and even the 14-day deadline for objections. The prison mail system often has significant delays so petitioners often do not receive their legal mail in time for these deadlines. Also, although our office has the benefit of the electronic court filing system, the short deadline for replies can pose issues for us too. When we file motions to dismiss a habeas petition (based on the statute of limitations, exhaustion, or other procedural issues), we often do not know what "exceptions" a pro se petitioner will be claiming until the opposition is filed. They often do not raise their reasons for untimeliness and failure to exhaust in their petitions. Because we are responsible for producing the state court records that support our defenses, seven days is not enough time to respond to claims raised in the opposition to the motion. These short deadlines routinely do not have any significant consequences because the federal judges will grant extensions of time. But extensions routinely do need to be requested, and the short deadlines are consequential when a judge decides to not grant extensions regardless of the reasons offered for the request.

From the Department of Justice, Jonathan Wroblewski reported that as of January 2021, those whom he had consulted at DOJ saw no reason for an emergency rule for Section 2255 proceedings.

To be certain that we weren't missing any problems that may have arisen during the pandemic, we asked Kevin Crenny, the Rules Law Clerk to scour Westlaw and LEXIS for indications that litigants were encountering difficult complying with any of these rules. He "did not find any evidence of issues related to these rule-based deadlines during the pandemic" and

concluded that "there does not appear to be any need to consider amendments to the habeas rules for emergency situations." We also looked ourselves for § 2254 and § 2255 cases discussing parties who did or could not file objections within the set period under § 636(b)(1). That research confirmed the statements of experienced litigants above that excusing or extending the time for filing objections is routine, and that § 636(b)(1) itself poses no barrier to emergency-related extensions of the fourteen-day period.[2]

In sum, there appears to be no need to modify any of the Section 2254 or 2255 rules in anticipation of future rules emergencies. The only rule with a set deadline is based on a statute that allows courts to extend the period in the interests of justice. Moreover, the Section 2254 and Section 2255 Rules permit judges to rely on Civil Rule 6 and Criminal Rule 45 to grant extensions, so long as those rules are not inconsistent with the other rules or any statute. Finally, research and reports from experienced practitioners above both indicate that courts regularly grant extensions, and they turned up no problems complying with the existing rules.

[2] The Supreme Court in 1985 recognized that the deadline for objections in Section 636(b)(1) may be excused in the interests of justice. *Thomas v. Arn*, 474 U.S. 140, 155 (1985).

TAB 4

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

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

RE: **Rule 6 Miniconference**

DATE: **April 21, 2021**

This memo provides a progress report on the work of the Rule 6 Subcommittee, which has been charged with evaluating three suggestions for amendments to Rule 6. The Public Citizen Litigation Group and five associations of historians (Suggestion 20-CR-B) and the Reporters Committee for Freedom of the Press and a coalition of 30 media organizations (Suggestion 20-CR-D) have proposed a new exception to grand jury secrecy for materials of historical or public interest. The Advisory Committee received a suggestion (20-CR-J) by Brent McKnight urging the addition of a residual exception to Rule 6(e) that would give courts flexibility and discretion, but also a clear source of authority and guidance, when considering requests for disclosure outside the Rule's enumerated exceptions. The Department of Justice (Suggestion 20-CR-H) proposed an amendment authorizing court orders delaying disclosure of grand jury subpoenas.

On April 13, 2021, the subcommittee held a virtual miniconference to obtain a broad range of opinion on whether any changes to Rule 6 are warranted, and, if so, the proper scope and limitations of any amendment(s). The following individuals participated in a series of panels focusing on the proposals to create a new exception to the rule of grand jury secrecy:

- Dr. Bruce Craig, Professor of History, University of Prince Edward Island
- Patrick Fitzgerald, Skadden Arps, former U.S. Attorney
- Katherine Hicks, primary witness in case involving grand jury leaks
- John Kocoras, First Assistant United States Attorney, in the N.D. IL
- Elizabeth Shapiro, Deputy Director, Federal Programs Branch, Department of Justice
- Gary Stern, General Counsel, National Archives & Records Administration
- Katie Townsend, Legal Director, Reporters Committee for Freedom of the Press
- Beth Wilkinson, Wilkinson Stekloff, Philadelphia
- Allison Zieve, Director, Public Citizen Litigation Group

These speakers provided a wide variety of perspectives on the question whether a new exception to grand jury secrecy is warranted, and, if so, how the new exception should be defined. Mr. Stern placed the proposals in the context of the general disclosure regimes for other government documents, including those involving national security and classified information. Other participants explored the implications of the proposed exceptions on the willingness of witnesses to testify and the government's ability to protect them and their families. Several witnesses described the efforts of historian and representatives of the media to obtain grand jury materials in past cases, where the courts had applied various factors.

There was no agreement among the speakers on whether a new exception was warranted, and the speakers expressed a variety of views key issues, particularly whether the criteria for a new exception should be specific or more general and flexible, and the minimum period of time before material could be considered for release.

Additionally, a panel focused on the Department's proposal to amend Rule 6 to authorize court orders delaying disclosure of grand jury subpoenas. The speakers were:

- Jennifer Granick, Surveillance & Cybersecurity Counsel, the ACLU
- David Howard, Corporate Vice President & Deputy General Counsel, Litigation, Competition Law and Compliance, Microsoft
- Orin Kerr, Professor, University of California Berkeley
- Karl Metzner, Deputy Chief of Appeals and Senior Litigation Counsel in S.D.N.Y

The speakers on this panel generally agreed that under some circumstances a delay in notification may be warranted, but they had varying views on other issues, such as how broadly defined the criteria for delayed disclosure should be, who should be subject to such orders, the time period for such orders (and renewals), and how to ensure robust judicial review of applications for delayed disclosure

We are also continuing to follow closely the possibility that the Supreme Court might address the issue of the courts' inherent authority to release grand jury materials not enumerated in Rule 6 in *Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (*cert. granted*, July 2, 2020). Although the issue on which the Supreme Court granted review was whether impeachment proceedings constitute "judicial proceedings" under Rule 6(e)(3)(E)(i), the respondent's brief in opposition argued, pp. 34-35, that the issue of inherent authority would be before the Court if it granted certiorari because it was properly raised below and would be an alternative ground for affirmance. On November 20, 2020, following the election, the Court granted the respondent's motion to remove the case from the Court's December argument calendar; however, the case remains on the Court's docket.

The subcommittee will continue its study of the proposals with the goal of providing its recommendations at the Advisory Committee's fall meeting.

TAB 5

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

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

RE: **Rule 6 – Authority to Release Redacted Versions of Grand Jury-Related Judicial Decisions**
(Suggestion 21-CR-C)

DATE: **April 21, 2021**

Chief Judge Beryl A. Howell and Senior Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia have requested consideration of an amendment making explicit the courts' authority to release redacted versions of grand jury-related opinions, despite the fact that "these decisions, even in redacted form, arguably reveal 'matters occurring before the grand jury,'" and are thus subject to grand jury secrecy under Rule 6(e).

As Judges Howell and Lamberth explain, the impetus for their request is the decision in *McKeever v. Barr,* 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), which held that courts have no inherent authority to disclose grand jury material outside the enumerated exceptions set out in Rule 6(e). *McKeever* cast doubt on the well-established practice of the chief judges in the District of Columbia (who are tasked with handling grand jury matters), and by the D.C. Circuit of releasing publicly redacted versions of judicial decisions resolving legal issues in grand jury matters—after consultation with the government and affected parties—despite the arguable revelation thereby of some matters occurring before the grand jury.

Judges Howell and Lamberth state that although "no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice and the Committee's clarification of the issue would be helpful."

The question for discussion at the May meeting is whether to refer the proposal to the Rule 6 Subcommittee for further consideration.

From: Beryl Howell
Sent: Sunday, January 3, 2021 8:49 AM
To: John Bates
Cc: Royce Lamberth
Subject: Consideration of Changes to Fed. R. Crim. P. 6(e)

Thank you for the good news that the Criminal Rules Committee is taking up the issue invited by Justice Breyer's statement concurring in the denial of certiorari in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), which rejected the view that courts have inherent authority to disclose grand jury material outside the enumerated exceptions set out in Fed. R. Crim. P. 6(e). *See McKeever v. Barr*, 140 S. Ct. 597, 597-98 (2020)(Breyer, J.)("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit."). We understand that some proposed amendments to Rule 6(e) have already been submitted to the Committee, including a proposed exception allowing release of otherwise secret grand jury material of historical importance, a version of which proposal the Department of Justice previously (and unsuccessfully) urged the Committee to consider. *See* Letter from Eric Holder, Attorney General, to Reena Raggi, Chair of Advisory Committee on the Criminal Rules (Oct. 18, 2011) (encouraging Committee to amend Rule 6(e)(3) to permit district courts to release historically significant grand jury records so that "the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e).").

At the risk of adding to the Committee's workload, Royce Lamberth and I would like to raise another issue we believe deserves consideration and clarification post-*McKeever*, at least in this Circuit: the authority of the court to release judicial decisions issued in grand jury matters, since these decisions, even in redacted form, arguably reveal "matters occurring before the grand jury," Fed. R. Crim. P. 6(e), given the broad scope of that phrase. *See Bartko v. United States DOJ*, 898 F.3d 51, 73 (D.C. Cir. 2018)(describing scope of Rule 6(e) as covering "information that would 'tend to reveal some secret aspect of the grand jury's investigation, including the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, or the deliberations or questions of jurors.'" (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)); *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 1001 (D.C. Cir. 1999)("this court's definition of 'matters occurring before the grand jury' … encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'"(quoting *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir.)). Judicial decisions in grand jury matters may arise in historically significant matters, *e.g*., Watergate investigation of former President Nixon; Whitewater and related investigations of former President Clinton, but not always.

The practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury. *See,*

e.g., In re Sealed Case, 932 F.3d 915, 940 (D.C. Cir. 2019)(releasing publicly redacted version of decision affirming district court's contempt orders against two Chinese Banks for failing to comply fully with grand jury subpoenas for records that might clarify how North Korea finances its nuclear weapons program). This practice is critically important to avoid building a body of "secret law" in the grand jury context. *See Leopold v. United States*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) ("The common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch. At bottom, it reflects the antipathy of a democratic country to the notion of 'secret law,' inaccessible to those who are governed by that law.")(internal citations and quotations omitted); *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)(construing FOIA exemption to require "disclosure of all opinions and interpretations which embody the agency's effective law and policy," as consistent with "a strong congressional aversion to secret [agency] law," and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law.") (internal citations and quotations omitted; brackets in original); *Elec. Frontier Found. v. United States DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (discussing policy of applying FOIA exemptions "to avoid the development of "'secret law'" by federal agencies).

Nevertheless, to the extent that judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in *Mckeever* rejected those bases. *McKeever*, 920 F.3d at 844 (holding district court has no "inherent authority to disclose what we assume are historically significant grand jury matters"); *id*. at 845 (holding district court has no authority to disclose grand jury matters outside exceptions in Rule 6(e)(3)). While no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice and the Committee's clarification of the issue would be helpful.

Thank you so much for your offer to pass our concerns along to the Criminal Rules Committee.

Chief Judge Beryl A. Howell
Judge Royce C. Lamberth
United States District Court
for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Ave., NW, Room 2010
Washington, D.C. 20001

TAB 6

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

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

RE: **Authority to Excuse Grand Jurors Temporarily (Suggestion 21-CR-A)**

DATE: **April 21, 2021**

Judge Donald Molloy, the Advisory Committee's former chair, has written suggesting that Rule 6(c) be amended (as shown below) to authorize the grand jury's foreperson to "temporarily" excuse an individual grand juror from an individual grand jury session.

> **(c) Foreperson and Deputy Foreperson.** The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders. For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session.

Judge Molloy explains that the jury plans for district courts in the Ninth Circuit vary widely on the question who has the authority to grant such temporary excuses. An amendment would eliminate this inconsistency, and granting this authority to the foreperson would be a "practical" change that would be especially useful in rural districts where the jurors often travel significant distances to attend. The court would, however, still retain ultimate authority either for permanent excuses or, if need be, for temporary excuses.

After submitting the proposal, Judge Molloy assisted the reporters by obtaining information from the various districts about their practices. We have not made a thorough study of the various approaches, but they seem to span the gamut from districts that allow the foreperson or the grand jury clerk to grand temporary excuses to others that in which only the court can excuse a juror temporarily. Although giving this authority to the foreperson may be convenient, districts that place the authority in the hands of the grand jury clerk, in consultation with the court, are able to gauge whether an excuse would deprive the grand jury of a quorum.

The question for discussion at the May meeting is whether to refer this proposal to the Rule 6 Subcommittee for further consideration.

January 14, 2021

Advisory Committee on Criminal Rules
ATTN: Rebecca Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

To the Chair and Members of the Criminal Rules Committee:

Recently the Congress passed into law an amendment to Rule 5(f) of the Federal Rules of Criminal Procedure. * * * * * Additionally, it has come to my attention that the issue of grand juror excuses is not uniformly applied under Rule 6, F.R.Cr.P. and I ask the Committee to consider a minor change to address the discrepancy.

* * * * *

I also propose amending Rule 6(c) to add the following language as the last sentence of that paragraph. "For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session." I make this recommendation because in reviewing the jury plans for districts in the Ninth Circuit it is evident there are inconsistencies concerning who has the authority to "temporarily" excuse a grand juror from a particular session. The amendment proposed would not conflict with paragraph 6(h) nor would it interfere with any judicial obligation regarding the Grand Jury. The change would be practical and permit the foreperson to relieve an individual juror for a specific session, a need not uncommon in rural districts where the jurors often travel significant distances to attend. The court would still retain ultimate authority either for permanent excuses or, if need be, for temporary excuses. I have attached a redline version of the proposed change.

* * * * *

Sincerely,

Donald W. Molloy
U.S. District Judge

* * * * *

Rule 6. The Grand Jury

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson--or another juror designated by the foreperson--will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders. For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session.

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(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

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

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

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand juror's vote--may be made to:

> **(i)** an attorney for the government for use in performing that attorney's duty;
> **(ii)** any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
> **(iii)** a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.
(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.
(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--
• actual or potential attack or other grave hostile acts of a foreign power or its agent;
• sabotage or international terrorism by a foreign power or its agent; or
• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or
(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--
• the national defense or the security of the United States; or
• the conduct of the foreign affairs of the United States.

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

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;
(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;
(ii) the parties to the judicial proceeding; and
(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the

indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

TAB 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Amending Rule 16 to Require Courts to Inform Prosecutors of Their *Brady* Obligations
(Suggestions 21-CR-A & 21-CR-B)

DATE: April 21, 2021

Judge Donald Molloy, the Advisory Committee's former chair, and John Siffert, a former member of the Advisory Committee, propose amending Rule 16 to require courts to inform prosecutors of their constitutional *Brady* obligations. Although the recently enacted Due Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, they urge that the Advisory Committee develop a national standard. Mr. Siffert writes:

> I see no benefit from having prosecutors in different districts be held to different standards. Nor should defendants tried in different districts have different remedies if exculpatory evidence is wrongfully withheld. As difficult as the task may be, I expect that the members of the Advisory Committee can come to a common understanding of how a prosecutor's obligations should be expressed at the outset of every case.

Judge Molloy states that a national standard would benefit federal prosecutors, the defense bar, and the appellate courts. Judge Molloy suggests that the amendment be modeled on the District of Columbia's Local Criminal Rule 5.1.

Although Judge Molloy and Mr. Siffert urge the adoption of a national rule, the Due Process Protections Act took a different approach, expressly endorsing local *Brady* rules. The Act directly amended Rule 16, adding a new subdivision (f),[1] which provides:

> (f) REMINDER OF PROSECUTORIAL OBLIGATION.—
> (1) IN GENERAL.—In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963)[,] and its progeny, and the possible consequences of violating such order under applicable law.
> (2) FORMATION OF ORDER.—Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.

This issue is on the May agenda for discussion of the question whether to refer these proposals to the Rule 16 Subcommittee.

[1] The Act redesignated existing subdivision (f) as (g).

January 14, 2021

Advisory Committee on Criminal Rules
ATTN: Rebecca Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

To the Chair and Members of the Criminal Rules Committee:

Recently the Congress passed into law an amendment to Rule 5(f) of the Federal Rules of Criminal Procedure. I ask the Committee to consider an amendment to Rule 16 in light of the congressional change to Rule 5(f).

* * * * *

I propose changing Rule 16 based on the language set forth in the attached document. The language does not come out of thin air as it has been in the Local Rules for the District Court for the District of Columbia for some time. I think it is short and to the point and is not a matter of which DOJ is unaware. Because of the existing use of the language, and DOJ's familiarity with it, there should not be significant objection to the change. I believe such an amendment would be proper and has far greater efficacy than a multiplicity of local rules. The proposed amendment would also mandate a uniform standard throughout the country, which would benefit DOJ, the defense bar, and appellate courts in the development of the rules. I am hopeful the Committee will consider and adopt the change.

* * * * *

Sincerely,

Donald W. Molloy
U.S. District Judge

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Voting: Chief Judge Howell, Judges Sullivan, Kotelly, Boasberg, Amy Jackson, Cooper, Chutkan, Moss, Mehta, Kelly, McFadden, Friedrich, Hogan, Lamberth, Friedman, Huvelle, Walton, Bates, Leon and Collyer

ORDER

It is the 1st day of May, 2018 ordered that LCrR 5.1, Disclosure of Information was adopted by the Court.

(a) Unless the parties otherwise agree and where not prohibited by law, the government shall disclose to the defense all information "favorable to an accused" that is "material either to guilt or to punishment" under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and that is known to the government. This requirement applies regardless of whether the information would itself constitute admissible evidence. The information, furthermore, shall be produced in a reasonably usable form unless that is impracticable; in such a circumstance, it shall be made available to the defense for inspection and copying. Beginning at the defendant's arraignment and continuing throughout the criminal proceeding, the government shall make good-faith efforts to disclose such information to the defense as soon as reasonably possible after its existence is known, so as to enable the defense to make effective use of the disclosed information in the preparation of its case.

(b) The information to be disclosed under (a) includes, but is not limited to:

(1) Information that is inconsistent with or tends to negate the defendant's guilt as to any element, including identification, of the offense(s) with which the defendant is charged;

(2) Information that tends to mitigate the charged offense(s) or reduce the potential penalty;

(3) Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged;

(4) Information that casts doubt on the credibility or accuracy of any evidence, including witness testimony, the government anticipates using in its case-in-chief at trial; and

(5) Impeachment information, which includes but is not limited to: (i) information regarding whether any promise, reward, or inducement has been given by the government to any witness it anticipates calling in its case-in-chief; and (ii) information that identifies all pending criminal cases against, and all criminal convictions of, any such witness.

(c) As impeachment information described in (b)(5) and witness-credibility information described in (b)(4) are dependent on which witnesses the government intends to call at trial, this rule does not require the government to disclose such information before a trial date is set.

(d) In the event the government believes that a disclosure under this rule would compromise witness safety, victim rights, national security, a sensitive law-enforcement technique, or any other substantial government interest, it may apply to the Court for a modification of the requirements of this rule, which may include *in camera* review and/or withholding or subjecting to a protective order all or part of the information.

(e) For purposes of this rule, the government includes federal, state, and local law-enforcement officers and other government officials who have participated in the investigation and prosecution of the offense(s) with which the defendant is charged. The government has an obligation to seek from these sources all information subject to disclosure under this Rule.

(f) The Court may set specific timelines for disclosure of any information encompassed by this rule.

(g) If the government fails to comply with this rule, the Court, in addition to ordering production of the information, may:

(1) specify the terms and conditions of such production;
(2) grant a continuance;
(3) impose evidentiary sanctions; or
(4) enter any other order that is just under the circumstances.

FOR THE COURT:

Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. XX-XX (EGS)
[PARTY NAME],	)	
Defendant.	)	

ORDER

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the government has a continuing obligation to produce all evidence required by the law and the Federal Rules of Criminal Procedure. *See id.,* 373 U.S. at 87 (holding that due process requires disclosure of "evidence [that] is material either to guilt or to punishment" upon request); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (holding that the obligation to disclose includes producing evidence "known only to police investigators and not to the prosecutor" and that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . . , including the police"); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that the duty to disclose exculpatory evidence applies even when there has been no request by the accused); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972)

(holding that *Brady* encompasses impeachment evidence); *see also* Fed. R. Crim. P. 16(a) (outlining information subject to government disclosure); *United States v. Marshall*, 132 F.3d 63, 67-68 (D.C. Cir. 1998) (holding that the disclosure requirements of Federal Rule of Criminal Procedure 16(a)(1)(C) apply to inculpatory, as well as exculpatory, evidence).

The government's *Brady* obligation to provide exculpatory evidence in a timely manner is not diminished by the fact that such evidence also constitutes evidence that must be produced later pursuant to the Jencks Act, 18 U.S.C. § 3500, or by the fact that such evidence need not be produced according to Rule 16. *See United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988); *see also* Advisory Committee Note to Fed. R. Crim. P. 16 (1974) ("The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled."). Where doubt exists as to the usefulness of the evidence to the defendant, the government must resolve all such doubts in favor of full disclosure. *See United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988).

Accordingly, the Court, *sua sponte,* directs the government to produce to defendant in a timely manner any evidence in its possession that is favorable to defendant and material either to defendant's guilt or punishment. This government responsibility includes producing, during plea negotiations, any exculpatory

evidence in the government's possession.[1] The government is further directed to produce all discoverable evidence in a readily usable form. For example, the government must produce documents as they are kept in the usual course of business or must organize and label them clearly. The government must also produce electronically-stored information in a form in which it is ordinarily maintained unless the form is not readily usable, in which case the government is directed to produce it in a readily-usable form. If the information already exists or was memorialized in a tangible format, such as a document or

[1]*See United States v. Ruiz*, 536 U.S. 622, 633 (2002)(government not required "to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant"); *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010)(noting that the "Supreme Court has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context")(emphases in the original); *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005)("By holding in *Ruiz* that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, the Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession."); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003)(noting that "given th[e significant distinction between impeachment information and exculpatory evidence of actual innocence], it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea"); *United States v. Nelson*, 979 F. Supp. 2d 123, 135-36 (D.D.C. 2013)("Because the prosecution suppressed exculpatory evidence before Nelson pled guilty, Nelson's due process rights were violated to his prejudice and his guilty plea was not voluntary and knowing."); *Buffey v. Ballard*, 782 S.E.2d 204, 221 (W. Va. 2015)(finding "that the DNA results were favorable, suppressed, and material to the defense," and therefore "the Petitioner's due process rights, as enunciated in *Brady*, were violated by the State's suppression of that exculpatory evidence"). *But see United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009)(disagreeing with the proposition that, based on *Ruiz*, "exculpatory evidence is different [from impeachment information] and must be turned over before entry of a plea").

recording, the information shall be produced in that format. If the information does not exist in such a format and, as a result, the government is providing the information in a summary format, the summary must include sufficient detail and specificity to enable the defense to assess its relevance and potential usefulness.

Finally, if the government has identified any information which is favorable to the defendant but which the government believes not to be material, the government shall submit such information to the Court for *in camera* review.

SO ORDERED.

Signed: **Emmet G. Sullivan**
United States District Judge
Month Day, Year

Rule 16

***Brady* evidence.**

(a)Pursuant to Rule 5, without any request, the government must produce the following information. The court must, pursuant to Rule 5, enter an order requiring the disclosure of

(1) Information that is inconsistent with or tends to negate defendant's guilt as to any element, including identification, of the offenses with which the defendant is charged;

(2) Information that tends to mitigate the charged offense(s) with which the defendant is charged;

(3) Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged'

(4) Information that casts doubt on the credibility or accuracy of any evidence including witness testimony, the government anticipates using in its case-in-chief at trial, and;

(5) Impeachment information which includes but is not limited to (i) information regarding whether any promise, reward, or inducement has been given by the government to any witness it anticipates calling in its case-in-chief, and (ii) information that identifies all pending criminal cases against, and all criminal convictions of any such witness;

(6) In the event the government believes that a disclosure under this rule would compromise witness safety, victim rights, national security, a sensitive law enforcement technique, or any other substantial government interest, it may apply to the Court for a modification of the requirements of this rule, which may include in camera review and/or withholding or subjecting to a protective order all or part of the information.

(b) **Government's Disclosure**.

(1) *Information Subject to Disclosure*.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

· the statement is within the government's possession, custody, or control; and

· the attorney for the government knows-or through due diligence could know-that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows-or through due diligence could know-that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows-or through due diligence could know-that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
(3) *Grand Jury Transcripts*. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.
(c) **Defendant's Disclosure**.
(1) *Information Subject to Disclosure*.
(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Witnesses. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if-

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) *Information Not Subject to Disclosure*. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(d) **Continuing Duty to Disclose**. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:
(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(e) **Regulating Discovery**.
(1) *Protective and Modifying Orders*. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.
(2) *Failure to Comply*. If a party fails to comply with this rule, the court may:
(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

LANKLER SIFFERT & WOHL LLP
ATTORNEYS AT LAW

500 FIFTH AVENUE
NEW YORK, N.Y. 10110-3398
WWW.LSWLAW.COM

TELEPHONE (212) 921-8399
TELEFAX (212) 764-3701

January 21, 2021

Advisory Committee on Criminal Rules
ATTN: Rebecca Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

To the Chair and Members of the Criminal Rules Committee:

I am writing to support Hon. Donald Molloy's recommendation that the Advisory Committee amend Rule 16 of the Federal Rules of Criminal Procedure in the face of the recently enacted Due Process Protection Act ("DPPA") that created Rule 5(f) mandating that federal courts inform prosecutors of their Brady obligations.

The fact that Rule 5(f) was enacted without consultation with or input from the Rules Committee is sufficiently significant to require the Rules Committee's attention, including on the need for a uniform, national Brady order. The Advisory Committee should address the question with a sense of urgency because federal judges already are issuing Brady orders regardless whether the various judicial councils officially have promulgated model orders.

The DPPA calls for the individual districts to devise their own rule. I agree with Judge Molloy that it makes enormous sense for the Rules Committee to create a national standard. [1]

Judge Molloy's proposal makes sense, and it should not be controversial. The DPPA resolves the controversial issues of whether courts should always enter a Brady order and whether a Brady order should be entered at the commencement of a criminal case. The DPPA requires the courts to issue such Brady orders at the commencement of every criminal case.

What the DPPA did not resolve is what the Brady order should say, leaving that issue to be resolved by the various districts in their own discretion. The Advisory Committee should not leave the can that Congress kicked down the road in the haphazard place where it happened to land

[1] That said, I can conceive of a situation where a district could adopt a rule different than the rule adopted by the Rules Committee. It is also conceivable that such a district could choose to follow the standard that its judicial council adopted in response to the DPPA. This could create a situation where the Supreme Court would have to decide whether a district rule adopted pursuant to the DPPA can stand in the face of a rule change made by the Rules Committee. Because a Judicial Conference rule can become effective only after the Supreme Court approves and Congress does not disapprove, I do not think this scenario is anything other than hypothetical. It is far more likely that all of the districts will adopt a Rule 16 amendment.

depending on the district. The Advisory Committee should pick up the can and move it to the place it ought to be. What is at stake is a clear embrace by the courts of the prosecutors' Brady obligations that are rooted in the due process clause.

Judge Molloy's proposal can be fairly characterized as doing nothing more than requiring courts to articulate what courts consistently have interpreted Brady to mean. The proposal is derived from an existing rule that has been in place in the District of Columbia for approximately three years. I trust that the reporters will confirm whether there has been any claim by the Department of Justice that the District of Columbia standing order is at odds with what the DOJ understands its obligations to be and whether its implementation has led to any untoward outcomes. To the extent that the Brady orders issued pursuant to the DPPA may contain language or approaches that also should be considered, I am equally confident that the reporters will bring any acceptable alternative language to the committee's attention.

Because the proposal to amend Rule 16 is careful to retain the ability of the government to request that the court "opt out" of requiring production of Brady material in any given case if it is in the interests of justice, it has the virtue of leaving ultimate discretion in the hands of the district court and is consistent with the second paragraph of the DPPA.

I see no benefit from having prosecutors in different districts be held to different standards. Nor should defendants tried in different districts have different remedies if exculpatory evidence is wrongfully withheld. As difficult as the task may be, I expect that the members of the Advisory Committee can come to a common understanding of how a prosecutor's obligations should be expressed at the outset of every case.

Bottom line, I think Judge Molloy's proposal is timely and terrific.

Respectfully,

John S. Siffert

JSS:ac

TAB 8

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 29.1 (Closing Argument)
(Suggestion 20-CR-I)

DATE: April 21, 2021

Brian Kerzetski has written to the Advisory Committee suggesting that Rule 29.1 be revised. The rule currently provides:

> Closing arguments proceed in the following order:
> (a) the government argues;
> (b) the defense argues; and
> (c) the government rebuts.

Based on John B. Mitchell's article *Why Should The Prosecutor Get The Last Word*?, Mr. Kerzetski suggests the elimination of government rebuttal. After surveying research on opinion change (primacy, recency, inoculation, asymmetrical rebound effect, anti-primacy), rhetoric, and cognitive psychology, Mitchell concludes:

> This chance for the last words, words to which the defense attorney cannot respond, would thus seem to have the capacity of altering juror opinions between a verdict of guilty and not guilty, in at least some cases. . . . Permitting a citizen's fate to possibly be determined by the order of arguments is not a risk our legal system should willingly take, particularly not with its unwavering, though at times more or less diluted, ideological commitment to the protection of the innocent. Whether one sees that giving the rebuttal to the prosecution affords an advantage to the State or that it denies an advantage that should be given the defense is of no matter to me. Either way it comes out the same. The prosecution should not get rebuttal. What to do about it?
>
> I would not reverse arguments, giving the defense first and last. After all, the prosecution does have the burden, and the first position reflects that. I would just end with the defense closing. Simple. Two arguments. No prosecution rebuttal, and the citizen whose liberty, and perhaps life, is at stake gets the last word.

John B. Mitchell, *Why Should The Prosecutor Get The Last Word?,* 29 AM. J. CRIM. L. 139, 216 (2000).

This issue is on the May agenda for discussion of the question whether to refer Mr. Kerzetski's suggestion to a subcommittee for further study.

From: Brian Kerzetski
To: RulesCommittee Secretary
Subject: Suggest Change to Fed. R. Civ. P. 29.1
Date: Sunday, November 01, 2020 7:02:13 PM
Attachments: Why Should the Prosecutor Get the Last Word .pdf

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To whom it may concern,

Through experience and ponderance of views, I have come to realize in order to preserve due process and ensure justice the following changes must be made to rule 29.1:

29.1(b) the defense argues~~; and~~.
29.1(c) *delete in its entirety.*

I have attached a well-reasoned article which I feel makes a superb case for the rule change.

Please excuse any poor form as this is my first request. I would appreciate any assistance to better relay this request to the Committee.

Sincerely,

Brian Kerzetski
2271 Autumn Fire Ct.
Las Vegas, NV 89117
(702) 491-2521

1-1-2000

Why Should the Prosecutor Get the Last Word?

John B. Mitchell

AMERICAN JOURNAL
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Article

Why Should The Prosecutor Get The Last Word?

John B. Mitchell*

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* Clinical Professor of Law, Seattle University School of Law. J.D. 1970, Stanford Law School. The author wishes to thank Gail Stygall, Director of the University of Washington Expository Writing Program, for immersing him in the worlds of social psychology, rhetoric and debate; Lisa Brodoff for her editorial suggestions; Nancy Ammons and Laurie Sleeper for formatting footnotes without end; and, as always, thanks to Kelly Kunsch, librarian extraordinaire.

