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

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MEMORANDUM

TO: Committee on Rules of Practice and Procedure

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

Daniel J. Capra, Reporter
Advisory Committee on Evidence Rules

RE: CARES Act Project Regarding Emergency Rules

DATE: May 17, 2022

As the Standing Committee is aware, during 2020-2021 the advisory committees collaborated to prepare for publication a package of rules for use in extreme situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. The set of proposed new rules and amendments published for public comment in August 2021 included this package of emergency rules, and the package is now before the Standing Committee for final approval. This memo provides a brief overview of the project; further details are in the reports of the relevant advisory committees.

In 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act,"[1] which among other things addresses the use of video conferences and telephone conferences in criminal cases during the period of the national emergency relating to COVID-19. In addition, Section 15002 of the CARES Act assigns a broader project to the Judicial Conference and the Supreme Court:

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

CARES Act § 15002(b)(6).

The set of proposed amendments and new rules developed in response to this charge includes an amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The relevant advisory committees, having reviewed the public comments on these proposed amendments and new rules, each voted to forward their respective proposals to the Standing Committee for final approval. If the Standing Committee votes to approve the proposals, they will be on track to take effect in December 2023 (if they are approved at each further stage of the Enabling Act process and if Congress takes no contrary action).

Though the Appellate rule is much more flexible than the others, and though the Bankruptcy, Civil, and Criminal rules provide for deviation from quite different types of provisions in the non-emergency Rules, the proposed emergency rules share some overarching, uniform features.[2] Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court,[3] substantially impair the court's ability to perform its functions in compliance with these rules."[4] The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration (though the Civil rule uses a different formulation than that in the Bankruptcy

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

[2] It should be noted that the somewhat different approaches were approved by the Standing Committee at its Spring 2021 meeting.

[3] Bankruptcy Rule 9038(a) here substitutes "bankruptcy court" in place of "court."

[4] In addition to the uniform basic definition of "rules emergency" set forth above, Criminal Rule 62(a)(2) adds the requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time."

and Criminal rules).[5] Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

The advisory committees' reports describe the comments submitted on each of the proposed emergency rules. The comments that touched on uniform aspects of the emergency rules focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare[6] or terminate[7] a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference.[8] One commentator argued that there should be a backup plan in case the emergency prevents the Judicial Conference from acting.[9]

As the Standing Committee will recall, the role of the Judicial Conference was carefully discussed in the pre-publication process. Consideration of the public comments by the advisory committees this spring did not cause any of the four advisory committees to revise that role. The Committees uniformly concluded that the Judicial Conference was fully capable of responding to Rules emergencies, and that the uniform approach of the Judicial Conference was preferable to different approaches of more decisionmakers. Accordingly, the advisory committees have voted to retain, as published, all of the uniform features of the set of proposed emergency rules.

The reports from the Civil and Criminal Rules Committees detail post-publication changes made in the Committee Notes to Civil Rule 87 and Criminal Rule 62. Those changes concern non-uniform features of those particular rules, and thus are not addressed in this cover memo.

[5] The Civil rule states that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

[6] See Comments AP-2021-0001-0004 (Ivan Moritzky); AP-2021-0001-0010 (Jane Castro); CV-2021-0004-0007 (Federal Magistrate Judges Association); see also Comment CV-2021-0004-0008 (NY State Bar Ass'n Commercial & Federal Litigation Section) (arguing that Civil Rule 87 should set more specific criteria for declaring emergency).

[7] See Comment AP-2021-0001-0006 (Matthew Deinhardt).

[8] See Comment AP-2021-0001-0009 (Federal Bar Association).

[9] See Comment CV-2021-0004-0012 (American Association for Justice).

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MEMORANDUM

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

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

RE: Appellate Rule 2 and Appellate Rule 4 (CARES Act)

DATE: May 13, 2022

At its June 2021 meeting, the Standing Committee approved for publication proposed amendments to Appellate Rule 2 and Appellate Rule 4. The text of each of those proposed amendments as published with accompanying Committee Note is attached to this report.

The Advisory Committee now seeks final approval of these proposed amendments without change.

Appellate Rule 2. Existing Appellate Rule 2 broadly empowers a court of appeals to suspend virtually any provision of the Appellate Rules in a particular case and order proceedings as it directs. This power does not reach the time to file a notice of appeal or petition for review. *See* Appellate Rule 26(b).

The proposed amendment to Appellate Rule 2 would modestly broaden this power when the Judicial Conference declares an Appellate Rules emergency. In such a declared emergency, the court of appeals would be empowered to "suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

The power is broadened in two ways. First, the suspension power reaches beyond a particular case. Second, the suspension power reaches time limits to appeal or petition for review that are established only by rule. It does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.

As detailed in the cover memo by Professors Capra and Struve, the standards and process for declaring an Appellate Rules emergency parallel that proposed by other Advisory Committees.

Appellate Rule 4. The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. That's because the time allowed for filing a motion under Rule 59 is 28 days after the judgment is entered.

But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

As a refresher on how that works, here is the relevant passage from the Advisory Committee's June 2021 report:

> Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the

judgment so that it does not run until entry of an order disposing of the last such motion.

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

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

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

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

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

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

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

Discussion of Comments Received

The Advisory Committee received a total of six comments. Two were fully supportive. Two were broadly critical. One was irrelevant. One raised issues that the Advisory Committee had considered. The Advisory Committee did not make any changes in response to the public comment.

Fully supportive

The Federal Bar Association (comment 0009) "supports each of the revised and new rules developed . . . in response to . . . the CARES Act," noting that they "provide important flexibility . . . in future unforeseen situations." The Federal Bar Association "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only

particular regions or other subsets of federal courts." It also "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Louis Koerner (comment 0003) thinks the proposed amendments are "entirely appropriate, well drafted, and even overdue."

Broadly critical

Irvan Moritzky (comment 0004) opposes the emergency rules as impractical, complex, and centralized. He urges that issues be left to local district judges, noting that if large retailers are open, local judges should run their courts. He included the Supreme Court's decision in *Duncan v Kahanamoku*, 327 U.S. 304 (1946), which held that Congress had not authorized the supplanting of courts in Hawaii with military tribunals.

Matthew Deinhardt (comment 0006) believes that the proposed amendments create an unequal playing field and lean heavily towards the government side. He urges notice to any defendant who is adversely affected by a suspension of the rules and the opportunity to postpone the proceeding, He also urges that the Judicial Conference not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Neither of these critical comments convinced the Advisory Committee to make any changes. The Advisory Committee is confident that the Judicial Conference (or its executive committee) will consult as appropriate with the courts affected by any declaration of a rules emergency.

Irrelevant

Andrew Straw (comment 0005) states that no court of appeals should "hire an appellee who is before a panel of the Court to be a federal bankruptcy judge."

Raised issues

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (comment 0010) raised several thoughtful issues.

FRAP 2. Ms. Castro suggests that the proposed amendment to Rule 2 is "largely unnecessary" because courts, under the current rules, can enter form orders suspending a rule in individual cases. There is some power to the critique; the proposed amendment to Rule 2 does not add a lot. But it would provide clear authority for across-the-board actions. Some might question whether current Rule 2, which limits the suspension authority to "a particular case," permits identical orders entered in every case.

She also suggests that perhaps "the circuits should be authorized to extend nonstatutory deadlines for good cause even without a declared emergency." This suggestion is sufficiently broader than the current proposal that it would require republication. And current Rule 26(b) already imposes few limits on the court's power to extend nonstatutory deadlines.

FRAP 4. Ms. Castro questions how the proposed amendment to Rule 4 will work in the context of Civil Rule 60 motions, noting that the proposed amendment "pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59." She is concerned that if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion, the party will not get the benefit of the Rules Emergency declaration.

The reason for drafting the proposed amendment this way is that the non-emergency deadlines for Civil Rule 59 and Civil Rule 60(b) motions are quite different. A Rule 59 motion must be filed within 28 days of the judgment. FRCP 59(b). A Rule 60(b) motion, on the other hand, must be made "within a reasonable time." FRCP 60(c)(1). It would seem unnecessary to allow an extension beyond a "reasonable time"; any emergency circumstances can be considered in determining what is reasonable. Motions made under FRCP 60(b)(1), (2), and (3) face the additional requirement that they must be brought no more than one year after judgment, FRCP 60(c)(1), so it is possible that an extension of this one-year deadline might be necessary in an emergency. But if the one-year deadline is the one that needs to be relaxed, the time to appeal the underlying judgment should not be reset.

