ADVISORY COMMITTEE ON CRIMINAL RULES
April 28, 2022
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 28, 2022, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via telephone)
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)
Professor Daniel Capra, Reporter, Evidence Committee (via Microsoft Teams)

The following persons participated to support the Committee:

Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
S. Scott Myers, Esq., Counsel, Rules Committee Staff

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

The following persons attended as observers on Microsoft Teams or by telephone:

Pedro E. Briones	DC Courts
Patrick Egan	American College of Trial Lawyers
Peter Goldberger	National Association of Criminal Defense Lawyers
John Hawkinson	Freelance Journalist
Nate Raymond	Legal Affairs Correspondent – Reuters
Crystal Williams	Public

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the staff at the Administrative Office for making all of the arrangements, and he expressed pleasure that the meeting was taking place in person for the first time in almost three years, though a few participants were attending virtually.[2]

Judge Kethledge stated this was his last meeting, and he expressed gratitude for the experience of serving on the Committee for nine years. He characterized the Committee's work as interesting, important, and fulfilling. He called the Committee an exemplary body whose members trust one another and work collectively to identify the best solutions for administration of criminal justice. The Committee, he observed, is an example of the respect and civility that this country should move towards.

Judge Kethledge thanked the Administrative Office again for everything that they had done over many years, as well as the many members with whom he had worked. He expressed special thanks to Judges David Campbell and John Bates for their work as chairs of the Standing Committee, and to prior Criminal Rules Committee chairs whose examples he sought to follow. Finally, Judge Kethledge thanked the reporters, calling their work truly extraordinary and expressing appreciation for their friendship and kindness. He said he would miss the constant interaction he had had with them.

Overall, Judge Kethledge concluded, his overall feeling was one of gratitude for being able to serve here.

Professor King opened her comments on Judge Kethledge's contributions with a photo of him holding a very large fish. Noting that Judge Kethledge is an accomplished fisherman, she described the traits that made him successful as both a fisherman and committee chair: being goal oriented, decisive, and patient. She characterized Judge Kethledge as laser focused on what was most important and willing to go slowly through multiple revisions, forging and maintaining a consensus. She noted that as fisherman and chair Judge Kethledge had to have a sense of humor and the resilience to persist when things go wrong, like the line breaking, the bait falling

[2] Judge Andre Birotte, Dean Roger Fairfax, and Professors Cathie Struve, Dan Capra, and Dan Coquillette participated virtually.

off, or the Standing Committee sending back a draft rule. She concluded that Judge Kethledge had been an outstanding chair, and the Committee was grateful to have "caught" him.

Professor Beale said that although she had no photograph, everyone on the Committee had observed the three things she wished to speak about: Judge Kethledge's service, leadership, and his traits as a person. Describing his strong sense of duty and service, she noted that in nearly a decade he never missed a meeting of the Committee or its many subcommittees, and he was always available to the reporters by telephone or email. He placed the Committee's work high on a busy agenda that included not only his judicial work, but also teaching at the University of Michigan, his own writing, and his family.

Professor Beale said that Judge Kethledge's handling of the Rule 16 project was an example of his leadership. The Committee received a lengthy and complex proposal from a New York bar group. As he wrote in his book about leadership, Judge Kethledge—and the Committee—took a step back to determine what was most important. We held a miniconference with a wide range of participants to help identify and understand the most important problems. It led to a breakthrough, and with Judge Kethledge's constant encouragement the participants forged a consensus that all agreed was a significant improvement—though not necessarily everything that each member might want. In this process, Judge Kethledge brought the best in each person. If there is no objection in Congress, the resulting amendment will go into effect December 1, 2022.

Professor Beale also praised Judge Kethledge's work on the emergency rules. It was an enormous project, which the Committee accomplished because Judge Kethledge created a subcommittee and then divided it into working groups. There were countless telephone meetings, and Professor Beale wished she had a nickel for each call.

Finally, Professor Beale praised Judge Kethledge's friendship, kindness, and patience. She noted that he always asked the most from each member and reporter, but also recognized their other responsibilities, including to their families. She concluded that she would really miss him.

Judge Bates said that both he and the Committee would greatly miss Judge Kethledge. They had worked together not only on the rules, but also with Judge David Campbell and others on the CARES Act. Judge Bates called that a great exercise that turned out very well. He said Judge Kethledge's leadership had been crucial for this Committee. The judiciary is the better for it, and we appreciate it.

Mr. Wroblewski said he had had the honor of representing the Department of Justice on this Committee for several decades, and he called Judge Kethledge an extraordinary steward of the Committee and the Federal Rules of Criminal Procedure. He praised Judge Kethledge for recognizing that we have inherited a really fine text in the existing Rules of Criminal Procedure, which he compared favorably to two foundational criminal justice documents—the federal criminal code and the Sentencing Guidelines. But Judge Kethledge had also recognized that the world was changing in ways that required changes in the rules to deal with networks of robots

committing crimes and pandemics, and he guided the Committee to the needed reforms while maintaining the core virtues of the text, the rules that have stood the test of time. Mr. Wroblewski concluded with his mother's advice: when you take on something like this, you always want to leave it better than you found it. He said Judge Kethledge had done just that. Calling Judge Kethledge a man of solitude, grace, humility, principle, confidence, intellect, and common sense, he said it had been a privilege to get to know him over the past decade.