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I. Introduction

It is generally accepted without much question or thought that the prosecution gets the last argument in closing.[1] This is consistent with the general theory[2] that the party bearing the burden of proof is entitled to the last opportunity to talk to the jury and, thus, get a last chance to convince

1. *See* HERBERT J. STERN, TRYING CASES TO WIN – SUMMATION 285 (1995) ("[M]ost jurisdictions award the party with the burden of proof two closings: an initial, main summation that is delivered first, and then a brief rebuttal following the closing of the defense."); *see also* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 468 (2d ed. 1997) ("The plaintiff or prosecutor, as the burdened party, is generally afforded the opportunity to present the last argument.").

2. These are scattered exceptions. In Florida, a defendant will be given the last argument if he puts on no evidence. *See* Preston v. State, 260 So.2d 501, 503 (Fla. 1972) ("[A] defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.") (citation omitted). In the penalty phase in California, where "neither side has the burden of proving that one or the other penalty is the proper one...," the defense is given last argument. People v. Bandhauer, 426 P.2d 900, 905 (Cal. 1967) ("The prosecution may... argue in rebuttal and the defense close in surrebutal.").

Only in Minnesota did the defendant get the last argument in every instance. "When the evidence shall be concluded upon the trial of any indictment... the plaintiff shall commence and the defendant conclude the argument to the jury." MINN. STAT. § 631.07 (1953). *See generally* Marilyn Vavra Kunkel & Gilbert Geis, *Order of Final Argument In Minnesota Criminal Trials*, 42 MINN. L. REV. 549 (1958) (describing an exception to the American criminal trial procedure in Minnesota that allows the defendant to conclude jury argument). This was changed by amendment, and currently the "prosecution... [has] the right to reply in rebuttal to the closing argument of the defense." MINN. STAT. § 631.07 (2000).

the panel.[3] This is said to be even more justified in criminal cases due to the extremely heavy burden the prosecution must bear.[4]

While this rationale superficially makes sense when narrowly focusing on the traditional analysis of the connection between burden of proof and the order of argument, the analysis becomes suspect[5] when applied within the framework of our constitutionally circumscribed criminal justice system.[6] For in that arena, we are dealing with a system where all the formal procedural advantages are given the defendant,[7] even at the expense of truth.

---

3. *See* JAMES W. JEANS, TRIAL ADVOCACY 371 (1975) ("[The] party having the risk of non-persuasion has the opportunity of the last argument."); *see also* PETER MURRAY, BASIC TRIAL ADVOCACY 375 (1995) ("In most jurisdictions, the party with the burden of proof has the last word with the factfinders."); James W. McElhaney, *Trial Notebook – Rules of Final Argument*, 9 LITIG. 45, 46 (1993) [hereinafter *"Rules of Final Argument"*] ("In virtually every state, it is said that the party with the burden of proof 'has the right to open and close.").

4. *See* Kunkel & Geis, *supra* note 2, at 552 ("[S]ince the state must prove guilt beyond a reasonable doubt, the considerable burden thus placed on the state, and given emphasis by the trial judge's instructions, should be balanced by allowing the prosecutor the final argument.") (citations omitted).

Further, in support of the prosecution having the last argument, it has been posited that, if the prosecution goes last, it has an opportunity to blunt any misconduct in the defendant's closing. *See id.* at 552-53. If the prosecution commits misconduct in its rebuttal, on the other hand, the defense has an appellate remedy. *See id.* However, if the defense goes last, the prosecution has absolutely no remedy against defense misconduct. *See id.*

5. Nonetheless, as early as 1823, an American appellate court summarily, and without any analysis, dismissed the notion that there was any legal problem with permitting the prosecution to argue last. *See* United States v. Bates, 2 Cranch C.C. 405, F. Cas. 14,542 (D.C. Cir. 1823). Those few courts which have subsequently considered the issue have similarly engaged in a summary analysis in concluding that the conventional ordering of arguments raised no due process concerns. *See, e.g.*, People v. Cory, 204 Cal. Rptr. 117, 123-24 (Cal. Ct. App. 1984) ("Indeed, the very presence of this constitutionally compelled unequal burden of proof imposed upon the prosecution refutes appellant's premise that due process requires exact equality among the procedural rights enjoyed by both prosecution and defense.") (citation omitted); *Preston*, 260 So.2d at 503-05 (rejecting defendant's due process challenge).

Perhaps, however, I'm being greedy. At least criminal defendants in our system are constitutionally entitled to a closing argument. *See* Herring v. New York, 422 U.S. 853, 864-65 (1975). That is more than they once were entitled to in Olde England. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 129 (1983) ("Until 1836 counsel was forbidden to 'address the jury,' that is, to make opening and closing statements.") (citation omitted).

6. European commentators view the American criminal justice system as unfair because the prosecution, and not the defense, gets the last word. *See* Kunkel & Geis, *supra* note 2, at 549 (citing foreign commentators' criticism of the order of summation in American criminal trials). Their criticism, however, must be placed in institutional perspective. The European inquisitorial system differs greatly from our own adversary system. In practical effect, once an investigative file is completed and the case presented for trial, the defendant is all but presumed guilty. *See generally* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 75-80 (1998) (noting that, in a usual case, after gathering evidence, "a preliminary diagnosis [by the police or the prosecution] makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention."); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany*, 87 YALE L. J. 240 (1977). It is little wonder then that European advocates believe that having the last word is so essential to a fair trial.

7. *See* Kunkel & Geis, *supra* note 2, at 549 ("In the American process of adjudication, the accused is granted procedural advantages and safeguards which serve to enhance his invulnerability to miscarriages of justice."); John B. Mitchell, *The Ethics of the Criminal Defense Attorney – New Answers to Old Questions*, 32 STAN. L. REV. 295, 300-01 (1980):

Now, don't misunderstand me. We care about truth in the criminal system, at least that vision of truth delineated by existing doctrine.[8] In fact, the system is laden with procedures that guide the results towards truth: discovery, an oath, testifying in open court surrounded by the dignity of the tribunal, cross-examination, techniques of impeachment, credibility instructions, and the threat of perjury. Yet, in the end, it is not a truth system. The extreme burden of proof of beyond a reasonable doubt skews decisions in a way which continuously risks letting people go who have actually committed crimes. At the same time, the Fifth Amendment keeps the fact finder from access to the most accurate source of evidence on the issue – the defendant. That's simply not how you would construct a system if your primary concern was to arrive at some notion of the truth.[9]

> [T]he criminal justice system does not operate primarily as a truth-seeking process in the scientific sense. It is weighted at trial in favor of protecting the innocent, even at the cost of acquitting the guilty. It is weighted on the streets in favor of protecting the individual from intrusion by the state, at the cost of the more efficient methods of crime control that would result if police could stop, question, and search anyone they desired.

(citations omitted).

See also generally U.S. CONST. amend. IV-VI, VIII.

8. The scope of "truth" which may be presented at trial, of course, is not only a matter of truthfulness and untruthfulness, completeness and incompleteness. It is also a property of applicable doctrine and the associated principle of relevance. As has been recognized, the voices of so-called marginalized persons or "outsiders" have been removed from the courtroom in the past through substantive law. *See, e.g.*, Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law*, 42 U. MIAMI L. REV. 29 (1987) (discussing the impact of historically excluding certain groups from the legal profession on the "truth" that is "imposed... by a particular class of [male] truth creators and interpreters"); Benita Ramsey, *Symposium: Excluded Voices: Realities in Law and Law Reform – Introduction*, 42 U. MIAMI L. REV. 1 (1987) (discussing unequal access to the legal profession and the resulting impact on the law); Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 8 (1988).

9. *See* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's 'Different Mission,'* 1 GEO. J. LEGAL ETHICS 339, 340-41 (1987):

> It is emotionally easy (and perhaps even rhetorically convincing) to proclaim the virtue of 'truth' in the abstract; it is more difficult to extol 'truth's' virtues when analyzing the American criminal justice system. An analysis of the American criminal justice system in actual operation is appropriate at this point.
>
> A system focused on truth would first collect all information relevant to the inquiry. In our system, the defendant is generally the best source of information in the dispute, but he is not available unless he so chooses. The police may not question him. He may not be called to the stand with his own lawyer beside him and with a judge controlling questioning under the rules of evidence. The prosecutor may not even comment to the jury about the defendant's failure to testify, even though fair inferences may be drawn from the refusal to respond to serious accusations.
>
> A system focused on truth would have the factfinder look at all the information and then decide what it believed had occurred. In our system, the inquiry is dramatically skewed against finding guilt. 'Beyond a reasonable doubt' expresses the deep cultural value that 'it is better to let ten guilty men go than convict one innocent man.' It is a system where, after rendering a verdict of not guilty, jurors routinely approach defense counsel and say, 'I thought your guy was guilty, but that prosecutor did not prove it to me beyond a reasonable doubt.' What I have

Rather, our criminal justice system is a screening system which protects the defendant against overreaching governmental power.[10] From initial contact with the police, through trial, the system consists of a series of screens which both serve to protect the innocent, and facilitate the defendant's release from the system at the earliest possible juncture. In trial, the ultimate screen, a group of fellow citizens, stands between the defendant and the government. This is a system in which the greatest concern is the protection of the innocent.[11] That is why the defendant, not the prosecution,[12] gets all the procedural advantages.[13]

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just described is not a 'truth system' in any sense in which one could reasonably understand that term. Truth may play a role, but it is not a dominant role; there is something else afoot.

10. *See* Mitchell, *supra* note 7, at 299-302:

> Our criminal justice system is more appropriately defined as a screening system than as a truth-seeking one. This screening process is directed at accurately sorting out those whose deviancy has gone beyond what society considers tolerable and has passed into the area that substantive law labels criminal. The ultimate objective of this screening is to determine who are the proper subjects of the criminal sanction.
>
> .....
>
> The criminal justice system is itself composed of a series of "screens," of which trial is but one. By keeping innocents out of the process and, at the same time, limiting the intrusion of the state into people's lives, each of these screens functions to protect the values of human dignity and autonomy while enforcing our criminal laws. Further, to ensure that the intrusion of the state into the individual's life will be halted at the soonest possible juncture, our system provides a separate screen at each of the several stages of the criminal process. Thus, at any screen, the individual may be taken out of the criminal process and returned to the society with as little disruption of his or her life as possible.

(citations omited). *See also* Freedman, *supra* note 6, at 61-62 ("[D]efense counsel serves to make our criminal procedures consistent with our ideals... to protect individual rights in the criminal process (and to protect those who should not become entangled in the criminal process).") (citations omitted).

11. *See* Kunkel & Geis, *supra* note 2, at 549 ("It is an American legal truism, only rarely disputed, that it is preferable to lose a score of convictions than to find one innocent person guilty."); Mitchell, *supra* note 7, at 300 ("[T]he criminal justice system... is weighted at trial in favor of protecting the innocent, even at the cost of acquitting the guilty.") (citation omitted); Lawrence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 388 (1970) ("Since some error is inevitable, the common law adversary system deliberately chose to err on the side of risking acquittal of some who are guilty in order to make near certain that no innocent person will suffer conviction.").

In emphasizing the centrality of protecting the rights of the defendant, I am not unmindful of the concerns for victims and their rights. *See, e.g.,* Walter A. Matthews, *Proposed Victim's Rights Amendment: Ethical Considerations for the Prudent Prosecutor,* 11 GEO. J. LEGAL ETHICS 735 (1988); Anne E. Morgan, *Criminal Law – Victim's Rights: Remembering the "Forgotten Person" in the Criminal Justice System,* 70 MARQ. L. REV. 572 (1987). Nor do I confine this concern to giving victim's a role at the penalty phase, restitution, access to public services, victim's advocates, or to training police and prosecutors how to deal with victims. I recognize that it also includes confronting substantive law when its effect is to victimize the victim. *See, e.g.,* SUSAN ESTRICH, REAL RAPE (1987).

That said, I nonetheless hold firm that, as a constitutional matter (that is, a 4th, 5th, and 6th Amendment matter), the central concerns of the criminal justice system must be with the defendant and the protection of the innocent. Some authors express concern about the possible diminution of defendants' rights, and the rule of law itself, through the victim's rights movement. *See generally* Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation,* 85 GEO. L.J. 1691 (1997) (arguing that the proposed Victims' Rights Amendment

should not be adopted because it is misguided and unworthy of a constitutional amendment); Ahmed A. White, *Victim's Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1985) (arguing that the victims' rights movement contradicts and undermines the rule of law).

12. Now, before you feel too sorry for the prosecution, it would be mistaken to ignore all the actual advantages which the prosecution has in the process. Far from being at a disadvantage, one might attribute a built-in unfairness in the trial process when the prosecution and police resources are compared to those of the defense. This is particularly so given that the budgets of prosecution offices are generally "three times the budget of public defenders, as well as the use of police, forensic laboratories, and state employed psychiatrists." Stacy Colino, *When Justice Goes Begging – The Crisis in Indigent Defense*, STUDENT LAWYER, Oct. 1988, at 14. "Public Defenders, on the other hand, must pay for these services out of their limited budgets." *Id.* This only compounds the prosecution team's (prosecution and police) "inherent information-gathering advantages...." Wardius v. Oregon, 412 U.S. 470, 476 n.9 (1973).

The Court in *Wardius* stated:

> Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. As one commentator has noted:
>
> > "Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when the[y] might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019 (1972) (footnotes omitted).

Id.

Once trial actually starts, it is the prosecution who represents "The People" or "The State," the very entities of which the jurors are members, and for whom the prosecutor acts as protector. The defendant, on the other hand, has been arrested by the police and, you know, "where there is smoke there is fire." Even more so are the narrative advantages of having police as your information-gatherers *and* witnesses. First, information can be constructed during investigation with future testimony in mind. Second, though tarnished somewhat by recent events in the news, police still bring with them to court story elements favorable to the prosecution – that is, protectors of society (the jurors), who are honest, accurate perceivers, and neutral. All this is enhanced by being professionals at testifying as a result of both training and experience. *See generally* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (discussing police discretion to disclose exculpatory evidence in their reports).

13. Admittedly, many of these have been weakened a bit in recent years, but the procedural advantages nonetheless consistently rest on the defense side of the scales. As such, though the defendant

So why in a procedural system which so favors the defense does the prosecutor get the final argument in closing? It would seem that if this is a real procedural advantage, then our consistent deference to the procedural rights of criminal defendants should trump the analysis applicable in the civil arena that the burden of proof dictates the order of argument. Arguments of equity to the effect that, since a party already has the burden, we should at least give them the advantage of the last word, do not really play well when transposed to the criminal system. For in the criminal system, we have little reason to look for equitable devices to offset the fact that the prosecution must carry the burden, and a heavy one at that. It is supposed to be difficult to get convictions; that is the whole point. We surely do not want to do anything which lessons the difficulty of meeting that burden and thereby risk diluting its role in protecting the innocent. The question then is whether the rebuttal argument gives any real advantage to the prosecution.

On the surface, it would seem so. The entire rationale for giving the rebuttal to the prosecution is that they get something from going last, that it helps them carry their burden, or at least that it somewhat offsets the task of having to carry such a heavy burden. Moreover, the significance of having or getting in the "last word" is so deeply embedded in our culture that we all assume that some advantage goes to she who speaks last.[14] That being

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may no longer be entitled to a unanimous, see *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), twelve-person, see *Williams v. Florida*, 399 U.S. 78, 86 (1970), jury for conviction, conviction still requires the vast majority of a substantially-sized panel, see *Ballew v. Georgia*, 435 U.S. 223, 245 (1978). Likewise, while the Fifth Amendment may not bar access to alibi witnesses, *see Williams*, 399 U.S. 78, non-testimonial evidence, see *Schmerber v. California*, 384 U.S. 757, 761 (1966), and incriminating evidence in defendant's possession which the government did not make him create, see *Fisher v. United States*, 425 U.S. 391, 400-01 (1976), still the defendant does not have to put on a case, can refuse to take the stand, and will even be assured that the prosecution is barred from commenting on his failure to testify, see *Griffin v. California*, 380 U.S. 609, 612-14 (1965). Similarly, while the standards for reversal for governmental destruction of evidence, see *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988), or prosecutorial failure to produce exculpatory evidence, see *United States v. Bagley*, 473 U.S. 667, 682 (1985), may be stringent, the government is still admonished not to destroy potentially exculpatory evidence, see *Youngblood*, 488 U.S. at 57-8, and the prosecution still has the duty to provide exculpatory evidence without any request by the defense, see *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963). Similarly, while the right to confrontation may not allow the defendant to obtain the address of a rape victim, see *McGrath v. Vinzant*, 528 F.2d 681, 684 (1st Cir. 1976), still, the defense may generally determine a witness's address and community in cross-examination, see *Smith v. Illinois*, 390 U.S. 129, 132 (1968) and *Alford v. United States*, 282 U.S. 687, 694 (1931), and may probe into prior convictions and even juvenile probation, see *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

Finally, although the defendant may not be entitled to a great attorney, see *Strickland v. Washington*, 466 U.S. 668, 689 (1984), he still is entitled to an attorney, see *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963), which is a lot better than the situation felony defendants faced in Merry Olde England. *See* John H. Langbein, *The Historical Origins of the Privilege Against Selfincrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994) (noting that "[f]rom the middle of the sixteenth century... until late in the eighteenth century,... the most fundamental [attribute in English common law] was the rule that forbade defense counsel."). Interestingly, in contrast to felons, persons accused of misdemeanors were entitled to counsel. *See id.* at 1049 n.7.

14. As Oliver Goldsmith put it: "I always get the better when I argue alone." MICHAEL REGAN & BOB PHILLIPS, THE ALL AMERICAN QUOTE BOOK 28 (1995). That, in effect, is the essence of having the

said, I guess I could rest here and conclude that the prosecution should not get the last argument. But, such a leap to judgment based principally on intuitive arguments seems inappropriate for what I believe is a serious issue within criminal practice.

My entire practice career was spent as a criminal defense attorney, and I vividly remember the moments of sheer agony while I had to sit listening to the prosecutor's rebuttal. I wanted to answer, to speak again. I knew that I could counter all that had been said. But I had to sit quietly. Those were, and are, the rules of the game.

With that background, you and I both know how I want this to end; I want the last argument in closing. But I'm also an academic and a realist. Therefore, I'm not going to end the article here. Before I consider rocking the boat by suggesting that we change a procedure so universally accepted, I promise to (try to) put aside my admitted bias in order to explore whether going last gives the prosecution any *really significant* advantage. For if there are not such significant advantages, then it is probably wiser to leave things as they are and look for more important matters with which to be concerned.

In this exploration, I will look to every area of opinion and expertise which would seem to help explicate the nature and power of the rebuttal argument – opinions of practicing attorneys and jurors, wisdom of those in the academic field of legal advocacy, studies of sociologists (ethnographers of closing arguments), social psychologist, (researchers in primacy, recency, and persuasion theory), cognitive psychologists (researches in narrative and schema theory), and the expert knowledge base of those in the fields of rhetoric and debate (experts in the processes of refutation).

In Section II, I look at the question of whether closing arguments are important at all. Section III examines the significance of the fact that in most jurisdictions the prosecution gets the initial, as well as rebuttal closing. The advantages of the rebuttal argument are examined in Section IV, while the tactical steps the defense can take to combat these advantages appear in Section V. My final conclusion then awaits the end of this journey of exploration into the rebuttal argument.

II. How Important are Closing Arguments?

It seems appropriate that I begin with closing arguments themselves. For in looking at the significance of rebuttal arguments, I'm focusing on only a piece of that entire trial performance we call closing arguments. If that entire performance is relatively insignificant, I can pack my proverbial

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last word.

bags and write on some other topic. How important then is the role of closing argument at a jury trial?

If you judged by the mass of literature devoted to the subject of closing argument, you would think that it was one of the most significant topics in Western thought.[15] There, in the law library, are shelves upon shelves of such volumes.[16] And a great number of attorneys do seem to view the

15. Admittedly, not everyone in the profession believes that the closing is important. Thus, "there has been an increasing tendency in recent years to underestimate its value." ASSOCIATION OF TRIAL LAWYERS OF AMERICA EDUCATION FUND, THE ANATOMY OF A PERSONAL INJURY LAWSUIT: A HANDBOOK OF BASIC TRIAL ADVOCACY 387 (1981) [hereinafter "ANATOMY"]. *See also* Daniel D. Gross, *Winning Narratives in Courtroom Rhetoric: Blending Stories and the "Evidence" in Closing Argument*, 19 TRIAL DIPL. J. 331, 333 (1996) ("A second preliminary consideration involves the presumed unimportance of the closing argument in the final outcome of the trial."). This is hardly, however, the dominant view. In fact, each of the two sources quoted in this footnote immediately go on to reject the notion that closing arguments are not significant in the trial process. *See* ANATOMY, *supra*, at 387; Gross, *supra*, at 333 ("Recent research has indicated that closing arguments may well play a much larger role than previously argued.").

16. A limited sampling of what can be found in one's law library include: AMERICAN COLLEGE OF TRIAL LAWYERS & ALI/ABA, 2 CIVIL TRIAL MANUAL 646 (1980) [hereinafter "ALI/ABA"]; ANATOMY, *supra* note 15, at 387; ROBERTO ARON ET AL., *Chapter 23. Communication During Closing Argument*, *in* TRIAL COMMUNICATION SKILLS 23-1 (1996); MELVIN M. BELLI, 5 MODERN TRIALS 68 (2d. ed. 1982); MARILYN J. BERGER ET AL., *Chapter XII. Closing Argument*, *in* TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY 469 (1989); PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 57-64 (3d ed. 1997); RICHARD J. CRAWFORD, THE PERSUASIVE EDGE: WINNING PSYCHOLOGICAL STRATEGIES AND TACTICS FOR LAWYERS 161 (1989); ROBERT L. CONASON ET AL., BASIC TRIAL STRATEGY Chapter VII (1984); DOUGLAS DANNER & JOHN W. TOOTHMAN, TRIAL PRACTICE CHECKLISTS 492 (1988); RICHARD A. GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE (2d ed. 1985); SONYA HAMLIN, WHAT MAKES JURIES LISTEN TODAY 603-85 (1998); ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES 601-63 (1991); JEANS, *supra* note 3, at 367-94; PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT (1989); LUBET, *supra* note 1, at 443-504; THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 273-332 (3d ed. 1992); ALBERT J. MOORE ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES 213-42 (1996); MURRAY, *supra* note 3, at 353; NEW YORK STATE ASS'N OF TRIAL LAWYERS, THE ART OF SUMMATION (Melvin Block ed., 1964) [hereinafter "ART OF SUMMATION"]; LEONARD PACKEL & DOLORES B. SPINA, TRIAL ADVOCACY: A SYSTEMATIC APPROACH 135-56 (1984); JAMES BORDEN ROSENBLUM, THE DEFENSE LAWYER'S TRIAL HANDBOOK: SUCCESSFUL COURTROOM STRATEGIES FOR DEFENDING PERSONAL INJURY AND MALPRACTICE CASES 1001-43 (1984); SYDNEY C. SCHWEITZER, 1 CYCLOPEDIA OF TRIAL PRACTICE 697 (2d ed., 1970); KENT SINCLAIR, TRIAL HANDBOOK, *Chapter 5* (3d. ed., 1985); KENT SINCLAIR, FEDERAL CIVIL PRACTICE 867 (2d ed. 1986); JACOB A. STEIN, CLOSING ARGUMENT: THE ART AND THE LAW (1982); STERN, *supra* note 1, at 1-443; J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 369-410 (2d ed. 1993) [hereinafter "THE TRIAL PROCESS"]; THE PRACTICAL LAWYER'S MANUAL OF TRIAL AND APPELLATE PRACTICE NO. 2, at 47 (1979) [hereinafter "THE PRACTICAL LAWYER'S MANUAL"]; THE TRIAL MASTERS - A HANDBOOK OF STRATEGIES AND TACTICS THAT WIN CASES 327-400 (Bertram G. Warshaw ed., 1984); LESLIE H. VOGEL, FINAL ARGUMENT 1-36 (1954); Scott Baldwin, *Jury Argument: How to Prepare and Present a Winning Closing Argument*, 20 TRIAL 58 (April 1984); James E. Beasley, *Chapter VIII. Closing Arguments*, *in* TRIAL PRACTICE FOR THE GENERAL PRACTITIONER 98 (Leonard Packel ed., 1980); Robert E. Cartwright, *Winning Psychological Principles in Summation*, 1 TRIAL DIPL. J. 31 (1978); Michael F. Colley, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42 (August 1981); Mark Dombroff, *Finishing Big: Closing Arguments That Win Cases*, 25 FOR THE DEFENSE 12 (November 1983); Harry G. English, *Opening and Closing to a Jury*, 9 PRAC. LAW. 69, 74-76 (April 1963); Harry A. Gair, *Summations for the Plaintiff*, 6 AM. JUR. *Trials* § 641 (1967); Gross, *supra* note 15, at 331-38; John Wyne Herron, *The Art of Jury Argument*, Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecution Summation in Tennessee*, 58 TENN. L. REV. 117 (1990); Brooke Jackson & Richard J. Crawford, *Improving the Damages Appeal - A Few*

moment of closing argument as the pinnacle of their art.[17] For them it is in that moment that they take the tiny, fragmented pieces of evidence from trial and deftly assemble them into a magnificent picture which vividly demands victory for their client.[18]

That attorneys should see closing argument as so significant is hardly surprising. The closing is the last thing they do in a case, so it is only natural that they will, and even must, believe that they can make that final difference and tip the scale – at least in a close case. Thus, this belief in the importance of closing argument reinforces the sense that they have control of the outcome, that their skill can make a difference. While this belief undoubtedly adds a great deal of pressure onto the advocate, it is hard to imagine things being otherwise. Trained for three grueling years, working day after day learning their craft, it makes sense that they would come to

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Words on Having the Last Word, 32 TRIAL 66-68 (May 1996); James W. Jeans, *Chapter 18. Summation*, 3 LITIG. 1287 (1992); Guy O. Kornblum, *The Voir Dire, Opening Statement, and Closing Argument*, 23 PRAC. LAW. 23-28 (Oct. 1977); Theodore I. Koskoff, *The First Person Summation*, *in* ATLA MASTERS AT WORK 238 (1984); Fred Lane, *Part VI. Closing Argument*, LANE GOLDSTEIN TRIAL TECHNIQUE 1 (Scott D. Lane ed., 3d ed. 1997); J. D. Lee, *Final Strokes: Painting the Whole Picture at Summation*, 19 TRIAL 63 (June 1983); Henry G. Miller, *Principles of Summation*, 28 AM. JUR. *Trials* § 549 (1981); John P. Miller, *Opening and Closing Statements From the Point of View of the Plaintiff's Attorney*, *in* THE PRACTICAL LAWYER'S MANUAL, *supra*, at 39; McElhaney, *Rules of Final Argument*, *supra* note 3, at 45; James W. McElhaney, *Trial Notebook – The Final Five*, 12 LITIGATION 41 (1986); Albert H. Parnell, *The Effective Use of Demonstrative Aids in Closing Argument*, 15 FOR THE DEFENSE 15 (December 1983); Earl J. Silbert, *Chapter 16. Closing Argument*, *in* THE JURY 1984: TECHNIQUES FOR THE TRIAL LAWYER 531-39 (1984); Stuart M. Speiser, *Chapter 14. Closing Argument*, *in* MASTER ADVOCATE'S HANDBOOK 233 (D. Lake Rumsey ed., 1988) [hereinafter "MASTER ADVOCATE'S HANDBOOK"]; Stuart M. Speiser, *Closing Argument*, 10 THE DOCKET 1 (Fall 1986) [hereinafter "THE DOCKET"]; *Summation: Practice and Procedure – Aspects of Trial Practice*, 1974 DEFENSE RESEARCH INSTITUTE 64 (1974); J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. JUR. *Trial Advocacy* § 47 (1986) [hereinafter "*Closing Argument Procedure*"]; Donald E. Vinson & Phillip K. Anthony, *The Closing Arguments: Application of Attribution Theory*, 7 TR. DIPL. J. 33 (1984).

17. In interviews with trial attorneys by sociologist Bettyruth Walter, the importance of closing argument was consistently emphasized by the participants. *See* BETTYRUTH WALTER, THE JURY SUMMATION AS SPEECH GENRE: AN ETHNOGRAPHIC STUDY OF WHAT IT MEANS TO THOSE WHO USE IT 38-39, 105 (1988). This is consistent with the general tone of the literature. *See, e.g.*, ANATOMY, *supra* note 15, at 387 ("The importance of summation in the trial of a case is very great...."); DICK CAMERON GIBSON, THE ROLE OF COMMUNICATION IN THE PRACTICE OF LAW, 114 (1990) ("Clearly, every part of a trial is important... still, the closing argument is especially important, by virtue of its location in the trial process."); RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 202 (1991) ("Despite the popular belief that jurors have solidified their positions on the case prior to the summation, the opportunity to interpret the facts for the jury has lead many trial lawyers to contend that the closing argument is the performance that most determines the outcome of the case."); Speiser, THE DOCKET, *supra* note 16, at 1 ("The importance of the closing argument cannot be overestimated. Since most cases that go all the way through to verdict are by definition close calls, it follows that the strength of the closing argument often can make the difference between victory and defeat.") *See also* ALI/ABA, *supra* note 16, at 647 ("The importance of closing increases in almost direct ratio with the length of the trial and the amount of controversy over the facts.")

18. *See* WALTER, *supra* note 17, at 179:

> The trial is like a jigsaw puzzle. It has a bunch of little tiny pieces of evidence all coming in at different times, and really meaningless to a jury. And when you put it together in the summation, it becomes a great big painting. A beautiful painting is what you want them to see.

see the outcome of a case affected by their skills. And, I think they are correct to feel that way. But there are also reasons for attorney perceptions about the significance of closing argument which spring from our culture.

Lawyers were once children, too. They grew up and were part of a culture which has routinely found drama within the confines of the courtroom. No doubt, part of their desire even to choose law as a profession was fueled by moments from books, movies, and (now) television. In that cultural image, it is the closing argument which is the great dramatic moment – give or take a few witnesses breaking down on cross-examination or court spectators suddenly jumping up and confessing to the crimes of which the defendant has been accused. In this singular moment, the attorney stands alone, facing those who will decide his or her client's fate.[19] There the attorney stands in the shoes of Clarence Darrow, pleading for the lives of Leapold and Loeb,[20] and in those of Atticus Finch,[21] pleading for racial justice.[22]

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19. Giving the closing argument is actually very personal; it is very much putting yourself out in front of the jury. "Probably no other phase of trial technique is more personalized than final argument." ANATOMY, *supra* note 15, at 387. And experienced litigators take particular pride in their ability to talk with the jury. *See, e.g.*, WALTER, *supra* note 17, at 115:

> Eighty-one percent of the informants [*i.e.*, attorneys] were able to decide their own style.... In answer to the question, "Are you good at it?," half of the lawyers interviewed said, "yes", or "I've heard it said about me." Only twelve percent wouldn't comment, or answered, "no, not yet," or "I'm getting better at it." These last comments came primarily from women lawyers.

20. Darrow's fabled representation of two rich, brilliant young men with families in the upper echelons of Chicago society who killed a teenaged boy just to prove that they could get away with murder has recently surfaced in the popular magazines and fiction. *See, e.g.*, DEAN KOONTZ, THE FACE OF FEAR 116-17 (1985); *Playing For Keeps: Teenage child-killers Leopold and Loeb saw murder as a game for superior minds*, PEOPLE WEEKLY, June 14, 1999, at 141.

21. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

22. I admit to a somewhat similar bias towards closing, though for a far less dramatic reason. My entire approach to teaching beginning trial advocacy uses closing argument as the central organizational structure for trial. *See* BERGER ET AL., *supra* note 16, at 469-70 ("[P]lanning closing argument is also the beginning of your trial preparation."). I conceive of the trial as presentation underlain by narrative theory. *See* John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 105-11 (1999). In other words, the jurors will both use the evidence to create stories, and will place subsequent evidence within this story structure. They will then evaluate these stories by comparing them to their own repertoire of stories that they have created from experience, culture, bias, etc.