FRCP 6. Finally, Ms. Castro noted that it is odd for a Civil Rule, rather than an Appellate Rule, to state the effect of an extension on the time to appeal. She added that "consistency and clarity for the public, courts, and practitioners" would seem to call for this to be included in FRAP 4, not FRCP 6.

In the abstract, there is much to be said for this critique. But drafting in this area proved daunting, and the placement in Emergency Civil Rule 6 resulted in the clearest drafting that could be found.

The provision is applicable only in a declared rules emergency, so all should know to look to the emergency rules. In addition, the effect on time to appeal in such an emergency arises in the context of extensions that are available only under Emergency Civil Rule 6, so anyone dealing with such an extension must already engage with Emergency Civil Rule 6. Having the relevant provisions in a single emergency rule—rather than spread over two sets of emergency rules—should promote ease of use.

In the end, the Advisory Committee was reassured by Ms. Castro's careful submission. That is because such a thoughtful comment did not reveal that the Advisory Committee had overlooked important concerns, but instead pointed to issues that the Advisory Committee had grappled with earlier.

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

Rule 2. Suspension of Rules

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

(b) In an Appellate Rules Emergency.

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

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

perform its functions in compliance with these rules.

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

(A) designate the circuit or circuits affected; and

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

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

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

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

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

(B) order proceedings as it directs.

Committee Note

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

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Louis Koerner (AP-2021-0001-0003) - The proposed amendments are "entirely appropriate, well drafted, and even overdue."

Irvan Moritzky (AP-2021-0001-0004) - The emergency rules are impractical, complex, and centralized. Issues should be left to local district judges; if large retailers are open, local judges should run their courts.

Andrew Straw (AP-2021-0001-0005) - No court of appeals should "hire an appellee who is before a panel of the Court to be a federal bankruptcy judge."

Matthew Deinhardt (AP-2021-0001-0006) - The proposed amendments create an unequal playing field and lean heavily towards the government side. Any defendant who is adversely affected by a suspension of the rules should be provided notice and the opportunity to postpone the proceeding. The Judicial Conference should not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Federal Bar Association (AP-2021-0001-0009) - The Federal Bar Association "supports each of the revised and new rules developed . . . in response to . . . the CARES Act," noting that they "provide important flexibility . . . in future unforeseen situations." It "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts." It also "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (AP-2021-0001-0009) - The proposed amendment to Rule 2 is "largely

unnecessary" because courts, under the current rules, can enter form orders suspending a rule in individual cases.

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

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

* * * * *

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

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed

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

by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

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

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

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

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

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

* * * * *

Committee Note

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

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

from the judgment so that it does not run until entry of an order disposing of the last such motion.

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

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

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

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

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

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

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Matthew Deinhardt (AP-2021-0001-0006) - The proposed amendments create an unequal playing field and lean heavily towards the government side. Any defendant who is adversely affected by a suspension of the rules should be provided notice and the opportunity to postpone the proceeding. The Judicial Conference should not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Federal Bar Association (AP-2021-0001-0009) - The Federal Bar Association "supports each of the revised and new rules developed . . . in response to . . . the CARES Act," noting that they "provide important flexibility . . . in future unforeseen situations." It "agrees that the Judicial

Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts." It also "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (AP-2021-0001-0009) - The proposed amendment "pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59," which may be a problem if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion. It is odd that Civil Rule 6, rather than an Appellate Rule, states the effect of an extension on the time to appeal. To promote "consistency and clarity for the public, courts, and practitioners," this should be included in FRAP 4, not FRCP 6.

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

MEMORANDUM

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

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

RE: Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

DATE: May 5, 2022

At the Advisory Committee's spring meeting, members unanimously approved, as published, new Rule 9038, which would allow extensions of time limits in the Bankruptcy Rules to be granted if the Judicial Conference declared a bankruptcy rules emergency. As Professors Struve and Capra explain, subdivisions (a) and (b) of the rule are similar to the Civil and Criminal Emergency Rules in the way they define a rules emergency, provide authority to the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) is basically an expansion of existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. During the COVID pandemic, many courts relied on this provision to grant extensions of time. The existing rule, however, does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. One of these is the time limit for holding meetings of creditors, a limitation that either caused problems for courts during the current

emergency or was honored in the breach. Also, it probably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases.

Only one comment was submitted concerning Rule 9038. The Federal Bar Association submitted a comment (BK-2021-0002-0019) addressing all of the proposed emergency rules. It stated that it "supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act." It noted in particular that "the judiciary is best suited to declare an emergency concerning court rules of practice and procedure" and that it "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." The Association also commended the "success in achieving relative uniformity across all four emergency rules."

The Advisory Committee recommends that the Standing Committee give final approval to Rule 9038 as published.

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

Rule 9038. Bankruptcy Rules Emergency

(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Bankruptcy Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a bankruptcy court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content*. The declaration must:

(A) designate the bankruptcy court or courts affected;

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

[1] New material is underlined in red.

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

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

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

(c) TOLLING AND EXTENDING TIME LIMITS.

(1) *In an Entire District or Division.* When an emergency is in effect for a bankruptcy court, the chief bankruptcy judge may, for all cases and proceedings in the district or in a division:

(A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, a clerk, a party in interest, or the United States trustee, by a

specified deadline, to commence a proceeding, file or send a document, hold or conclude a hearing, or take any other action, despite any other Bankruptcy Rule, local rule, or order; or

(B) order that, when a Bankruptcy Rule, local rule, or order requires that an action be taken "promptly," "forthwith," "immediately," or "without delay," it be taken as soon as is practicable or by a date set by the court in a specific case or proceeding.

(2) *In a Specific Case or Proceeding.* When an emergency is in effect for a bankruptcy court, a presiding judge may take the action described in (1) in a specific case or proceeding.

(3) *When an Extension or Tolling Ends.* A period extended or tolled under (1) or (2) terminates on the later of:

(A) the last day of the time period as extended or tolled or 30 days after the emergency declaration terminates, whichever is earlier; or

(B) the last day of the time period originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was extended or tolled.

(4) *Further Extensions or Shortenings.* A presiding judge may lengthen or shorten an extension or tolling in a specific case or proceeding. The judge may do so only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee.

(5) *Exception.* A time period imposed by statute may not be extended or tolled.

Committee Note

The rule is new. It provides authority to extend or toll the time limits in these rules during times of major emergencies affecting the bankruptcy courts. The continuing operation of the bankruptcy courts during the COVID-19 pandemic showed that the existing rules are flexible enough to accommodate remote proceedings, service by mail, and electronic transmission of documents. Nevertheless, it appeared that greater flexibility than Rule 9006(b) provides might be needed to allow the extension of certain time periods in specific cases or any extension on a district-wide basis in response to an emergency.

Emergency rule provisions have also been added to the Civil, Criminal, and Appellate Rules. Along with the Bankruptcy Rule, these rules have been made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Subdivision (a) specifies the limited circumstances under which the authority conferred by this rule may be exercised. The Judicial Conference of the United States has the exclusive authority to declare a Bankruptcy Rules emergency, and it may do so only under extraordinary circumstances. Those circumstances must relate to public health or safety or affect physical or electronic access to a bankruptcy court. And, importantly, the court's ability to operate in compliance with the Bankruptcy Rules must be substantially impaired.

Under subdivision (b)(1), a Bankruptcy Rules emergency declaration must specify the bankruptcy courts to which it applies because, instead of being nationwide, an emergency might be limited to one area of the country or even to a particular state. The declaration must also specify

a termination date that is no later than 90 days from the declaration's issuance. Under subdivisions (b)(2) and (b)(3), however, that time period may be extended by the issuance of additional declarations or reduced by early termination if circumstances change. The declaration must also specify any limitations placed on the authority granted in subdivision (c) to modify time periods.

Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. Unless limited by the emergency declaration, this authority extends to all time periods in the rules that are not also imposed by statute. It also applies to directives to take quick action, such as rule provisions that require action to be taken "promptly," "forthwith," "immediately," or "without delay."

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

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted.

Subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting

laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

Federal Bar Association (BK-2021-0002-0019) – It supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act and agrees that the judiciary is best suited to declare an emergency concerning court rules of practice and procedure.