Judge Kethledge responded warmly, thanking Mr. Wroblewski and expressing his respect for him as a professional and person who brought the Department's perspective and represented it well, but always put the nation's interest first. That made the Committee's accomplishments on Rule 16, Rule 62, and all of the other projects possible.

Noting that he would go over everyone's comments later, Judge Kethledge moved to the next items on the agenda. He thanked the members of the public who were observing, noting the Committee appreciated their interest as well as the comments and suggestions they provide. Ms. Bunting provided a quick review of meeting etiquette for those in person and those online.

Minutes and Rules Committee staff report

Judge Kethledge noted the minutes of the last meeting were lengthy, and he thanked the reporters for their work. Hearing no comments or concerns, he called for a motion to approve the minutes. The motion was made and seconded, and the minutes were approved.

The next item was the Rules Committee Staff report. Ms. Healy provided the first portion, drawing the Committee's attention to the fact that Rule 16 would go into effect on December 1, 2022, unless Congress prevented it. Mr. DeWitt discussed the legislation that might affect the Criminal Rules, noting the overarching theme was Congress's interest in virtual proceedings, which is reflected in multiple bills. The Courtroom Video Conferencing Act of 2022, page 98, would make certain provisions of the CARES Act permanent, allowing the chief judge of a district to authorize teleconferencing for a variety of proceedings. This would not require an emergency, and would effectively negate some of the provisions in draft Rule 62. Mr. DeWitt also drew attention to the Protecting Our Democracy Act, pp. 96-97, which passed the House in December 2021. It would prohibit any interpretation of Rule 6(e) dealing with grand jury secrecy that would prohibit disclosure to Congress of grand jury materials related to individuals that the president has pardoned or commuted their sentences. Professor Beale commented that it was somewhat surprising that the bill did not purport to amend Rule 6(e), but rather to prohibit any interpretation that would preclude disclosure to Congress. Professor Beale noted that this was related to a degree to some of the issues considered by the Committee at its last meeting, when it declined to move ahead with amendments to Rule 6(e). Mr. DeWitt stated that the bill passed the House on almost a party line vote in December, and was now before the Senate Judiciary Committee and perhaps some other committees. Finally, Mr. DeWitt noted the Government Surveillance Transparency Act of 2022, p. 98, which would explicitly amend Rule 41(f)(1)(B) regarding what the government must disclose in the required inventory. Mr. DeWitt confirmed that the Administrative Office was closely tracking all of the legislation affecting the rules.

Rule 62

Judge Kethledge began the discussion of draft Rule 62 with a brief description of the process that followed the legislative directive in the CARES Act to prepare amendments that would apply in future emergencies. Judge Dever chaired the Emergency Rules Subcommittee, which broke into working groups. The working groups and the subcommittee had innumerable telephone calls and Zoom meetings, and then the subcommittee held a day long miniconference to get input from all kinds of affected parties, asking how they were faring in the emergency and the particular challenges they were facing with regards to the Criminal Rules. The process for developing the draft rule and repeatedly refining it was lengthy and involved. Eventually the draft rule was approved for publication in August 2021. Despite the breadth of the rule, there were only a modest number of public comments, including the thoughtful comments and suggestions the Committee would be discussing.

Judge Kethledge thanked the reporters for their memorandum and the subcommittee for its thoughtful consideration, but he emphasized that the Committee's review was plenary. He asked Judge Conrad, the subcommittee chair, to begin the discussion.

Judge Conrad stated that after careful review of the public comments the subcommittee was recommending no change in the text of the rule as published but a few changes in the committee note. The Committee would go through each of the issues in the memo, with the reporters describing the comments and the subcommittee's response.

With regard to the process, Judge Kethledge and the reporters stated that motions to make changes in the rule or text could be made during the discussion, which would conclude with a final vote to approve the rule and note for transmittal to the Standing Committee.

Rule 62(d)(1)

Professor Beale began the discussion of the one change the subcommittee recommended, discussed in the memorandum on page 101 of the agenda book. The public comments stated conflicting views regarding the treatment of victims in the committee note for (d)(1), which concerns public access. The Department of Justice expressed concern that the note did not mention the Crime Victims' Rights Act (CVRA) and grouped victims with other members of the public, which might lead courts to take actions that would not be in compliance with the CVRA. Accordingly, the Department proposed adding an explicit reference to the need to comply with the CVRA to make sure it was scrupulously followed.

The National Association of Criminal Defense Lawyers (NACDL) strongly disagreed, stating that the committee note as published was absolutely correct and opposing the Department's proposal.

Finally, Professor Miller and her federal criminal justice clinic students (the FCJC) thought that the text and committee note short-changed the members of the defendant's family and friends, whose support is critical and who should not be placed on a lower priority than victims.