The advocate, therefore, tries to control this narrative process, have the story be the advocate's story. In this approach to advocacy, the master narrative the attorney seeks to create is embedded in the closing. Within this model of advocacy, direct and cross-examinations are focused upon getting out the information, or its lack, that you need for closing, *See* BERGER ET AL., *supra* note 16, at 277-80, 344-52, 469-70. In closing, the attorney then reasons with the jury in order to guide them to draw from all this information the *inferences* which support the narrative(s) the advocate desires. *See* MOORE ET AL., *supra* note 16 (providing an excellent exposition on the role of inferences at trial). *See also* W. Lance Bennett, *Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment*, 65 Q. J. SPEECH 311, 318 (1979) ("These diverse connecting tactics [by the prosecution and defense] all share the objective of linking evidence to a specified subset of story elements and providing a basis for drawing an inference from the connection.").

Note also that I said "reason with" the jury. While some might see closing as a moment to move the jury with your rhetoric as you would an audience at a play, I approach it far more as an opportunity

Sociological studies capture this widespread belief among trial attorneys in our profession regarding the significance of closing argument in jury

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to persuade by reasoning with the panel. Many other attorneys have the same perspective. *See, e.g.*, ANATOMY, *supra* note 15, at 387 ("Most good lawyers believe that they do not argue to a jury but instead they reason with it."); HAMLIN, *supra* note 16, at 611 ("To win, you must be able to assuage their doubts with solid answers, to show them logic and objective reasoning that will support their inclinations...."); Speiser, MASTER ADVOCATE'S HANDBOOK, *supra* note 16, at 243 ("Use logic instead of emotion to be persuasive.").

One might answer my concern by taking the position that even under my teaching methodology, the actual closing is not necessarily important, only that the young advocate have one in mind while planning a trial. As long as the information developed at trial is guided by a closing argument which exists in the back of the mind of the advocate who is conducting the exams, the jurors will draw those underlying inferences and eventually arrive at the narratives you desire on their own. All that matters is that the witness examinations be guided by an underlying theory, best expressed in the organization of a closing argument. Actually giving the argument is redundant.

While I can appreciate the perspective, I believe that it is misguided for a number of reasons. Initially, information at trial often comes in as fragmented, nonlinear data. The jurors' struggle with pressing this evidence is well expressed in W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 8-9 (1981):

> First, stories solve the problems of information load in trials by making it possible for individuals continuously to organize and reorganize large amounts of constantly changing information. New pieces of evidence can be fit within the structural categories in an incident.
>
> .....
>
> In trials cases often unfold in a more complex and disjointed fashion than do plots in novels or movies. The juror or spectator in a trial may be confronted with conflicting testimony, disorienting time lapses, the piecemeal reconstruction of a scene from the perspectives of many witnesses and experts, and a confusing array of subplots. Without the aid of an analytical device such as the story, the disjointed presentations of information in trials would be difficult, if not impossible, to assimilate.

The jury, thus, will undoubtedly place all the fragments of trial evidence within a structure, but I am not at all confident that it will be the assembly of information I wish them to make. I want to be their guide. This notion of the attorney as a guide, leading jurors through the issues and evidence in summation, is well-expressed in ALI/ABA, *supra* note 16, at 647:

> The importance of the closing argument increases in almost a direct ratio with the length of the trial and the amount of controversy over the facts. Although the importance of certain testimony may be obvious to an attorney, it does not necessarily follow that it will be obvious to the jury. Especially in long and complicated cases, the nuggets of important facts may, to the layman juror, remain buried in the sands of trivial and conflicting testimony. It is the closing argument that must collect the important facts and expose them to the view of the jury in a logical and unified pattern that they will want to accept and believe.
>
> No less important than clarifying the facts of the case is the clarification of the issues. Even though in counsel's opening statement he may have clearly spelled out the issues in the case, by the time of the closing argument there may be jurors who either misunderstand the issues or simply do not remember the issues at all.

Further, in many criminal cases, the defense does not put on any evidence, relying instead on cross-examination and the concept of reasonable doubt. *See* John B. Mitchell, *supra* note 22, at 106 ("[A] criminal defendant can put on no evidence and raise a purely reasonable doubt defense, attacking the prosecution's case as one whose narrative 'does not make sense' or 'cannot be trusted....'"). Again, I am unsure that jurors would analyze such a case as I would wish absent an advocate to teach them how to appreciate a picture of reasonable doubt. In short, I'm just another attorney who believes in the importance of closing argument.

trials. In the most thorough ethnographic study[23] ever done of closing arguments, sociologist Bettyruth Walter watched closing arguments in sixty-six actual trials and interviewed thirty-four attorneys, 223 jurors, and thirty-five alternate jurors.[24] When interviewed, every attorney felt closing was important, with 75% saying that it was the difference, at least in close cases.[25] When asked if they thought the outcome of trials would be different

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23. An ethnographic study is a "descriptive work" produced by the "study and systematic recording of human cultures." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 398 (10th ed. 1997).

24. *See* WALTER, *supra* note 17, at 9-10.

25. *See id.* at 115. In the actual interviews, the responses fell into two categories: "Extremely important" and "Important – but not the most important phase of the trial." *Id.* Their actual responses provide insights beyond the raw statistics:

A. What is the value of the summation to the trial process?
(N = 34)

a) *Extremely important*	26	.76
b) *Important*	8	.24
c) *Not important*	0	.00

a) *Extremely important*

1. "If a case can still be won or lost at the summation stage, then it is clearly the most important part of the trial."
S. Gerald Litvin
2. "I regard the trial as only a divide to enable you to sum up to a jury."
A. Charles Peruto
3. "I think it's probably the single most important factor that determines the guilt or innocence of the defendant. It's that important."
"To me the entire trial is a preface to a summation. It's all leading up to that. The lawyer is gearing the whole trial to that hour he can stand up before the jury and GO! He can do his thing."
Eugene F. Toro
4. "I think it's probably the most important part of the trial because it's the only part of the case that represents pure advocacy. It's the one time in a trial when almost without restraint a lawyer can stand in front of a group of people and literally argue his case. It's the most persuasive part of the case. He tries to explain away some of the calamities and exploit some of the good fortune he's experienced."
"His summation... brings to bear on the litigation all of the lawyer's skills: his imagination, his use of language..."
"Those of us who defend criminal cases are concerned with that perhaps 20% in the middle where the lawyer's skill can make the difference. And in that category of cases, I think the summation is probably the most influential part of the trial."
Herald Price Fahringer
5. "It's the most important thing I can contribute."
Donald J. Goldberg
6. "I think a proper summation can make a difference in a case that's *not* even close."
Raymond A. Brown
7. "From a defense lawyer's standpoint, it's the critical stage of the trial. Particularly in fairly lengthy cases involving complicated factual patterns, where it's not going to be clear to the jury what the case is really about until they hear it summarized and put together and related to one theory or another. I think it's probably, from the defense standpoint, the single most important phase of the trial."

without closing argument, 66% said yes, and 33% said maybe.[26] No one said no.

But what did the jurors say? Eighty-eight percent said they thought closing was important,[27] and I would comfortably go on to the next topic in this article were it not for two other studies cited in Ms. Walter's book. In these two studies, subjects were asked to rank the aspects of trial they felt were most important. Closing argument made the top of the list in only 4% in one study, and 6% in the other.[28] Significantly, Dr. Walter herself drew

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Thomas Colas Carroll

8. "It's priceless – if properly used. Communicating is *the* key point. By communicating you persuade."

John Rogers Carroll

9. "It's of real significant value primarily because you have an opportunity for the first time – and actually for the last – to have direct contact with the jury."

Joseph J. McGill

b) *Important – but not the most important phase of the trial*

1. "Summations aren't as valuable a tool as a lot of lawyers think they are. Summations are important, but far too many lawyers think if they make a great speech, and do nothing else, they're going to win the case. I don't think that's true at all."

F. Emmett Fitzpatrick

2. "They are not the crowning glory of the trial [which she believed them to be in law school]. They are not the most significant moment in this magic time. But they are very important."

Holly Maguigan

3. "I like to think that it is the most important part of the case, but I'm not convinced that it is... I think it's only important in certain cases."

Thomas A. Bergstrom

4. "I've heard so many awful summations – by the government, for example – and then they routinely win their cases. So I'm just not convinced that a summation is the end-all and be-all."

Criminal Defense

5. "Closing speeches don't make a damn bit of difference. It's part of the show. But the jurors expect it."

Criminal Defense

6. "It can be everything, or it can be nothing."

Stephen P. Meyer

7. "I think it's important – extremely important. But I think it's only one important phase of a multitude of important phases of the case. I think your opening is just as important. Much, much shorter, but just as important."

Barbara L. Christie

8. "The jury is entitled to it. The jury wants to know how you really feel. They need to know you more. They need to hear from you. They need to know what it is that you think about the case, what you think about the witnesses...."

Richard Haynes

Id. at 38-39.

While hardly constituting a statistically valid sample, it is interesting that the women attorney's in this study generally consider closing argument to be less pivotal than their male counterparts.

26. *See* WALTER, *supra* note 17, at 115.

27. *See id.* at 197. The most frequent reasons given why they thought the closing argument was important were: refreshes memory; clarifies issues and pulls pieces together; and gives a good summary of the entire trial. *See id.*

28. *See id.* at 205-08. The factors on the list rated higher, not surprisingly, were the law and the facts. *See id.* at 207-08. Where closings got 6%, law received 35%, and facts 59%. *See id.* at 205.

from this, in spite of the 88% number in her own study, that closing arguments are not very important to the juror's verdict decision.[29]

But do these studies really mean that closing arguments are not that important to jurors? Plainly that is not a conclusion I wish to reach, nor, with all respects to Dr. Walter, is it one that I believe follows from these two studies. Specifically, there are four reasons that diminish what superficially appear in these studies to signal a low significance of closing arguments to jurors.

First, the jurors were motivated on a number of levels to give that type of ranking. They had just been instructed by the court that they were to decide based on the evidence and that "arguments of counsel are not evidence."[30] To give too much weight to the arguments of counsel would tend to deny the rules of law just given them by the judge. Also, jurors have a sense of their role. They are the fact finders; they are the decision makers. They are the ones in charge of the outcome, and so they surely are not some pawn to be manipulated by the rhetoric of one or another of the advocates. Diminishing the influence of the attorney's persuasion over them makes good psychological sense. In fact, any advocate who tries to persuade a jury without appreciating their sense of their role does so at their own, and their client's, peril.

Of course, much of this is a function of the general limitations on all ethnographic studies. They are based upon self-reporting and reflecting the subjects' own perceptions – perceptions which may or may not comport with what was really going on.[31] Anyone who has talked to jurors after a verdict understands this. You want to know why they decided like they did, but after a few minutes, you realize that you will never get the full story. It

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Where closings got 4%, law received 41%, and facts 47%. *See id.* at 208.

29. *See id.*:

> Once again, we have jurors stating in very strong numbers that they did not change their opinions after hearing the closing speeches, and that these speeches were not very important to their verdict decisions. Even taking into account the comments by judges which admonish jurors not to place too much emphasis on closing speeches, and the possible influence that admonition might have on conscientious jurors when questioned on this same issue, one cannot ignore the consistent and dramatic percentages every study has produced.

I respectfully disagree for the reasons that follow.

30. *See id.* at 205.

31. *See* RAY L. BIRDWHISTELL, KINESICS AND CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION 191 (1970):

> An informant should be used as a window into a culture. ... [H]is contribution to the research is indispensable. The investigator must constantly remind himself, however, that his informant is an adherent, not an objective interpreter, of his communicational system. The report of an informant about his behavior is itself behavior; such reports are data and not evidence. And the fact that all informants agree does not make their statements true, except insofar as agreement indicates conventional understanding.

See also WALTER, *supra* note 17, at 115.

is not that they are deliberately hiding it from you; it is more that a new, collective "here's why we reached our verdict" story has been created which obliterates all the prior stories of individual jurors. On the other hand, I note this inevitable limitation on ethnographic studies without pushing the point too hard. After all, I like the fact that 88% of the jurors in the primary study said closing was important.

Second, this ranking does not necessarily account for the influence closing arguments may have had on the juror's actual deliberations. Arguments, images and evidence may interact in jury deliberation in ways such that it is not easy to separate out any one piece. When I think of giving a closing, I do not imagine sweeping the jury on the wave of my reasoning directly to a verdict. I understand that the rhetorical power of my presentation will diminish as time passes and deliberations continue. My principle goal in closing is not so much to persuade – though surely I try – but rather to give analyses (some might say "ammunition") to those who support my position that they can use to persuade others, and with which those who are hold-outs can persist. Raw rankings fail to reflect this interconnectedness of the various aspects of trial.

Third, without knowing far more, it is hard to fully evaluate the significance of the 4% and 6% statistics. For example, the 4% and 6% may reflect jurors who had all sat in trials which were "close" cases. Most of the jurors, on the other hand, may not have sat on cases which were at all close. In criminal cases, the fact that a case goes to trial does not mean it is a close case.[32] In fact, from my experience, a large percentage of cases which go to trial are not close at all. The prosecution has almost all the bargaining power in the system,[33] and in truly close cases can often make the offer that the defendant cannot refuse. On the other hand, the prosecution may try a clear winner in which the defense has no realistic

32. A very experienced and successful civil attorney once told me that there is no excuse for trying the average civil case; it's only about money and that's something which should be worked out beforehand. Now, clearly this was an overstatement which didn't encompass cases involving personal principles, significant legal precedent, implications in the future for the defendant as to other possible claimants, etc. Yet, it did capture something of the truth, as evidenced by the analogous opinion of master advocate Stuart M. Speiser that "most cases that go all the way through to verdict are by definition close calls...." Speiser, THE DOCKET, *supra* note 16, at 1.

33. It is the prosecutor who makes the decision to charge and who is the central figure in the criminal system. *See* JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 126 (1972); Jack Kress, *Progress and Prosecution,* 423 ANNALS 99 (1976). In charging, the prosecution's exercise of discretion is all but unreviewable. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable caue to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file... generally rests entirely in his discretion.") (citation omitted). In court, the prosecutor has significant "administrative concerns" such as keeping "the calendar moving" Jerome H. Skolnick, *Social Control in the Adversary System,* 11 CONFLICT RESOL. 52, 55 (1967). Further "one can argue that the adversary component of the prosecutor's job is shifted from establishing guilt or innocence to determining the seriousness of the defendant's guilt and whether he should receive time." MILTON HEVMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 103 (1978).

possibility of success because, for whatever reasons, she does not want to make any deal.[34] The defendant, in turn, may go to trial on a clear loser if the penalty he faces if convicted is not significantly greater than what he will receive under any deal which will be offered. As such, he has little to lose by going to trial. Miracles do happen. The point is that if only 4-6% of the cases were close, and it is jurors from those close trials who gave closing argument a top ranking, the statistics mean that closings are vastly important when there is really something to decide. Of course, we do not know that. We do not know anything about the cases in these two studies. As such, we cannot really assess what the statistics mean.

Fourth, the nature of the question biased the result. Jurors were given a list of items and asked to rank the *most* important factor in their decision.[35] But, because something is not the most important, does not mean that it is not important.

Imagine that I ask you to rank among the following list what you think is most important for "the good life:" family, love, health, service to community, friends, economic security. My guess is that service to community will rank very low – it would on my list. Yet service to community is extremely important to me. In reality, it may well interweave with friendship, love (capacity for, opportunity to receive), and health (a full, worthwhile life focused on others as well as myself). But when the question is asked that way, and I'm given the list to rank, there it is at the bottom. It's all how you ask the question. Interestingly, in a different study where the question was phrased in terms of "what factors most affect *deliberation* [as opposed to your decision]...," closing argument was ranked second only to questioning of witnesses.[36]

There is, however, a far more significant statistic buried within Ms. Walter's ethnography and the two cited studies than the 88% numbers reflecting juror impressions of importance or the 4-6% numbers reflecting rankings. In these studies, jurors were also asked whether their opinion had been changed by the closing. In the ethnographic study, 14% reported their opinions changed by the prosecution argument, 10% by the defense.[37] In the cited studies, 5% were changed by the prosecution, 7% by the defense.[38]

34. From my experience, however, there are "losers" for the state which the prosecutor will consistently try, if the defense will not accept a deal. These are typically either Driving While Intoxicated or Domestic Violence Assault, particularly if the latter case is one where the woman is the alleged victim in an abusive relationship with a man. In those cases, the prosecution will let the jury acquit if it so wishes. Fine. The prosecutor is now not the one blamed the next week in the newspapers if the defendant should kill someone in a car crash while drunk, or beat his girlfriend to death in a rage.

35. *See* WALTER, *supra* note 17, at 205, 208.

36. RIEKE & STUTMAN, *supra* note 17, at 202 (emphasis added). *See also* Gross, *supra* note 15, at 333 ("'When asked what factors most affect deliberation, jurors ranked the closing statement second only to the questioning of witnesses.'").

37. *See* WALTER, *supra* note 17, at 207.

38. *See id.*

Think about what that means. Felony juries consist of twelve persons who, in most jurisdictions, must reach a unanimous verdict. Twenty-four percent of the jurors in the ethnographic study, and 12% in the cited studies, changed their opinions because of the closing.[39] It only takes one juror to hang a jury – one juror who stands on the line between conviction and mistrial. If you look at the 24% and 12% statistics, that means that between one and three jurors on each felony panel was subject to having their opinions changed by closing argument.[40] Now, that's important. And although it speaks generally to closing argument, and not specifically to the prosecution's rebuttal argument, it's a start.

III. Is it Significant that the Prosecution Gets to Speak First as Well as Last in Closing?

In exploring the possible advantages the prosecution is given by going last, it seems appropriate, initially, to consider that in almost all jurisdictions the prosecution also goes first, with the defense sandwiched in between prosecution arguments.[41] Before we focus exclusively on the rebuttal, it seems appropriate that we should then first explore the significance, if any, of this one-two punch.

A. The Legal Profession's Fascination with "Primacy" and "Recency"

For those who have been reading current advocacy literature,[42] or who have recently attended a continuing legal education program on advocacy,[43]

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39. Interestingly, jurors' feelings about the respective arguments appeared a function of whether or not they agreed with them. The argument of the attorney they agreed with ("winner") was memorable, interesting and more believable. The side they did not agree with ("loser") spoke too long, was less interesting, and less believable. *See id.* at 194-95. What does this mean, though? Did they perceive those qualities because they agreed or disagreed, or did they come to agree or disagree on account of those qualities? The study does not give us any guidance.

40. I, of course, do not know anything about the quality of the arguments or about the closeness of the case. I also do not know if any of the jurors had some strange proclivity where they could only have their opinion changed if the argument was by, e.g., the prosecution. But I sincerely doubt it.

41. *See* FED. R. CRIM. PRO. 29.1; ARON ET AL., *supra* note 16, at 15-10; DANNER & TOOTHMAN, *supra* note 16, at 493; ALAN E. MORRIL, TRIAL DIPLOMACY – SELECTED TEXT, 87 (1975); STERN, *supra* note 1, at 285. There are a few exceptions to this general ordering of closing arguments. In a few jurisdictions, there are only two arguments, with the defense going first and the prosecution concluding. *See, e.g.*, DANNER & TOOTHMAN, *supra* note 16, at 493 ("[S]ome courts allow only one argument from each, usually with plaintiff going last...."); McElhaney, *Rules of Final Argument*, *supra* note 3, at 46 (1993) ("[I]n New York and Massachusetts... the right to close means giving the last final argument. From this, they conclude that the other party – usually the defendant – gives the second opening statement and the first final argument.") (emphasis omitted).

42 *See* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 666-67 (3d ed. 1994) ("Thousands of lawyers know the advantage of primacy and recency. The chances are, if they have heard of one, they have heard of the other."); *see also* GIVENS, *supra* note 16, at 341 (discussing primacy and recency); RIEKE & STUTMAN, *supra* note 17, at 91 ("[L]egal practitioners have given

the phrase "first and last" will evoke an almost reflexive response. For such persons are unlikely to hear that phrase without immediately drawing to mind the principles from social psychology of *primacy* and *recency*. If you press them as to what these concepts mean, you are unlikely to get a scientific dissertation on the subject. Instead the response will more likely be that these concepts connote that what comes first and what comes last is most important for the jury. So, start and end your exams and arguments on your strong points, bury the weak or problematic matter in the middle.[44]

I admit it. I'd like to stop here. First is great. Last is great. The prosecution gets both. End of argument; it's unfair. But I promised that I would reign in my biases and fairly approach my analysis. When I do that, my glib argument runs into a bit of a problem. The more I research, the less it seems that our profession has really looked too deeply into the scientific underpinning of the concepts of primacy and recency.

Since I began by noting that the prosecution generally gets the first argument in closing, let me look at a common example of our profession's current embrace of the concept of "primacy" in an analogous area of trial. It takes place in the context of opening statements. Widely quoted[45] is the statistic that 80% of jurors make up their minds on civil liability after opening statement.[46] Now that's hardly an insignificant datum. The jurors merely hear the attorneys speak, no evidence, no witnesses, and the case is

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thought to the relative power of the first message the jury is exposed to in contrast with the last one they hear (primacy v. recency)...."); Michael F. Colby, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42, 46 (1981) ("Plaintiffs have the advantage of both primacy and recency because they have the burden of proof. At the start of trial, they speak first, and, in most jurisdictions, they speak first and last in closing argument."); Kunkel & Geis, *supra* note 2, at 556-58 (discussing psychological studies into the "law of primacy").

43. *See, e.g.*, Murray Ogborn, *Trial Psychology*, Washington State Trial Lawyers Association, ATLA All-Stars Seminar (November 8, 1991) 234-35 (applying primacy and recency to arguments and examinations); Herbert J. Stern, *Trying Cases to Win*, Washington Law School Foundation Continuing Legal Education (April 28-19, 1995) I-11 ("Do not give a speech on opening statement (the 'long windup') explaining how the trial is going to be conducted. The long windup is the destruction of primacy.").

44. *See, e.g.*, Ogborn, *supra* note 43, at 235 ("End each witness with a high point of testimony. End the day with a strong statement, whether it be through testimony or the introduction of an impactive demonstrative exhibit. By following these guidelines, you will have effected... recency.").

45. *See, e.g.*, WALTER, *supra* note 17, at 208 ("In another study of juror decisionmaking, Vinson (1985) reports that, '80 to 90 percent of all jurors came to a decision during or immediately after the opening statements....'"); Cartwright, *supra* note 16, at 31 ("Studies at the University of Chicago made sometime ago show that 80 percent of the jurors do not change their minds following opening statement, at least on issues of liability."); Ogborn, *supra* note 43, at 234 ("A Chicago study conducted several years ago indicated 80 percent of jurors irrevocably made up their mind by the time opening statement has been conducted."); *cf.* RIEKE & STUTMAN, *supra* note 17, at 92 ("While these studies do not support the conclusion that many cases are truly over after the opening statement, they allow that to be a serious possibility.").

46. The genesis of this statistic appears to be an article by Vinson. *See* Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72, 72 (Oct. 1985) ("In all of our work as behavioral scientists involving pretrial group analysis, trial simulations and post-trial interviews, we've reached the conclusion that 80 to 90 percent of all jurors come to a decision during or immediately after the opening statements.").

over.[47] No wonder our profession took notice. And, since criminal guilt and civil liability appear to have much in common, i.e., the defendant in both did something wrong, this statistic sounds significant for the criminal arena. But is it?

Let's look a bit more carefully at this 80% figure. After all, if our profession is to be seduced by the lure of having its art guided by principles derived from scientific disciplines, we may wish to take a bit of time to assess the underlying assumptions and experimental data which supports these principles we have chosen to follow.

First, we know the 80% figure did not come out of any real trials. You simply cannot stop a trial after opening statement to ask the jurors who they favor, and then repeat the question at various junctures throughout the process. During a trial, jurors are not permitted to discuss the case with anyone, including fellow jurors until deliberation. They receive an instruction to this effect at the beginning of the trial, and the same admonition is generally repeated at each break and adjournment.[48] I know

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47. Assuming the law of primacy imparts strategic significance to the opening statement, it is not obvious how much advantage this bestows upon the prosecution in particular. They do speak first and a powerful opening can sway the panel. I've seen that. But then the defense speaks and has the opportunity to pull the jury back. I've seen that, too. Admittedly, after a strong prosecution opening, the natural human tendency to avoid ambiguity and its resulting tension can provide some powerful psychological friction in the defense effort to drag the jury back:

> If the opening argument of the plaintiff appeals to the jurors and they accept it, then there is a tendency to defend its acceptance against contrary logic. Making an important decision is hard work for jurors, who often have nothing more significant to decide than what looks good for dessert on the menu. The average juror is like anyone else; if he can in good conscience go along with the plaintiff after a persuasive argument, he will not want to be brought back to the point of indecision by the defense lawyer. But the defense lawyer must drag him back to again face the struggle of making a correct decision.

MORRILL, *supra* note 41, at 87-88.

Yet, it can be done, and is done in our courts every day. More problematic is the situation where the defense reserves or even waives opening. *See* RIEKE & STUTMAN, *supra* note 17, at 91 (citing studies to the effect that, if defense delays opening, "perceptions of eye witnesses, attorney effectiveness, and the prosecutor's case... benefited the prosecution;" when given immediately after the prosecution opening, those perceptions favored the defense). That, however, is the function of a tactical choice by the defense and not something inherent in the prosecution having the first opening statement. Further, to the extent primacy functions by jurors creating "story" theories, those theories could form at any point during the openings, not necessarily in the first opening given. At most, one could say that primacy makes opening statement important for both sides. *See id.* at 106.

Moreover, while the first position in opening does allow the prosecution to somewhat anticipate and weaken defense attacks on its case, even this cannot be employed to full strategic advantage because of the Fifth Amendment. Thus, the prosecution could anticipate attacks on its evidence which potentially might be brought out on cross-examination of its witnesses (e.g., "True, our key eyewitness was not wearing her glasses, but she only wears those for reading,"), but cannot refer to any potential defense evidence (e.g., "The defense may try to put on a witness who will claim...."). After all, constitutionally the defendant does not have to put on any defense.

48. In this regard, the following portion of a federal pattern "Introductory Instruction" is typical of all federal and state courts:

> The attorneys and the parties will not speak with you because I have already instructed them that they must not. It simply does not look appropriate for one

of no exception for social science researchers. Second, whatever the basis for the statistic, it did not factor in the impact of actual jury deliberations. Jurors consistently come into the jury room, vote one way initially, and then change their minds over the course of deliberations.[49] Third, the 80% figure is alleged to be the result of some study, but the study is never cited. In fact, a leading expert in juries and lawyer argumentation confesses that she has never been able to locate the supposed study.[50] We therefore have no basis to assess the experiment that yielded this dramatic statistic which has had such influence in our profession.

So again, I return to the question as to what underlies this concept of primacy, and what if anything it tells us about the consequences of the prosecution having the initial closing argument. Thus, I now will move to a discussion which applies the research on primacy to the prosecution's initial closing, postponing a more extensive analysis of recency and so-called "order effects" until discussion of the rebuttal argument.

B. Advantages of Going First and the Scientific Bases of "Primacy"

The scientific research about the power of primacy (and recency) has taken place in two separate contexts. One path of research has focused on memory. The other has involved opinion change. Though these two paths can be perceived as somewhat interrelated, for our purposes they are quite different.

1. Research on Primacy and Memory.—Suppose I gave you the following sequence of numbers: 16, 12, 316, 42, 19, 174, 56, 23. I don't think you'd be surprised to learn that the first and last numbers will be recalled most easily, with those numbers in the middle straining our

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> side or the other to this case to be speaking with any of you no matter how innocent or trivial that conversation might in fact be.
>
> Until this case is submitted to you to begin your deliberations you must not discuss it with anyone at all – even with your fellow jurors. After it is submitted, you must discuss the case only in the jury room with your fellow jurors. It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you and you have received the final instructions of the court regarding the law which you must apply to the evidence.

EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 10.01 at 253-59 (1992).

49. Vinson would acknowledge this. *See* Vinson, *supra* note 46, at 72 ("The fact that people come to quick decisions doesn't mean those decisions are immutable. People do change their minds. But they usually would rather not, and if you haven't hooked your jurors early, it may be hard to get them later.").

50. *See* WALTER, *supra* note 17, at 208 ("Although these figures [i.e., 80%] are startling... I note that I have never found this research referenced, nor do I know that it has ever been published. Yet, these figures are widely quoted in the legal community.")

powers of recall.[51] There you have primacy (and recency) as they relate to the task of recalling sequences of numbers, words, and such. Naturally, there are further complexities. The process one uses to recall a sequence from front to back differs from the one the memory employs when going back to front.[52] The former relies on a process of conceptually associating items in pairs at the time of study,[53] while the latter incorporates, at least partially, a visual-spatial process.[54] Additionally, much of our memory for sequences is accomplished by what has been termed "chunking."[55] Using chunking, we simultaneously memorize full sequences and the individual items comprising the sequence.[56] For example, a word is a chunk from which we can recall the full sequence (i.e., the word) as well as the individual items composing the word (i.e., letters), while a phone number chunks both the full sequence and individual numbers. It is even possible that chunking could apply to propositions.[57]

While I find this interesting, it is not clear what all this says about the significance of the fact that the prosecution gets to give the initial closing argument. If I apply the concept of primacy as applied to memory of sequences, does that mean that the jury will tend to remember the first word? The first argument? The first image?

Also, a closing argument differs in several significant respects from the discrete number or word sequences used in the memory studies. First, the information will not come in clean, discrete, uniform packets like word or numbers.[58] It will be far messier:

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51. Murdock describes this: "In episodic memory, primacy refers to superior performance (greater accuracy, shorter latency) on items at the beginning of the list, whereas recency refers to superior performance on items at the end of the list." Bennet B. Murdock, *Chapter 4. Primacy and Recency in the Chunking Model, in* DISCOURSE COMPREHENSION: ESSAYS IN HONOR OF WALTER KINTSCH 49, 49 (Charles A. Weaver et al. eds., 1995). *See also* Walter Kintsch & David M. Welsch, *The Construction-Integration Model: A Framework for Studying Memory for Text, in* RELATING THEORY AND DATA: ESSAYS ON HUMAN MEMORY IN HONOR OF BENNET B. MURDOCK 367 (William E. Hockley & Stephan Lewandowsky eds., 1991). Within this framework, serial recall rests heavily on primacy, while item recall tends toward recency. *See* Murdock, *supra*, at 49.

52. *See* Shu Chen Li & Stephan Lewandowsky, *Forward and Backward Recall: Different Retrieval Processes*, 21 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 837 (1995). In the experiment underlying these findings, all the information was presented visually, none verbally, and the participants were even discouraged from reading out loud. *See id.* at 846.

53. *See id.* at 837. This process contains an "auditory-verbal associative component." *Id.* at 839.

54. *See id.* at 837, 839. Experienced practitioners recommend the use of demonstrative aids in closing. *See, e.g.*, Parnell, *supra* note 16. To the extent your case requires the jury to see the story in "flashbacks" (i.e., moving from present to past), visuals would seem imperative.

55. *See* Murdock, *supra* note 49, at 52.

56. *See id.* at 52-53.

57. *See id.* at 61 ("As it has been presented here, the chunking model deals with unrelated item, but, as is well known, propositions are the building blocks in discourse processing... perhaps a proposition is only a special kind of chunk....").

58. *Cf., e.g.*, Jeremy N. Bailenson & Lance J. Rips, *Informal Reasoning and Burden of Proof*, 10 APPLIED COGNITIVE PSYCHOL. S3, S15 (1996) ("These complexities arise because the arguments we have studied have a more differentiated structure than do simple sequences of pro and con

> Ed Majors went to work on October 15th like it was a normal day. He opened the shop, unlocked the safe, filled the till, and pulled up the shades. But thanks to the defendant it was anything but normal – it was the last day of his life. Let me go through the evidence with you. [Prosecutor then goes through testimony of two eye-witnesses identifying defendant in the fatal robbery and explains why they are reliable, and then reasons through the incriminating physical evidence.]