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

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rule (Rule 87)

DATE: May 13, 2022

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note.

Much of the work that went into the four published emergency rules was devoted to achieving as much uniformity as possible, accepting disuniformities only to the extent required by differences in the fundamental premises of the separate sets of rules. Rule 87 continues to differ from the other emergency rules in a few ways. The standard for declaration of a Civil Rules Emergency by the Judicial Conference is common to all four sets of rules, but does not include the "no feasible alternative measures" addition that is unique to Criminal Rule 62(a)(2). That difference has been discussed extensively and accepted as a response to the particularly sensitive concerns raised by the emergency criminal rules provisions.

Another disuniformity arises from Rule 87(b)(1)(B), which directs that the Judicial Conference declaration of a Civil Rules Emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The parallel provisions in the Bankruptcy and Criminal Rules direct that the declaration must "state any restrictions on the authority granted in" their emergency provisions. This difference was accepted in careful discussions among the reporters after publication of the proposed rules and approved by the advisory committees. The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes adoption of five Emergency Rules 4, each of which allows the court to order service of process by a means reasonably calculated to give notice. In addition, it authorizes adoption of Emergency Rule 6(b)(2), which displaces the provision in Rule 6(b)(2) that absolutely prohibits any extension of the times set to make post-judgment motions by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). It can make sense for the Conference to choose among the separate Emergency Rules 4 in declaring a Civil Rules Emergency. Authority to allow service by alternative means on corporations or other entities may seem appropriate, while it may not be appropriate to authorize alternative means of service on individual defendants. But it is not feasible to ask the Conference to identify categories of acceptable or unacceptable methods of service reasonably calculated to give notice. The circumstances of an emergency may be hard to predict, and appropriate alternative methods of service may depend on the nature of the litigation and of the parties. The provisions of Emergency Rule 6(b)(2) that establish discretion to allow no more than an additional 30 days for post-judgment motions are even less suitable for further refinement or "restrictions." Whether an extension is justified in the particular circumstances of case and parties, and how long any extension might be, cannot be guessed in advance. Emergency Rule 6(b)(2), moreover, presents intricate and carefully resolved questions of integration with the appeal time provisions of Appellate Rule 4. A parallel amendment of Rule 4 is being recommended to ensure effective integration for Rule 60(b) motions.

The provisions for completing acts authorized under Emergency Rules 4 or 6 after expiration of an emergency declaration also differ from the parallel provisions in other rules. These differences too are mandated by the distinctive function of these emergency rules.

Reporters Capra and Struve, who led the uniformity efforts, agree that -- in Professor Capra's words -- "We're in a good place on uniformity." The differences that remain "can be easily explained."

There were few public comments on Rule 87 as published. A few raised the "delegation" question, vigorously debated during the early development of the emergency rules by the advisory committees and in this committee. No new reasons were advanced to doubt the propriety of relying on the Judicial Conference to declare a rules emergency and to choose from the menu of specific emergency rules responses set out in each emergency rule. The American Association for Justice lauded Rule 87 as published, but suggested that other of the civil rules should be the subject of additional emergency rules to be specified in Rule 87(c) or should be directly amended to accommodate responses to emergency circumstances. The suggestions are cogent. Each of them, however, was carefully considered before Rule 87 was published, and as to each the CARES Act Subcommittee and the Committee concluded that the corresponding civil rules preserve sufficient

flexibility and discretion to meet whatever needs may arise. The Committee Note encourages courts to make the best use of these qualities as deliberately built into the rules over the course of many years. As much as has been learned about adaptations to the Covid-19 pandemic seems to confirm this confidence in the rules as they are.

Rule 87 did not stimulate extensive Committee discussion. One member asked whether the definition of an emergency is too narrow because it focuses on the court's ability to perform its functions in compliance with the rules. Should not account be taken of an emergency's impact on the parties? Examination of the way in which this problem is addressed in the second paragraph of the Committee Note was found to satisfy this concern.

The Committee Note was revised to respond to a public comment in one respect, adding additional language to reinforce the need to evaluate all opportunities for serving process under Rule 4 before a court orders service by an alternative means under one of the Emergency Rules 4.

The Committee Note was further revised to resolve questions raised by portions that were published in brackets to invite comments. No comments were made. The final and long sentence in the paragraph on Rule 6(b)(1)(A) was deleted as an accurate but unnecessary and potentially confusing reflection on one aspect of the complicated process of integrating Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4. The final sentence in the paragraph on Emergency Rule 6(b)(2), item B(i), advising that a court should rule on a motion to extend the time for a post-judgment motion as promptly as possible was deleted as gratuitous advice on a point that all judges will understand without prompting. In the last line of the paragraph on resetting appeal time under Emergency Rule 6(b)(2), brackets around "original" will be removed, retaining "original." It seems useful to remind readers that an order finally resolving all issues raised by a Rule 60(b) motion is appealable as a final judgment that does not of itself support review of the earlier -- "original" -- final judgment challenged by the motion.

The Committee voted to advance Rule 87 for a recommendation to adopt as published, with the amendments of the Committee Note described above.

SUMMARY OF COMMENTS

Anonymous, 21-CV-0005: We have three branches of government. "Your job is to bring importance of a matter of emergency declaration then it should be evaluated between three branches of government with respect to our constitution. We can't respect a party that only has one point of you [sic] * * *."

Anonymous, CV-2021-0006: With an extensive quotation from Locke on delegating legislative powers, urges that "to leave any entity sole power over anything would be opposite of what our Constitution represents." So "changing any rule during a national emergency should be illegal. Emergency powers are clearly being abused and extended by many offenders in order to accommodate their agendas."

Federal Magistrate Judges Association, CV 2021-0007: Several members of the group thought the Committee might forgo any new rule for emergencies because the Civil Rules "already provide district courts with tools to address emergency circumstances." There is a great deal of flexibility. But the consensus [apparently looking to Emergency Rule 6(b)(2)] was that the rule allows courts discretion to address unique challenges that might arise from different kinds of emergencies. "We did not identify any other areas of the Civil Rules where we thought emergency extensions would be required and are not already permitted by court Order."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: Notes that comments it offered last year on possible Civil Rules amendments to respond to an emergency were based on assuming circumstances like the Covid-19 pandemic, "nationwide in scope, and of a sufficient severity to cause the closure of public access to the federal courts." Proposed Rule 87 does not require an Executive Branch determination of emergency. "Indeed, there is no expressed criteria by which the Judicial Conference can determine that such an emergency exists. We have concerns about such an approach." If adopted, Rule 87 "should contain explicit criteria under which the Judicial Conference may determine that an Emergency, either national or local, exists."

American Association for Justice, 21-CV-0012: This comment is detailed and provides strong support for Rule 87 as published, while suggesting additional provisions for Rule 87 and further rules changes to "facilitate flexibility in emergency situations." These suggestions cover issues that were considered at length in subcommittee and committee, often by other advisory committees, and at times by the Standing Committee. They are important and will be described in some detail, with brief statements of the reasons why they were not recommended while generating Rule 87. The fact that the issues have been considered in the past does not mean that further consideration is inappropriate. But the reasons that proved persuasive once may remain persuasive.

AAJ conducted a survey at the end of January, 2021 to gather information from its members about experience during the first year of the Covid-19 pandemic. Its proposals rest in part on the 112 responses, and in part on more a more general sense of experience during the pandemic.

AAJ strongly supports the provisions in Rule 87 as published. The definition of a rules emergency properly omits the "no feasible alternative measures" provision that appears in, and is appropriate for, Criminal Rule 62. Confiding authority to declare a rules emergency in the Judicial Conference is wise, although a "backup" provision should be added. The structure that provides that a declaration of a civil rules emergency adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them "helps streamline the process and creates less work for the Judicial Conference." The provisions for completing proceedings begun under an emergency rule after the declaration terminates also are proper.

AAJ suggests there should be a backup plan to cover a situation in which the Judicial Conference is unable to meet to declare a rules emergency. This subject was discussed and put aside by each of the advisory committees. In January, 2021, the Standing Committee thought it deserved further consideration. The advisory committees deliberated further, and again recommended that any attempt to create such a provision for a "doomsday" scenario would be unwise, for reasons described at pages 80-81 of the June, 2021 Standing Committee agenda materials.