The subcommittee came up with what we think is a very good compromise, quoted on page 104. It draws attention to both sets of interests that courts should consider: both the First and Sixth Amendments (which include the defendant's friends and family) and the Crime Victims' Rights Act (CVRA). It does not try to spell out either the constitutional requirements or those of the CVRA. And it doesn't assume the CVRA is the only possible statutory provision. Although we did not identify other possibilities, the "including" language leaves open room for other statutory directives. After drawing attention to these constitutional and statutory directives, it leaves it to the courts to define what reasonable alternative access would be in particular circumstances. With this new reference to the CVRA, the subcommittee proposed deleting the parenthetical reference to victims in the note as published. Drawing attention to, but not attempting to fully define, the constitutional and statutory provisions that should be considered is consistent with the approach the Committee has historically taken in other committee notes.

Noting that this was one of the more difficult issues raised by the public comment, Professor Beale asked for discussion of the issues and the subcommittee's proposed approach.

Judge Bates asked whether there is a common law right of access in addition to the First and Sixth Amendment constitutional guarantees and the CVRA. If so, he wondered if the failure to reference it might mislead some judges.

Professor King commented that common law rights govern unless modified by statute, so it was something we could consider adding because the proposed note language does list three things and might suggest it is comprehensive.

Judge Kethledge asked what common law would mean in this context. Would common law be the basis for judicial judgment as opposed to informing constitutional analysis?

Professor King responded that the common law analysis came up in connection with the Committee's study of issues raised by efforts to protect cooperators, but could not recall what difference there was between the common law and First Amendment rights of access.

Professor Beale also had some recollection of that research connected to the cooperator proposals, and thought that some courts went to the common law right of access first, before turning to the constitutional analysis. She thought that to the extent there was a body of law recognizing a common right of access it was a helpful suggestion to add a reference in the note listing things courts should be attentive to.

Judge Furman agreed it would be a good idea to mention the common law and suggested that it might be sufficient to refer to "the constitutional and/or common law guarantees of public access." The references to the First and Sixth Amendments could be deleted on the theory that there's no need to specify which provisions of the constitution are applicable. Judge Kethledge responded it might be sufficient to make sure courts do not overlook the constitutional guarantees without being specific.

Professor Beale asked whether there was agreement to add the common law right of access; if so, then it would be necessary to think about the precise wording. Judge Kethledge

responded that if a reference to the common law were added, it would be appropriate to be "agnostic" rather than instructing judges to find such a right.

Professor King reminded the Committee that the FCJC's concerns centered on the Sixth and First Amendments and the need to follow the constitutional requirements whenever there is some sort of courtroom closure. This proposed mention of the First and Sixth Amendments in the addition to the committee note was as far as the subcommittee went in responding to the FCJC's comments, which requested many references to the Sixth Amendment test throughout the note. Eliminating the references to the First and Sixth Amendments would be something the FCJC would strongly oppose. They were very focused on bringing judicial attention to the Sixth Amendment.

Professor Coquillette asked whether it would be sufficient to say any applicable statutory provision, rather than mentioning the CVRA. That would avoid any problems down the line if the CVRA were repealed, and he noted it was more likely a statute like the CVRA might be repealed than the constitution be repealed. He suggested that the same arguments made in favor of deleting the references to the First and Sixth Amendments would also favor deleting the reference to the CVRA.

Mr. Wroblewski responded by first putting the discussion in context, noting that no one was suggesting any change in the rule. The only issue under discussion concerned the note language intending to identify the considerations that judges should look at in implementing the emergency procedures. As published, the note referred to both "victims" and the First and Sixth Amendments. In light of the fact that the CVRA is very relevant to who has access to the courtroom and how they have access, the Department thought it was important to refer to the CVRA in the note as one of those considerations. The Department was not trying to determine the priority of access between friends and families, but only to make clear the CVRA should be a consideration. This particular statute is different from all others and should be mentioned within the note. The way the reporters and subcommittee have drafted the note makes it clear that the Committee is not trying to identify relative priorities, but only trying to say to judges these are things you need to consider: the constitution, the common law, statutory provisions and this one in particular—the CVRA—because it specifies access to courts in the statute.

Responding to Professor Coquillette's concern about citing a statute in the note, Professor Beale commented that other notes specify statutes, such as the Speedy Trial Act. That Act could be repealed, but that is not likely. And it is not likely that the CVRA will be repealed. Because the CVRA directly addresses the victim's right to address the court and otherwise participate in proceedings, she favored retaining the reference to it in the note (and adding the common law as well as referencing the First and Sixth Amendments). She agreed with Professor King's comment about the very strong concerns expressed by the FCJC in the public comments that the Sixth Amendment right to public access may be overlooked or not given enough attention in an emergency. The note is listing things for courts to think about, not trying to say one is more important than another. But in saying these things must be considered, the rule does not spell out exactly what kind of access must be provided. So it's pretty spare, and the question what courts

must consider has been deferred to the note. It was appropriate to identify some of the things they should consider.

Professor Coquillette said he understood that consideration, and he commented that in general the note was very well crafted and struck a good balance.

A member said she liked the language of the proposed note with the addition of any common law. Given the purpose of the note, the specificity of the First and Sixth Amendments gives helpful guidance for courts. She also liked the proposed treatment of victims and deleting the earlier general reference. The proposed language did not seem clunky or awkward.