Second, even if one could somehow break all of this into some form of discrete information packets, they would not be neutral, unweighted pieces of information like numbers and (non-emotionally charged) words. While we may at times have personal feelings about a particular number, e.g., it's our age, address, etc., generally that will not be the case. In contrast, individual pieces of information at trial carry significant differences in their quality of meaning. Imagine the following sequence of information in a homicide case in which the victim was stabbed:

> The killer wore a red outer garment; the killer ran north after the stabbing; the victim died of a stab wound; defendant owns a red windbreaker; a knife dripping blood was found under the defendant's bed; the victim died on the way to the hospital; defendant lives in the direction that the suspect ran; people who saw the defendant shortly after the killing said he seemed upset and distracted; the day after the stabbing defendant gave away his red jacket to Goodwill; defendant immediately went to the mall and bought a blue jacket.

I don't know what portions of this sequence people would remember, but I would be shocked if they did not recall the "knife dripping blood" even though it falls smack in the middle of the sequence. It possesses both significance and a powerful image ("dripping blood"), qualities that the number "576" or the word "ball" are unlikely to possess.

But even if I put aside these objections to transplanting the results of these memory studies to the prosecution's first argument, it is still unclear to me what advantage I'd gain. Some might gasp that it's obvious, and ironic that so close to solidifying a step in my goal of establishing the prosecution's advantage in closing I should so completely miss the point. Obviously, if a jury does not remember, they cannot be persuaded. And, if the defense argument is sandwiched between two prosecution arguments, it will be forgotten. While I'd like to think that the studies lead to that conclusion, I just cannot.

No study has even hinted that an advocate's entire argument could thus disappear into the mental ether because it goes second in a three-argument sequence. At most, primacy-recency advocates in our profession would counsel the defense to put their strongest arguments first and last. This

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evidence.").

advice would be consistent with my own experience. Jurors do not hear the closings as a single uninterrupted sequence of information like that in the memory experiments. Rather, they perceive three separate performance moments, each with a beginning, middle, and end.

Further, the time between the end of the initial prosecution closing and the end of the (relatively short) prosecution rebuttal which immediately follows the defense closing, hardly seems sufficient to significantly diminish juror memories of the main points raised by the defense. Granted, by the end of the prosecutor's rebuttal, the jurors are unlikely to be able to repeat verbatim any substantial portions of the defense presentation, but that isn't the point. General comprehension, not precise recall, is the point. The memory experiments sought answers like "1...6...15...47." If the subjects from the memory recall experiments were asked to process the data employing the type of narrative synthesis required at trial, however, the desired answer would be something like, "it was a series of random numbers, all under 50." Again, general comprehension, not precise recall, is the goal.

Moreover, I do not accept the underlying premise. People can be persuaded without recalling all the data which persuaded them.[59] I recognize that if they have a strong belief (e.g., "guilty"), but cannot recall the basis for it, one may posit that they will have trouble justifying their vote if it is strongly challenged in deliberation. That, however, will not necessarily be the case in practice. What persuaded them is not the same as what they can post hoc come up with as a justification, or what they can take from other jurors who share their sympathies to use as a justification.

Also, even if an individual juror may not recall what has been said, from my experience, collectively a jury sees and hears everything. I recognize that some might say that I have vastly understated the significance of memory in persuasion and have thereby given up potential support for my position. They might go on to say that I seem to have forgotten what I just said about providing jurors with arguments and instead have projected a very simplistic notion of jury persuasion, one in which the jury "is persuaded" and then immediately rushes into the jury room and votes like

59. Among those studying belief change, one current theory analyzes belief change in terms of the adjustment from a current belief state, or "anchor." Within this theory, the existence of a belief anchor does not imply that one recalls the origin of that anchor. "[I]t is assumed that memory is limited to the location of one's current anchor and not how this was reached...." Robin M. Hogarth & Hillel J. Einhorn, *Order Effects in Belief Updating: The Belief-Adjustment Model*, 24 COGNITIVE PSYCHOL. 1, 40 (1995).

Other studies also appear to give some support to my intuition that there is only a vague correlation between retention of information and opinion/persuasion. *See, e.g.*, Warner Wilson & Howard Miller, *Repetition, Order of Presentation, and Timing of Arguments and Measures as Determinants of Opinion Change*, 9 J. PERSONALITY & SOC. PSYCHOL. 184, 188 (1968) [hereinafter "*Repetition*"] ("The correlational analysis agrees with other data in suggesting that learning considerations account for some, but only a modest proportion, of the variance found in opinion measures.").

throwing a lever in an election booth. That, they will go on to say, completely ignores the rich relationship between adversary argument and jury deliberation. Again, closing argument is far more than an argument. It is as importantly a source of arguments – arguments that jurors in your favor (based on their own story constructions) will use to support your position and to persuade others. If they do not remember your arguments they cannot do this, no matter how "persuaded" they are after your closing.

Since I have previously made the same point in this article, I'll obviously accept all that. I am merely saying that the link between memory and persuasion is not a direct one. As for jurors remembering my arguments so as to have an argumentative arsenal for deliberation, that is a different matter. That is less about them being persuaded than them having the capacity to persuade others while, at the same time, resisting counter persuasion. There I agree memory is important, but I do not believe it affected by any ordering of arguments. Based on my experience, it is my sense that the motivation of the individual juror[60] is the key to remembering arguments. If you are leaning towards the defense, or on the fence genuinely seeking guidance, you will remember any arguments I make which seem useful, whether I go first, last, or in between. Also, as I have said, it is general comprehension of the advocate's position that counts, not exact recall of the words and phrases used.

In short, I find little support in the memory research. I am nevertheless ever hopeful for support as I turn to the studies on opinion change.

2. Research on Primacy and Opinion Change.—In assessing the importance of the initial information that an audience receives, one cannot deny that an awareness of primacy runs deep into our cultural understanding. All of us know that first impressions are important.[61] As the ad says, "You never get a second chance to make a first impression." That is why we spend so much time calculating what we will wear on a first date, interview, presentation, and such. And in general, science parallels our beliefs. Unless there are memory constraints, strong contrast (i.e., the second piece of data is completely at odds with the

60. *Cf.* RALPH L. ROSNOW & EDWARD J. ROBINSON, *Primacy-Recency, in* SOCIAL PSYCHOLOGY – EXPERIMENTS IN PERSUATION 102 (Ralph L. Rosnow & Edward J. Robinson eds., 1967) [hereinafter "EXPERIMENTS"] ("For example, if a message containing information relevant to the satisfaction of a need were presented after the need had been aroused, there would be greater acceptance of the position advocated than if need arousal followed presentation of the message.") (citation omitted).

61. *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 172 (1980) ("First impressions *are* important, and the primary effect in impression formation, in which early-presented information has an undue influence on final judgment, is found almost as universally as would be suggested by its predominance in lay psychological theorizing."). *See also* HAMLIN, *supra* note 16, at 376-78 (noting, generally, that people usually draw conclusions and develop attitudes toward a stranger within the first several minutes after they meet him).

impression from first), or the object or process involved is known to change over time,[62] first impressions are powerful.[63]

The classic experiment on primacy and persuasion consisted of giving a list of adjectives describing an individual to the research subjects.[64] Imagine the adjectives given were: intelligent, kind, reflective, stingy, angry. If the adjectives were given in this order, the subjects had a favorable impression of the person being described. However, if given in reverse order (i.e., beginning with "angry"), the subjects had a negative impression of the person being described.[65] Hence, the power of primacy.

Over time, further research has led experts to first one, and then another explanation for the dramatic perceptual differences from this simple manipulation of the ordering of a few adjectives. The first theory was one of "redefinition."[66] Interpreting the latter adjectives by their first impressions, this theory had the subjects literally changing the meaning of the subsequent adjectives. Thus, if the sequence started with "intelligent," the subjects interpreted "angry" in the most positive context to mean, e.g., "so smart she gets frustrated with incompetence." If it begins with "angry", the last adjective, "intelligent", casts a very different meaning. Now we have someone who is very dangerous, violent with the brains to do real harm.

While there remain strong adherents to this redefinition theory,[67] most in the field discarded it in light of research establishing the "discounting" theory.[68] Under this theory, once "intelligent" is heard first, the subject can ignore what follows. The subject's reaction may be characterized as "I don't need to hear anymore." No doubt conventions of speech would support such a reaction. When I describe someone, I generally will begin with words reflecting my strongest sense of the individual. It seems to me that others do the same. If the first words out of your mouth are positive, I immediately assume that you think well of the individual. If negative, I will

62. *See* NISBETT & ROSS, *supra* note 61, at 172.

63. By the same token, going first carries its risks since, if you make a bad impression, it will assist the advocate who follows you. In the words of one litigator, "if the presentation is incomplete or inadequate, such an effort can boomerang." GIVENS, *supra* note 16, at 340; *see also* ALI/ABA, *supra* note 16, at 40 ("[B]ut being first is only an advantage if you speak with plan and purpose. If you do not, being first can be a serious handicap.").

64. *See* Bailenson & Rips, *supra* note 58, at S5; Hogarth & Einhorn, *supra* note 59, at 7.

65. *See id.*

66. *See id.*; NISBETT & ROSS, *supra* note 61, at 173 ("[E]arly information was processed 'holistically' and... the resulting Gestalt colored the *meaning* of later-presented information.").

67. *See* NISBETT & ROSS, *supra* note 61, at 173 ("The change-in-meaning hypothesis still has many vociferous adherents....").

68. *See* NISBETT & ROSS, *supra* note 61, at 174 ("[L]ater-presented information, if it is inconsistent with the affective implications of early-presented information, is 'discounted' or given a lower weight by the subject."); Hogarth & Einhorn, *supra* note 59, at 7.

assume you at least have reservations. After that, I do not need to hear anymore.[69]

But, like those before, this seemingly sensible theory fell by the wayside. In its place came the "lessening attention" theory.[70] No complex cognitive process here, people simply ceased paying attention after the first words. They did not even hear the subsequent adjectives, or at least did not think about them. This was the world of channel surfing and minuscule attention spans.

It too did not last. In its place is the most current theory, the "theory" theory. From initial impressions, the listener develops a "theory." This conceptual construct then biases how they conduct later information gathering.[71] While this theory makes sense, I frankly do not understand

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69. Hogarth and Einhorn recognized the same possibility for the results: "An alternative explanation of the same phenomenon follows from the notion that when someone describes another person, there is a natural presumption that order reflects the importance of information provided." Hogarth & Einhorn, *supra* note 59, at 7.

Put otherwise, this mode for interpreting the adjectives fit into our everyday schema for describing people. Schema can be thought of as follows:

> All of us carry socially-constructed conceptions of the world composed of an array of cognitive structures that guide the constant process of interpretation that we call giving meaning to our experience. The influences that create these structures are both a function of our concrete experiences and our cultural knowledge base. Both of those components of course will likely differ with class, ethnicity, gender, and sexual orientation.

John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1310-11 (1994) (citation omitted).

Further elaboration of the basic cognitive processes of making meaning through these interpretive frameworks, generally referred to as "schema theory," can be found in RICHARD C. ANDERSON, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference, in* SCHOOLING AND THE ACQUISITION OF KNOWLEDGE 415 (Richard C. Anderson et al., eds., 1977); DAVID E. RUMELHART, *Schemata: The Building Blocks of Cognition, in* THEORETICAL ISSUES IN READING COMPREHENSION 33-58 (Rand J. Spiro et al., eds., 1980); Robert Glaser, *Education and Thinking the Role of Knowledge*, 39 AM. PSYCHOL. 93 (1984); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-87 (1989); *See also,* JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD (2d ed. 1932) (presenting cognitive, as opposed to behavioral, theory regarding child development).

70. *See* Hogarth & Einhorn, *supra* note 59, at 8; NISBETT & ROSS, *supra* note 61, at 174.

71. *See* NISBETT & ROSS, *supra* note 61, at 175:

> Other experiments by Jones and his colleagues shed further doubt on the view that primacy effects are wholly or even partially due to attention decrement. They supported instead the view advocated by Jones and Goethals and the present writers that *primacy effects are due to theories that are formed early* and which are insufficiently sensitive to the implications of subsequent data.

(emphasis added).

This theory is consistent with the hypothesis to explain experimental findings that at some point subjects were no longer swayed by raw information. The hypothesis posited the formation of a "basal" opinion which was resistant to subsequent persuasion:

> The following, somewhat speculative, explanation of these discrepancies involves two assumptions one general and one specific. The general assumption states that opinion has two components: a basal component which is relatively little affected by the communications once it is formed, and a superficial

> component which is quite labile, and which obeys the original model. The two components act together to produce the observed opinion response.
>
> Now at the beginning of the experiment, the basal opinion is presumably vague, or nonexistent, but begins to form as successive arguments accumulate. The special assumption locates the major portion of this basal opinion formation in the last half of Stage 2 and in the first half of Stage 3.
>
> These two assumptions will account for the discrepancies according to the following argument. In Stage 1, there is as yet little basal opinion. Hence the obtained Stage 1 recency effect is created entirely by the superficial component. Since this component obeys the model, the decay of the Stage 1 recency effect is in accord with the prediction made in the introduction. The opinion at the end of Stage 2 has both superficial and basal components, and both contribute to the recency effect at this stage, the former because it obeys the model, and the latter because it is formed in the second half of the stage. In the succeeding arguments, that portion of the Stage 2 recency effect which is due to the superficial component decays away as seen in Fig. 2. The basal component, however, being resistant to change, is carried along beneath the perambulations of the observed opinion at a fairly constant value thereafter. The formation of the basal component in the first half of Stage 3 would of itself produce a primacy effect in this stage. The observed recency effect presumably arises from the overriding influences of the superficial component. Following Stage 3, the decay of the superficial component reveals the primacy effect caused by the basal component formed in Stage 3.

Norman H. Anderson, *Test of a Model For Opinion Change*, 59 J. ABNORMAL & SOC. PSYCHOL. 371, 379 (1959), *reprinted in* EXPERIMENTS, *supra* note 60, at 105, 113.

Significantly, this is all consistent with two prominent theories of juror decision-making, the Narrative and the Story Model theories. As discussed, jurors use narratives both to organize the information they receive at trial and to make judgments about that information. *See* BENNETT & FELDMAN, *supra* note 22. The recent study by Pennington and Hastie confirms the Bennett and Feldman thesis. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991). Jurors decide by what Pennington and Hastie call the "Story Model." *Id.* Like Bennett and Feldman, these researchers conclude that jurors order the information at trial into story representations and then compare their own stories to those offered by the parties in deciding the case outcome. *See id.* at 521. Their central finding was that "the story the juror constructs determines the juror's decision." *Id. See also id.* at 525 ("Different jurors will construct different stories, and a central claim of the theory is that the story will determine the decision that a particular juror reaches."). Significantly, any particular set of information could trigger a number of different story constructions or schema. *See* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A. L. REV. 273, 276-77, 292 (1989) (discussing how jurors may react differently to the same story). Here, schema and narrative intersect, since the schemas we use to describe daily life take the form of narratives. *See id.* at 281. Further, the chosen narrative will not only be a function of the perceived relevance, but also of the intensity of the particular schema to the individual such that it can quickly be retrieved and brought to mind. *See id.* at 295-96. Once a schema is chosen, moreover, it biases perception. *See id.* at 277, 303. In a trial context, this means that once jurors construct their story, they will tend to focus on information in the case supporting their particular story, ignoring much other (perhaps highly relevant) information. *See id.*

For other discussions of narrative and story theories, *see* STEVEN PENROD ET AL., *Chapter 31. The Implications of Social Psychological Research for Trial Practice Attorneys*, *in* PSYCHOLOGY AND LAW: TOPICS FROM AN INTERNATIONAL CONFERENCE 447-48 (Dave J. Muller et al., eds., 1984); RIEKE & STUTMAN, *supra* note 17, at 94-105; Wayne A. Boach, *Temporal Density in Courtroom Interaction: Constraints on the Recovery of Past Events in Legal Discourse*, 52 COMM. MONOGRAPH 1, 3-4 (1985); *Cf.* Kunkel & Geis, *supra* note 2, at 557:

> Thus, the first time a proposition is presented to us, we tend to form an opinion and we do so according to the influences present to shape it. Later, such an opinion may gain a certain emotional content if it is contradicted. This follows because of its personal reference and because we would not have our ideas appear frail and inconsequential.

why there is not room for the previous theories under its umbrella. For example, the conversational schemata which seem to at least partially underlie the discounting theory, would seem to influence the initial theory choice under the theory.

In any event, regardless of the explanatory theory, all agree that primacy is powerful. Since the prosecution already goes first in closing, it would then seem that all this science helps me begin to establish the extreme advantages given the prosecution in closing argument. The problem is that if I am going to be fair, and I promised I would try, I have to admit that it is far from clear whether the results of any of these experiments apply to jury trials.[72]

Initially, in many of the experiments, the subjects are repeatedly asked their opinion after they are presented with each new piece of information or argument.[73] This is obviously a good way to measure opinion change. It is equally obvious that is nothing like a trial. It may make trials more interesting, giving them the sense of a game show, but as long as we follow our current system no one gets to ask juror's opinion on the evidence until they complete deliberation. In fact, in one respected study, subjects were *specifically* told *not* to act as jurors, and thus not to withhold their opinion until the close of evidence.[74]

Further, the subjects generally are not asked to reach a final decision.[75] In those studies where the subjects do reach a decision, they merely vote. They never meet with other subjects and deliberate.[76] In fact, in a study where subjects were told that they would have to justify their decisions, this intervening process nullified all "order effects."[77] In other words, once they knew that, like a jury, they would have to justify their conclusions, it did not matter whether argument A preceded B, or B preceded A.

Finally, the subjects never see live witnesses, complete with personalities, speech cues, and non-verbal behavior. They read written

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(quoting FREDERICK H. LUND, EMOTIONS OF MAN 40-41 (1930)); Vinson & Anthony, *supra* note 16, at 34 ("Rather, sometimes people tend to reflect their own psychological needs and motivations as opposed to an objective assessment of available information.").

72. Aron, Fast, and Klein attributed the lack of research in this area to the results researchers were achieving. *See* ARON ET AL., *supra* note 16, at 15-12 ("During the 1950s and 1960s, research activity into the many facets of persuasion was impressive. Since then, however, theoretical development and empirical interest have waned, primarily because inconsistent data accumulated and the emergence of each new study revealed unanticipated complexity about the topic being studied.") (citation omitted).

73. *See, e.g.*, Anderson, *supra* note 71, at 107.

74. *See id.*

75. *See id.* at 107-08.

76. *See, e.g., id.*; Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOC. PSYCHOL. 1, 3-4 (1959), *reprinted in* EXPERIMENTS, *supra* note 60, at 117, 119-20; Wallace & Wilson, *supra* note 76, at 314 (asking subjects to mark response measure instrument after they hear all arguments.).

77. *See* Hogarth & Einhorn, *supra* note 59, at 18-19.

hypotheticals in a booklet, turning the page to get new information[78] and then fill out another line on their score sheet.[79] This certainly narrows the variables in the experiment. The problem is that real trials are all variables.[80]

Moreover, even if I were to accept that these studies carry over to the trial arena, with primacy holding sway, I would nevertheless have doubts about the extent to which it would have much application to the prosecution's initial closing argument. These are not the first words at trial. The jurors have already gone through voir dire and heard openings and all the evidence. They have already developed their cognitive conceptions and theories.[81] Also, it is logical to expect that primacy will be most powerful when there is a large time gap between the initial message and any counter information.[82] In criminal trials, however, the defense closing follows immediately after the prosecution's. Now, none of this is to say that

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78. *See, e.g.*, Anderson, *supra* note 71, at 107 ("Each [subject] then received a booklet containing the arguments...."); Bailenson & Rips, *supra* note 58, at S12 ("Subjects received a booklet consisting of five pages: an instruction page and four pages of arguments."); Wallace & Wilson, *supra* note 76, at 312-13; Stanley Zdep & Warner Wilson, *Recency Effects in Opinion Formation*, 23 PSYCHOL. REPORTS 195, 197 (1968). *But see* Wallace & Wilson, *supra* note 76, at 312 ("Fred L. Strodtbeck at the University of Chicago arranged to have a real jury trial reenacted and recorded.").

79. *See* Hogarth & Einhorn, *supra* note 59, at 21 ("After responding to this question, subjects turned the page of their experimental booklets...."); Kunkel & Geis, *supra* note 2, at 557 ("[In his primacy experiments, Lund] employed written rather than oral stimuli."); Miller & Campbell, *supra* note 76, at 119 ("A transcript of an actual trial... was edited for the purposes of the present experiment.") (citation omitted).

80. *See* ARON ET AL., *supra* note 16, at 15-11:

> The problem with these theories and experiments is that they are mostly based on the analysis of one or two parts of the lawyer's court presentations. A trial is a total process. Each case has a different combination of persons sitting in the jury box, or a different judge on the bench. Each case has a different subject and different parties. Each case has its own issues and situations to be resolved. For these reasons, it is not possible to establish a fixed rule saying that the best tactic will always be to apply the primacy or the recency theory, or the climax or the anticlimax theory. It is, however, true that a responsible trial lawyer must know how the different principles work in order to be able to apply them to the particular characteristics and merits of the case at bar.

81. In explaining why primary experiments may not be useful when assessing closing arguments, Kunkel and Geis noted that "closing arguments essentially reiterate previous testimony rather than introduce a fresh subject." Kunkel & Geis, *supra* note 2, at 557. Placing a similar notion within research on cognitive framing, Rieke and Stutman note:

> Research on cognitive framing suggests that when jurors are relatively unfamiliar with the events in question, as they are at the start of a trial, they will search for ways of organizing the information presented. Because of this, arguments presented first will provide them with the point of reference necessary to digest the information efficiently. Research focusing on order effects for unfamiliar subjects confirms this primacy effect (Lana 1961). As jurors develop a sense of what a case involves, such as during the summation, more recent arguments will be better remembered and a recency effect should commonly prevail.

RIEKE & STUTMAN, *supra* note 17, at 206-07.

82. *Cf.* ARON ET AL., *supra* note 16, at 15-11 ("[T]he validity of this theory (primacy) is affected by the passage of time, with first impressions becoming weaker with the lapse of time.").

beginning the closing argument sequence does not bestow advantages upon the prosecution. It is just that, if they are to be found, they will have to reside in the realm of art, not science.

C. Advantages of Going First and the Arts of Advocacy

Going first, the prosecution can set the terms and structure of the final debate.[83] Put in terms of argumentation metaphors, they can frame the issues. Using military metaphors, they can choose the terrain for the battle. Employing commercial metaphors, they pick the location on which to do business. In any domain, this is an advantage.

Let's look at an example. Defendant is charged with assaulting a police officer. According to the officer, he pulled defendant over for speeding and determined that the defendant was driving on a revoked license. He ordered the defendant out of the car, told him to place his hands on the hood, and began the process of handcuffing the defendant. To that end, he ordered the defendant to put back his left hand. The defendant did not comply. He ordered him again. Nothing. He moved forward to grab the defendant's left hand at which moment the defendant threw back his elbow, striking the officer in the chest. The defendant spun off and appeared to take a step as if to flee. Before he could take another step, the officer grabbed, then quickly subdued and handcuffed the defendant. The officer claims that he can tell that the elbowing was intentional. Therein lies the assault. The defendant maintains it was an accident which happened as he was complying with the officer's order.

In their initial closing, the prosecution may wish to frame this as a credibility contest between a trained police officer in the field and someone who was speeding and driving without a license. She may also want to provide the jury with a backdrop against which to analyze the credibility issues, e.g., the dangers police officers bravely face while acting alone in the field to protect us all.

By the time the defense speaks, they have a lot of work to do. The jurors have now cognitively gone down a road of analysis created by their adversary. To impose their structure/framework the defense must first spend time tearing down the prosecution's framework, and then rebuild their own. Only then can they finally apply the evidence to their structure for analysis. Here, the defense would initially want to dismantle the "credibility" contest framework established by the prosecution. That will take two steps here. The first is to make clear that the issue is not who you believe. You must believe the prosecution's sole witness beyond a

83. *See, e.g.*, GIVENS, *supra* note 16, at 340 ("The party going first has the opportunity of stating the contentions of both parties....").

reasonable doubt. You only need a reasonable doubt that the defendant is telling the truth. The second is to point out that in this specific case, we're really not talking about whether or not the officer is telling the truth. The question rather is whether that officer's subjective belief as to what was in defendant's mind when he reached back and contacted the officer with his elbow is accurate beyond a reasonable doubt. He's telling the truth about what he saw, experienced, and believes. It's just that there's a reasonable doubt that his subjective belief could be incorrect.

As for the prosecution's backdrop that being a police officer alone on the highway requires bravery in the face of danger, that is completely correct. That explains why the officer would and must interpret all actions in their most negative if he is to stay alive. He must react quickly, just like he did here. His actions were totally correct and reasonable under the circumstances, but now in the calm of the courtroom there exists at least a reasonable doubt that he misperceived the defendant's intentions.

Now, by doing all this the defense may have successfully reframed the issues. But it took a lot of time, a lot of work, and a lot of concentration by the jurors.

In addition to framing the issues, by going first, the prosecution also can anticipate defense arguments.[84] There is nothing new about this use of the first argument. Since Aristotle, anticipating the opponent's arguments have been a common technique of argumentation.[85] As such, a party can provide

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84. *See* Cartwright, *supra* note 16, at 36:

> I believe that it is very important to take the sting out of your opponent's argument by anticipating it and discussing it in advance. Rob him of his potency by putting it in the light most favorable to your client before opposing counsel has an opportunity to discuss it with the jury.

See also GIVENS, *supra* note 16, at 340 ("The party arguing first has the opportunity of... answering in advance what the opponent will say. If this is done successfully, the opponent is left with no ammunition...."); VOGEL, *supra* note 16, at 13 ("In this way the jury is given a preview of the opponent's argument and the answer to it, before the opponent has the opportunity to speak. The jurors are thus forearmed with skepticism, and the opponent's argument will encounter more resistance with the jurors and may fall flat."); John P. Miller, *Opening and Closing Statements From the Point of View of the Plaintiff's Attorney*, in ALI/ABA, *supra* note 16, at 44 ("Again, because you speak first, you have the real advantage in being able to mitigate some of the unfavorable aspects of your case and put them in the light you want the jury to see them in."). *Cf.* BERGMAN, *supra* note 16, at 254 ("Preemption means anticipating and responding to an adversary's argument before the adversary has a chance to make it.").

85. *See* Mike Allen, *Meta-Analysis Comparing the Persuasiveness of One-Sided and Two-Sided Messages*, 55 WESTERN J. SPEECH COMMUN. 390, 390 (1991) ("Aristotle, in his book *The Rhetoric* (1932), discussed how a speaker should refute the counter-arguments of an opponent."). This anticipatory rebuttal was in fact standard fare in ancient rhetoric: "[M]ost of the writers of antiquity admit that, normally, a legal speech has these minimum divisions: exordium, narration, proof, *refutation*, conclusion, and epilogue." C. H. PERLEMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 495 (1971) (emphasis added).

Recent scientific research has validated this wisdom. In the recent vernacular, it is termed "two-sided argument with refutation," i.e., you give the audience your side, then their side, and then supply your refutation. *See* Allen, *supra*, at 396 ("A one-sided message is more persuasive than a two-sided message with no refutation. However, a two-sided message with refutation is more persuasive than a one-sided message."). *Cf.* RIEKE & STUTMAN, *supra* note 17, at 208 ("The practical implications of this

the jury with actual counter arguments ("The officer did not misperceive. He told you how defendant was looking back at him when he threw the elbow. He also told you about all the training he's had to insure that he will remain cool under pressure"), as well as raw material with which the jurors can create their own counter arguments to the defense. To an extent, the prosecution thus can inoculate the jury from defense persuasion.[86]

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work for the closing argument appear forthright. Attorneys should not only provide arguments in support of their client's position, but should also raise and refute arguments harmful to that position."). One small word of caution about the science; the experiments involved single speakers, not an adversary setting. *See* Allen, *supra*, at 390. Nonetheless, I believe that the science and Aristotle have gotten it right: anticipate and refute.

86. Social psychology, using the biological analogy of inoculating against disease with a weakened dose of the disease, has apparently embraced the notion of persuasive "Inoculation Theory." *See, e.g.*, Allen, *supra* note 85, at 398. "Inoculation Theory uses the metaphor of disease to represent opinion and attitude change. Inoculation occurs when a speaker includes and then refutes counter arguments to the position advocated. This 'inoculates' the message receivers from subsequent counter-persuasion." *Id. See also* William J. McGuire, *Chapter 19. Attitudes and Attitude Change, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 272 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985):

> A rule of thumb in political campaigning is that one should keep on the offensive, ignoring rather than refuting opposition changes, but the current upsurge in comparison advertisements and empirical research reflects doubt about the wisdom of such stonewalling. It is better to acknowledge and refute opposition arguments.... Explicitly refuting opposition arguments is especially important for conferring resistance to subsequent attacks....;

ROSNOW & ROBINSON, *supra* note 60, at 100:

> The two-sided communication, subjecting the individual as it does to arguments which both support *and* attack his beliefs, may serve to forewarn him of the kind of arguments he subsequently could encounter. Thus, it would have the effect of reinforcing, or bolstering, his original beliefs, thereby leaving him even more resistant to counterpersuasion than he was initially.

(citation omitted).

The theory explaining why inoculation works is provided as follows:

> The social psychological research on forewarning, counterarguing, and 'innoculation' has revealed why these strategies work. First, giving people a general warning that they are about to hear a communication designed to make them change their minds about a particular issue causes them to generate counter-arguments *during* the subsequent persuasive appeal (Hass and Grady, 1975). Forewarnings concerning the specific content of an appeal are also effective in motivating subjects to generate counter-arguments if there is a sufficient time delay between the forewarning and the subsequent appeal (Petty and Cacioppo, 1979a,b). Second, if people generate these counter-arguments on their own, or even if they are provided with counter-arguments they have not thought of themselves (Brock, 1967; Petty and Brock, 1976; Petty, Brock, and Brock, 1978) before hearing a persuasive message, they will be less persuaded by the appeal when it comes (Adams and Beatty, 1977; McGuire and Papageorgis, 1961; Pryor and Steinfatt, 1978). Third, a forewarning is *not* effective because it causes the listener to attend selectively to the persuasive appeal (screening out what they do not agree with) or forget what they have heard (Petty and Cacioppo, 1979a). Instead, it is effective because it facilitates more *thought* about the message. Fourth, there are two factors which affect a person's motivation to counter-argue: who will be delivering the appeal and whether or not the topic of the message is a personally involving one. A message coming from a low credibility speaker will produce more thinking and counter-arguing (Gillig and Greenwald, 1974). A message that is of personal importance to the listener will stimulate more counter-arguments (Petty and Cacioppo, 1979b). Finally, enduring attitude change is most

Of course, no technique is risk free. By anticipating the adversary's argument, the prosecution runs the risk that it will raise arguments which neither the defense nor jurors have conceived.[87] Thus, though you generally

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> likely to occur when people have thoroughly processed the information contained in a communication and generated cognitions that are either favourable or unfavourable to the position advocated (Petty, 1977).

PENROD ET AL., *supra* note 71, at 499.

While this all sounds intriguing for legal argumentation, its actual application may be limited to the general notion of anticipating counter-arguments, including making concessions, *see* BERGMAN, *supra* note 16, at 255 ("Inoculation is a technique in which you acknowledge the validity of an argument while pointing out why it should not dictate the outcome of a case."). *Cf.* PERLEMAN & OLBRECHTS-TYTECA, *supra* note 85, at 501 ("Anticipatory refutation can also take the form of a concession.").