More specific recommendations suggest review of "several specific rules that would clarify what can be done virtually versus in-person during emergencies," noting that "a hybrid of in-person and virtual proceedings seems to be the direction courts are headed towards." Indeed, it may be time to consider broader rules provisions to facilitate virtual trials. Several clarifications of "in-person court requirements" are suggested. It is not always clear whether the suggestions are for new emergency civil rules to be added to Rule 87(c); perhaps none of them are. Instead, the suggestions at times clearly contemplate adding provisions to the regular rules that are available only in emergency circumstances, without describing what constitutes an emergency or who -- most likely the trial judge -- decides whether there is an emergency. Some of the proposals suggest general amendment of a current rule without being limited to an emergency.

The three rules suggestions in the first set aim at allowing witnesses to appear by video conference in emergency situations. (1) Rule 32(a)(4)(C) allows a deposition to be used at trial if the witness is unable to attend because of age, illness, infirmity, or imprisonment. The suggestion is to permit court and parties to determine the best ways to ensure the safety of witnesses while protecting the rights of the parties "during a public health emergency." The suggestion seems to extend beyond allowing use of the witness's deposition at trial, perhaps in part because of other provisions in Rule 32(a) that allow a party's deposition to be used for any purpose and allow the court to permit use of a deposition in exceptional circumstances. (2) Rule 45(c) limits the geographic reach of a subpoena to command a person to attend a trial, hearing, or deposition. The rule is not qualified by conferring a right not to attend during an emergent event, or when travel is otherwise challenging or burdensome. It should be amended to permit appearance by video conference, or even telephone, for good cause. Rule 43(a) now permits testimony in open court by contemporaneous transmission from a different location, on terms that should be readily met in any circumstances that would qualify as an emergency. And see also the general protective order provisions of Rule 26(c). (3) Rule 77(b) directs that no hearing may be conducted outside the district unless all affected parties consent. This provision was considered by the subcommittee, by all advisory committees -- most especially the Criminal Rules Committee. 28 U.S.C. § 141(b)(1), which provides for special sessions outside the district, also was considered. The conclusion was that remote proceedings satisfy the current rule, at least as long as the judge is participating from a place within the district, and likely more broadly if an emergency forces a court's judges to leave the district. The question remains under consideration by other Judicial Conference committees.

The second set of three rules described by AAJ is more easily disposed of. (1) and (2): Rules 28 and 30(b)(5)(A) direct that a deposition be conducted "before" an officer. AAJ recognizes that courts have allowed remote connections to count as "before" during the pandemic, but suggests time and resources would be saved by avoiding litigation of the issue. "Before" should be clarified, they urge, to ensure that the reporter need not be in the same physical location as the witness or counsel during an emergency situation. Subcommittee consideration of this issue concluded that the present rule text meets the need. It seems likely that continuing practice during the pandemic will confirm this conclusion. (3): Rule 30(b)(4) allows a deposition "by telephone or other remote means." AAJ proposes an amendment to expressly include "video conference" as an appropriate remote means, and to make virtual hearings the default means "during certain emergencies." The present language suffices to authorize video conferencing. Defining "certain emergencies" could prove difficult.

Finally, AAJ suggests that "language should be used" to clarify that local rules adopted during an emergency may not conflict with Rule 87 and must conform to 28 U.S.C. §§ 2072 and 2075. 28 U.S.C. § 2071(a) and Rule 83(a)(2) suffice to ensure this proposition.

Federal Bar Association, CV-2021-0013: "[T]he FBA believes the judiciary is best suited to declare an emergency concerning court rules of practice and procedure. The proposed amendments * * * provide important flexibility for the U.S. Courts in unforeseen situations, some of which may not rise to the level of a national emergency." The FBA also "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." This will help prevent a disjointed or balkanized response, particularly in circumstances that affect only particular regions or subsets of federal courts. And the FBA "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Lawyers for Civil Justice, CV-2021-0014: The need for any Emergency Rule 4 provisions should be carefully considered. "Rule 4 has functioned well during the pandemic." "Reasonably calculated to give notice" is a vague phrase that "could obviate established due process * * * by permitting courts to authorize alternative methods of service that will not necessarily ensure that actual notice occurs." e-mail or social media service might be authorized. "The potential alternative methods of service are without limit * * *." The risks of failure of notice are significant, particularly during an emergency situation. And the rule should provide that even if an alternative method of service is authorized, a default can be entered only after requiring service by a traditional method.

Changes Since Publication

No changes are recommended in the text of Rule 87 as published. The Committee Note is recommended for adoption with the changes described above, adding new language reinforcing the importance of considering the methods of service authorized by Rule 4 before ordering an alternative method under one of the Emergency Rules 4, removing two sentences published in brackets, and removing the brackets from a single word.

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

Rule 87. Civil Rules Emergency

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

(b) Declaring an Emergency.

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

(A) designate the court or courts affected;

(B) adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them; and

[1] New material is underlined in red.

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

(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) Emergency Rules.

(1) ***Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person.*** The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A

method of service may be completed under the order after the declaration ends unless the court, after notice and an opportunity to be heard, modifies or rescinds the order.

(2) *Emergency Rule 6(b)(2).*

(A) *Extension of Time to File Certain Motions.* A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) *Effect on Time to Appeal.* Unless the time to appeal would otherwise be longer:

(i) if the court denies an extension, the time to file an appeal runs for all parties

from the date the order denying the motion to extend is entered;

(ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed "within the time allowed by" the Federal Rules of Civil Procedure; and

(iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties

from the expiration of the extended period.

(C) *Declaration Ends.* An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.

Committee Note

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local—familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The

emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a Civil Rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this rule, or a declaration of a rules emergency, does not imply any limitation of the courts' ability to respond to emergency

circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties~~, and take account~~

~~of,~~ The court should explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. Any means of service authorized by the court must be calculated to fulfill the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. A modification that continues to allow a method of service specified by the order but not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those

times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50(b), 50(d), 52(b), 59(b), 59(d), 59(e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension. ~~[An extension of the time to file a Rule 60(b) motion would be superfluous so long as the motion is made within a reasonable time, except for the circumstance in which a rules emergency declaration is in effect and the emergency circumstances make it reasonable to permit a motion beyond the one-year limit for motions under Rule 60(b)(1), (2), or (3).]~~

Special care must be taken to ensure that the parties understand the effect of an order granting or denying an extension on the time for filing a notice of appeal. Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension.

Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for four separate situations.

The first situation is governed by the initial text: "Unless the time to appeal would otherwise be longer." One example that illustrates this situation would be a motion by the plaintiff for a new trial within the time allowed by Rule 59, followed by a timely motion by the defendant for an extension of time to file a renewed motion for judgment as a matter of law under Rule 50(b). The court denies the motion for an extension without yet ruling on the plaintiff's motion. The time to appeal after denial of the plaintiff's motion is longer for all parties than the time after denial of the defendant's motion for an extension.

Item (B)(i) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend. ~~[The court may need some time to make a careful decision on the motion, although the time constraints imposed on post-judgment motions reflect the concerns that conduce to deciding as promptly as the emergency circumstances make possible.]~~

Items (B)(ii) and (iii) reset appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed "within the time allowed by" the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order "disposing of the last such remaining motion." If no authorized motion is made, appeal time runs from the expiration of the extended period.

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." This Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the ┬original┬ final judgment.

Emergency Rule 6(b)(2)(C) addresses a situation in which a declaration of a Civil Rules emergency ends after an order is entered, whether the order grants or denies an extension. This rule preserves the integration of Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4(a)(4)(A). An act authorized by the order, which may be either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

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

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

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

RE: Report of the Advisory Committee on Criminal Rules (Rule 62)

DATE: May 11, 2022

Last June, the Standing Committee approved for publication proposed Criminal Rule 62, the draft emergency rule. In April, the Criminal Rules Committee met to consider the public comments on the proposed rule, which numbered ten or so. After considerable discussion, the Committee chose not to revise the proposed rule, but approved two changes in the note dealing with alternative public access.

The Committee recommends that Rule 62, with the two changes in the note, be approved for transmittal to the Judicial Conference with the recommendation that the Conference transmit the rule to the Supreme Court.

A. The recommended changes in the committee note

The Committee recommends two amendments to the published note accompanying paragraph (d)(1), which requires courts to provide reasonable alternative access for the public. As amended, the note would read as follows:

> **Paragraph (d)(1)** addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" ~~was~~ is[1] 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." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.
>
> 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.
>
> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

a. Comments received

Three submissions commented on the reference to "victims" in the published committee note discussing (d)(1). They offered conflicting views.