Another member agreed that we should retain the reference to the Sixth Amendment to provide some guidance to the courts. When we talk about public access, we often think of the First Amendment, and it is useful to have a reminder to consider the Sixth Amendment. If we want to be neutral about the common law, the note could say "the constitutional guarantees of public access in the First and Sixth Amendments, the common law, and any applicable statutory provision …." That way we would not be saying there is a common law right of access.

Judge Conrad observed that the subcommittee did not identify any other constitutional or statutory provision. Since the language of the proposed note is "any applicable statutory provision, including the Crime Victims' Rights Act," he wondered whether the word "including" should be added before the reference to the First and Sixth Amendments. That would make the provisions parallel.

Professor King said she was struggling to identify other constitutional provisions that might provide a right of access. Perhaps the Eighth Amendment. Or the Due Process Clause.

Professor Beale observed that the question whether there were other plausible constitutional provisions was closely related to the question whether parallel language was appropriate. If there are no other plausible constitutional provisions, then she would not favor the parallel phrasing "including." She too was uncertain whether there were other constitutional provisions and a need to draw attention to them.

Judge Kethledge commented that if something would be a relatively novel argument, it will arise only if someone makes the argument. In that situation, there would be no concern a court would overlook the issue.

Judge Furman noted that there is an argument that the Sixth Amendment is a trial right that would not apply to various pretrial proceedings governed by Rule 62 (which makes no provision for virtual trials). Without knowing the substantive law, he thought that arguments in that context might rely on the Due Process Clause rather than the Sixth Amendment. That would be a reason to be deliberately indefinite about the constitutional guarantees rather than specifying particular provisions, and to trust judges to understand that generally means the First and/or Sixth Amendments.

Professor King summed up the proposals that had been made:

- Refer to the constitutional guarantees of public access, including those in the First and Sixth Amendments
- Omit the reference to the First and Sixth Amendments
- Retain the reference to the First and Sixth Amendments and add a reference to the common law.

She suggested turning first to the question of references to the constitution, and then to whether to add a reference to the common law.

Judge Kethledge asked for discussion on whether to omit the references to the First and Sixth Amendments. A member who had previously spoken in favor of including them acknowledged the point that the Due Process Clause might be helpful in proceedings not covered by the Sixth Amendment. And if due process protects public access, we don't want to imply we are not protecting that here.

Professor Beale commented that making the reference to constitutional provisions parallel to the phrasing regarding statutes would leave open the possibility that people would litigate and over time a body of law would develop under the Sixth Amendment, the Fifth Amendment, or otherwise.

Another member who had also spoken in favor of including the First and Sixth Amendments in the text said she too had been unaware that there are other rights of public access. She asked whether the subcommittee had researched the due process issue.

Judge Kethledge and the reporters responded that the subcommittee had not done so, though Professor Beale said that due process rights had been discussed a bit in the Rule 49.1 subcommittee. A member of that subcommittee responded that in the context of Rule 49.1 the defense did turn to a due process argument, though not on the question of public access. She agreed that whenever there is a threat to the rights of the defendant you often turn first to due process, so that might be true here as well.

Professor Beale thought there was no need to be too restrictive in what the note suggests courts think about if there was a concern that about misdirection if the note is read as saying these are the only constitutional provisions. That argument had been successful when the subcommittee knew it wanted to cite the CVRA but did not want to signal that there could be no other statute.

Judge Kethledge observed that if we have "including" referring to the statutory but not the constitutional provisions that might suggest that we are certain about identifying the constitutional provisions. So one way to go forward would be "including" referencing the First and Sixth Amendments, adding the common law, and retaining the CVRA reference. But we heard some comments about eliminating the reference. He asked if anyone wished to do so.

Mr. Wroblewski sought clarification of the earlier reference to the First and Sixth Amendments (on the first line of page 140). Professor Beale responded that reference would not be affected by any change being discussed. This portion of the note explains how the Committee

defined the term "public proceeding" in Rule 62, which are the proceedings where there must be access under the First and Sixth Amendments. Judge Kethledge agreed that we were referring to an extant body of case law, which is a little different. Professor King agreed, noting that the first reference at the top of page 140 is to what is meant by public proceedings, and the new paragraph focuses on what judges should think about when they are determining whether alternative access is reasonable. She thought, for example, one might raise an equal protection challenge to alternative access. But that would not affect what is characterized as a public proceeding. Mr. Wroblewski thanked Judge Kethledge and the reporters for that explanation.

Judge Bates suggested that the Committee look ahead to the presentation of the rule to the Standing Committee, and he suggested that it would be helpful to have done research on these issues. If there is any case law on other constitutional bases for access other than the First or Sixth Amendments, that would raise the question whether the note should limit the reference only to those amendments. But it might be unwieldy to start adding other constitutional provisions, which might be a reason to refer only to constitutional guarantees in general.

Judge Kethledge responded that in light of the language at the top of page 140, which Mr. Wroblewski had just asked about, a judge who is reading the note to (d)(1) will just have read the reference to the First and Sixth Amendments. Perhaps the judge does not need to be reminded of them again specifically three paragraphs later in the same note.