First, Inoculation Theory is really concerned with long-term resistance, as in propaganda or advertising, not the few moments between the initial prosecution closing and the defense argument. *See* Allen, *supra* note 85, at 399 ("Inoculation Theory deals with attitude change over time."). *Cf.* CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE 17 (1953) ("Hence, the long-run effectiveness of a persuasive communication depends not only upon its success in inducing a momentary shift in opinion but also upon the sustained resistance it can create with respect to subsequent competing pressures."). Second, the experimental studies do not at all reflect the nature of a jury trial. The speaker was an authoritative speaker whom the audience accepts, and, as such, is uncritical of the truth, value, or cogency of her arguments. *See* IRVING L. JANIS & ROSALIND L. FEIERABEND, *Effects of Alternative Ways of Ordering Pro and Con Arguments in Persuasive Communications, in* THE ORDER OF PRESENTATION IN PERSUASION 115, 117 (Carl I. Hovland ed., 1957) ("For such communications it is assumed that the favorable attitude of the recipients toward the source predisposes them to be relatively uncritical as to the truth value and cogency of the main arguments."). That, of course, is not always the case when jurors are assessing the two advocates of trial. Third, the counter-arguments to the speaker were non-salient – the audience was not familiar with, or did not spontaneously recall, them. *See id.* In contrast, at trial, the jurors know as a structural matter that each side opposes the main point of the other's. Also, through *voir dire,* opening statement, and direct and cross-examinations the jury should have some decent sense of the arguments and counter-arguments for each side. Third, the position being inoculated against was a clearly-held value, such as "civil defense is good." *See id.* at 119. *See also* William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches,* 1 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 191, 227 (1964), *reprinted in* EXPERIMENTS, *supra* note 60, at 257, 293 (describing these values as "cultural truisms"). Lawsuits obviously involve controversial propositions. Even values like "police are truthful" may vary depending on the time period, locale, and community.

Finally, the methods that are suggested for achieving inoculation in the social sciences are far more sophisticated than simple trial arguments. These involve long-term, extensive techniques, most of which would not apply to trial (requiring relatively long-term education), and some of which would be forbidden as misconduct (e.g., appeals to bias, prejudice, fear: "If you don't find the defendant guilty, you're responsible for the next officer killed in action by a black man.") *See generally* McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches, supra,* at 262-65 (explaining techniques of inducing anxiety, linking to accepted values, ideological preconditioning, inducing aggressiveness), and 269 (explaining sequence of several 50-minute sessions with subject to be inoculated).

87. Similar sentiments were echoed by Givens and Moore. *See* GIVENS, *supra* note 16, at 341 ("On the other hand, there is an exquisite dilemma: whether to anticipate opposing argument that may not otherwise have been made and, perhaps, create opportunity for further rebuttal, or to remain silent as to potential counter-arguments which will have the sting of recency in the mind of the tribunal. Obviously, the sting of this dilemma is reduced if time for rebuttal is available."); Moore, *supra* note 71, at 339 (articulating that, while in anticipatory rebuttal the advocate may raise points favorable to the opposing counsel that had previously "been filtered out by the jurors..." or "suggest to opposing counsel a previously unappreciated argument...," this is less of a problem if the party also possesses the last argument.); *Id.* at 339-40 n.170 ("Since the prosecution (or plaintiff in a civil case) goes both first and last during closing, the prosecution can avoid suggesting a new argument to opposing counsel by saving rebuttal arguments until after the defense has addressed the jury. The defense does not have that

know the opposition's arguments by the time you have analyzed your case through preparation, discovery, and trial, the prosecution must always decide whether it is better to see whether a particular argument is actually raised and then deal with it in rebuttal.[88] In any event, it will be the prosecution's choice whether or not to anticipate defense arguments in its initial closing.

Further, in the initial closing, the prosecution can bait the defense with questions. If the defense falls for the bait and answers, they will have tracked the prosecution's agenda and sacrificed any coherence to their own argument.[89]

Finally, by having both the initial and rebuttal argument, the prosecution can develop a conjoined strategy. They can set up their basic themes and rationales in their initial closing. Then, in rebuttal, they can reinforce their central position, hitting hard on their basic themes.[90]

So, science aside, there does seem some advantage to the prosecution with going first in the sequence of closings. I do not begrudge them that – they do have a heavy burden to carry. But how much more do they gain from also having the last word in rebuttal? That, after all, is the primary investigation of this piece.

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option.").

88. Your adversary at trial is not limited to opposing counsel. Individual jurors also may raise arguments in deliberation which, unless you anticipate them, can be very persuasive. Professor Bergman has likewise recognized this strategic reality when he discusses employing the tactic of "[a]ttributing the argument to the factfinder..." when "[y]ou may want to preempt arguments that you think a factfinder may come up with...." BERGMAN, *supra* note 16, at 255.

89. *See* MCELHANEY, *supra* note 42, at 671, quoting an attorney:

> I was taught that in your opening summation you should pose a lot of questions for the other side. All these questions are absolutely designed to trap your opponent into opening up issues that you want opened up on your rebuttal.
> If you do this right, either of two things can happen. First, the defense can rise to the bait and discuss your issues. Since they are *your* issues, framed your way, that sets you up to show how they should be answered when you rebut. Second, if the defense ignores your questions, you can show how he was afraid of them, and then you answer the questions you posed – your way. Either way, you have gained control again, and either way, you answer those questions your way.

While a useful tactic if the adversary takes the bait, the literature warns against falling into such a rhetorical trap.

90. *See* Miller, *supra* note 84, at 43:

> In the opening statement you launch your sales campaign, and in the closing summation you try to close the deal, to get the jury to sign on the dotted line, so to speak.
> The closing summation gives you an opportunity once again to focus the jury's attention on the attractive aspects of your case.

See also MAUET, *supra* note 16, at 300 ("Make sure neither [the opening nor the rebuttal] argument steps on the other's toes so that the rebuttal will be fresh for the jury.")

IV. What are the Advantages of Rebuttal?

A. Power of Rebuttal as a Result of the Jurors' Psychological Processing

1. Lessons from Recency and Order Effects Theory Research.— Given that the prosecution has the last argument in closing, I would expect that the principle of recency will add strength to my argument that the prosecution gets a significant procedural advantage from having the last word. Admittedly, I did not get much when I examined the principle of primacy in conjunction with the prosecutions initial closing. But, I have reason to hope for something better by delving into the realm of recency. After all, no action by either advocate is any more recent to the jury than the prosecution's rebuttal argument in closing.

The field, or it is probably more proper to say fields, which deal with opinion change[91] – advertising, propaganda, politics, and such – put great significance in the question of so-called "order effects." If message A precedes message B, is the persuasive effect different than if B precedes A?[92] In these realms, the stakes are high as to whether the first or second

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91. *See* Hogarth & Einhorn, *supra* note 59, at 3:

> Belief updating is a ubiquitous human activity. It is an essential component in such diverse areas as probabilistic inference (Peterson & Beach, 1967; Edwards, 1958; Slovic & Lichtenstein, 1971; Hogarth, 1975; Schum, 1980; Fischhoff & Beyth-Marom, 1983), decision theory (Raiffa & Schlaifer, 1961; Winkler, 1972), economics (Camerer, 1987), social cognition (Fishbein & Ajzen, 1975; Nisbett & Ross, 1980; Anderson, 1981; Hastie, 1983), jury decision making (Schum & Martin, 1982; Davis, 1984; Pennington & Hastie, 1986), communication and persuasion (Hovland, Janis, & Kelley, 1953), attitude change (Triandis, 1971; Cooper & Croyle, 1984; Petty & Cacioppo, 1986), causal inference (Jones, 1979; Einhorn & Hogarth, 1986; Carlson & Dulany, 1988), and psychophysics (Green & Swets, 1966).

Interestingly, this widespread focus on persuasion has only been replicated in scattered epochs throughout human history.

> [P]ersuasion "[has] been the key mode of social control and effort mobilization only in four scattered centuries: the Periclean Hellenic period, the last decade of the Roman Republic, the humanistic Renaissance, and our own mass media century" [While oratory and religious prostelyzing has existed throughout] only in the four centuries mentioned has persuasion played so central an economic, social and political role as to have become not just an art but an essential craft in whose rules of thumb the elite youth were trained and a recognized science with a systemized body of theory developed by savants.

McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches, supra* note 86, at 233.

92. Horgath and Einhorn describe the study of order effects as follows:

> This paper presents a descriptive theory of belief updating that can be applied to many substantive domains. The focus is on order effects. In the paradigmatic situation considered here, a person responds to the presentation of several pieces of evidence by expressing an opinion about a specific proposition or hypothesis. However, were the person to process the same information in a different order, would this affect the final judgment? More specifically, under what conditions does information processed early in the sequence have greater influence, *i.e.*,

message has the greatest impact. On the answer to that question rests decisions ranging from whether to encourage AT&T put out their new long distance phone program before MCI (or whether it is better to wait and follow), to whether a particular presidential candidate's position on foreign policy should be presented to the American public before her opponent's, etc.

I cannot even begin to look at the study of order effects, and its possible application to closing arguments, however, without almost immediately finding cause to pause. For, when thinking about the sequence of closing, we are not just talking about manipulating the order of arguments A and B to B and A, and then testing if the sequence alters the persuasive impact of each argument. In that case, A and B remain constant. Only the order in which they are argued is altered. That is not true for closing arguments. If the advocates changed positions, likely the structure, if not some of the content would be altered. I simply would not give precisely the same argument in second position that I would give if I were in the first. Also, here we are considering reversing two totally different types of arguments, i.e., the full defense closing and the shorter prosecution rebuttal.

As I said, all this gives me cause to pause. It does not, however, keep me from moving on after pausing. While literal order reversal is not possible in closing arguments given that position will change the rhetoric and structure of the argument, good attorneys nevertheless will tell their stories their own way, regardless of where the other side speaks in relation to them. I do not need to hear the other side's exact rhetoric in closing to know their main arguments and what I must do to rebut them. I have anticipated all that throughout trial preparation, revising and evolving my understanding at every moment until the last witness finishes testifying. So, though the form of argument and rhetoric may vary depending on my position in the argument sequence, the crux of my argument will not.[93] That leads me back to the broader inquiry regarding the extent to which the audience is influenced by the fact that what they have heard has come last.[94]

> produce a primacy effect? Under what conditions is later information more important, *i.e.*, a recency effect? Under what conditions is order irrelevant?
>
> .....
>
> In the present work, we consider order effects of the following type: There are two pieces of evidence, A and B. Some subjects express an opinion after seeing the information in the order A-B; others receive information in the order B-A. An order effect occurs when opinions after A-B differ from those after B-A.

Hogarth & Einhorn, *supra* note 59, at 2-3.

93. Others agree with me that, regardless of order, the core of your argument remains constant. "MAXIM: whether you speak first or second does not change the basic points, or the order in which you should present them." STERN, *supra* note 1, at 290 (emphasis omitted).

94. I realize that in a three-argument format, the defense argument is in the recency position relative to the prosecution's initial closing, and primacy relative to rebuttal. I have no idea what this means, and it is not the subject of any study I've found. But when all the dust settles, the prosecution still goes last.

Early experiments actually indicated that the first argument (primacy) was more persuasive than the following (recency).[95] Later studies came to the opposite conclusion, giving the nod to recency.[96] Most recently, experts find that whether primacy or recency is the king or queen of order effects varies with the specific context. In short, there is no clear rule, no general law of primacy and recency.[97]

More specifically, some experts believe that instead there are an "assortment of miscellaneous variables."[98] Some produce primacy effect ("primacy bound variables"), some recency effects ("recency bound variables"), while others are capable of producing either effect, depending on their utilization and placement in a two-sided communication ("free variables").[99]

Primacy bound variables include non-salient arguments (i.e., the audience has not heard or does not immediately recall the argument), controversial topics, interesting subject matter, and highly familiar issues.[100] Recency bound variables include, salient topics, uninteresting subject matter, and moderately unfamiliar issues.[101]

This makes sense, as a general proposition. If you are familiar with an interesting issue, and/or the speakers are saying new and exciting things, you are going to be highly motivated to respond to the information and begin to construct your own theory, basal opinion,[102] etc. If you do not know much about the issue, it is not very interesting, and you may even

95. *See* ROSNOW & ROBINSON, *supra* note 60, at 100 (discussing initial experiments by Professor Lund upon which Lund "enunciated the controversial principle we know today as the 'law of primacy in persuasion.'") (citation omitted); Hogarth & Einhorn, *supra* note 59, at 3.

96. *See* ROSNOW & ROBINSON, *supra* note 60, at 100 ("Subsequent investigation appeared first to confirm but then to refute the primacy principle."); Hogarth & Einborn, *supra* note 59, at 3 ("This conclusion [as to the dominance of primacy], however, is contradicted by Davis (1984) in a review of studies of jury decision making that indicates greater prevalence of recency effects....").

97. *See* Anderson, *supra* note 71, at 114 ("With regard to the primacy-recency problem itself, these data make it amply clear that no general law of primacy or recency can exist...."); ROSNOW & ROBINSON, *supra* note 60, at 101 ("Instead of a general 'law' of primacy, or recency, we have today an assortment of miscellaneous variables...."), Miller & Campbell, *supra* note 76, at 117 ("[F]indings seemed to have ruled out any completely general principle of primacy in persuasion...."); Wallace & Wilson, *supra* note 76, at 311-12 (describing "the disaray in the order-effect literature....")

98. For example, one study found that order effects did not take place when a one-sided communication (i.e., only your side of the argument) followed a one-sided communication, or a two-sided communication (i.e., you acknowledge their side as well as your own) followed a two-sided one. Only when a two-sided followed a one-sided, or a one-sided followed a two-sided, were their order effects, always in direction of the two-sided communication. *See* ROSNOW & ROBINSON, *supra* note 60, at 99. Since all good legal arguments are two-sided, this study would seem to indicate that there are no order effects in legal argumentation. The study, however, did not seem to also include rebuttal in the two-sided format (i.e., attacking as well as just acknowledging the opponents argument). As such, it does not aid our inquiry as to any advantages inherent in giving the prosecution the final argument in closing.

99. *See id.* at 101.

100. *See id.* at 101-02.

101. *See id.*

102. *See supra* note 71 and accompanying text (describing "basal" opinion).

have heard the basic arguments before, you are probably not going to either quickly form a basal opinion, or to pay much attention for that matter. You simply are not likely to care very much. Fine. The challenge is to apply all of this to criminal trials.

In some ways, jurors in a criminal trial have heard the core arguments before. Through books, movies, television, and perhaps prior jury experience, they are familiar with burden of proof, reasonable doubt, the presumption of innocence, that the defendant does not have to testify, and such. So, in some respects, the arguments are salient. On the other hand, they are totally unfamiliar with the issues in this case (unless it is that rare case in the court's calendar which has received media attention). So, in other respects, the arguments are non-salient. In fact, if the case is familiar, the juror will be questioned on voir dire to determine if they should be removed from the panel for cause. On the other hand, while they do not know the particular facts and issues in the case, they often have familiar schemata or scripts about various crimes (murder to get the insurance money, shoplifting to steal food, a drug sale, a conspiracy, house burglary) and about various defenses (alibi, the lying codefendant who is getting a deal, insanity, misidentification, the defendant who was innocently along with the real criminals). So, we're back to salient. Then again, the case may involve totally unfamiliar law (RICO, money laundering, bribing foreign corporations) and completely unfamiliar scenarios (the life of a drug addict in a diminished capacity case, the operation of the import shirt business). So, maybe it is really non-salient.

As for the variables of "interesting" and "controversial," chance principally will determine whether a case is very interesting or controversial. Some will be dramatic (did the wife really have a lover, and then convince her to kill her husband), while others will be less so (does the "net worth" analysis demonstrate that the defendant willfully evaded taxes). It will also depend on the skill, style, and ingenuity of the respective advocates.

In short, I simply do not know how to apply the concepts of primacy and recency bound variables to the general topic of criminal trials. While these concepts may alert me to the crucial moments of juror decision-making in a particular case, they do not give me any overall framework with which to gauge the advantage to the prosecution in having the rebuttal argument.

What about the "free variables?" The clearest example of a free variable is the strength of the argument.[103] That makes sense. If one

103. *See* ROSNOW & ROBINSON, *supra* note 60, at 102. An example of another free variable is termed "reinforcement:"

> Another free variable is "reinforcement." When incidents that are perceived as rewarding or satisfying are initiated close in time to a persuasive communication,

argument is significantly stronger than another, it is hard to imagine that it would nevertheless face rejection merely because it follows or proceeds a far weaker position. Of course, when discussing a criminal trial, we are not looking at the absolute strength of the arguments. The prosecution may well have the strongest argument, but it still may not merit a conviction under a legal regime demanding proof beyond a reasonable doubt. Strength of argument thus must be translated into "strength within applicable burdens of proof."

All that, however, is not very helpful. The question still remains whether the very order of the argument can assist the prosecution side in making their argument appear "stronger." I agree that, within some parameters, there is a somewhat objective aspect to comparing the strength of two arguments.[104] That, however, only goes so far. Once you get to the position that neither side is absurd and both have their points, it gets a bit more unclear. For in a real trial, with all the fur flying, there is a great deal of room for the advocates to influence the juror's perceptions and for those perceptions to define their reality. So again, does going last significantly aid the prosecution in creating that perceptually-driven reality?

Not surprisingly, the more one looks into the studies on order effects, the more complicated it becomes. Researchers now believe that three sets of variables affect order effects.[105] Complexity is the first. Complexity is a function of the amount of information and the subjects lack of familiarity with the task.[106] Next is the length of the series of information.[107] Finally, is the mode of response.[108] This last variable in turn has two forms: end of sequence [Eos], which is what jurors in real trials are told to do (i.e., don't decide until all the evidence is in),[109] and item by item, or step by step [Sbs], which is what most of the studies do (i.e., make a new decision after each new piece of information).[110]

So, how do criminal jury trials rate on these three variables? Let's begin with complexity. Law cases, even "simple" ones, are extremely complex by this measure, as anyone who has used the most basic, beginner,

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> opinions tend to change in the direction of the arguments closer to the rewarding incident. When an incident is dissatisfying, or punishing, opinions tend to change in the direction of the arguments farther in time from it.

Id. (citation omitted).

104. For an example of an attempt to develop objective criteria for evaluations the quality of rebuttal in debate, see Don Faules, *Measuring Refutation Skill: An Exploratory Study*, 4 J. AM. FORENSIC ASS'N. 47 (1967).

105. These variables are termed "task variables." *See* Hogarth & Einhorn, *supra* note 59, at 4.

106. *See id.*

107. *See id.* at 4, 6. In actual order effect studies, "short" sequences had between 2 and 12 items, "long" over 17 items. *See id.*

108. *See id.* at 4 ("Response mode. Many studies have shown that judgments are sensitive to the manner in which they are elicited....").

109. *See id.* at 5.

110. *See id.*

no previous experience needed, mock trial case file when teaching trial advocacy. There is a lot of stuff in even this beginners' file. And though jurors have probably watched vast amounts of TV court drama, analyzing the evidence along the way during commercial breaks, the reality of being a juror is simply not something with which they have a great deal of experience. Surely, in daily life they constantly make decisions from information, with many of these being extremely important ones. That is what responsible adult humans do. But trials are different. They have a very peculiar, formal, constrained structure of information circumscribed by evidence rules, procedural rules, and a doctrinal framework. In the trial, the jurors know that they are not getting the whole story (they see the conferences at sidebar and hear references to previous rulings about which they know nothing), and on top of that, they must make their decision by trying to come to consensus through deliberating with a group of people about whom they know very little. All of this makes jury service a unique and unfamiliar task, at least until one has been on several juries.

As to the other variables, jury trials involve long series of information and, in theory, end of series (Eos) decision making. I say, in theory, because although they are instructed over and over again not to form an opinion until they have heard all the evidence, it is not clear that people are capable of doing that. Throughout the trial, they must make sense out of the mass of information bombarding them. They have to continually place it into some story framework so that it not be gibberish.[111] Also, there is a natural human tendency to avoid the discomfort of ambiguity (i.e., when a friend tells us "I feel like I'm in limbo" we tend not to see that as a positive thing).[112] So, jurors probably cannot wait till to the end. My guess is that they go through a series of step by step, item by item (Sbs) modes of responding as they refine their view of the case in a process alternatively termed narrative theory, story theory, or forming a basal opinion.[113] At that point, my guess is that they are ready to move into the Eos mode. And, my guess is as good as the next person's, because no study on order effects has

111. *See* BENNETT & FELDMAN, *supra* note 22, at 8-9.

112. In the context of studies, the natural motivation to eliminate the stress of ambiguity and conflict as been expressed as: "If acceptance and rejection motives are at approximately equal strengths while the communication is being presented, the longer this state of equality persists, the more strongly motivated the recipient will become to terminate the conflict." JANIS & FEIERABEND, *supra* note 86, at 126.

113. When subjects are asked to use a SbS mode, the SbS mode is always used. *See* Hogarth & Einhorn, *supra* note 59, at 13. When asked to use the EoS mode, the results are mixed. For short series of cognitively simple items the EoS mode is followed. *See id.* When series gets long and more complex, however, subjects tend to shift to a SbS process. *See id.* "We therefore assume that, when required to provide EoS responses, people are more likely to use an SbS process as the relative complexity and/or length of the series of evidence items increases." *Id.* at 13. *See also id.* at 14.

looked at complex tasks, with long series, and Eos response modes. In other words, none of the studies involve anything like a real jury trial.[114]

On top of it, the research reveals order effects as even more complex still. Opinion change researchers now think in terms of an "anchoring" and adjustment process in belief change.[115] Each belief state is an anchor – strong, weak, or in between.[116] Changes in that belief are therefore functions of adjustment from that anchor.[117] Advocates implicitly understand this. They know that people already come to jury service with an extensive set of beliefs. In voir dire you try to discover these beliefs (e.g., the police do not make mistakes) and then assess their intensity (i.e., strong, weak, in between). While you may never have heard the term "anchor" used outside a nautical setting or a relay race, you still understand the concept and its significance in your attempts to persuade these individuals who make up your jury.

None of this, however, directly aids our inquiry about the power of rebuttal arguments. The important question is the relationship of this anchor to order effects. That requires exploration of the further concept of task encoding.[118] In addition to the three variables already discussed – complexity of the task, length of the series, response mode required (Eos or Sbs) – effects on the anchor will be a function of how the subject encodes (i.e., gives meaning to) each new piece of information. In the vernacular of anchoring theory, there are two methods of encoding, evaluation[119] or estimation.[120] Which applies depends on the type of task you are being asked to perform with the information. Evaluative tasks encode evidence as positive or negative in relationship to some hypothesis.[121] Estimation involves what the researchers call a "moving average."[122] For reasons

114. Most existing experiments involved simple tasks for short sequences. *See* Hogarth & Einhorn, *supra* note 59, at 6. With those studies, primacy effects took place in EoS mode, recency in SbS. *See id.* Simple tasks with long sequences favored primacy, independent of response mode. *See id.* at 7. Recency, on the other hand, is "associated with" more complex tasks, regardless of response mode. *See id.*

115. *See* Hogarth & Einhorn, *supra* note 59, at 8 ("Our theory assumes that people handle belief-updating tasks by a general, sequential anchoring – and adjustment process in which current opinion, or the anchor, is adjusted by the impact of succeeding pieces of information.").

116. *See id.* (including the "initial strength of belief" in their model).

117. *See id.* at 40 ("[I]t is assumed that memory is limited to the location of one's current anchor and not how this was reached....").

118. *See id.* at 9 ("[I]n recent years there has been a growing awareness on the effects of encoding on outcomes of judgment and choice....")

119. *See id.*

120. *See id.*

121. *See id.* ("In evaluative tasks, evidence is seen as bipolar... relative to the hypothesis (confirming versus disconfirming)....").

122. *See id.* ("In Contrast, estimation tasks involve assessing some kind of 'moving average' (e.g., impression of 'likeableness') that reflects the position of each new piece of evidence relative to current opinion.").

which will be clear, this latter mode of encoding is extremely sensitive to nuances of new information relative to the existing anchor.[123]

Let's look at an example. Assessing whether the proposition "X gives to charity" is correct or not is an evaluation task. It is an up or down question (unless you are trained in law and ask questions like "what do you mean by 'charity?'"). When new information comes in, you will "encode" it in terms of whether or not he gives to charity. "X is a very generous person," on the other hand, is a task of estimation. Each new piece of information will be significant for our moving average.

How will order effects play out in these two encoding strategies according to the supporting studies? In short series, there will be no order effects for either form of encoding.[124] For longer series, no order effects for evaluation, but recency effects for estimation.[125] Further, if the evidence is weak, it will strengthen the anchor for evaluation, but weaken it for estimation.[126] This all makes sense.

In a very short sequence, you will be trying to figure out a pattern or theory from the minimal information. Your final theory is not likely to jell until you have put all the scraps together. A longer series will be otherwise. Go back to our example and assume that after ten items your belief system is anchored at the opinion that X gives to charity (evaluation) and that X is a very generous person (estimation). Imagine now I tell you that X has given $100 to the Red Cross. That will not likely affect either hypotheses. Now I tell you that he gave $10 to a homeless center. That information will strengthen your belief in the evaluative task, i.e., the binary decision whether or not X gives to charity; but, it will force you to estimate whether this makes X a very generous person. If I then add that X gave $0.25 to a street person, it again will only strengthen your evaluation ("X just keeps giving everywhere"). This consistent but weak evidence, however, when coded for an estimation task will lower your estimation ("A quarter! How cheap. That's almost insulting....").

Fine. Again I find all this very interesting, but fail when I try to transpose these theories into the arena of juror decision-making. I simply have no idea what form of information encoding is involved by a jury in a criminal trial. You could say that it is obviously evaluation. After all, the juror is deciding up or down on the proposition "defendant is guilty of _____."[127] But that is not so obvious. Guilt or innocence is not really a

123. *See id.* ("[I]n estimation tasks people are sensitive to the difference between the location of the current anchor ... and the level of opinion suggested by the evidence to be integrated.").

124. *See id.* at 33.

125. *See id.*

126. *See id.* at 10, 33; *cf.* McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches, supra* note 86, at 272 ("Averaging models imply that one should use only one's strongest arguments, while additive models imply that including weak arguments also enhances impact.")

127. Hogarth and Einhorn appear to characterize criminal jury trials as involving jurors in an

true or false type of question.[128] Did he or didn't he do it is a question for mystery novels. Criminal trials are a test of moral, not mathematical probabilities.[129] In that process, belief strength and belief content overlap. As my belief in the strength of the prosecution case increases, I move from a belief that the particular defendant is innocent (assuming I really accept the presumption of innocence), to a belief he is guilty. As my belief as to the strength of the government's case weakens, my belief in a reasonable doubt strengthens.[130]

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evaluative task: "For example, imagine having to evaluate testimony in a court case that requires a verdict of guilt or innocence. Here the hypothesis is bipolar in nature and evidence must be explicitly interpreted as to whether it incriminates or exonerates the accused." Hogarth & Einborn, *supra* note 59, at 11.

128. One might question whether notions of primacy and recency, born as they are out evaluating list – like evidence, even apply to processing information in a trial-like setting.

> We do not doubt that people sometimes evaluate list-like evidence. Judgments out which applicant to accept for a job or for a graduate fellowship may be examples, since the evidence often comes in discrete pieces with little overall structure (e.g., GRE scores. GPAs, institution granting the undergraduate degree). In this context, the search for serial-position effects may serve an important purpose. In conjecture, however, that judgments based on unorganized evidence may be the exception and that most of the critical evaluations we perform we base on evidence deeply embedded in conventional structures. People may even have difficulty distinguishing evidence from other forms of information that these structures convey (Ahrem and Rips, 1995; Kuhn, 1991; Ranney. Shank, Hoadley and Neff, 1994). Evidence in trials, political debates, scientific disputes, negotiations in business, and discussions among family members or friends virtually never take the form of merely sequential detail. Within these disputes the verbal-learning notions of primacy and recency may be out of place.

Bailenson & Rips, *supra* 58, at S15.

129. In the famous case (or at least a case that appears in every evidence text book) *People v. Collins*, the Court reversed a verdict in which the prosecutor had argued guilt based on statistical probability. *See* People v. Collins, 438 P.2d. 33, 41-42 (Cal. 1968). The Court's decision was based as much on the notion that guilt beyond reasonable doubt is not a mathematically calculable proposition as on the flawed statistical presentation by the prosecution. *See id.* at 38-40; *see also* LAWRENCE TRIBE, TRIAL BY MATHEMATICS: PRECISION AND RITUAL IN THE LEGAL PROCESS 1329, 1370-75 (1971).

130. *See, e.g.*, Mitchell, *supra* note 9, at 342-43:

> A different perspective on this inquiry in the nature of our criminal justice system may be obtained by examining Professor Subin's sense of truth and falsity. Professor Subin's "truth" is the true-false truth. In Subin's examples, he knows what is true and false. He would also like the system to sort the truth to one side of the line and false to the other. But for the *factfinder* in the criminal justice system, "truth" does not manifest itself as the static, true-false truth Professor Subin presents. Rather, it exists in relationship to burden of proof and reasonable doubt and is a dynamic zone moving from "false to true" and "true to false." Depending on the probativeness of particular pieces of information (viewed by themselves or in combination), a juror could locate reasonable doubt or lack thereof at various points along this moving zone:

False to True	True to False
I think that is false, but...	It may be true.
I am not sure.	I cannot say it is not true.
I cannot say that it is not true,	I think it is false, but I am not sure.
The evidence is not inconsistent with truth.	It could be false.

So again, what does a jury do? I guess I could characterize it as ultimately a task of evaluation (guilty or not guilty) conducted by estimation. Perhaps this involves double encoding. The jury encodes the evidence for the task of estimation. They then take the results of this initial estimation analysis and encode that for the final evaluation. I don't know. While I can see the possible use of this encoding theory for ordering strong and weak evidence in an exam, and perhaps even for ordering strong and weak arguments within your own closing, I frankly can not draw any conclusions about the possible advantages given the prosecution through the rebuttal argument. At this point one may fairly question whether anything in the scientific literature assists my position.

2. Research Regarding Magnitude of Opinion Change Sought.—One set of research findings, interrelating persuasion technique and order effects, did initially seem promising. These studies theorize that the greater opinion change you ask for, the more you get.[131] As a psychological principle, this theory does seem to comport with our everyday experience.

What we ask for sets the framework for what will be considered, what will constitute the audience's range of expectations. It is the ballpark in which we have chosen to play. Anyone who has ever tried to sell a car

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It might be true	I would not be surprised if it were false.
The evidence is consistent with the truth.	The evidence points to a falsity, but it might not be.
I am fairly confident that it is true.	I think it is probably true.
I am positive it is true.	I am sure it is false.

> The criminal justice system centers not on Subin's line between true and false, but on societally acceptable levels of certainty and doubt within the zones of "true to false" and "false to true." Truth and falsity have a part in this as the organizational constructs upon which the certainties and doubts center in such an analysis. A juror may doubt the truth of one piece of evidence or be uncertain about the falseness of another. But, it is the *level* of certainty and doubt, not the question of "truth" or "falseness," with which the system is concerned.

131. *See* Anderson, *supra* note 71, at 105 ("Experiments in persuasion generally find that the greater is the advocated change in opinion, the greater is the change produced."). This concept which concerns the magnitude of belief change achieved should not be confused with the idea that it is easier to obtain a smaller than larger change in the audience's belief system. *See, e.g.*, Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y. 195, 207 (1993):

> [A]rguments are persuasive only if the changes in audience belief called for by the arguments fall within the audience's latitude for change or acceptance. Thus, an argument that calls for a large change of belief is less likely to be persuasive than an argument that calls for a small change of belief simply because a large change of belief is less likely to be within an audience's latitude for change.