The **Department of Justice (21-CR-0003-0008)** requested that the following sentence be added to the note: "When providing 'reasonable alternative access' courts must be mindful of victims' rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771." It explained:

> …without an explicit reference to the CVRA, the commentary's grouping of victims with the public for the purposes of providing "reasonable alternative access, contemporaneous if feasible" may result in courts providing reasonable alternative

[1] To keep the present tense consistent throughout the note, the Committee also accepted this stylistic change at the meeting. No change in meaning is intended.

> access that falls short of the CVRA's requirements. We believe a victim should be considered similar to a participant in the proceedings, and not the public. Most importantly, we think the CVRA must be scrupulously followed. When providing "reasonable alternative access," courts must account for a victim who wishes to exercise her right: 1) to be "reasonably heard" at any public court proceeding involving the "release, plea, sentencing," or parole of the accused; 2) to not be excluded from any such court proceeding subject to limited exceptions; and 3) to have reasonable, accurate, and timely notice of any public court proceeding involving the crime, release, or escape of the accused. 18 U.S.C. § 3771(a)(2)-(4). Non-contemporaneous access or access that allows a victim to watch or listen, but not participate in the public proceedings, may not satisfy the CVRA. To avoid confusion the Department recommends explicitly referencing courts' obligations to comply with CVRA in the commentary.

The **National Association of Criminal Defense Lawyers (NACDL) (21-CR-0003-0011)** strongly disagreed with DOJ's request, and it urged no change to the published note. NACDL argued:

> The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of "victim" notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA's notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department's suggested addition to the Committee Note would not "avoid confusion" but rather would engender it, by encouraging challenges by alleged "victims," either before or after the fact, to proceedings held in accordance with the Rule.

Professor Miller and the Federal Criminal Justice Clinic at the University of Chicago (FCJC) (21-CR-0003-0013) requested that the Committee eliminate the phrase "'including victims' from the phrase 'duty to provide the public, including victims, with 'reasonable alternative access.'" Alternatively, the FCJC suggested revising the note to reflect the Sixth Amendment's priority of access for the friends and family of the defendant, and to ensure reasonable press access.

In addressing this topic and several others discussed below, the FCJC argued that some of the language in the proposed rule and note is misleading or inconsistent with existing constitutional standards:

> The Note's express reference to victims and silence about friends and family of the defendant may be interpreted to suggest that courts should prioritize the access rights of victims over others when space is limited. The Note thus appears to conflict with Supreme Court precedent that requires courts to provide access for friends and family of the accused, *Oliver*, 333 U.S. at 272.

The FCJC stated that "access problems can be felt most acutely by friends and family of the accused," listing lack of technology or the knowledge to use it, "[i]mprecise instructions that impede their ability to access proceedings," and the importance of their contributions at detention hearings and sentencings, under 18 U.S.C. §§ 3142(g)(3)(A); 3553(a)(1)."

b. Committee deliberations

The Committee accepted the subcommittee's recommendation to revise the note to draw attention to the concerns about victim participation under the CVRA—and also the concerns raised by FCJC that any access comply with the First and Sixth Amendments—without suggesting a position on substantive issues of constitutional law, assigning priority to any particular group among the public, or attempting to recite the groups "included" in "the public." After deleting the phrase "including victims," the revision adds the following sentence to the note's discussion of (d)(1):

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

The phrase "any applicable statutory provision, including the Crime Victims' Rights Act" is intended to encompass any other existing or future statutory provision that might be applicable.

The Committee agreed with the subcommittee's approach to the issues raised by public comments. But members extensively discussed two points concerning the precise wording of the new sentence: namely, whether to refer specifically to the First and Sixth Amendments, and whether to include a reference to the common law right of access.

As proposed by the subcommittee, the new sentence advised courts to be "mindful of the constitutional guarantees of public access in the First and Sixth Amendments." The proposal responded to the FCJC's concern that courts may overlook these rights during emergencies. At the April meeting, Judge Furman raised the question whether there might be other constitutional bases for a right of public access. No one had raised that issue before, and the reporters had not researched it. But members thought that defendants might turn to the Due Process Clause if the Sixth Amendment were not applicable, and they were reluctant to adopt language that might preclude such an approach.

Discussion focused on the benefits of drawing courts' attention to the extensive case law on the right of public access under the First and Sixth Amendments versus the potential for a negative implication that there were no other relevant constitutional rights. Members noted that the negative implication would be strengthened by the phrasing referring to statutory rights: "any applicable statutory provision, including the Crime Victims' Rights Act." There was some support for a revision to make the references to the constitutional and statutory provisions parallel, such as "the constitutional guarantees of public access, including the First and Sixth Amendments access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771."

A majority of the Committee was persuaded that the better course was to refer generally to "the constitutional guarantees of public access," without a reference in the new sentence to the First and Sixth Amendments. Members who supported that view pointed out that the note as published already referred to these amendments. Just three paragraphs earlier, the note to (d)(1) provided:

> The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments.

With this reference already in the note accompanying the very provision in question, members thought the new reference to the constitutional guarantees of public access would be construed to include the First and Sixth Amendments, while avoiding the potential for a negative implication.

The discussion of this issue also addressed a second question, raised by Judge Bates at the meeting: whether the note should refer to a common law right of public access. This issue had not been raised during the drafting process, nor in any of the public comments, and the reporters had not researched it. During the meeting the reporters recalled, in general, that they had found support for a common law right of access while researching the issues raised by efforts to protect cooperators through methods such as sealing court records. In order to avoid any negative implication, members expressed support for the inclusion of a reference to the common law.

By a vote of seven to three, the Committee voted at the meeting to revise the addition to the note as follows:

> When providing "reasonable public access," courts must be mindful of the constitutional and common law guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

After the meeting the reporters requested the assistance of the Rules Law Clerk, Mr. DeWitt, to determine whether there was a sufficient body of precedent on the common law right to physical presence at judicial proceedings to warrant an admonition that courts consider the common law in providing public access. His research found that only the Third Circuit had applied a common law right of access to proceedings, and all of the Third Circuit cases addressing the common law right of access did so while applying First and or Sixth Amendment rights to access as well.[2] None of these cases applied the common law right independently, or suggested that access under the common law right is any broader than access under the First or Sixth

[2] These cases from the Third Circuit enforce both the common law and constitutional rights simultaneously: Gov't of the V.I. v. Leonard A., 922 F.2d 1141, 1144-45 (3d Cir. 1991) (upholding district court decision to allow the daughter of a prosecution witness to remain in the courtroom); US Investigations Servs., LLC v. Callihan, No. 2:11-cv-0355, 2011 WL 1157256, at *1 (W.D. Pa. Mar. 29, 2011) (denying motion to close courtroom in civil case re trade secrets); Harris v. City of Philadelphia, No. CIV. A 82-1847, 1995 WL 385102, at *2 (E.D. Pa. June 26, 1995) (declining to close courtroom). And this one finds an exception to both constitutional and common law right of access and closed certain proceedings: United States v. Sabre Corp., 452 F. Supp. 3d 97, 149-50 (D. Del. 2020) (Stark, J), vacated as moot No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

Amendment. The Eleventh Circuit, and several district courts from other circuits, mentioned a common law right of access to judicial "proceedings and records" or "proceedings and documents" in cases addressing access to documents. Courts in other circuits by-and-large have not specifically addressed the issue, but turned to the common law only for discussion as to whether the public has a right to access certain documents.[3]

In light of this research, Judge Kethledge polled the Committee, which voted unanimously by email to delete the reference to "the . . . common law right" of access from the proposed addition to the committee note. The proposed addition provides:

> When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

B. Provisions with public comments, no change recommended

1. Subdivision (a) – the role of the Judicial Conference

a. Comments received

Two comments addressed the language in subdivision (a) authorizing the Judicial Conference to declare a "judicial emergency." The comments state conflicting views. The **Federal Magistrate Judges Association (FMJA) (21-CR-0003-0006)** expressed concern that "the Judicial Conference might not be well suited to addressing regional or District-specific emergencies of the type more likely to present in the future." In contrast, the **Federal Bar Association (21-CR-0003-0009)** "agree[d] that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency." It noted that "[c]onferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts."

b. Committee deliberations

The Committee declined to revise the carefully crafted consensus about the authority of the Judicial Conference reflected in subdivision (a) as published. It was satisfied that the Judicial Conference has the ability to gather information and respond quickly to emergencies, through its executive committee if necessary. Moreover, it is important to have the Judicial Conference act as a national gatekeeper, charged with strictly limiting the authority to depart from the Rules of Criminal Procedure, which have been carefully designed to protect constitutional and statutory rights, as well as other interests.