Professor King expressed reservations about deleting the references to the First and Sixth Amendments as things the judge should consider in determining reasonable alternative access. Several of the suggestions in the public comments wanted more detail and emphasis on the access guaranteed by these amendments, and the subcommittee declined to add those references in part because of the language proposed here. Judge Kethledge responded that the other reference to the First and Sixth Amendments was in a note to the same paragraph on public access, (d)(1). He returned to a point made earlier: because the law can change over time, our phrasing regarding statutory provisions allowed for others that might be added. He noted members had suggested the defense would turn to due process if they did not have other options. So a parallel treatment of the constitutional and statutory provisions might be appropriate if we were drawing attention to the constitutional provisions we knew should be considered, but trying to signal that we were not saying nothing else mattered.

Professor Beale stated she was not opposed to more research, but she was not sure more research was needed to defend an open-textured way of drawing attention to the provision we are 100% sure courts should be thinking about, but trying to signal that the door is not closed to other kinds of arguments. In response to a question from Judge Bates, she agreed this was an argument in favor of referring to constitutional guarantees of public access, <u>including</u> the First and Sixth Amendments. Judge Kethledge commented that the text might read better using parentheticals.

After clarifying that the reference to the First and Sixth Amendments at the top of page 140 would remain, a member said she was coming around to the position that the references to the First and Sixth Amendments might be confusing. Doing some quick research during the

meeting she had found multiple references that grouped together First Amendment, Due Process, and common law rights of access, all thrown together in one phrase. So it might be desirable to refer to "the constitutional right to public access, the common law, and any statutory provision" (acknowledging that the Justice Department wanted to specifically refer to the CVRA). She was not sure we would lose anything by deleting the reference to the First and Sixth Amendments since they were already in the earlier paragraph in the same note.

Judge Kethledge noted that the Committee seemed to be moving towards consensus. The question was whether to delete the references to the First and Sixth Amendments. He asked if there was a motion to do so. He suggested taking a voice vote on this issue—with those participating on Teams using the raised hand feature—and deferring the question whether to add a reference to the common law. This would be a vote on the concept.

A member asked for clarification, noting that it appeared there was a serious question whether due process might be applicable. Assuming that there might be other constitutional provisions that could provide a right of public access, she thought this would be a way to accommodate them. If we do not know whether or how many constitutional rights there might be, it would be safest not to list only two amendments since that might mislead judges.

The member and the reporters agreed there were two ways to do this: (1) delete the reference to specific amendments and refer only to constitutional guarantees or (2) refer to constitutional guarantees of public access "including the First and Sixth Amendments."

In favor of the second option, Professor Beale noted that most people have litigated public access under the First and Sixth Amendments, and there is a great deal of case law discussed in the FCJC's public comment memo. The FCJC urged that these amendments have great significance for the alternative access courts must provide. And if representatives of the press were present, she thought they would like the note to draw attention to the First Amendment. So the note could draw attention to these two amendments and recognize the potential for litigation on other issues (though they had not seen much of that). Or the note could be "short and sweet," referring simply to any constitutional guarantee of public access.

Noting that there had not been much discussion of the word "<u>any</u> constitutional guarantees," a member commented that it would be preferable to say "<u>the</u> constitutional guarantees," since there clearly are constitutional guarantees of public access.

Judge Kethledge suggested that the Committee try to reach agreement on specific language which someone then might move to adopt. In response to a member's question, he confirmed that the Committee was only considering the new paragraph proposed on page 104, not the reference in the first paragraph on that page.

Professor King stated the following option:

> When providing reasonable alternative access, courts must be mindful of the constitutional guarantees of public access….

Someone asked whether this should be "the constitutional and common law guarantees" (emphasis added). Judge Kethledge asked what that would mean, noting that he was not aware of a specific case. How sure, he asked, are we about common law guarantees? Professor Beale responded that the reporters had included the common law in their research memos when the Committee was considering protections for cooperators.

Professor King restated option 1:

> When providing reasonable alternative 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.

She then stated option 2:

> When providing reasonable alternative access, courts must be mindful of the constitutional guarantees, including the First and Sixth Amendments, the common law right of public access, and any applicable statutory provision, including the Crime Victims' Rights Act.

Judge Bates commented that rather than voting on both options, it might be simpler to vote initially on the first option, which he characterized as making just two simple changes: after "constitutional" deleting the words "First and Sixth Amendments," and adding the word "common law."

A motion to adopt option 1 was made, seconded, and passed by a vote of seven to three. Judge Kethledge observed this issue was likely to get attention at the Standing Committee meeting, and Professor Beale added that in writing it up the reporters would determine whether any additional research was needed.

A member raised a stylistic question about the note to (d)(1), which was generally in the present tense but included one verb in the past tense: "The term public proceeding was intended to capture…." Should this be the present tense, defining what the term is intended to capture? Judge Kethledge agreed that would be a good change, and asked whether a motion was necessary. Professor Beale thought not: if no one objected, it could be covered in the final vote to approve the rule and note. That would cover, as well, the strikeout of the words "including victims" on the top of page 140, which was part of the proposal to add the new paragraph the Committee just voted to adopt.