(citations omitted).

through the local paper understands this. Setting the starting price is everything.

I would, however, add two provisos to this psychological theory. First, even if this is correct, it will not mean that you will get all you desire or even need. You will just get more. In a trial setting, you therefore may get more than if you had asked for a lesser modification of a juror's belief anchor, but that more may still not be enough to carry your burden of proof with that individual juror. Second, if you ask for more than you can reasonably support, you risk not merely being limited to getting what is reasonable, but totally discrediting your entire position in the mind of the audience and getting nothing. In other words, if you ask for a ridiculous price for your beaten car, no one even will call. If you ask $500,000 for a $5,000 slip and fall, you may get a defense verdict.[132] Given those two provisos, however, the theory has potential for our purposes.

The relationship between this theory and order effects is best explained using a physical, spatial model. Imagine your belief anchor on a particular subject prior to hearing any arguments as a "basepoint." Now imagine that I ask you to move your opinion to a position to the left of that initial basepoint (i.e., anchor), say 10'. My opponent now asks you to move from where you now are after my argument to a position of 10' to the right of the original basepoint. If you initially moved entirely to the position to which I first tried to persuade you, you now will have to move 20' to get to my opponent's, i.e., ten back to the basepoint, and then ten more to the opponent's position. Even if I moved you only a metaphorical foot or two, my opponent will be asking for more change than I did. Since this second person is asking for more movement, under the theory my opponent will get more change.[133]

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132. Henry Miller echoes this observation:

> 14. Don't Be Greedy: The liability is weak- but the injuries are substantial. You've been reading about those large verdicts. You want one. It will help with "business." You tell the jury that "justice will only be served" by a verdict of two million dollars. The jurors are deeply troubled. They'd like to award something, but two million dollars is ridiculous. The verdict is for the defendant. Moral: Jurors resent overreaching.

Henry G. Miller, *Chapter VIII. Some Do's and Don'ts for Summation*, in BASIC TRIAL STRATEGY, *supra* note 16, at 141.

133. *See* ROSNOW & ROBINSON, *supra* note 60, at 103-04:

> The model rests on the assumption that the more opinion change asked for, the more received. Hence, if two successive communications produce proportionally the same amount of opinion change, the second communication should always have the advantage. This is because the first communication would move opinions a given amount, thereby increasing the attitudinal distance between the recipient and the second communication. If the second communication were proportionally as effective as the first, then, because it demanded more opinion change, it would have the effect of producing greater change.

(citation omitted).

This looks like the basis for finding an order effects advantage in the prosecution following my closing argument with her rebuttal argument. After all, I have just asked for innocence, based on reasonable doubt. The prosecution must now move all the way back to a guilt beyond a reasonable doubt. Being able to ask for, and therefore get more opinion change merely because of her sequence in closing, the prosecutor would appear to have an advantage. But does any of this really apply to a criminal jury trial? Probably not.

First, in a criminal trial there are three arguments in closing. The prosecution begins asking that the jury move from their basepoint to guilt (i.e., beyond a reasonable doubt). The defense then asks them to move from guilt, back through their basepoint, and all the way to innocence (i.e., reasonable doubt). At this point the defense has asked for the most opinion change under the theory. But now the prosecution stands up and gives a third argument where she asks that the jury change their opinion back all the way from innocence, through the basepoint, back to guilt. Thus, even accepting the theory, by the conclusion of closing each advocate has asked for the same magnitude of opinion change, giving neither side the advantage.

Second, in conception, a jury trial does not begin at a nonaligned basepoint. It begins at not guilty, the presumption of innocence. In its initial opening, the prosecution tries to move the jurors all the way to guilt. The defense then asks for movement all the way back to innocence, with the prosecution concluding by again asking the jurors to trudge back to guilt. Again, each side is asking for the same quantum of opinion change. No advantage to either side.

Third, in reality, by the time closing arguments arrive, most jurors are not resting at some uncommitted basepoint, begging to be persuaded. They have formed their story/narrative theory and they have an opinion on the case. It is subject to change in closing arguments and again during deliberation, but it is nonetheless an opinion. Applying the theory, the greatest change asked for will be a function of this opinion at the outset of argument. So, if at the end of the evidence, a particular juror believes the defendant guilty, the prosecutor in her initial argument is asking for no opinion change. My point is that this theory is probably correct, but there is no way to meaningfully apply it to assessing the relative advantages of the advocates in closing.

3. The Asymmetric Rebound Effect.—There is one last experimentally derived theory concerning order effects which could have application to our inquiry, the "Asymmetric Rebound Effect."[134] What

134. *See* Hogarth & Einhorn, *supra* note 59, at 35.

researchers found was that the stronger the anchor of belief, the more vulnerable that anchor was to subsequent negative information.[135] If the basis of belief underlying this strong anchor was weakened, the effect was to move the anchor beyond the person's initial position. The experimenters characterized this phenomenon as akin to the notion of "the bigger they are, the harder they fall."[136] Thus, in an experiment utilizing a mock trial, subjects had initially changed their entire belief about the case based on the testimony of a single witness. This subsequently adjusted belief based on that witness's testimony would, in the vernacular, be considered a strong anchor in favor of the party for whom the witness was testifying.[137] Yet when that same witness's testimony was subsequently discredited, the subjects did not just return to their previous position as if they had never heard the testimony in the first place. Instead, they readjusted their beliefs so that the net effect of that witness's testimony was negative.[138]

The result is hardly surprising. From our own experience, most of us can recall a time when we strongly believed in something or someone, and then subsequently, for whatever reasons, became terribly disillusioned. It is often the case in such a situation, that our disillusionment leads us to overreact in the other direction of the belief. We do not just evaluate and reassess the effect of the new information on our belief, calmly and rationally adjusting the previous anchor. Rather, we emotionally feel betrayed. As an example, imagine you are in junior high school and you have a teacher you think is just wonderful, the greatest, walks on water. Suddenly, one day that teacher is unfairly rude to you, humiliating you in front of the entire class. Undoubtedly, your anchor will begin to move. But you will not likely reassess your belief to something like "he's still an excellent teacher, better than most, but human and imperfect." No, you will more likely to move to "I hate Mr. _____. He's horrible, a total fraud pretending to be...."[139]

From all this, my first thought is that in rebuttal the prosecution can in effect "over persuade" jurors who were strongly committed to my position,

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135. *See id.* at 14.

136. *See id.*

137. *See id.* at 36.

138. To a litigator, this would make complete sense. The jury is not only judging the credibility of individual witnesses, but it simultaneously assessing the credibility of a party's entire case. After all, they do not know any of the parties or witnesses, so they must begin trusting that each party will at least try to present an honest case.

139. Of course, this phenomenon is only likely to apply to opinions which are the product of personal (emotional, moral) commitment, as opposed to ones which are purely part of our factual knowledge base. Thus, if I believed that Mt. Everest was the highest mountain in the world and then was confronted with evidence indicating that my belief was wrong, I would probably react something like: "Oh ... I didn't know that; I guess I was wrong...." It is all but unimaginable that I would think: "That Everest is a complete fraud... really more akin to a small hill or a steeply inclined driveway."

i.e., innocence. If she weakens this belief, she has the opportunity to use the Asymmetrical Rebound Effect to slingshot them beyond what the analysis justified in anchor adjustment (i.e., "After the prosecution I don't believe a word of those defense phonies" vs. "I'm not as certain now after hearing the prosecution, but I still maintain a reasonable doubt.").

As anyone who has seen his client get caught on the stand in even a minor lie, I have no question as to the validity of the theory of rebound effect when applied to evidence. But when it comes to actual evidence, order effects do not benefit the prosecution; for it is the defense that puts on the final evidence. The question then is whether this can reasonably be expected to happen, not in evidence, but in argument. I do not think so.

True, the prosecutor could undermine the defense by convincing the jurors that defense counsel has lied or intentionally misrepresented the evidence. But that has far more to do with defense misconduct than sequence of arguments. Also, the prosecutor could point out the significance of a piece of evidence that a juror had seen yet not appreciated. This is done all the time on closing. But I doubt that one could miss the significance of evidence that is so powerful as to be able to trigger the rebound effect. When that type of evidence comes out, usually it is pretty clear. I am not saying that it is impossible to trigger this rebound phenomenon with just an argument. I do not know. What I am saying is that while it may be possible in theory to trigger a rebound effect in closing, it seems so unlikely that I can not in good faith use the theory to base a claim for altering the accepted procedure for closing arguments.

4. Studies of Closing Arguments and Order Effects.—To this point, we have concentrated upon theoretical approaches to order-effects and recency. In fact, there are social psychology studies which specifically evaluated order-effects in closing arguments.[140] In fact, the two most recent such studies, both done in the late 1960s, found strong recency effects.[141]

140. *See* RIEKE & STUTMAN, *supra* note 17, at 207 (noting that "experimental studies [on order effects in trials] have primarily used closing arguments or combinations of arguments....")

141. *See* Wallace & Wilson, *supra* note 76, at 314 ("[T]he net order effect was a recency effect 10 times out of 10."); Zdep & Wilson, *supra* note 78, at 195 ("The current study casts another vote in favor of a recency effect in no interval – no delay conditions.").

Were all our strolls through the previous theories thus naught but academic indulgence, when the plain and simple facts were always there for the taking, residing in these two studies? Does this then, at last, unequivocally establish the advantage given the prosecution in rebuttal? Sadly, I do not believe so, though the studies surely are instructive.

In these studies, subjects were given a (written) defense and prosecution closing argument. The arguments were equal in both length and strength.[142] The direction in which subjects were persuaded was strongly affected by the order of the two arguments, with whichever side was placed in second position consistently having the advantage.[143] That is clearly a powerful demonstration of the triumph of recency order effects, but what does it tell us about real closing arguments?

In some ways, the experiment paralleled the initial prosecution summation and the defense closing, which both are (theoretically) equal in length and strength. In other ways, it was not at all like the reality of a closing. The subjects in the study did not know anything about the case except what they read in the arguments. Thus, the "arguments" included the evidence.[144] As such, unlike jurors, the subjects had to accept the written presentation of evidence as both truthful testimony and as an accurate recitation of that testimony. That alone, however, does not matter for purposes of evaluating the study. The variable of witness credibility and accurate recounting of testimony weighs equally in either argument position.

The problem rather lies elsewhere. Because the evidence was simultaneously introduced with the argument,[145] it seems possible that the study establishes the preeminence of recency as to *trial evidence*,[146] but may say little about order-effects as they apply to actual *trial arguments*.

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142. *See* Wallace & Wilson, *supra* note 76, at 313; Zdep & Wilson, *supra* note 78, at 197.

143. *See* Wallace & Wilson, *supra* note 76, at 313; Zdep & Wilson, *supra* note 78, at 197.

144. Wallace & Wilson, *supra* note76, at 313; Zdep & Wilson, *supra* note 78, at 197.

145. In fact, virtually all of the experiments on persuasion and recency involved presenting the subjects with evidence. *See, e.g.*, Hogarth & Einborn, *supra* note 59, at 8 (providing description of typical experiments). While debate, rhetoric, and social psychology experiments thus tend to conjoin argument with evidence, the legal world is otherwise. Jurors are specifically told that arguments are not evidence, that they must base their decision on what they heard on the witness stand and what was admitted into evidence. First the evidence, then the arguments.

146. Studies do show recency effects as to evidence which, under our system, favors the defendant who presents last:

> Previously noted order effects do indeed persist in group decisions following discussion, but with no evident exaggeration. The procedural aim that requires the defendant's case in a criminal trial to be presented last appears justified by the recency results taken as a whole. Any 'biasing' seems likely to benefit the defendant... an outcome consistent with the philosophical disposition that failure to convict the guilty is a more desirable error than conviction of the innocent.
>
> The evidence to date seems clear; the order in which items of testimony are presented, both fairly gross and more detailed, can have a substantial impact upon individual mock jurors *and* the verdicts of mock juries following deliberation. These are procedural events of a rather mundane sort. The empirical demonstrations serve primarily to confirm both our concern for the order of

Further, the studies juxtaposed two equal arguments, paralleling the first prosecution summation and the defense closing. We, on the other hand, are looking at the import of a third (rebuttal) argument following those two. The studies do not directly deal with this situation when, after both sides' positions have fully been put forth, one of the adversaries returns for a short, second crack at the audience. While the studies may provide some inkling, they simply cannot be directly extrapolated to encompass the rebuttal. In summary, the studies place a few weights in the pan on my side of the scale, just not enough to significantly tip the scale by themselves.

Additionally, whatever advantage to be gained by the recency principle would be short-lived, given the findings as to recency decay. In other words, recency effects tend to weaken somewhat rapidly over time.[147] Thus, though any speech will have short-term effects,[148] the longer deliberation lasts, the less will be the impact of recency.[149] Also, recency is strongest when there is a significant delay between the first and second message.[150] It is weakest if the first message immediately precedes the second.[151] That of course sounds just like a criminal jury trial where the prosecution rebuttal closing is immediately preceded by the full defense closing argument.

None of this means that I doubt that there is a true psychological advantage from getting the last word. It is rather that I can not draw

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> informational input, and in this case, the probable desirability of the order customary in criminal trials.

James M. Davis, *Chapter 19. Order in the Courtroom, in* PSYCHOLOGY AND LAW: TOPICS FROM AN INTERNATIONAL CONFERENCE 154 (Dave J. Muller et al., eds., 1984).

See also id. at 253-54.

147. *See* WALTER, *supra* note 17, at 198:

> This evidence seems to indicate that the response to the closing speech immediately after hearing it is much stronger than after jurors have discussed it as a group, and blended it with the evidence and testimony. It appears that the immediate dramatic effects of closing speeches are mitigated through the process of reasoned discussion. (See Chapter 11 for more discussion of this important finding.)
>
> There is support for this conclusion in Hovland, Janis, and Kelley (1953:30). They reported the findings of a Hovland and Weiss study: 'The effect of the source [speaker] is maximal at the time of the communication but decreases with the passage of time more rapidly than the effects of the content [message].'

See also Miller & Campbell, *supra* note 76, at 117 ("The momentary advantage of the very recent may allow trivial events of this morning to overweigh momentarily more significant learnings of the past, but this momentary advantage will dissipate rapidly...."); Wilson & Miller, *Repetition*, *supra* note 59, at 184; Zdep & Wilson, *supra* note 78, at 186 ("[L]ess recency [is] expected when a delay occurs after a second speech....").

148. *See* Miller & Campbell, *supra* note 76, at 124.

149. *See* WALTER, *supra* note 17, at 198.

150. *See* Miller & Campbell, *supra* note 76, at 123.

151. *See id.* ("[T]he strength of recency being minimal when the two presentations are contiguous...."); Wilson & Miller, *Repetition*, *supra* note 59, at 184 ("[There is] more recency with intervals between arguments...."); Zdep & Wilson, *supra* note 78, at 196 ("[There is] relatively more recency being expected when an interval occurs between the arguments....").

support for this belief from order effects research and the principle of recency.

5. Other Cognitively Based Theories: Narrative or "Story" Theory, Anti-Primacy, and "Argument Fields."—There are yet three cognitively-based theories floating about that may shed light on the extent of advantage from having the last argument – narrative (or "story") theory, anti-primacy, and audience expectations within argument fields. Since I believe that narrative theory actually provides a strong framework for evaluating the rebuttal, while the other two theories, though arguably applicable, are far less useful, I begin with narrative, or "story" theory.

As we have already discussed, under these theories jurors make sense of the information at trial by putting it into narrative form.[152] The story they choose to describe the events being presented to them then will be the determining factor in their ultimate decision.[153] The advocate with the last word therefore has the final opportunity to shape this determinative story.[154] While a closing argument may appear to be a monologue, speaker and silent audience, only inexperienced counsel sees it so. Surely the rules of trial preclude jurors and counsel from speaking with one another in an interactive process. Yet that belies the reality that, juror silence aside, this is a two-way communication between counsel and jury,[155] a subtle negotiation over

152. For a discussion of "Story" Theory and Narrative Theory at trial, see *supra* note 71. In appreciating the role of the advocate in guarding the construction of juror stories, one must understand that trials involve a form of continuous "time-travel," with witnesses alternatively speaking about the present ("Do you recognize Exhibit C?"), the past ("And then what happened?"), the past as seen from the present ("Looking back on that night with hindsight..."), the future as seen as in the present ("How do you intend to raise your children?"), etc. *See* Wayne A. Beach, *Temporal Density in Courtroom Interaction: Constraints on the Recovery of Past Events in Legal Discourse*, 52 COMMUNITY MONOGRAPHS 1 (1985). At trial, advocates seek to manipulate these time frames for advantage. *See id.* at 14 ("Moreover, especially during cross-examinations and rebuttals, lawyers purposely attempt to *create* ambiguity by transforming the mere reporting of past event into nothing more than a product of the witness's idiosyncratic biases and perceptions.").

153. *See* Pennington & Hastie, *supra* note 71, at 521, 525 ("Different jurors will construct different stories, and a central claim of the theory is that the story will determine the decision that a particular juror reaches.").

154. Professor Moore articulated the possibility of affecting these stories in a rebuttal argument as one in which

> the prosecutor could develop one or more of these explanatory hypotheses in an attempt to reduce the cognitive dissonance of our hypothetical juror, thus changing her tentative conclusion about the outcome of the case. ... [Thus], because the phenomena underlying belief perseverance may make it very difficult for counsel to change the opinion of a juror during closing, the potential benefit of a rebuttal argument may outweigh the risk [i.e., that counsel will raise negative points not previously perceived by the jury].

Moore, *supra* note 71, at 339-40 (citations omitted).

155. This notion of jury summation as a two-way communication was expressed by Bettyruth Walter: "The summation, traditionally considered to be a monologue, is in fact a two-way communication." WALTER, *supra* note 17, at Abstract viii. Dr. Walter further elaborates on this point:

> The Cooperative Principle is of interest because the maxims seem to be operational (although often flouted) even in a discourse which might be

meaning.[156] It is a struggle over definitions,[157] over whether a piece of evidence creates a narrative of guilt or innocence. It is counsel's attempt to reason with the jurors over the appropriate choice of story.

Go back to our young man who is on trial for assaulting a police officer. Imagine the officer's direct examination as the following:

PROSECUTOR:	Did defendant ever say anything after you gave him *Miranda* warning?
OFFICER:	Other than that he understood?
PROSECUTOR:	Yes.
OFFICER:	No. Not at that time.
PROSECUTOR:	Did he at any other time?
OFFICER:	Yes. When we were driving to the station in my patrol car.
PROSECUTOR:	What did he say?
OFFICER:	He just suddenly said that he was sorry about what happened....
PROSECUTOR:	Anything else?
OFFICER:	Yes. He wanted to know if there was any way he could not be arrested and taken to jail.

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described as a one-way event. The functioning of this principle in summation might lend evidence to maintaining that summation can be conceived of as a two-way interaction, with jurors and lawyers cooperating....

Id. at 21.

156. *Cf.* Jack Blines, *Proposition and Confrontation in Legal Discourse*, 34 SEMIOTICA 251, 266 (1981):

> The participants proceed as if the meaning of their utterances are fixed.... From a theoretical perspective, however, we may suggest that meaning is negotiated – the meaning of an utterance emerge, in part, from a further course of interaction. As a result of their interactional work, an utterance may come to have a meaning, for the speaker as well as the audience, which it did not have at the moment it was produced. [This reflects] [t]he possibility of such renegotiation and transformation of meaning....

157. *See* W. Lance Bennet, *Rhetorical Transformation of Evidence in Criminal Jury Trials*, 65 Q. J. SPEECH 311, 313-14 (1979):

> Most of the action in a trial is centered around the efforts of lawyers to define the evidence in keeping with their story strategies. This generally entails efforts by the prosecution to limit the scope of definitions to terms that fall within the legal categories that make up the alleged crime. The defense usually works against these narrowing tactics in an effort to expand the range of definitions beyond the legal categories that jurors will use to judge the stories.
>
> An interesting example of this pattern occurred in a lengthy exchange between the prosecutor and the defendant in a drunken driving case. The prosecutor sought to establish that the defendant had a number of beers prior to his arrest for running a red light. Each question asked by the prosecutor was designed to restrict the answer to a narrow numerical estimate of the number of beers consumed. The defendant's responses, in contrast, attempted to return to his lawyer's earlier line of questioning, in which the drinking activity was defined in the context of an extended period of time during which the defendant had several beers in different social settings. The time factor and the multiple social contexts that the defense wanted to include in its definition of the number of beers consumed tended to put the defendant's behavior in a more sympathetic light and raise doubts about the probable effects of the quantity of alcohol consumed.

In closing, each advocate will try to influence the story created from this information. The prosecution will try to define this as all but an outright confession. The defense will make a number of narrative moves. First, the defense counsel may try to define this as part of a story of our acculturation. When you know you are in trouble and have no power in the matter, being totally under control of an authority, the first and best thing to do is grovel, say you are "sorry." Next, counsel may try to define the meaning of saying he is "sorry" in a way that is not a confession of assault, but an apology for something else, e.g., he is sorry that it all happened, that he had accidentally struck the officer with his elbow, etc. Finally, the attorney may try to give this seemingly inculpatory statement as appropriately fitting into the story of an innocent mind. After all, if someone was apologizing because he intentionally struck a police officer, could he conceivably imagine asking the officer to then not arrest him? Of course not. Thus, he must have believed it was an accident.

With the final chance at argument, however, the prosecution has the opportunity to make the last attempt at convincing the jurors to come to her definition of the event, her narrative. She will point out that defendant never said it was an accident; that just because you would have to be stupid to think you would not be arrested if you assaulted an officer, so what – no one ever said criminals have to be smart, and hoping you might not be arrested is no more stupid than striking the officer in the first place, etc. Plainly, going last gives some advantage in influencing this struggle over definition and meaning within the broader process of juror creation of the decision-determinative narratives.

A second possible advantage comes out of research exploring so-called "anti-primacy." The initial phase of this research focused upon the consequences of going first in an argument. According to this first research phase,[158] going first apparently carried some drawbacks all well as advantages. Specifically, the person who takes the first substantive stance also is seen by the audience to bear the burden of proof.[159] Now this may not seem to be a big deal when considering the prosecution in a criminal trial. Everyone knows the prosecution has the burden of proof. They learn it in school, in movies, and on television. They were reminded in voir dire, opening statements, and the Judge's Jury Instructions. Yet the fact that research indicates that this procedural demand will be reinforced by juror psychology which is derivative from the very order of the arguments is reassuring.

158. In the experiment, subjects were asked: "Who has the most work to do to prove their case to you?" This formulation was used so as not to confuse the subjects with the legal definition of burden of proof, but the intent was the same. *See* Bailenson & Rips, *supra* note 58, at S8.

159. *See id.* at S5, S11-S12.

This of course tells us nothing about rebuttal. That comes from the results of the second phase of the experiment. When the speaker who went first was then permitted to give some final words, and those final words included a "challenge" to the opposing position in the form of a rhetorical question (e.g., "what is the evidence to support that?"), the speaker's burden was decreased and shifted to the opponent.[160] In a legal regime where burden of proof beyond a reasonable doubt is the heart and soul of the entire process, this seems significant. But again, is it?

The subjects may have only meant that they were now convinced that the speaker had satisfied his burden of proof and that unless the opposition came up with something else (which procedurally he could not), then the speaker wins. This would reinforce the notion that having the last word in an argument to a jury is helpful, but adds no more than one would otherwise assume. If, on the other hand, they really lowered or shifted the burden and then evaluated the evidence under this revised burden structure, that would be significant. The problem is that I do not have enough information from this experiment alone to confidently draw the latter conclusion.

Finally, the very "lastness" of the prosecution's rebuttal argument, unrelated to content, bears some persuasive force. Its power comes from its very existence in the argument structure. Like varying expert domains have different conventions for approaching and answering problems,[161] so too are all arguments conducted "within pregiven contexts of interpretive categories, background beliefs and values, standards of proof and authority,

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160. *See id.* at S14-S15 ("Moreover, Experiment 2 showed that the last statement decreases a speaker's burden of proof only when it challenges the evidence on the opposite side of the issue."). Further, it is plausible that these "late challenges" are effective at shifting the burden because "the second speaker has no opportunity to answer the challenge when it appears in final position. Leaving the challenge hanging in this way may have worked strongly against the second speakers." *Id.* at S14. *Cf.* WALTER, *supra* note 17, at 104 ("The rhetorical question is probably the prosecutor's best friends. Rhetorical questions – that's the savior.").

161. *See* Mitchell, *supra* note 7, at 290-91:

> [Experts are aware] that conventions are only conventions, not rules, that principles are only instances of higher principles, and that what is unsaid can be said. Postsocialized individuals [i.e., experts] are able to articulate all this. They have a working knowledge of history within larger history, and of relations of their subject matter to other fields. They are able to sound like insiders but do not feel compelled to do so, because they value communication over style. Finally, they are able to live with uncertainty, multiplicity, and ambiguity, and yet they are confident in their choices.
>
> .....
>
> [Professor Joseph] Williams gives the notion of "conventions" particular attention in his discussion of all three developmental stages. Expert knowledge communities possess tacit conventions that determine the discourse of the community. The conventions, which comprise one aspect of an expert's schema, determine how evidence can be selected, used, and presented, and generally cover what *counts* as a point, why one point is worth making rather than another, and what can and cannot be said in support of a point.

(citations omitted).

norms of conduct, and so on."[162] In other words, the whole post-modern stew. These contexts have been termed "argument fields."[163] While there are likely aspects of evaluating an argument that apply to any argument, i.e., are "field invariant" (e.g., that you can hear the speaker, that what they are saying is in the same language as the audience, is minimally intelligible, etc.), the core of criteria and expectation for judging the argument will be unique to the particular context, i.e., "field-dependent."[164]

Argumentation at a criminal jury trial is plainly deeply laden with conventions of form (generally no singing), content (no personal assertions of belief, no appeals to prejudice), focus (application of facts to legal principles, challenging and supporting credibility of witnesses), and structural expectations.[165] As to the latter, the prosecution will go first, explaining why it has proved guilt beyond a reasonable doubt, personalizing the victim, and making clear that the defendant is a bad woman. The defense will follow pleading for acquittal, poking holes and probing for reasonable doubts, castigating the prosecution witnesses, and parading the image of the client as a possible victim of coincidence, misperceptions, and outright falsehoods. Then comes the prosecution rebuttal, clearing the air of the defense attempts at confusion and obfuscation, and hammering away at guilt with dramatic clarity. That is all built into the argument field; it constitutes a dramatic order which is aligned with what we all see as the natural, inevitable structure of closing arguments at trial. And therein may lie the advantage of the very position of lastness. For an insight of rhetoric tells us that ordering of an argument that conforms to the specific audience expectations enhances its persuasiveness.[166]

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162. FRANS H. VAN EEMEREN ET AL., RECONSTRUCTING ARGUMENTATIVE DISCOURSE 143 (1993). *See also* STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT 14 (1965).

163. *See* TOULMIN, *supra* note 162, at 14:

> How far accordingly, when we are assessing the merits of these different arguments, can we rely on the same sort of cannons or standards of arguments in criticizing them? Do they have the same sort of merits or different ones, and in what respects are we entitled to look for one and the same sort of merit in arguments of all these different sorts?
>
> For the sake of brevity, it will be convenient to introduce a technical term: let us accordingly talk of a *field* of arguments. Two arguments will be said to belong to the same field when the data and conclusions in each of the two arguments are, respectively, of the same logical type: they will be said to come from different fields when the backing or the conclusions in each of the two arguments are not of the same logical type. The proofs in Euclid's *Elements*, for example, belong to one field, the calculations performed in preparing an issue of the *Nautical Almanac* belong to another.

164. *See id.* at 15 (discussing notion of field-invariant and field-dependant variables); *see also* Mitchell, *supra* note 7, at 290-91 (discussing presocialized and socialized stages).

165. *See* Kunkel & Geis, *supra* note 2, at 557 ("[T]he procedure of the jury trial is very likely deeply impressed in the juror's mind: he knows that he will be exposed to two arguments and that he is expected to be receptive to both.") (citation omitted).

166. C. H. Perleman reflects this notion of the importance of an argumentative structure which matches the needs and expectations of an audience:

All that, however, does not greatly advance our inquiry. Initially, the rhetorical insight may more apply to the structure of the individual arguments themselves, rather than the structure of a field's sequence of the argument format. Further, even if it also applies to the format sequence, which I believe it might, this advantage would not seem of a sufficient magnitude to justify claiming that a change in currently established closing argument sequence must take place. Again, aside from the implications of narrative or story theory, if there are advantages to the rebuttal, the proof at this date must reside in the rhetorical arts, not science.

B. Advantages from the Advocate's Rhetorical Options

1. A View from the Trial Attorney and the Literature of Advocacy.— As a general proposition, trial attorneys see rebuttal as an important strategic tool. It gives the advocate with the final say an opportunity to "close the sale" on their case,[167] the chance to rebut the defense case

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> The guiding consideration in the study of order in a speech should be the needs of adaptation to the audience. This adaptation will operate either directly or through reflections of the hearer on the question of order. What the hearer envisages as the natural order, and the analogies he may see with an organism or a work of art are no more than arguments among others. The speaker will have to take them into account on the same footing as all the factors that are capable of conditioning the audience.

PERLEMAN & OLBRECHTS-TYTECA, *supra* note 85, at 508.

Cf., Dick CAMERON GIBSON, THE ROLE OF COMMUNICATION IN THE PRACTICE OF LAW 113 (1990) ("Clearly, every part of trial is important... still, the closing argument is especially important, by virtue of its location in the trial process."); TOULMIN, *supra* note 162, at 14.

167. *See* Miller, *supra* note 84, at 43 ("[I]n the closing summation you try to close the deal, to get the jury to sign on the dotted line...."). This same sales metaphor is incorporated in the notion of the rebuttal argument by Alan E. Morril:

> The other obvious advantage is that the plaintiff is the last one to analyze the evidence for them and can answer all of the arguments advanced by the defendant. This last opportunity may flop a juror or two into the plaintiff's wigwam who had been struggling with feelings of uncertainty, fully capable of going either way. There are also those jurors who can be sold and unsold easily; this gives the edge to the last one to close. Add this last type of juror to the others in your camp, and it may well be enough to tip the scales.

MORRIL, *supra* note 41, at 88.

See also WALTER, *supra* note 17, at 73 (As one defense attorney put it: "You give me the final word, and you're in big trouble!" Another said, "The last word is always the best word... I don't want a dynamic speaker going last. He'll blow you right out of the water."); Kunkel & Geis, *supra* note 2, at 555 ("[W]hen all factors such as ability of counsel and the merit of the respective cases are seemingly equal, the order of argument may be decisive.") (citation omitted); *Id.* at 558 ("[All respondents] generally agree that the right of final argument carries some advantage.").

While this article focuses on the prosecution rebuttal, it is worth noting that in the multiple defendant cases, the defense attorney who argues last has some of these advantages relative to other codefendants. *See* MORRIL, *supra* note 41, at 88 ("The last defense lawyer to speak has an opportunity not only to meet the arguments of his codefendant, but also to advance some of his own arguments, which his codefendants will have no opportunity to answer.").

without in turn facing rebuttal by the defense,[168] and a final opportunity to reinforce their theme.[169]

But for all that is written on the subject of the closing argument, it is surprising how meager is the treatment of the rebuttal in the literature.[170] What little there is, moreover, is extremely basic. Perhaps this reflects a belief that the rebuttal is so contingent on what the defense does that you cannot really plan.[171] So what you generally get is a very brief recitation of "don'ts." Collectively, these seem to boil down to not letting the defense argument dictate your topics, or to frame the issues or organization upon which your rebuttal will be built.[172] Thus, never jump to the bait of any

168. *See* MURRAY, *supra* note 3, at 376 ("The party with the opportunity for the last word has a slight advantage in being able to rebut the arguments of the other side without having to undergo further rebuttal."); LUBET, *supra* note 1, at 467 ("The plaintiff may comment on, criticize, or even ridicule defendant's argument, but the defendant may not respond. Defense counsel may have perfectly good answers for everything that the plaintiff says on rebuttal, but no matter."); Miller, *supra* note 84, at 46 ("The only time you should ask rhetorical questions of another lawyer is in rebuttal, when you know the defendant can not answer.").