[3] The Sixth Circuit opinion in Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177-79 (6th Cir. 1983), for example, discussed the common law right of access to proceedings for a couple of paragraphs, but the issue in the case was sealing documents.

2. Paragraph (d)(1) - deleting or revising references to requiring public access to be "contemporaneous if feasible"

As published, paragraph (d)(1) provided:

> **(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.

a. Comments received

Two comments expressed concern that the language "contemporaneous if feasible" in the text of (d)(1) and accompanying note did not convey adequately the importance of providing contemporaneous access and might be read as endorsing delayed access. They proposed different revisions to avoid this concern.

The **FMJA (21-CR-0003-0006)** requested that the Committee "eliminate the reference of contemporaneous if feasible" or revise the text to "indicate public access may only be denied if the interests of justice require a proceeding to go forward without public access." The FMJA expressed concern that this phrase "might actually lead to more frequent denial of public access."

The **FCJC (21-CR-0003-0013)** commented that the Committee should revise the proposed rule to "expressly provide that any limitations on public access during Rules Emergencies must satisfy *Waller*." Specifically, "the Rule should be amended to expressly state that courts must provide both contemporaneous and audio-visual public access except where closure complies with the constitutional standard." The FCJC objected to the statement in the note that "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." Also, the FCJC urged that "the Rule and Note should clarify that feasibility and appropriateness are likewise governed by the constitutional standard."

b. Committee deliberations

After extensive discussion (Draft Minutes, pp. 13-18), the Committee decided to retain the phrase "contemporaneous if feasible," and not to add references to particular Supreme Court decisions defining the constitutional standards for public access. There was general agreement that it would not be appropriate for the rule or note to attempt to spell out the substantive constitutional requirements. But members found the decision whether to retain, reword, or eliminate the phrase "contemporaneous if feasible" more challenging.

During the drafting process, this phrase had been added to recognize the importance of contemporaneous access but also the possibility that such access might not be possible under emergency conditions that could be foreseen. By itself, the phrase "reasonable alternative access" is very general, and under emergency circumstances there was a concern that courts might not be attentive to the need for contemporaneous access. Adding this phrase to the text (as well as the note) was intended to serve as a reminder of this important norm, which might otherwise be overlooked in emergency situations. At the April meeting, there was a consensus that contemporaneous access should be the norm.

On the other hand, members recognized the need for flexibility given the impossibility of foreseeing the kinds of rules emergencies that might occur in the future. For example, in a situation like 9/11, telephone lines and the Internet could be down, and physical access interrupted as well. In that scenario, it might be impossible to provide public access contemporaneously.

But members also expressed concern that the limiting phrase, "contemporaneous *if feasible*" might, as the magistrate judges suggested, actually cause courts to provide less rather than more contemporary access. Members grappled with the tradeoff between the value of calling attention to the importance of contemporary access versus the possibility that the phrase might have such an unintended effect. Some possible compromises were discussed. The possibility of revising that phrase to the stronger wording of "contemporaneous if possible" was suggested, but several participants thought it would state too stringent a standard, potentially requiring herculean efforts. The possibility of deleting "contemporaneous if feasible" from the text but retaining it in the note was also considered. It was rejected because notes should not add requirements to the text, and they are also difficult for courts and litigants to access.

A member urged that when contemporaneous access cannot be provided proceedings should not occur, and she made a motion to revise the rule to require the court to provide "contemporaneous reasonable alternative access." She argued that contemporaneous access to a public hearing is critical to allow victims and family members to participate, and the press to hear as the proceeding is occurring. If some form of contemporary access cannot be provided, she thought proceedings should not go forward. But other participants disagreed, citing the need for flexibility and noting that it would be inappropriate to delay some proceedings. For example, if someone was due to be released on bond, the proceedings should not be delayed if there was no phone line or the Internet that people could use to allow public access.

When there was no second to the motion to revise the rule, the Committee accepted the language of the rule as published.

3. Paragraph (d)(1) - adding references to the constitutional tests and various requirements regarding public access

Several other changes were proposed to paragraph (d)(1), quoted above, or to the note accompanying it.

a. Comment received

The **FCJC (21-CR-0003-0013)** proposed a series of additions to the text of (d)(1) and/or the note: requiring court participants to be able to see the public, barring courts from conditioning public access on advance permission of the court, and requiring prominently placed, district-wide announcement of any public access limitations.

The FCJC urged the Committee to revise the rule and note to "expressly require that court participants be able to see the public unless *Waller* can be satisfied." Stating that during the pandemic at least 32 districts rendered spectators "effectively invisible" by reducing them to a phone number on a computer screen, the FCJC argued that the public should be visible to participants to the degree possible. It argued that "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their

functions." *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). Without being seen, the public may lose trust in the criminal justice system, the FCJC argued. Admitting that "*Waller* may well allow such restrictions based on technological capacity and courtroom decorum," the FCJC argued that "such closures should be analyzed and justified, not taken as the default."

The FCJC also asked the Committee to bar courts from conditioning public access on advance permission of the court, except as permitted by *Waller*. The submission states: "Eliminating advance registration requirements would bring public access during Rules Emergencies closer to the norm: The public could 'walk into' a courtroom at any time, with or without permission, unless the courtroom has been lawfully closed."

And the FCJC proposed adding to the rule the requirement of a prominently placed, district-wide announcement of any public access limitations that (a) details the scope of the limitation, (b) explains in plain language how the public can access court, and (c) contains necessary constitutional findings.

b. Committee deliberations

The Committee declined to add the proposed details to the rule or the note. If guidance this detailed is necessary, it should come from other sources, such as the Benchbook or the Committee on Court Administration and Case Management.

4. Paragraph (d)(1) - barring courthouse-only access to remote proceedings

a. Comment received

The **FCJC (21-CR-0003-0013)** also objected to language in the published note that states: "For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided." The FCJC argued that "[t]he Rule should prohibit courthouse-only [public] access to remote proceedings," and "should recommend that districts allow remote access to any proceedings remotely or partially remotely. That remote access should not be within the courthouse itself." Noting that several districts allowed only in-person public access, even to remote or partially remote hearings, the FCJC commented it is "debatable whether doing so during a deadly and contagious pandemic constitutes public access within the meaning of the First and Sixth Amendments." But in any event, the FCJC contended, such a restriction is "unwise." It explained: "when public health or safety is on the line—no one should have to choose between exercising their First or Sixth Amendment rights and risking their lives."

b. Committee deliberations

The Committee declined to revise the rule to prohibit court-house only alternative access to remote proceedings or to delete the language referring to overflow courthouse space from the note. Rule 53 generally bans broadcasting, and the norm is in-person attendance. The FCJC suggestion would limit how courts could navigate around the prohibition against broadcasting

during emergencies, and would add an unprecedented prohibition regarding alternative in-person access. There was no support for making the proposed changes in the rule and note.

5. Paragraph (d)(2): written consents, waivers, and signatures of the defendant

This provision provides alternative signature requirements when emergency conditions limit a defendant's ability to sign. This was a particular problem for detained defendants who were unable to have in-person contact with counsel or receive and send documents electronically during the pandemic.

As published, (d)(2) states: "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." Paragraph (d)(2) also allows counsel to sign on behalf of a defendant who is not before the court at the time of consent; in that scenario, defense counsel must file an affidavit. The rule allows the judge to sign for the defendant only if the defendant is pro se and consents on the record.