Other comments on Rule 62: No changes recommended

Professor Beale then turned to the discussion of the other comments received, which the subcommittee had considered and declined to make the changes that were proposed. She noted that these were all decisions to be made by the Committee as a whole.

Rule 62(a) – the role of the Judicial Conference

Two comments, described on page 105, addressed the decision to give the Judicial Conference the exclusive authority to declare rules emergencies. Lodging this authority in the

Judicial Conference, she noted, was an important common feature shared by the other emergency rules. The Federal Magistrate Judges Association expressed concern that the Conference would not be able to act quickly enough in different kinds of emergencies. On the other hand, the Federal Bar Association strongly supported this feature.

The subcommittee recommended no change. It understood that this issue had received serious consideration throughout the process. Professor Beale noted that the Committee had strongly favored the Judicial Conference as a single gatekeeper that would have a uniform and fairly strict approach to relaxing the ordinary and important requirements in the Federal Rules of Criminal Procedure for emergency situations. It had been persuaded that the Judicial Conference can act quickly, including through its executive committee as necessary. The Conference has the ability to gain the necessary information and respond quickly. And there is a value in placing this responsibility in the judiciary and in the Judicial Conference exclusively. So the subcommittee was comfortable with this portion of the rule as published, and it also understood that this was a common feature of all the rules going forward.

Professor Coquillette stated his agreement with Professor Beale's comments. Having served as the Standing Committee reporter for many years, he had been able to see the Judicial Conference and executive committee act quickly in in emergency situations. They're quite capable of doing it under the leadership of the Chief Justice.

Neither Judge Conrad nor any other member of the Committee wished to add anything more on this issue.

Rule 62(d)(1) – deleting or revising existing references to contemporaneous and audio access

Professor Beale turned next to two comments, both of which expressed concern about the requirement that the reasonable alternative access be "contemporaneous if feasible." The Federal Magistrate Judges Association expressed concern that saying "contemporaneous if feasible" was too weak. It might signal that contemporaneous access was not important or not necessary, and that language might actually lead to more frequent denial of the right of public access during emergencies. The group from Chicago (abbreviated as the FCJC in the memorandum) wanted to expressly provide that any limitations on public access during rules emergencies must satisfy the *Waller* test, a constitutional decision that spells out multiple criteria.

So the question for the subcommittee—and now the Committee as a whole—was whether the rule struck the right balance. The subcommittee was not persuaded that it would be appropriate for the rule or the note itself to try to spell out the constitutional analysis that courts should apply. That gets into substantive constitutional decision making, and the subcommittee felt that that was not appropriate for the rule or note. The proposal signals to courts that they need to attend to the constitutional principles applicable to public access, but does not try to spell out those provisions. As to the language "contemporaneous if feasible" and whether it might actually undercut and cause courts to provide less rather than more access, the subcommittee

recognized that we don't know what kinds of emergencies courts might be dealing with. Or what would be possible in these unknown future emergencies.

The language "contemporaneous if feasible" was intended to strike a balance, to nudge courts towards understanding that contemporary access should be afforded, though it may not be feasible or possible under all circumstances. There was some debate within the subcommittee about whether "possible" would be better than "feasible." Is it correct to signal that contemporaneous is the goal, though it may not always be possible?

The subcommittee decided to recommend no change. The word "feasible" is used elsewhere in in the notes. The questions for discussion were whether to substitute the word "possible," or—as the Federal Magistrate Judges Association suggested—better to strike it entirely. The subcommittee thought we probably got the balance right.

Professor Beale noted there were two discrete questions here. One is about whether "contemporaneous if feasible" is helpful or harmful, and the other is whether we ought to include an express reference to a particular Supreme Court case as something that the judges should be mindful of.

Judge Conrad stated the approach here was consistent with the earlier discussion. The Committee tries to avoid substantive constitutional analysis in the notes. The subcommittee did try to think of words other than feasible, but it did not come up with anything that expressed it better. That was why, at the end of the day, it recommended retaining those words.

Judge Kethledge responded that reasonable people could differ on "feasible" or "possible," and the subcommittee had talked about that.

A subcommittee member recounted her recollection of the discussion at various stages. She thought when we first discussed alternative access we came up with the idea of requiring contemporaneous alternative access from the courtroom. She thought contemporaneous access is pretty critical when we talk about a public hearing. We want victims to be able to participate in the hearing. We want family members to participate. We want the press to hear as the proceeding is occurring, not to receive a transcript, maybe weeks later. So, she recalled, we discussed contemporaneous alternative access. And then in the subcommittee we wondered if contemporaneous was always possible, and we discussed if it is possible, then is it feasible? Which would be the right modifier? She now agreed with the magistrate judges. By putting a limiter on contemporaneous, we may be signaling that that would be acceptable to provide access that is not contemporaneous. Perhaps we should strike the phrase "contemporaneous if feasible" altogether so that our rule just requires alternative access. That would leave it up to the judges to decide how to interpret what's actually feasible. If we say "contemporaneous if feasible," that would suggest the Committee thought that it would comply with the constitution and the common law right of public access, because the rule should not allow something that's unconstitutional. We'd want that to develop in the case law. So she proposed that our rule require reasonable alternative access, and we strike "contemporaneous if feasible." We would not be

watering down that important idea, though not requiring it either if the emergency is so great that it couldn't happen.