169. *See* MAUET, *supra* note 16, at 300 ("Use your rebuttal to hit your best points in a fresh way."); Lane, *supra* note 16, at 82 ("Then 'wrap-up' the liability aspects by summarizing briefly the evidence and law supporting a favorable verdict."); MCELHANEY, *supra* note 42, at 671 ("Jo Ann Harris sees rebuttal as the final conclusion to what was carefully set up at the beginning of final argument...."); Miller, *supra* note 84 at 44 ("point up the correctness of your position and the error of the defendant's position....").

170. What little I could find included: ANATOMY, *supra* note 15, at 399; BERGER ET. AL, *supra* note 16, at 479; CRAWFORD, *supra* note 16, at 175; HAYDOCK & SONSTENG, *supra* note 16, at 611; JEANS, *supra* note 3, at 1387; LAGARIAS, *supra* note 16, at 143; LUBET, *supra* note 1, at 467-70; MAUET, *supra* note 16, at 299-300; MCELHAEY, *supra* note 42, at 666; PACKEL & SPINA, *supra* note 16, at 150-51; STERN, *supra* note 1, at 285-93; Brook Jackson & Richard J. Crawford, *Improving the Damages Appeal: A Few Words on Having the Last Word*, 12 LITIGATION 41 (Summer 1986); Lane, *supra* note 16, at 82; Miller, *supra* note 84, at 43. The literature does include some examples of rebuttal arguments. *See* OPENING STATEMENTS AND CLOSING ARGUMENTS 291 et seq. (Grace W. Holmes ed., 1982); LAGARIAS, *supra* note 16, at 447; Lane, *supra* note 16, at 83.

171. *See, e.g.*, ANATOMY, *supra* note 15, at 400 ("Rebuttal cannot be completely planned in advance of the defense argument, but its general nature can be anticipated."); LUBET, *supra* note 1, at 468 ("While the plaintiff's argument in chief can be completely planned in advance, and the defendant's argument in chief can be mostly planned, rebuttal must generally be delivered almost extemporaneously. Preparation for rebuttal typically takes place while plaintiff's counsel listens to the defendant's argument in chief."); JEANS, *supra* note 3, at 1387 ("This is the real test of an advocate's ability to think quickly. It is one thing to devise a well-crafted and well-structured argument while meditating in your home or office. It is quite another to listen to your opponent's argument, make notes of the most telling blows, and generate an effective rebuttal to lessen their impact,").

172. This concept of not letting the defense closing define the plaintiff's rebuttal is strongly stated throughout the literature:

> A second principle of rebuttal is to present the plaintiff's case in affirmative light. Even when it is well organized, rebuttal is weakened if it becomes nothing more than a series of retorts. As with all argument it is more effective to present the positive side of your own case, and this is particularly important when you represent the burdened party. Consequently, even in rebuttal, every position should be framed as a constructive statement of the plaintiff's own theory, with the refutation of the defense being used to explain further or elaborate on the plaintiff's case.

LUBET, *supra* note 1, at 469;

> It is usually unwise, however, to spend a major portion of your time in trying to refute the opposing case. Your major emphasis should always be on your version

rhetorical questions directed at you in the defense argument.[173] If you must answer them at all, make certain that the answers come up within the framework of your own structure.[174]

> of the facts and a discussion of why your version is more probable, the more logical, and the more reasonable explanation. Too often, counsel, particularly defense counsel, will make their entire argument sound like a criticism of the plaintiff's or the prosecution's case rather than a positive presentation. Certainly you should discuss the weaknesses in your opponent's case, but it should be in contrast to the strengths in your own case unless you have none to point to.

PACKEL & SPINA, *supra* note 16, at 150;

> You must *never* be euchred out of your position of greatest power and protection.
>
> .....
>
> To be sure, you will answer the points your adversary has made, just as you would have answered the points that he *will* make if you had spoken first, but these answers should be made as they naturally arise during your overall presentation. You must not rush out of your position of greatest power and protection, just because your adversary has landed some solid blows. Freshman lawyers rush to the site of their conflagrations, anxious to immediately douse the flames.

STERN, *supra* note 1, at 289.

See also ANATOMY, *supra* note 15, at 400 ("Plaintiff's counsel should not attempt to answer every argument made by the defense, but should focus on a few telling points."); SILBERT, *supra* note 16, at 539 ("Emphasis on strong points, do not merely respond to or rebut defense's contentions."); WALTER, *supra* note 17, at 93 ("Don't answer tit for tat defense's closing. I don't feel that's a productive thing to do because I think it detracts from the points you are trying to make – and it also appears it's a defensive move... why do that when you have your own points to make?"); English, *supra* note 16, at 75 ("Do not attempt to refute everything your opponent may have discussed").

173. *See* MAUET, *supra* note 16, 300 ("A clever defense lawyer during his argument will throw out a series of questions and challenge the other side to answer them during the rebuttal. Resist the temptation."); STERN, *supra* note 1, at 289 ("The foolish lawyer writes those questions down on one page and then answers them in a body before going on to his own presentation."); Lane, *supra* note 16, at 82 ("Beware of defendant's tactics of posing many questions. It is not necessary that you respond to all of them.... Your rebuttal outline should be covered first."); Miller, *supra* note 132, at 140:

> Don't Answer Their Questions: Mr. Sly looks at the young plaintiff's attorney and tells the jury that before Mary Smith can recover, her attorney must satisfactorily answer the following thirty-nine questions. The young plaintiff's lawyer dutifully records all the questions and proceeds to answer them one by one. After the last answer, his time is up and his case is over. Antidote: Don't answer their questions. Make your own argument. Emphasize your strong points. You should answer only those questions which truly must be answered. you must present your case and not take the bait of a sly opponent.

In fact, some experienced advocates specifically point out to the jury the defense's use of question as an attempt to throw off the plaintiff in rebuttal:

> Members of the jury, I don't know whether counsel is deliberately trying to divert me from arguing our case and our evidence or not. He wants me to answer a whole series of questions which he knows would take up much of my allotted time. If I had the time I could answer each and every question as I am sure you can from the testimony that you have heard. For instance, he asked me to answer this question. (*Repeat the question and then answer it* using the evidence favorable to your side....) I could take each and every one of these questions and answer them the same way to your satisfaction. However, first I am going to deal with the real issues and important evidence in this case. And I know you will find the answers to just about all of his questions in my comments.

TANFORD, THE TRIAL PROCESS, *supra* note 16, at 407 (citation omitted) (emphasis added).

To be sure, there are those who counsel that the rebuttal should be planned in advance.[175] Like all advocacy, there are different approaches to this task. One author suggests that you should begin with your main points, then rebut the key points of the defense and end with a set piece recitation of your theme.[176] Another recommends that you organize your rebuttal around the main topics in your position, rebutting the defense's points within the content of the main topic to which it best relates.[177] Others advise to end with damages (in civil cases),[178] close with an affirmative or emotional appeal,[179] or put into place some set piece (e.g., "this is my client's only day

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See also ART OF SUMMATION, *supra* note 16, at 11-12:

> Mr. Levine: I like to say to the jury, 'Now you have just been exposed to a technique which is quite old. My opponent spent all his time concocting a number of questions he wants me to answer, and, frankly, he doesn't care whether I answer them or not. He'd rather I didn't. He figures I'd spend all my time on this and I wouldn't have any time to talk to you about the important things. I hope this isn't what you want me to do. It's what he wants me to do. I'm not going to do it. Instead of that, let me show you that these questions are ridiculous, really don't exist and have no bearing upon the outcome of the case. Then I'll talk to you about the things concerning which I should talk to you.' You must do something like that.

174. *See, e.g.*, ART OF SUMMATION, *supra* note 16, at 12 ("You see, you can meet the arguments as you go along while you keep your own theme in mind."); MAUET, *supra* note 16, at 300 ("Periodically weave in selected defense contentions you have anticipated when your refutation is strong."); STERN, *supra* note 1, at 287 ("Answers will be given, of course, but only as they naturally arise in the context of one's own argument."); TANFORD, THE TRIAL PROCESS, *supra* note 16, at 407 ("In most cases, the challenge should be ignored. Give your prepared argument. ... The other option is to write down the questions, plug them into your outline, and answer them as they come up naturally in your argument.").

175. *See* CRAWFORD, *supra* note 16, at 175:

> What the defense says in closing argument in a civil or criminal case is rarely a surprise at any level – except maybe stylistically. Thus, plaintiff and prosecution lawyers should compose their rebuttal speeches well in advance of the trial. As a matter of fact, when you put together your closing argument, you should not stop until you have also written your rebuttal speech – you are not finished until that is done.

See also MAUET, *supra* note 16, at 300 ("The rebuttal argument, like all parts of the trial, must be planned in advance."); Jackson & Crawford, *supra* note 16, at 66 ("*Prepare the form and substance of your rebuttal early*. The most powerful and persuasive damage appeals during rebuttal speeches are those that have been put together well in advance of their delivery.").

176. *See* MCELHANEY, *supra* note 42, at 668-69 (discussing organizational technique used by attorney Barbara Caufield of San Francisco, California).

177. *See* LUBET, *supra* note 1, at 469 (suggesting the technique of "matching the defendant's arguments to the major propositions in the plaintiff's case.").

178. *See, e.g.*, Jackson & Crawford, *supra* note 16, at 67 ("*Close with an emphasis on damages.*"); Lane, *supra* note 16, at 82 ("Psychologically it is to the plaintiff's advantage to close her argument on damage note.").

179. *See, e.g.*, Lane, *supra* note 16, at 82 ("Defense counsel will usually provide the motivation for a rebuttal argument that is perhaps more animated and emotional than the opening argument. However, plaintiff's counsel will have to take her cue from the defendant. Sometimes a loud, emotional argument by the defendant may call for a calm, unemotional rebuttal."); MCELHANEY, *supra* note 42, at 670:

> And I find that the defense almost always says or does something outrageous during final argument. Then, if I react to that in my rebuttal, the jury will be impressed. They will see that I really must have a good reason for getting indignant, because I have been so calm during the rest of trial.

in court"; "what you decide, my client will have to live with the rest of...."; "the defense has claimed _____, but the defense can't deny _____, and the defense can't deny _____, and...."). [180]

This is all to the good. Better to have some plan based on some theory rather than none. Yet, there is a whole world of sophisticated rebuttal techniques – both fair and unfair – from the disciplines of rhetoric and debate which are also at the disposal of the prosecution, or any civil plaintiff for that matter, in their rebuttal argument. [181]

See also Miller, *supra* note 84, at 46 ("You can use your rebuttal to become emotional or righteously indignant, if the defendant, in his closing remarks, has given you a springboard from which to launch into a more emotional appeal.").

180. There are a range of "set pieces" suggested as endings for rebuttal. *See* MCELHENY, *supra* note 42, at 670-71. For example, there is the "Indelible Pencil:" "What you decide in this case can not be changed if you later discover you made a mistake. You are writing with an indelible pencil, and you must write carefully." *Id.* And, there is the "One Day in Court:"

> This is Mike Arnold's one day in court... when that money is gone and Mike Arnold still can't work, he comes back to court and says, Judge McMonagele, the jury didn't award enough, and I don't know what to do. The judge will have to tell him that he has had his one chance for justice, and that he can not come back a second time.

Id.

See also Jackson & Crawford, *supra* note 16, at 67 (*"Emphasize that this is the plaintiff's only opportunity for compensation."*); Miller, *supra* note 84, at 46:

> It is essential that, sometime during the argument, you very clearly and emphatically let the jury know that this is the one and only day defendant will have in court, and that their decision will be the final decision for all time. This is usually a good note on which to end the summation, since it tends to convey to the jury their serious responsibility and the far-reaching effects of their decision.

Still others offer set piece strategies that only require fill in the blanks. The "No Denial" gambit provides a good example:

> This special technique will work wonders in just the right short rebuttal circumstance. Try this 'no denial' approach when the time is right and when you have a case in which you can group together several factual items your opponent cannot deny:
>
> This whole case simply boils down to some factual questions never denied anywhere during this trail:
>
> They have never denied that the design of their auger was chosen primarily because it saved them money.
>
> They never denied that the exposed auger bolts were extremely hazardous.
>
> They never denied that technology was available to permanently cover the bolts and thereby protect workers.
>
> They never denied that industry voluntary safety guidelines were violated when they distributed this auger.
>
> And they cannot deny their responsibility to Jim Gardner....

CRAWFORD, *supra* note 16, at 176.

181. *See generally* DOUGLAS EHNIGER, INFLUENCE, BELIEF, AND ARGUMENT: AN INTRODUCTION TO RESPONSIBLE PERSUASION (1974); AUSTIN J. FREELEY, ARGUMENTATION AND DEBATE: CRITICAL THINKING FOR REASONED DECISION MAKING (9th ed. 1996); STEVEN E. TOULMIN ET AL., AN INTRODUCTION TO REASONING (2d ed. 1984).

2. The Availability of Forensic Techniques from Rhetoric and Debate

a. "Sham" Arguments.—To begin with, the world of rhetoric recognizes that the persuasive speaker has available an arsenal of techniques, not all of which are fair. This latter category is composed of a wide range of sham or pseudo arguments which reflect fallacies in reasoning.[182] These have been categorized by some as stratagems of language, stratagems of thought, and stratagems of tone or manner.[183] Others have divided these fallacies into missing grounds, irrelevant grounds, defective grounds, unwarranted grounds, and ambiguity.[184] The point of all of these are the same. The form of argument leads the audience away from the path of clear thinking, reason, and logic.

(1) Arguments Rising to the Level of Prosecutorial Misconduct.—Plainly, some categories of sham arguments are forbidden prosecutorial misconduct (e.g., arguments based on an appeal to

182. *See* EHNIGER, *supra* note 181, at 113:

> Some claims, however, which to the uncritical observer may seem sound, actually rest on sham or counterfeit proofs in the form of vague, unfair, or irrelevant appeals... Pseudoproofs of this sort, known technically as *stratagems*, are many, and they have over the centuries been classified in a variety of ways.

(emphasis added).

183. *See, e.g.*, EHNIGER, *supra* note 181, at 113 ("They [the stratagem] are arranged in terms of the major constituents of oral and written discourse: language, thought, and the tone or manner of presentation."). *See also* FREELEY, *supra* note 181, at 188, 190, 192 (dividing in terms of "Fallacies" of Evidence, Reasoning, Language, and Pseudoarguments).

184. *See, e.g.*, TOULMIN ET AL., *supra* note 181, at 132-33:

> Fallacies are arguments that can seem persuasive despite being unsound. Their power of persuasion arises from their superficial resemblance to sound forms of reasoning.
>
> .....
>
> Fallacies divide into five broad types according to our model:
>
> 1. Fallacies that result from missing grounds;
> 2. Fallacies that result from irrelevant grounds;
> 3. Fallacies that result from defective grounds;
> 4. Fallacies that result from unwarranted assumptions; and
> 5. Fallacies that result from ambiguities in our arguments.
>
> Fallacies that result from missing grounds are pseudo-arguments, for no real evidence is presented on behalf of the claim. Fallacies that result from defective grounds present evidence for a claim of the right sort of establishing the claim in question but which are insufficient for establishing the claim in question. These fallacies involve relevant but inadequate grounds. Fallacies resulting from irrelevant grounds simply offer the wrong type of evidence. The data in question do not pertain to the claim being pressed. Fallacies resulting from unwarranted assumptions involve the presumption that you can move from grounds to claim when you really cannot. They usually involve an assumption that there is widespread consensus concerning the applicability of a warrant, when in fact there is not. Fallacies resulting from ambiguity occur when some term in our argument can be construed in more than one way. This fifth class of fallacies differs from the first four in that fallacies of ambiguity concern the meaning of terms or assertions within our arguments rather than structural problems in our inferences.

(emphasis omitted).

prejudice), and thereby carry the risk of appellate reversal.[185] The efficacy of such an appellate threat, however, is somewhat limited. In the first place, it is unclear how willing appellate courts are to reverse on this grounds, there appearing to be some disagreement on the point.[186] Further, the issue of prosecutorial misconduct in closing argument is subject to being obviated by a range of procedural grounds[187] – failure to object, failure to request a cautionary instruction, invited error, harmless error.[188]

In reality, however, I do not believe that true misconduct is the greatest problem. Misconduct lets you get up and scream bloody murder, ask for a mistrial, and get some response from the Judge. Most reasoning fallacies, on the other hand, are not misconduct. You have to just sit there and hope the jury is not misled.

(2) Arguments Violating the Standards of Rhetoric, Debate, and Argumentation.—Every attorney who has had to sit quietly through rebuttal by the adversary has undoubtedly thought, e.g., "that doesn't follow", "that's really misleading", or such.[189] This is not surprising,

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185. For a list of typical categories of misconduct in closing argument, see ALI/ABA, *supra* note 16, at 648-49. *See also generally* Holt, *supra* note 16; Peter B. Hong, *Summation at the Border: Serious Misconduct in Final Argument in Criminal Trials*, 20 HAMLINE L. REV. 43 (1996) (providing examples and an appendix of serious misconduct in final argument during criminal trials in Minnesota); J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK., LITTLE ROCK L. J. 213 (1998); Tanford, *Closing Argument Procedure*, *supra* note 16, at 47.

186. The debate over the efficacy of appellate remedies for prosecutorial misconduct in closing argument is characterized by the following two polar-opposite positions:

> [O]ne of the most striking features of the law governing arguments is the infrequency with which appellate courts reverse a conviction on the grounds of argument error.

David Crump, *The Functions and Limits of Prosecution Jury Argument*, 28 SW. L.J. 505, 537 (1974).

> This author also found no evidence to support the related claim by some writers that appellate courts take violations of the rules of closing argument less seriously than other kinds of legal errors. To the contrary, appeals based on closing argument law errors proved just as likely to result in reversal as appeals based on other claims.

Tanford, *Closing Argument Procedure*, *supra* note 16, at 137 (citations omitted).

187. *See, e.g.*, Holt, *supra* note 16, at 129 (noting procedural bars for responding "to remarks made in the defense attorneys' closing," such as invited error and harmless error); Hong, *supra* note 185, at 247-58 (discussing "contemporaneous objection" rule and other procedural bars); Tanford, *Closing Argument Procedure*, *supra* note 16, at 138 (noting the range of procedural bars, including "cured error," such as cautionary instruction and invited errors).

188. *See* WALTER, *supra* note 17, at 47, quoting a prosecutor:

> During the rebuttal more is forgiven us on appeal. And for that matter, we are more likely to have the jury with us if we engage in passion. So, if the defense lawyer has, God forgive him, engaged in some sort of unfair tactic in closing argument himself, then the [jurors] expect and relish a certain amount of righteous indignation.

189. *See* LUBET, *supra* note 1, at 467:

> The greatest difficulty for defense counsel is knowing that she cannot speak again following the plaintiff's rebuttal. The plaintiff may comment on, criticize,

nor is it by any means necessarily deliberate. People do not always reason clearly. Further, in the heat of argument we can all lose perspective. Within this reality, it is striking what an incredible range of fallacious and pseudo arguments are available.[190] A typical list includes using incorrect examples[191] ("he had a beeper and cell phone, now what sixteen year old carries those around except a drug runner"), poor analogies[192] ("pushing the officer was like attacking all the nation's law enforcement"), loaded language[193] ("and what does this racist do then...."), irrelevant point[194] ("this is a person who didn't even call his mother that evening to tell her he'd be out late"), circular arguments/begging the question[195] ("how do you know the witness's identification was accurate – well she told you so"), ad hominem attacks[196] ("but my adversary has treated this panel, in fact this whole process with contempt"), and appeal to authority[197] ("this was not just any witness, this was a police officer who spoke").

This list also includes ignoring the issue,[198] baiting the opponent,[199] repeating assertions,[200] misattributing cause or assuming cause only because X precedes Y (post hoc fallacy),[201] ambiguity,[202] misinterpreting signs,[203]

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or even ridicule defendant's argument, but the defendant may not respond. Defense counsel may have perfectly good answers for everything that the plaintiff says on rebuttal, but no matter. The rule is that the defense may argue only once.

190. For a detailed compilation and description of the range of reasoning fallacies, see EHNIGER, *supra* note 181, at 113-25; FREELEY, *supra* note 181, at 188-98; TOULMIN ET AL., *supra* note 181, at 131-75.

191. *See* FREELEY, *supra* note 181, at 188.

192. *See id.* at 189; TOULMIN ET AL., *supra* note 181, at 161-63.

193. *See* EHNIGER, *supra* note 181, at 115; FREELEY, *supra* note 181, at 191.

194. *See* FREELEY, *supra* note 181, at 192.

195. *See* EHNIGER, *supra* note 181, at 121; FREELEY, *supra* note 181, at 192; TOULMIN ET AL., *supra* note 181, at 135.

196. *See* EHNIGER, *supra* note 181, at 121., *supra* note 181, at 117; FREELEY, *supra* note 181 at 194; TOULMIN ET AL., *supra* note 181, at 144-45.

197. *See* EHNIGER, *supra* note 181, at 120; FREELEY, *supra* note 181, at 188, and "poisoning the well" (unsupported assertion used to support other claims); TOULMIN ET AL., *supra* note 181, at 142-44. Fallacies which depend on the speaker's claim of authority include "unsupported assertions" (i.e., audience to believe without any supporting evidence simply because speaker says so).

198. *See* FREELEY, *supra* note 181, at 192. This fallacy can also encompass "shifting grounds" (i.e., moving debate to different, easier to deal with issues), see EHNIGER, *supra* note 181, at 119, and "evading the issue," see TOULMIN ET AL., *supra* note 181, at 139-42.

199. *See* FREELEY, *supra* note 181, at 192.

200. *See* FREELEY, *supra* note 181, at 192 (discussing repeating an argument "with the repetition treated as proof.")

201. *See* FREELEY, *supra* note 181, at 189 (discussing partial cause treated as sole cause in multiple factor situation), and at 198 (discussing Post Hoc fallacy; i.e., because follows A, B causes by A); TOULMIN ET AL., *supra* note 181, at 158-61 (discussing "false cause").

202. *See* EHNIGER, *supra* note 181, at 114; FREELEY, *supra* note 181, at 190; TOULMIN ET AL., *supra* note 181, at 167-75 (discussing variety of oral and written ambiguity, including "equivocation.").

203. *See* FREELEY, *supra* note 181, at 190 (discussing, e.g., when a doctor misinterprets symptoms).

verbalism,[204] bombast,[205] denying the inevitable conclusion,[206] appeal to what is popular,[207] appeal to tradition,[208] appeal to ignorance (i.e., if you can't prove it, it's not true),[209] the "straw man" argument,[210] pseudo questions ("are you still cheating on your boyfriend?"),[211] non sequiturs,[212] overstatement,[213] transfers (from parts to whole, whole to parts, from a discredited proof to an undiscredited claim),[214] appeal to pity,[215] appeal to fear,[216] use of technical language,[217] fastening upon a trivial point,[218] use of ridicule,[219] and (in some circumstances) humor.[220] I think you get the point. There are more than enough sham arguments to go around.

b. Arguments Employing Legitimate Techniques from Rhetoric, Argumentation, and Debate.—Even discounting sham or pseudo arguments, the advocate has available a range of legitimate techniques with which to attack their adversary's position. There is nothing new about attacking the premises of the adversary or building the negative case, as it is called in rhetoric and debate.[221] In fact, rhetoric and law

204. *See id.* ("The abundant use of words without conveying much meaning.").

205. *See id.* at 194; *see also* EHNIGER, *supra* note 181, 124.

206. *See* FREELEY, *supra* note 181, at 195 (discussing, i.e., admits premises, but denies conclusion which logically follows.).

207 *See id.* at 195; *see also* EHNIGER, *supra* note 181, at 123 (discussing joining the "bandwagon"); TOULMIN ET AL., *supra* note 181, at 146-47 ("The appeal to the people.").

208. *See* FREELEY, *supra* note 181, at 197; EHNIGER, *supra* note 181, at 120 (discussing, i.e., that's how he dealt with issue in past, always dealt with the issue, etc.).

209. *See* EHNIGER, *supra* note 181, at 121; FREELEY, *supra* note 181, at 196; TOULMIN ET AL., *supra* note 181, at 145-46.

210. *See* FREELEY, *supra* note 181, at 196.

211. *See id.* at 197.

212. *See id.* (discussing, i.e., conclusion not following from premises.).

213. *See* EHNIGER, *supra* note 181, at 116-17 (discussing "reductio ad absurdum" as specific form of overstatement.).

214. *See* TOULMIN ET AL., *supra* note 181, at 151-54. *See also* EHNIGER, *supra* note 181, at 116 (regarding the related concept of "hasty generalization" (i.e., drawing conclusion from either too few instances or atypical instances)).

215. *See* EHNIGER, *supra* note 181, at 119.

216. *See id.*

217. *See id.* at 120.

218. *See id.* at 122.

219. *See id.* at 124.

220. *See id.*

221. *See, e.g.*, FREELEY, *supra* note 181, at 247-80; LAGARIAS, *supra* note 16, at 143 ("The best response will commonly employ the classic format of refutation, outlined above, within a reiteration of one's own affirmative case.").

An interesting study into the notion of "highly argumentative individuals" correlate individual level trait of argumentativeness with actual argument activity. The researchers found that (not surprisingly) "highly argumentative individuals engaged in more total advocacy and refutation across issues than did moderate and low argumentatives" (although when the topics required little knowledge or research – e.g., sports, entertainment, family – lows and moderates were as argumentative as highs). Dominic A. Infante & Andrew S. Rancer, *Relations Between Argumentative Motivation and Advocacy and Refutation on Controversial Issues*, 41 COMM. Q. 415, 423, 424 (1993). The researchers also found that

> [a]cross all levels of advocacy [the existence of] more advocacy than refutation behavior.... Refutation, attacking an opponent's position, may have been

have had a continuous, though at times uneven, relationship throughout much of Western Civilization's history.[222]

> perceived as a more difficult dimension of argumentative activity. Refutation, the attack on the adversary's argument, evidence, and reasoning may require more preparation, more skill, and more competence to accomplish successfully.... Another speculation offered for this finding suggests that refutation may be perceived as a more aggressive dimension of argumentative behavior than is advocacy. When we refute, we are attacking another person's position on an issue. Previous research... suggests that some individuals have trouble distinguishing attacks on issues and attacks on self. If a person believes that attacking an adversary's position will be seen by that individual as an attack on self, this may serve to deepen refutative behavior.

Id. at 423.

Perhaps practicing trial advocates are immune to such qualms or, more likely, feel shielded from the personal by the mantel of their professional roles.

222. Even in ancient Rome, rhetoric was not universally embraced. Aristotle believed that only logic could produce truth, and rhetoric distorted truth. Isocrates, on the other hand, thought absolute rules of science impossible. For Isocrates, like the Sophists, "conjecture and belief were more practically reliable than any absolutes." Frederic G. Gale, *Logic, Rhetoric, and Legal Writing*, 10 J. BUS. & TECH. COMM. 203, 204 (1996). "The Sophists were the first law faculty, and like their modern counterparts, they understood that their students were less interested in absolute truth than in winning cases... [and] that the simple, unadorned prose then being taught did not persuade...." *Id.* Aristotle represented a middle ground. Logic for the pure sciences. But in the human sciences, politics, and ethics, rhetoric permits the deliberation necessary to "change some aspects of our lives." *Id.* at 205.

In Rome, the great lawyer Cicero, whose oratory format set a pattern upon which our own trials are organized, see RIEKE & STUTMAN, *supra* note 17, at 88, used those skills of rhetoric to lead an extensive legal community:

> Lawyers flourished in ancient Rome. One of the most noteworthy was Cierco, an outstanding teacher, orator, and statesman (Hendrickson, Hubbell). Cicero wrote a formulatory rhetoric where he discussed everything form the stock issues in a legal case (particulars of the crime or *factum*, reason for the accused to commit the crime or *causa*, and personal circumstances of the accused or *persona*) to specific techniques for persuading in the courtroom. Quintilian, a famous pleader in the courts before becoming a teacher, emphasized in his *Institutes of Oratory* that an effective litigator is "a good man speaking well" (Butler). Rhetoric became a central factor in Roman legal education; the techniques and strategies of persuasion became vehicles for teaching legal concepts to students of law.

Ronald J. Malton, *Legal Communication: An Introduction*, 30 ARGUMENT & ADVOC. 187-88 (1994).

In the sixteenth century, however, law and rhetoric abandoned their natural alliance, a trend that has carried over to modern legal education:

> But in the sixteenth century, rhetoric was to travel a path separate from the analytical dimension of forensic or legal speaking. Later, as great legal thinkers and philosophers such as Locke, Hobbes, Coke, and Blackstone were education in England, they became attracted to dialectic, but not to rhetoric. Legal and rhetorical theory took separate paths, with the latter subject focusing on the art of amplifying and beautifying one's thoughts. As law developed in England, neither the solicitors (those who do legal research) nor the barristers (those who engage in trial appearances) knew much rhetoric.
>
> American legal education was patterned after the case method developed by Christopher Columbus Langdell at Harvard Law School. This method was designed to systematically teach legal (logical) thinking and reasoning. Langdell was a logical positivist who maintained that juridic decisions are found by examining rules, laws, and logic. Thus, justice was a means of arriving at an absolute and universal truth Langdell believed that rhetoric only confused and distorted the search for truth (Frank, "Why Not," 907-908). Law students at

Through this extensive history, and with the evolution of debate, a set of classic moves have developed for use in rebutting the adversary's case.[223] These disciplines have developed clear, categorized approaches for probing the weaknesses in various types of evidence – e.g., factual evidence,[224] statistics,[225] exhibits,[226] presumptions,[227] and opinions[228] – as well as for systematically approaching the credibility of evidence[229] in general.[230]

Harvard and most of the law schools elsewhere (except for Yale) got no training in the techniques of persuasion (Rieke, 76-77, 81).

Id.

223. *See generally* FREELEY, *supra* note 181, at 247;-80 *see also* Faules, *supra* note 104, at 48 ("[A] number of factors are involved in effective communication – adaptation, selection of arguments to be refuted, application of the methods of refutation, organization and language... quality arguments were those that examined causal relationships, basic assumptions, and the relationship of evidence to arguments.") (citations omitted.)

224. *See* EHNIGER, *supra* note 181, at 62-63:

A. Tests of factual evidence

1. Tests of reports of specific occurrences or states of affairs

a. Was the person making the observation qualified to do so physically and mentally?

b. Was the person making the observation qualified to do so by training and experience?

c. Under what conditions was the observation made?

d. Is the situation still essentially the same as it was when the observation was made?

e. May the observer's attitude toward the event or situation have colored his perception?

f. May the observer's attitude toward the person or persons receiving the report have influenced his description or account?

g. Were the actions, events, or conditions described in the report actually witnessed by the observer, or did he infer them from other actions, events, or conditions he did witness?

h. Was the report made orally or in writing?

i. If the occurrence or condition was witnessed by someone other than the reporter, did that person transmit to the reporter a full and accurate account of what he saw?

See also id. at 55-58.

225. *See id.* at 63:

2. Tests of statistical evidence

a. Do the statistics come from a reliable source?

b. Do the statistics cover a sufficiently long period of time?

c. Are the units comparable?

d. Does the method of reporting the data hide significant variations within them?

See also id. at 58-59.

226. *See id.* at 63:

3. Tests of exhibits

a. Is the exhibit genuine?

b. Is the item offered in evidence typical of the class of phenomena it is alleged to represent?