As published, the note states:

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

a. Comments received

Judge Denise Cote (21-CR-0003-0005) recommended that (d)(2) be revised to provide that "defense counsel or the court may sign for the defendant." She explained "it may be difficult and create unnecessary delay for the attorney to affix the defendant's name to a signature line and then provide that document to the court." She argued Rule 62 should focus exclusively on creating an unambiguous record of the defendant's consent, regardless of who affixes the defendant's signature. Describing her court's experience during emergencies including the pandemic, Judge Cote noted that it regularly conducted proceedings where everyone participated remotely from different locations, and it was both useful and important for the court to be able to sign documents on the defendant's behalf with proper safeguards:

> Defense counsel were provided an opportunity to consult confidentially with the defendant and the judge confirmed on the record that the consultation had occurred, that the issue requiring the defendant's signature had been discussed, and that the defendant had knowingly and voluntarily given consent. Defense counsel often ask the judge to add the defendant's signature to the form or express relief when we volunteer to do so. Again, what is essential is that the consultation has occurred, that consent has been knowing and voluntary, and that there is an adequate contemporaneous record of this consultation and assent.

The **FMJA (21-CR-0003-0006)** agreed that the court should be able to sign for a defendant if the court can obtain "oral consent on the record." It urged that:

> Flexibility during emergencies is the key to ensuring a defendant can be seen promptly by the Court, especially when first arrested. Many members of the FMJA had to obtain oral consent on the record during the pandemic and believe the flexibility to do this was critical to ensuring that initial presentments, in particular, went forward without delay.

b. Committee deliberations

Allowing counsel to sign for the defendant was first suggested at the 2020 miniconference by defense attorneys, who said it was working well. The Committee discussed the issue again at its November 2020 meeting. There, in response to a suggestion that the judge should be permitted to sign for a defendant who consented on the record, Judge Dever (who then chaired the Emergency Rules subcommittee) noted that the written signature by counsel on the defendant's behalf is an "extra piece of evidence to the extent someone later says, 'I didn't really consent, or the judge misunderstood me'. . . ." Minutes, at 19. Judge Dever raised an additional 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 we're going to do this today.'" *Id.* at 28. The Committee declined to revise the rule to allow the court to sign for a represented defendant.

At its April 2022 meeting, the Committee gave this question plenary consideration. The Committee's discussion revealed little support for claims that defense counsel wanted judges to be able to sign for their clients. Nor was there much evidence that defense counsel have been unable themselves to sign on their clients' behalf. To the contrary, every defense member, as well as

many judicial members, said that defense counsel have been able to sign and submit those documents without problems. One member summed it up this way: "it is a matter of expediency that maybe isn't worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising." Draft Minutes, at p. 24.

6. Paragraph (d)(4): Rule 35 deadlines

Rule 62(d)(4) allows a court to extend the time to take action under Rule 35 as reasonably necessary when emergency conditions provide good cause to do so. The published committee note states the rationale for this provision:

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

a. Comment received

The **Department of Justice (21-CR-0003-0008)** recommended that the Committee add to the note accompanying this paragraph the following language to make it clear that the extension is "limited to sentences imposed immediately prior to or during the criminal rules emergency." It explained:

> The extension of time to take action under Rule 35 only applies to sentences imposed within 14 days immediately prior to the declaration of a criminal rules emergency or to sentences imposed during the criminal rules emergency. Nothing in this rule is intended to provide relief for a defendant who had the benefit of a full 14-day period under Rule 35, but failed to take action.

b. Committee deliberations

The Department did not raise this proposed addition during the drafting process. It did previously suggest limiting language for the note. At the Department's suggestion the Committee approved the sentence that reads: "Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35."

The subcommittee recommended that the Committee reject the new addition suggested by

the Department. The subcommittee concluded that the rule was clear and no additional language in the note was needed to address any frivolous motions seeking relief, including motions by those who had the benefit of a full 14-day period under Rule 35 before the emergency declaration but failed to take action.

At the April Committee meeting, Mr. Wroblewski said the Department was satisfied with these deliberations by the subcommittee, and that he did not intend to renew the request for new note language. Draft Minutes, at p. 42.

7. Paragraphs (e)(1), (2), and (3): consultation opportunities with counsel

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

Paragraph (e)(1) addresses proceedings that courts may already conduct by videoconference with the defendant's consent under existing Rules 5, 10, 40, and 43(b)(2) (initial appearances, arraignments, and certain misdemeanor proceedings). The committee note explains that paragraph (e)(1) –

> does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

Paragraphs (e)(2) and (3), addressing the use of videoconferencing in other proceedings, also require that the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings.

a. Comments received

Three of the comments received by the Committee addressed the language requiring an adequate opportunity to consult confidentially with counsel.

The **FMJA (21-CR-0003-0006)** recommended deleting from paragraph (e)(1) the requirement "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." That paragraph addresses videoconferencing authorized by current Rules 5, 10, 40, and 43(b)(2). The FMJA expressed concern that this requirement "appears to impose a duty on the Court only in emergency situations," and implies that this obligation does not exist in the non-emergency times.

Judge Cote (21-CR-0003-0005) recommended revising the proposed consultation requirements in (e)(1) and (2) so that they require that the defendant have an "adequate opportunity" to consult with counsel "confidentially either before ~~and~~ or during" certain videoconference proceedings. She explained:

> Our experience . . . has been that consultation between the defendant and defense counsel might be very difficult to arrange, particularly if a defendant is incarcerated. If the record created by the judge during the proceeding establishes that an adequate opportunity for consultation has been provided for the particular proceeding (that is, for whatever the defendant must understand from that proceeding and do at it), that should be sufficient.

A third comment from **NACDL (21-CR-0003-0011)** supported retaining the requirement as published but recommended adding to the note more explanation of what an "adequate opportunity" would entail. NACDL expressed strong support for the requirement of an adequate opportunity to consult with counsel before (as well as during) proceedings under proposed Rule 62(e). During the pandemic, NACDL's members were "often unable to consult with clients—a critical aspect of rendering effective assistance of counsel—as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and fulfill our professional duties and constitutional mission." NACDL urged an addition to the committee note stating that "an 'adequate opportunity' will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before—and whenever feasible, not on the same day as—the proceeding itself." Noting that the current note is silent on what "before" means, NACDL urged that it should not be sufficient to have only a few minutes of contact just before the proceeding, while the other participants are waiting.

b. Committee deliberations

At the April 2022 meeting, members did not share the FMJA's concern that the requirement in (e)(1) that the court ensure an adequate opportunity for confidential consultation for proceedings under Rules 5, 10, 40, and 43(b) would somehow imply that the same obligation is absent in non-emergency times. The requirement, the subcommittee had concluded, is clearly conditioned on the impairment of consultation opportunities by emergency conditions—and will not suggest that courts can dispense with consultation opportunities in non-emergency times.

Members were similarly unpersuaded by Judge Cote's suggestion to require only an adequate opportunity before *or* during the proceeding. Arguably the top priority for the defense bar with respect to the emergency rule has been to ensure an adequate opportunity to consult with clients. Members likewise emphasized the importance of these consultations, and saw no practical reason to dilute this requirement.

As for NACDL's request for added language defining when consultation would be adequate, the subcommittee recommendation to the Committee was that no change to the rule or note as published be made, and no Committee member opted to discuss this issue further.

8. Paragraph (e)(3): defendant's written request for videoconferencing for pleas and sentencings

This provision prompted lengthy discussion at the Committee's April meeting. Paragraph (e)(3), like the CARES Act, imposes more restrictions on the use of videoconferencing at pleas and sentencings than it imposes on its use in other proceedings. In addition to the consultation requirement, videoconferencing for pleas or sentencings are permissible only if (1) the chief judge of the district makes a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district, (2) "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing," and (3) the court finds "that further delay in that particular case would cause serious harm to the interests of justice."

As published, the committee note accompanying this provision states:

> **Paragraph (e)(3)** addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).
>
> Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.
>
> Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency

provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

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

a. Comments received

The Committee received comments from **Judge Denise Cote (21-CR-0003-0005)** and **Judge Mark R. Hornak (21-CR-0003-0012)** on this portion of the rule.

Judge Cote recommended omitting the requirement that felony pleas and sentencing can occur by videoconferencing only if the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing. She urged that the rule be revised to allow videoconferencing if "the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by videoconferencing."

Judge Cote contended there is no need for a written request received *before* the proceeding, and if a written request is required, the rule should allow signature by the defendant, defense counsel, *or the court* on behalf of and with authorization from the defendant on the record. She urged that the focus should be on whether there is consent, based on consultation with defense counsel, and that the record adequately reflect informed and voluntary consent. She stressed practical difficulties:

During an emergency it may be particularly difficult for a defendant to sign and transmit any writing to his/her counsel or the court. A defendant, particularly an incarcerated defendant, may lack access to the technology needed to sign and electronically transmit a request to his/her counsel or the court, and during an emergency such as a pandemic, defense counsel and the court may not be able to receive a signed writing by mail. Even if the Rule envisions that defense counsel may sign the written request on behalf of the defendant, defense counsel may in many emergencies find it difficult to create the writing and to transmit it.