Professor Beale responded that she thought the history was slightly different. We did not have "contemporaneous" in initially. It was added because there was a strong sense that we should be signaling the importance of access being contemporaneous. (Not, for example, like the Supreme Court recordings and transcripts that are released later.) But we recognized that we couldn't possibly guarantee it would always be possible in future emergencies. So if we were going to reference it, it might be critical to have some recognition of that possibility. But the goal was to at least state the norm while recognizing it couldn't always be met. That's the debate, she said. Is it important to state the norm, even with that limitation?

Judge Kethledge wanted to retrace some of the committee's thinking. He observed that everyone prefers contemporaneous access, and no one thinks later access is better. He thought the emphasis or preference for contemporary access did seem like something that some judges could overlook and not be mindful of during an emergency. So we thought a reference to contemporaneous access was helpful, so that judges don't lose sight of it when they are making these arrangements. If we are going to have a reference to contemporaneous, then the question was would this be "if possible" or "if feasible." "Possible" is somewhat more demanding. If you construe it literally, a lot of things are possible. We could be mandating herculean efforts to have contemporaneous access, and the Committee backed away from that idea, preferring feasible or practicable: do this, if it's feasible. But if it was going to be unreasonable, then the Committee backed away. With that recap, he called for other comments on whether to retain the word "feasible" or have this phrase at all.

Mr. Wroblewski had a question for the member who had expressed support for deleting the phrase "contemporaneous if feasible." He asked if she wanted to keep the paragraph in the note that states alternative access must be contemporaneous when feasible, but take it out of the rule. Or did she want to take it out of both? He wondered where she stood on giving this nudge to the judges that it should be contemporaneous. He agreed there was universal agreement that that is the preference. He understood there may be a negative implication that could be drawn from including the words. So did she want to give the nudge in the note but not the rule, or take it out of both?

The member responded that was a good question. If we took it out of the rule, the rule would no longer suggest it considers non contemporaneous to be appropriate. But if the note still referenced contemporaneous access if feasible, she remained concerned because even suggesting that it doesn't have to be contemporaneous waters down that right. She definitely thought the rule should not include that phrase. And she noted the reporters would probably say if it's not in the rule, it's considered less binding. Judge Kethledge commented that it would be less binding.

Professor Beale stated that reasonable alternative access is a very broad idea. It just tells the judge to figure out what's reasonable. It doesn't say anything about whether it has to be contemporaneous. Judge Kethledge agreed and commented that there was a danger that a judge might think contemporaneous access is going to be a lot of trouble, and I think what I am doing

is reasonable. Professor Beale recalled a prior member who was strongly against including contemporaneous because he was afraid it wouldn't always be possible. The pushback to his argument was that it was not sufficient just to say "reasonable." On its face "reasonable" doesn't give any signal about the importance of it being contemporaneous—none. It suggests to the judge whatever you think is reasonable, so that's the issue. And the member was correct that if you demote it only to the to the committee note it will have less significance. Judges may not see it. The notes are not in the little yellow pamphlets that they print and provide to the courts.

Judge Kethledge suggested it might be inappropriate to remove the phrase from the rule, but retain a mandate for contemporaneous access in the note.

Professor Coquillette, who called himself a real believer opposed to putting anything in a note that changes the way they understand the rules, said if it's going to be important, put it in the rule. A lot of people don't see the notes, and he thought this was also much better rulemaking.

Judge Kethledge commented that as a judge he found the notes are harder to access than the text. The notes are not in the hard copies distributed to judges. He found accessing the notes tricky, and usually has his clerks do it.

Professor King commented that leaving "contemporaneous if feasible" in the rule on line 39, page 129, elevates this aspect of reasonable alternative access above other aspects of reasonable alternative access. The rule does not say visual if feasible, or anything else about reasonable alternative access except that it must be contemporaneous. It's a choice to take that aspect of what the Constitution requires and say something about it in the rule if you're concerned about singling that out, and not talking about other things as the FCJC advocated. It may also be a problem if you are concerned (as the magistrate judges were) about suggesting the possibility that it would not need to be contemporaneous. Otherwise, it is the subcommittee's recommendation that this particular aspect of reasonable alternative access should be front and center in the rule.

Judge Kethledge responded that sometimes the decision to highlight something or to call it out is not about elevating that thing above other values. Rather, it's based on a fear that judges might forget or overlook it. He thought that was driving the Committee on this issue.

But now, Professor Beale noted, adding "contemporaneous if feasible" was causing concern about negative implications. To the extent the concern is negative implications, the Committee might consider the stronger wording "contemporaneous if possible."