See also id. at 59.

227. *See id.* at 63:

4. Tests of presumptions

a. Are there any reasons to believe that in the case at hand things will turn out differently than they have in the past?

See also id. at 59.

They also have reduced to a checklist the process of refutation (e.g., overthrowing the opposition's evidence by demonstrating that it is invalid, erroneous, or invalid; overthrowing the opponent's evidence by introducing other evidence that contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the tests of evidence; and so forth).[231] Those in

228. *See id.* at 63:

> B. Tests of opinion evidence
>
> 1. Does the person offering the opinion possess the background of knowledge and information upon which a sound judgment must rest?
> 2. Is the person offering the opinion reasonably unbiased?
> 3. Was the person offering the opinion in a position to observe at firsthand the facts on which his judgment bears?

See also id. at 60.

229. *See, e.g., id.* at 61-62; *see also id.* at 63:

> General tests of evidence are:
>
> 1. Is the evidence consistent with other evidence?
> 2. Is the evidence consistent with itself?
> 3. Is the evidence consistent with human nature?
> 4. Is the evidence clearly and objectively presented?

See also FREELEY, *supra* note 181, at 127:

> In general, affirmative answers to these questions imply that the evidence is credible; negative answers imply a weakness in the evidence.
> Is there enough evidence? (See II-A.)
> Is the evidence clear? (See II-B.)
> Is the evidence consistent with other known evidence? (See II-C.)
> Is the evidence consistent within itself? (See II-D.
> Is the evidence verifiable? (See II-E.)
> Is the source of the evidence competent? (See II-F.)
> Is the source of the evidence unprejudiced? (See II-G.)
> Is the source of the evidence reliable? (See II-H.)
> Is the evidence relevant? (See II-I.)
> Is the evidence statistically sound? (See II-J.)
> Is the evidence the most recent available? (See II-K.)
> Is the evidence cumulative? (See II-L.)
> Is the evidence critical? (See II-M.)

230. By dividing rhetoric from science, I did not mean to convey the impression that the art and discipline of rhetoric has nothing to gain from scientific inquiry. Thus, a study in public debate revealed that the choice between emphasizing your own position or revealing the fallacies in a weak opponent's case should in part be guided by the audience's personal reaction to the proponent's position. Thus, if they hold a position consistent with weaker opponents, they will hold it against you if you point out fallacies in her position, thereby humiliating her. *See* Vernon E. Cronen, *Responding to Weaker Opponent: A Study of Likeability and Refutation in Public Debate,* 1974 WESTERN SPEECH 108, 115 (1974).

231. *See, e.g.*, FREELEY, *supra* note 181, at 287:

> The Process of Refutation
>
> Overthrowing the opposition's evidence by demonstrating that it is invalid, erroneous, or irrelevant.
> Overthrowing the opposition's evidence by introducing the other evidence that contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the tests of evidence.
> Overthrowing the opposition's reasoning by demonstrating that it is faulty.
> Overthrowing the opposition's reasoning by introducing other reasoning that turns it to the opposition's disadvantage, contradicts it, casts doubt on it, minimizes its effect, or shows that it fails to meet the test of reasoning.
> Rebuilding evidence by introducing new and additional evidence to further substantiate it.

debate even have developed a list of regular areas to attack in an opponent's case (e.g., hasty generalizations, definitions, criteria, and significance).[232]

Now, not all of these checklists from the fields of argument and debate will apply directly to criminal jury trials, though many of them will. Remember, debate deals with issues such as "Resolved that the United States should withdraw from the United Nations", or that "All public school teachers should be retested every three years in their subject area...."[233] Plainly, this is not precisely the same type of analysis as is involved in deciding whether the defendant should be found guilty. But that is not the point.

What debaters and rhetoricians have perceived, trial attorneys have also intuitively understood and applied. We are constantly probing for weaknesses in the adversaries arguments, developing our own patterns and checklists. While this particular knowledge does not widely appear in our literature as it does in that of rhetoric and debate, it nevertheless exists throughout our profession.[234] That all of the processes and points of attack in debate will not directly apply to trial law thus does not matter. It only means that each skillful trial attorney will develop an analogous and no less extensive repertoire of methods of rebuttal which will be tied to what is unique about criminal trials. In short, a good prosecutor has a great deal to work with in rebuttal.

V. What Can the Defense do to Protect their Position from the Rebuttal?

Defendant's only argument follows the prosecution's initial closing. In this initial closing, however, the prosecution has likely presented the core of its case.[235] As such, defendant's argument melds a positive argument in

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> Rebuilding reasoning by introducing new and additional reasoning to further substantiate it.
>
> Presenting exploratory refutation preliminary refutation offered for the purpose of probing the opponent's position and designed to clarify the opponent's position or to force them to take a more definite position.

232. *See, e.g.*, FREELEY, *supra* note 181, at 249-53 (noting that attacks in debate include hasty generalizations, topicality, definitions, criteria, significance, inherency, application, solvency, value objections, topicality). Looked at from the perspective of a legal advocate, most of these grounds for attack appear to involve the familiar topics of appropriate standards, relevance, and appropriate inferences. *See id.*

233. For example, one proposition Freeley used in his examples was "Resolved: that the United States is justified in providing military support to nondemocratic governments." *Id.* at 250.

234. For such a list compiling a wide range of stock attacks on the defense argument the prosecution can take in rebuttal, see Ray Moses, *Refutation and Reply*, *in* JURY ARGUMENT IN CRIMINAL CASES – A TRIAL LAWYER'S GUIDE § 5.12, 5-338 (1985).

235. *See* BELLI, *supra* note 16, at 447:

> The opportunity to rebut prosecution arguments of course depends on the prosecutor presenting its full argument in the initial rebuttal. To blunt the defendant's ability to rebut, some attorneys attempt a tactic known as "sandbagging." Employing this tactic [a] prosecutor may offer a brief opening

favor of its position, with a rebuttal of the one put forth by the prosecution. In practice, these two facets may be indistinguishable in content, particularly when the defense has not put on any evidence and is thus presenting a pure reasonable doubt case.[236] In any event, the defense has available all the

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argument or waive it so that the defense may be 'sandbagged' in a lengthy final argument.

This tactic, however, is both legally and tactically risky. Legally, "the scope of rebuttal argument is limited by the scope of defendant's argument – new matters should not be raised on rebuttal...." DANNER & TOOTHMAN, *supra* note 16, at 493. In other words, if you don't say it in initial opening, you may not be allowed to raise a topic (unless broached by the defense) in rebuttal. *See also* JEANS, *supra* note 3, at 371 ("The content of the concluding portion must be confined to rebuttal argument; (thus new topics cannot be introduced at such stage and if the subject of damages or amount has not been argued before it cannot be introduced in this concluding rebuttal portion)."); LAGARIAS, *supra* note 16, at 144 ("[I]n some jurisdictions, a plaintiff is limited to replying to the defendant's closing argument. Thus, a plaintiff who withholds a portion of his argument for reply may be denied this argument if the topic is not raised in the defense closing argument.") (citation omitted.); MORRIL, *supra* note 41, at 96 ("If, on rebuttal, the plaintiff commits the sin of bringing up a new argument that can not be classified as a reply to the defendant's argument, then an immediate objection should be made...."); VOGEL, *supra* note 16, at 13 ("In this way the jury is given a preview of the opponent's argument and the answer to it, before the opponent has the opportunity to speak. The jurors are thus forearmed with skepticism, and the opponent's argument will encounter more resistance with the jurors and may fall flat."); Dombroff, *supra* note 16, at 17 ("if you are plaintiff, you will be limited on your rebuttal to only those things raised by the defendant and not things forgotten by you that should be part of your argument.").

Of course, in practice the interpretation of this rule will vary with the court, with many tending toward the liberal side:

> Courts tend to be liberal in their findings of what constitutes proper rebuttal. As long as no completely new issues are raised, you may bring up new lines of argument, new illustrations and exhibits, and additional details.
>
> The final argument is not limited strictly to a rebuttal of the defendant's arguments. The fact than an issue is ignored by the defense does not foreclose the plaintiff from raising it in rebuttal. If the plaintiff raised the matter in his first argument, he may expand it or reiterate it during final argument.

Tanford, *Closing Argument Procedure*, *supra* note 16, at 142.

See also LUBET, *supra* note 1, at 470:

> The rule requiring rebuttal to be within the scope of the defendant's argument is enforced with varying degrees of strictness from court to court. It is generally safe to assume, however, that the rule will be applied more rigidly to topics (such as damages) than to lines of argument (such as elaboration on a theme). Consequently, it is usually not risky to withhold the use of an analogy or story until rebuttal, thereby preventing the defendant from "reversing" it.

Tactically, there are also problems with sandbagging. If you hold back for rebuttal, the defendant now is given the advantages of setting the structure and agenda for the argument. *See, e.g.*, STERN, *supra* note 1, at 286:

> As you observe trials... you will see lawyers who merely touch the high spots in the first argument and wait until the defendant has argued before developing their argument in full. They even reserve points upon which to hammer at the end. ... I favor a full presentation of the plaintiff's case in the first instance. The jury is fresh and should be interested in argument when you start. You should so fully convince them of the merits of your case that the other side is handicapped.

(citation omitted).

Also, the jurors can see what is going on, may think it unfair, and hold it against the party who is sandbagging.

236. For a discussion of a "reasonable doubt" case, see Mitchell, *supra* note 22, at 106-07.

rebuttal and negative case techniques available to the prosecution in its final argument.[237]

In this second position, with its full opportunities for rebuttal, the defense has both advantages and disadvantages in relation to the prosecution's position in final rebuttal. On the plus side for the defense, it will have much more time in rebuttal than will the prosecution. The defense argument is a full presentation, matching or exceeding the prosecution's initial opening in length. In contrast, the prosecutor generally "reserves time" for rebuttal, generally allocating a relatively short time (often five to seven minutes, or less) to the presentation.[238] The defense thus has the advantage of having available a significant amount of time with which to thoroughly reason through the weaknesses of the prosecution's position. No such opportunity for careful, detailed analysis exists in the time frame of the prosecution rebuttal.

On the negative side of the ledger is the obvious. The prosecution can answer the defense rebuttal. The defense cannot answer the prosecution's. So, what is the defense to do? Several tactics are put forth throughout the advocacy literature.

One can try to anticipate the arguments and counter arguments the prosecution will raise in rebuttal.[239] This type of two-sided argument with

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237. *See, e.g.*, Moses, *supra* note 234 (listing stock rebuttals to variety of prosecution attacks: response to prosecution statement that defense witness is lying; reply to prosecution argument that jury accept officer's testimony over accused; reply to prosecutor argument that defense is trying to put prosecution witnesses on trial).

238. *See, e.g.*, DANNER & TOOTHMAN, *supra* note 16, at 493 (referring to rebuttal as "brief"); GIVENS, *supra* note 16, at 340 ("Sometimes a fixed period of time may be allotted to the party, some of which can be saved for reply. In such instances, if it extremely wise to reserve reply time and not to use up all of the allotted time in initial argument."); Lane, *supra* note 16, at 85 (suggesting that out of one hour allotted to closing, one should allocate one-quarter of the total time to rebuttal).

239. *See* WALTER, *supra* note 17, at 65, 89, quoting defense counsel:

> I try, in closing argument, to anticipate the closing argument of the prosecutor – because they're gonna have the last word – and I wanna take some sting from what I can anticipate they're gonna say.
>
> .....
>
> You've gotta anticipate what the prosecutor's gonna say, and then be ready for it, and knock 'em down.

See also LUBET, *supra* note 1, at 476 ("Under these circumstances [i.e., when the prosecution gets the rebuttal] it is extremely important that counsel do whatever is possible to blunt the rebuttal in advance. One approach is to anticipate and reply specifically to plaintiff's possible rebuttal arguments...."); ALI/ABA, *supra* note 16, at 658:

> If counsel is in the poorer position of having to speak before his opponent makes his final argument, the task is more difficult if for no other reason than that he must not only anticipate the questions the jury would ask but also those points opposing counsel will attempt to either avoid or gloss over.

Cf. HAMLIN, *supra* note 16, at 614 ("You do not profit from presenting only half of the case. *You must answer your opponent's allegations and theories.* [Since that's the basic fight the jury must decide on,] [y]ou must give the jurors reasons why opposing counsel is *wrong as well as why you are right.*").

Anticipating counter arguments is, in fact, deeply imbedded in the argumentation theories of informal logician Stephen Toulmin. *See generally* TOULMIN, *supra* note 162, at 101-02 (explaining the conditions of "rebuttal"). For Toulmin, arguments are composed of claims and the data from which you

rebuttal is the same "inoculation" strategy the prosecution has available in its initial opening. This is certainly feasible, as far as it goes. By this point in the trial you better know your case and know that of your adversary. You better know all the arguments, counter arguments, and replies to these counter arguments. You better understand your jury, and understand the issues around which their decision will pivot. Understanding all this, you can anticipate and counter much of what your adversary will do in rebuttal.[240]

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draw the claim. As an example, assume for data that "Sally wants to be healthy" and the claim "she should eat plenty of green vegetables." Something, however, is missing. We need a principle to get from our real world data to the claim. This principle, or what Toulmin terms a warrant, would then be something like "green vegetables are good for people." Toulmin also recognizes that there will be conditions when the warrant will not hold. These counter arguments he terms rebuttals. In this case, rebuttals to the warrant would include the case where Sally is allergic to green vegetables, where the vegetables are covered with pesticides, etc. *See also* TOULMIN ET AL., *supra* note 181, at 95-102; Kurt M. Saunder, *Law as Rhetoric, Rhetorics as Argument*, 44 J. LEGAL EDUC. 566, 569 (1994); Paul T. Waggerin, *A Multidisciplinary Analysis of the Structure of Persuasive Argument*, 16 HARV. J. L. & PUB. POL'Y 195, 220-22 (1993) (applying literature of cognitive psychology and computer science to Toulmin's model for argumentation).

Professors Moore, Bergman, and Binder bring Toulmin's concept of "rebuttal" down to earth in the form of "except whens." *See* MOORE ET AL., *supra* note 16, at 35. *See id.* at 41-42:

> Take the proposition that "Police will take care before firing a gun." This can be strengthened with a few "especially whens" (for example, in public, large crowd, many children around). The "except whens" then become the counter argument to the initial proposition (for example, it goes off accidentally, the officer panics, the suspect is extraordinarily dangerous and about to get away, the particular officer is mentally unbalanced).
>
> Using this model you can anticipate two general types of prosecution attacks on your argument. In the first, you put forth some general principle in your respective arguments then anticipate that they will attack your principle with some "except whens." You can then either argue that their "expect whens" are not accurate, or come up with your own further "except whens." In the second, it's the prosecutor who you anticipate will put forth the general principle and you come up with the except whens.

There are cases where superficially it appears that the prosecution and defense cases are not meeting each other's (e.g., the prosecution claims the defendant robbed a store; the defense does not deny the robbery, but claims duress). *See id.* at 42-43. If you look at what's being contested, however, you will find plenty of "especially whens," e.g., by the defense (defendant had reason to fear co-defendant, especially when only co-defendant has a weapon and defendant knew that the co-defendant had been in prison for murder) and "except whens," e.g., by the prosecution (co-defendant was defendants' brother; the defendant walked into store two minutes after the co-defendant, so he had plenty of time to call the police, or runaway; etc.). *See id.*

240. While some might be seduced by the movie image of trail attorneys, shooting form the hip in brilliant spontaneity, the key to being a competent trial attorney is preparation. *See* BERGER ET AL., *supra* note 16, at 8-14; (explaining approach to, and rationales for, focusing approach on planning and preparation; also articulating categories of preparation, i.e., pre-planning, organization, content planning, and performance planning). *See also* Marilyn J. Berger & John B. Mitchell, Rethinking Advocacy Training, 16 AM. J. TRIAL ADVOC. 821, 830-31 (1998):

> First, experienced lawyers often win cases before they walk into the courtroom by virtue of thorough preparation. The perception that lawyers are commonly viewed as individuals who are remarkably adroit at the spontaneous skill of thinking on your feet is mistaken. Undoubtedly, the courtroom performances of good advocates offer some tangible demonstration of this skill. Yet, the absolute key to the success of every lawyer is extensive planning and preparation. Often, this extensive preparation is characterized by the attorney's bold disclosure that she knows her opponent's argument better than her own.

But as hard as I try, as much as I prepare, I am never able to anticipate, not only what comes out of the prosecution's mouth, but precisely how it will be framed. There are simply "surprises" I can not anticipate. That, after all, is the quality that makes them surprises. I particularly cannot anticipate the "sham" arguments. What is particularly disturbing is that these sham arguments are the ones that at the same time are both so readily rebuttable if given the opportunity, yet so misleading and potentially persuasive if not answered.[241]

The literature also suggests blunting the power of the rebuttal by giving variants of a stock speech to the effect that "I cannot answer the prosecution, so you will have to answer for me."[242] Who knows, maybe

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A good example of how preparation ties to the specific performance of summation is provided in ALI/ABA, *supra* note 16, at 649-50.

241. Jurors are not stupid and, as I've said, collectively see everything. They may well see through a particular sham or fallacious prosecution argument. But these are not always easy to catch. More than intelligence is involved – experience in seeing argument patterns in legal case (which an expert trial attorney possess) is most useful, and it is just what jurors will lack.

242. The literature is filled with examples of set pieces meant to offset that the prosecution has the last word and the defense therefore cannot respond to those final arguments. The following are typical examples:

> If the other side is to have the last word, it may be helpful to point out the disadvantage to the tribunal, and ask it to compensate:
>
> > I ask you to remember that this is the last opportunity I will have to speak to you. The other side will speak, but I will not be permitted to reply. This means that I must rely on you to judge the validity of whatever my opponent will say, and examine it very closely. You will have to come up with the answers to any erroneous arguments that are made, because I can no longer do so. It is your responsibility, as the members of this jury, to do that so that an innocent person will not be convicted because of anything I have failed to say.

GIVENS, *supra* note 16, at 340-41.

> Meet the arguments in advance. Do not just respond to your opponent's first argument, look forward to his rebuttal. If you do it right, you can even get the jury to start thinking of themselves on your side:
>
> > This is the last time I will be able to talk to you about this case, and there is so much more that I would like to say. The plaintiff's lawyer, Mr. Rawlings, is going to get to talk to you one more time. The rules of court let him get the last word, and I don't get a chance to answer what he says. So, there is something important that I want you to do. You know that there will be things he will say that I would answer if I could. And you know what all the evidence is in this case. So please listen carefully to everything he says, and whenever he makes an argument, make the response I would make if I could. And if you do that, I know that you will be fair.

MCELHANEY, *supra* note 42, at 673.

For similar advice and examples, see HAYDOCK & SONSTENG, *supra* note 16, at 645 (providing an example); LAGARIAS, *supra* note 16, at 144; LUBET, *supra* note 1, at 468 (providing an example); MURRAY, *supra* note 3, at 376 (providing an example); VOGEL, *supra* note 16, at 14 (providing advice); WALTER, *supra* note 17, at 64 (noting that among topics most mentioned in defense closing was "Defenders remind jurors that prosecution has the last word (speech)."); Frank Cicero, *Nondefensive Final Argument for the Defense*, 8 LITIGATION 45 (Spring 1982); Kornblum, *supra* note 16, at 28 (providing advice); Moses, *supra* note 234, at 5-359. An interesting variant on the stock rap appears in

this really works, like some kind of magical incantation. Surely far brighter and more talented trial attorneys than I have suggested this tack. Yet, in the end I cannot help but doubt if this has any effect other than making the attorney feel they did their best.

Finally, comes the suggestion that you pepper your adversary with rhetorical questions, challenging them to use up their spare rebuttal time in answering your queries. The theory is that if they do, they have devoted their rebuttal to your agenda. If they do not, the jury will see.[243] The problem is two-fold. The prosecutor probably can give some plausible answer to your question. After all, they understand the case, too. And when they answer your dramatic challenge, then what?[244] Further, while as we have seen there is scant attention to rebuttal in legal literature, the one bit of wisdom which is uniformly mentioned is do not answer the adversary's rhetorical questions to your rebuttal, or at least weave your answers into your own structure. Falling for this ploy thus would be the equivalent of falling for the hidden ball trick in professional baseball.

Not to dismiss this notion totally, however, there is a variant of this rhetorical question tactic that I do believe can help blunt some aspects of rebuttal. It focuses on evidence which is lacking from the prosecution's case and is coupled with what I call blocking the "shifting of the burden of proof."[245]

From my experience, criminal cases are often lost to the defense because valid reasonable doubts are simply discounted as if they never existed. They disappear because jurors find the particular piece of evidence consistent with guilt through a process of literally making up explanations or excuses that have no evidentiary basis.

Imagine the defendant is charged with armed robbery. No weapon or money is found on the defendant when he is detained and subsequently arrested two blocks from the scene. Sounds like reasonable doubt to me.

WALTER, *supra* note 17, at 171: "He's got the last speech – but you've got the last word [Pause] But better than that, you've got the last two words."

243. This tactic is strictly a trap laid for novices. *See* STERN, *supra* note 1, at 289 ("Experienced lawyers know this. They try to goad the less experienced by posing questions to them, in the hope that he adversary will be foolish enough to respond to those questions in a body.").

244. *See* STERN, *supra* note 1, at 292:

> Indeed, the raised question can pose its own destruction for the one who raised it. If the question is successfully answered, whether in the immediate moment by the subliminal responses of unfavorable jurors rushing to protect staked-out positions, or later in the adversary's response, the questioner has hurt only himself. ... Moreover, *most* questions *can* be answered – at least well enough for appearances.

See also, ALI/ABA, *supra* note 16, at 698 ("It is an extremely dangerous practice to ask an 'open-end' question in the summation when opposing counsel is in a position to answer or appear to answer it in his own closing argument.").

245. For an extensive discussion of blocking the "shifting of the burden," see BERGER ET AL., *supra* note 16, at 479-80.

The robber would have had the weapon and money a mere two blocks away. This must be the wrong guy, or at least it raises a reasonable doubt. But no, once in the jury room – and I am as concerned with some juror's "rebuttal" as I am with the prosecution's[246] – the reasonable doubt disappears: "He probably ditched the gun and hid the money; that's why he didn't have it on him." Poof! Now you see reasonable doubt, now you don't. What happened? Simple, they shifted the burden of proof. In other words, if we presume the defendant guilty, he must have ditched the gun and money.[247] But if we presume him innocent as our jurisprudence requires, you need evidence that he ditched the gun and money, or the reasonable doubt stands – e.g., the gun was found in a trash can in a direction consistent with where the defendant was stopped; police saw him tossing something in the water; police were chasing him through back yards and over fences, and lost sight of him for a couple of minutes, etc.

To illustrate blocking this burden shifting, let us go back to the case of the young man accused of assaulting the officer. Imagine that in part of the closing the defense says:

> Why would he do that? He was in the middle of nowhere. Where was he going? He could not get to his car. He was facing a minor offense, driving with a revoked license. No one would commit a clearly serious offense, risking getting beaten up or shot in the process, to avoid arrest for this minor driving offense. It simply does not make sense....

In rebuttal, the prosecution will likely respond, shifting the burden along the way:

> People do crazy things. People do stupid things. Everyday people do things which make absolutely no sense. But as prosecutor it is not part of my burden to prove to you why the defendant did this thing---I do not have to explain or prove his motive. All I have to prove is that he deliberately stuck the officer – and you heard that officer take the stand and tell you under oath that there was absolutely no doubt in his mind that the defendant acted intentionally, deliberately striking the officer....

The defense could have instead structured this portion of the closing to make it at least more difficult to shift the burden and to make these reasonable doubts disappear in the process:

> Why would my client deliberately hit an officer? It makes absolutely no sense. And if it does not make sense, it cannot be proof beyond a reasonable doubt. Now if for just a minute we presume my client guilty, then we know that there must have

246. *See* MOORE ET AL., *supra* note 16, at 233 ("Regardless of what you adversary says, factfinders may come up with arguments of their own. And you should consider responding to such arguments, just as you might if an adversary was making them.").

247. In effect, what the jurors have done is created fictitious (i.e., not based on any evidence) "except whens" to my reasonable doubts. *See* MOORE ET AL., *supra* note 239 and accompanying text.

> been an explanation, and you and I can probably imagine several – he was crazy, drunk, on drugs, being arrested for a serious crime, wanted for a serious crime, was an escaped prisoner, became violently angry and lost his temper. That's not a bad list.
>
> But of course we do not presume Mr. _____ guilty, we presume him innocent. If there was no reason for him to do something – like deliberately hit a police officer – than there is a reasonable doubt that he did, a reason to believe it might have been an accident. And this doubt does not disappear just because the prosecution says, "Oh, people do stupid things." She wants to make these reasonable doubts disappear by making up explanations and excuses. You can always do that if you presume someone guilty, and shift the burden of proof. But those reasonable doubts stay unless there is *evidence* – so it would be different if my client were screaming at the cop, crazy, drunk, wanted, on drugs. That's evidence.
>
> But the prosecution has no such evidence, so all she will give you in rebuttal is explanation and excuses. And do not be fooled. I am not saying that the prosecutor must prove motive, she does not. What I am saying is that if my client had no reason to deliberately strike the officer, then there is reasonable doubt that he did.
>
> One last thing, I challenge the prosecutor to give *evidence* as to why my client would do this – not excuses or explanations – but evidence. And if she or one of your fellow jurors tries to make doubts disappear by merely making up explanations and excuses, you answer for me because I do not have the last argument and I surely will not be in the juror room, you tell them – "Hey. You are shifting the burden of proof."

How effective is all this at blocking rebuttal? Better than nothing, particularly when dealing with this notion of burden shifting. I certainly feel it more effective than some stock incantation to the effect that "you jurors will have to answer for me." But with all the rhetorical techniques available on rebuttal, both fair and unfair, there is only so much you can do when you have no chance to answer.

VI. Conclusion: What Process is Due?

I began this journey with a simple objective – to determine whether allowing the prosecutor to have the last argument in closing was a sufficient enough procedural advantage that it was worth rocking the boat, and thereby altering a procedure that almost the entire profession takes as a given. As I reach the end, having traveled through so many different worlds of expertise, I have come to what I believe is a reasonable perspective.

To have any impact on our criminal justice system, however, any conclusion I reach must carry the force of more than what I believe reasonable or generally good policy. It must be constitutionally mandated. Thus the briefest of digressions into the standard for determining what process is due as a matter of constitutional due process is in order. The test from the United States Supreme Court case of *Matthews v. Eldridge*[248] is therefore our guide:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[249]

Factors one and three are easy. The private interest involved is the highest, i.e., liberty (and even literally life in some circumstances).[250] The administrative burden is nothing, change the order of argumentation or eliminate the prosecution's rebuttal. The real issue is the second factor – "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" – the very inquiry to which this entire article is addressed. Thus, *Matthews v. Eldridge* brings us back full circle.

Does the prosecution gain enough of an advantage from having the rebuttal to justify any change in the order of closing arguments and, if so,

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248. 424 U.S. 319 (1976).

249. *Id.* at 335. For a criticism of the Matthews test as permitting total flexibility in result without any foundational constitutional values context, see Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process* 95 YALE L. J. 455, 472 (1986):

> The development of the Mathews balancing test gave rise to a structure within which an individual can possess an undisputed property interest... and thus, a clear right to due process... but have no right to any procedures at all. In other words, balancing can lead to the anomalous result that an individual will have a clear due process right to no process. Such a result is surely problematic in light of the explicit constitutional requirement that no life, liberty, or property be taken without due process of law.

See also Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENTARY 339 (1987) (providing a historical approach to the procedural aspect of the due process clause).

250. The protection of physical liberty is "the oldest and most widely recognized part of the [due process] guarantee." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 459 (3d ed. 1986); *see also* Stephen F. Williams, *Liberty in the Due Process Clause of the Fifth and Fourteenth Amendments*, 53 COLO. L. REV. 117, 136 (1981) (positing that Framers of Fifth Amendment due process clause only thought of "life, liberty, and property" in "the sense a criminal trial typically puts those values at risk.").

what change? We know closing arguments can change juror's opinions. That is an important start. What else do we know?

Plainly, as interesting as all the current notions on opinion change – primacy, recency, inoculation, asymmetrical rebound effect, anti-primacy – none really lead to a clear answer. They give us some useful general principles, but nothing so specifically attuned to the nuance of trial that they can guide us in this inquiry. Rhetoric offers us more. Within this field exists a world of rebuttal techniques, fair and unfair, logical and logically fallacious, which are available in the arsenal of the advocate in rebuttal, and which can even be strategically conjoined with the prosecutor's initial closing. Cognitive psychology also provides useful insights. From this last position in argument, the prosecution has some opportunity to effect the final narrative or story the jurors will rely upon to reach their final decision.

This chance for the last words, words to which the defense attorney can not respond, would thus seem to have the capacity of altering juror opinions between a verdict of guilty and not guilty, in at least some cases. That is enough for me. Permitting a citizen's fate to possibly be determined by the order of arguments is not a risk our legal system should willingly take, particularly not with its unwavering, though at times more or less diluted, ideological commitment to the protection of the innocent. Whether one sees that giving the rebuttal to the prosecution affords an advantage to the State or that it denies an advantage that should be given the defense is of no matter to me. Either way it comes out the same. The prosecution should not get rebuttal. What to do about it?

I would not reverse arguments, giving the defense first and last. After all, the prosecution does have the burden, and the first position reflects that. I would just end with the defense closing. Simple. Two arguments. No prosecution rebuttal, and the citizen whose liberty, and perhaps life, is at stake gets the last word. That is my unbiased opinion.

TAB 9

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Plea of Not Guilty by Reason of Insanity (Suggestion 21-CR-D)

DATE: April 21, 2021

Gerald Gleeson has written to suggest that the Criminal Rules be amended to address cases in which both the prosecution and the defense agree that that the defendant should be found not guilty by reason of insanity. He states that in a recent case where he was representing the defendant both the government and the defense agreed that the proper outcome is a verdict of not guilty by reason of insanity, but the rules "do not provide for a plea-based outcome in this regard."

Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, Pub. L. 98-473, ch. 4, 98 Stat. 2057, provides a procedure by which a defendant may be found not guilty by reason of insanity. It states:

> (b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—
>
> (1) guilty;
> (2) not guilty; or
> (3) not guilty only by reason of insanity.

However, as Mr. Gleeson observes, at present neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense."

The Rules Committee Staff found nothing in its records indicating that the Advisory Committee considered any amendment to Rule 11 that would have included a plea of not guilty by reason of insanity (either related to the 1984 Act or otherwise).

This issue is on the May agenda for discussion of the question whether to refer Mr. Gleeson's suggestion to a subcommittee.

From: Gleeson II, Gerald J.
Sent: Wednesday, April 14, 2021 1:35 PM
To: Raymond Kethledge
Cc: Hudson, Paul D.
Subject: Criminal Advisory Rules Committee

Judge Kethledge:

I write to you in your capacity as the Committee Chair (and at the suggestion of Judge Murphy). I apologize if I am being presumptuous in bringing this to your attention, but we have a proposal that seems to have some merit. I have taken the liberty of cc'ing my smarter colleague Paul Hudson for his input as well.

I am completing a case involving the insanity defense, and it appears that the Government and the Defense agree that the proper outcome is a verdict of not guilty by reason of insanity. However, the rules currently do not provide for a plea-based outcome in this regard. It seemed to Judge Murphy and the lawyers that the Committee might consider amending the rules to allow for such a plea. The Michigan Court Rules allow for such a plea, and it is a process that works fairly fluidly.

Candidly, I have not given much thought as to whether this would require any statutory amendments, but such a procedure would streamline the process between indictment and the mental health treatment provided for by 18 USC 4243. I have always viewed post-acquittal treatment as the key component for the NGRI client.

Thanks,

Gerry