Judge Hornak concurred in this portion of Judge Cote's comment. Based on his court's experience, he concluded:

> the requirement of an advance writing signed by the defendant (1) would likely be inconsistent with the circumstances generating the emergency that would warrant such proceedings in the first place, (2) would generate a procedure that would be functionally impractical in most every case during an emergency, (3) would create a precondition for which there does not appear to be empirical or anecdotal evidence of necessity, and (4) addresses a concern which may be readily addressed in alternative ways.

Judge Hornak stated that in his court the defendant's consent has been placed on the record and then confirmed in a colloquy with the defendant and counsel at each video-conference proceeding. He concluded that "imposing the 'written request signed by the defendant' requirement is almost certainly inconsistent with the existence of the emergency that would require it in the first place." Difficulties of access "will be particularly acute for those in detention, but even for defendants on bond/conditions of release, physical or other access in order to exchange and process written and signed request documents will likely be most challenging and difficult for their own reasons."

Judge Hornak also stated that in his experience the courts have been conducting "a detailed on-the-record colloquy to confirm the counseled consent and desire of the defendant to proceed via videoconferencing, and in those in which I have presided, there has been no doubt about that counseled consent and desire before the hearing proceeded." In his role as chief judge, he had received no formal or informal concerns about the counseled voluntary nature of the defendants' consent. Moreover, he argued, imposing this requirement is inconsistent with the type and level of judgments that district judges make in every plea proceeding. Finally, he concluded that allowing counsel to sign the required writing would not solve the problem because the existence of the emergency would almost always impede counsel's access.

Accordingly, Judge Hornak recommended either retaining the current consent procedures under the CARES Act, or requiring confirmation of counseled consent and a desire to proceed by videoconferencing via a judicial colloquy with the defendant at the beginning of the proceeding in question.

b. Committee deliberations.

To the extent these comments reflected concern about any inability of defendants themselves to sign, that concern is already addressed in (d)(2). The Committee's discussion as to (e)(3) itself focused on whether the rule meant that the written request must be submitted *in advance* of the videoconference in which the plea proceeding takes place, or whether instead the defendant can somehow make that written request during a videoconference proceeding.

Throughout the discussion of (e)(3), Judge Kethledge and other members stressed the Committee's animating concern for the requirement that any request for remote pleas or sentencings originate from the *defendant*, in writing. That concern is that some judges do not share the Committee's view that conducting a plea or sentencing remotely is truly a last resort. Instead, some judges have emphasized convenience or efficiency more than whether the defendant himself

would prefer an in-person proceeding. As Judge Kethledge explained (Draft Minutes, at p. 36):

> Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.
>
> And . . . the defense bar never came to us with this. The defense bar never came saying, "We're having a problem. My guy wants to make it a plea and he can't." We have never heard a peep along those lines from the defense bar. The Department of Justice hasn't come to us. It has always been judges who wanted this, and we're a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Similar comments at the meeting included statements describing judges who had expressed "frustration and anger about not being able to force a defendant to go forward virtually" and attorneys "being pressured by the courts to get their clients . . . pled, and out of whatever jail system they were in . . . having that barrier between the client and the court is a very important protection." Judge Kethledge reiterated that "there are many judges who want to do a lot of remote pleas and sentencings . . . . That's the concern."

Request v. Consent

The requirement that the *request* for a video proceeding come from the defendant—after consultation with counsel—is aimed to prevent a defendant from feeling pressured to *consent* to a remote plea or sentencing if that were suggested by the judge. The Committee's concern was "that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely" when the person who will sentence him is asking. Draft Minutes, at p. 26.

Judge Bates asked whether his district's practice of including a consent to video in the plea agreement would comply with the requirement of "request" in proposed rule. He asked if the idea of holding a plea or sentence by video could come initially from the prosecution instead of the defendant. Judge Kethledge's response was yes, so long as in the document submitted to the court, the defendant says, "I request" or "I want my proceeding to be remote," rather than just "I agree" or "I consent." It can't be the judge saying to the defendant, "Do you have a problem with this?"

A judicial member echoed this understanding: "...[W]e're all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it." Draft Minutes, at p. 27. This member described her interpretation of the rule:

> . . . . [S]he did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Id. at 28.

Timing of the request

The comments of both Judge Cote and Judge Hornak assumed that the written request must be submitted prior to the plea or sentencing proceeding. They opposed that requirement. Judge Furman shared that opposition to a requirement that the written request be filed in advance. He did not read the language of the rule to require that the request be filed in advance. He thus urged the Committee to add language to the note stating two things: first, that the preferred approach would be to schedule a video plea or sentence only if the defense had already filed a request to that effect with the court; but second, the rule as written would permit a court to convert an ongoing videoconference—originally convened for some other purpose—to a remote plea or sentencing if the defense wrote out a request to that effect and held it up to the camera for the judge to see. Judge Furman said that this process was frequently used in his district.

Judge Bates and some Committee members read the rule to allow what Judge Furman described, but most did not. They thought that the nature of a written request to a court is that the court must have the request in hand for the request to be effective. Judge Kethledge and some members also thought that any process that allows judges to accept a defendant's mid-hearing request for a remote plea or sentence would open the door to actual or perceived pressure by the judge upon the defendant to make that request—which is precisely what this requirement seeks to avoid.

Ultimately, no member of the Committee moved to add the note language that Judge Furman requested. A member did move to amend the rule expressly to require that the defendant's request for videoconferencing be "filed," but the motion was withdrawn because of uncertainty about whether that revision would require republication.

9. Adding a new subdivision on grand juries

The **Department of Justice (21-CR-0003-0008)** also recommended adding a new paragraph (d)(5) to allow courts to extend the term of sitting grand juries during judicial emergencies. In its submission **NACDL (21-CR-0003-0011)** opposed this proposal.

Because this new provision could not be added without republication of the whole rule, derailing the accelerated schedule set by the Standing Committee for all of the emergency rules,

the Committee treated this as a new suggestion. It is discussed as an information item in the Committee's general report.

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

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;

[1] New material is underlined in red.

(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.

(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 requirement in (2)(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 a writing signed by the defendant 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 by One or More Participants.*** A court may conduct a

proceeding, in whole or in part, by teleconferencing if:

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

(B) the court finds that:

(i) videoconferencing is not reasonably available for any person who would participate by teleconference; 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.

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 even 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 extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141.

Another example might be a situation in which the judges in a district are unable to carry out their duties as a result of an emergency that renders them unavailable, but courthouses remain 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. This 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 Criminal Rules emergency designate the court or courts affected by the Criminal Rules emergency as defined in subdivision (a). Some emergencies may affect all courts, some will be local or regional. The declaration must be no broader than the Criminal 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 Criminal 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. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the proceeding authorized by (d)(3) is the completed impanelment. In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

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 term "public proceeding" ~~wa~~is 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." Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding.

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.

When providing "reasonable alternative access," courts must be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771.

Paragraph (d)(2) recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record,

defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.

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

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

Paragraph (d)(3) allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to

impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

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

Subdivision (e) provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules), to more clearly

distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).

Subdivision (e) applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it 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 paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the

court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

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

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

First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found

that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.

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

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

The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or

when trial participants other than the defendant may appear by videoconferencing.

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

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

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

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

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 participants communicate through

audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites. Because the rule applies to teleconferencing "in whole or in part," it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding.

The first prerequisite, in (e)(4)(A), is that all of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

Second, (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is "reasonably available," this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular

proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

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

Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to

teleconferencing be given only after consultation with counsel. By requiring only "consent," it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, "do you want to talk to your lawyer about finishing this now without the video?," an answer "No, I'm ok, we can finish now" would be sufficient consent under (e)(4)(C).

Changes After Publication

The note accompanying (d)(1), which requires courts to provide reasonable alternative public access, was revised to draw attention to the need to consider the constitutional guarantees of public access and applicable statutory provisions, including the Crime Victims' Rights Act. In light of this addition, an earlier parenthetical reference to victims was deleted.

In addition, two stylistic changes were made for consistency.