A member who had expressed concern about the negative implications asked whether others thought "contemporaneous if feasible" signaled that access does not have to be contemporaneous. She suggested the alternative of requiring "reasonable contemporaneous alternative access." Perhaps the rule should say that even in an emergency public access must be contemporaneous. Do we think, she asked, that in an emergency a court should be able to have hearings in which there is no contemporary public access? If that would not be feasible, perhaps the court hearing should not proceed. She found herself coming back to that position. If we can't

even have a phone line to allow people to listen in, then maybe they should not have the court hearing even if it's an emergency. Like the magistrates, she was concerned that "contemporaneous if feasible" weakens the requirement of alternative public access significantly. So she preferred either omitting that phrase or substituting "reasonable contemporaneous alternative access."

Professor Beale said that the Committee talked about different kinds of public emergencies. One possibility might involve the grid and a loss of electronic communications, but in that scenario, some members of the public could come into the courthouse and be physically present. She recalled a former member from Judge Furman's court had described that court's experience and the impossibility of providing any kind of alternative at some points: people could not come in physically because of the COVID, and there were so many technology problems that he thought that it might be just impossible. So the question for the Committee is whether there are proceedings that should go ahead when it is not possible to give any kind of alternative public access contemporaneously? Is that a real possibility based on what we know? If so, we have a hard choice. Should the rule say that the court cannot go ahead with that procedure?

Judge Furman agreed this was consistent with his recollection of the prior discussion and his own experience. He would adamantly oppose a change from "feasible" to "possible" because the latter is too restrictive. In his experience, particularly in the early days of the pandemic, they were scrambling to keep the system going and encountering all sorts of practical problems, obstacles, and technological issues. Having some degree of flexibility—mindful of the important principles at stake—was definitely necessary. There were circumstances and proceedings where it was very critical that they go forward. But situations arose where people could only listen in and not be on the video—just more practical limitations than one might think. So based on his experience he definitely supported the "if feasible" language as an important recognition of the needed flexibility.

The clerk of court liaison noted she had spoken to this issue at the last meeting when we were talking about a September 11th situation where phone lines don't work, and Internet service is not available. There will be circumstances where it is important to have a hearing if you can physically do so. For example, if someone's due to be released on bond, you don't want to delay those proceedings if you don't have to just because you don't have a phone line or the Internet so that people can listen in. The rights of the defendant are important, and we need to have the proceedings. She thought it was important to say it should be contemporaneous, but at the same time there may be limitations. So the rules should allow flexibility for judges, but not to say "I don't have to do it," but rather "I can't do it." We should provide contemporaneous public access. We need to do it. But if for some reason circumstances don't allow it, we have to have something in the rule that says it's OK for us to continue. She said 9/11 is a good example. In the Southern District of New York, you could not get to the courthouse because of its proximity to Ground Zero.

Judge Conrad commented that the emphasis on flexibility was very important to the Committee. If we are going to prioritize contemporaneous access, we should also modify it by the flexibility required during an emergency which nobody can predict.

Judge Kethledge asked if there was a motion, and a member moved to strike "contemporaneous if feasible" and instead insert the word "contemporaneous" earlier, so that (d)(1) would require the court to provide "contemporaneous reasonable alternative access." There was no second, so the motion did not go forward.

Rule 62(d)(1) – adding references to constitutional standards

After a ten minute break, Professor Beale returned to the public comments discussed on pages 109 and 110. These suggestions requested quite a lot of additional detail in the rule and/or the note: the requirement that public access allow participants to see observers, that there be no advance registration, and that there be a requirement of announcement of public access limitations unless *Waller* was satisfied. The subcommittee's response to all of these was that this level of detail is not appropriate for a rule of this nature, and there are other ways of providing it, such as CACM advisories, the Benchbook, and so forth. Maybe courts require more advice on these matters, but the subcommittee did not think that the rule was the place for it.

Judge Kethledge commented that there is a difference between a rule and an application, and these proposals started to get into applying it to particulars.

Professor Beale drew attention to one additional suggestion at the bottom of 110, barring courthouse-only access. She thought it was interesting that the supporters of contemporaneous access also wanted the right not to be required to come into the courthouse. That was based on a pandemic-type situation where coming in might risk their health. But as noted in the reporters' memo, that suggestion raised other issues. Rule 53 generally bans broadcasting, and the norm is in-person attendance. That is what these commenters wanted in other contexts: alternative access should be like the ability to walk into a courthouse. The subcommittee did not agree that type of restriction was appropriate for the rule. And it did not agree that the rule should limit how courts could navigate around the prohibition between broadcasting, or that allowing a kind of alternative in-person access would be insufficient. The subcommittee did not think that was something that would be appropriate to put in the rule.

Judge Kethledge commented that as an institutional matter the approach of the rules has been to lay out a principle or a standard. Then the rule leaves it to the District Judge to apply that rule to particular circumstances, and we expect that that District Judge will be reasonable and prudent and wise in doing so. An alternative approach, foreign to the Anglo-American tradition, is to try to codify all the particulars that a judge might face and say you shall do this, or shall not do this or that as to many particulars. The rule-based approach, as opposed to the codification approach, leaves such matters to the judge's discretion and judgment based on that judge's greater information about the situation in front of him or her. He thought these suggestions implicate that different approach.

Judge Kethledge asked if there were any comments about these particular suggestions. Hearing none, the reporters moved on.

Rule 62(d)(2) – signing on behalf of the defendant

Professor King began the discussion of comments concerning the provisions on signing or consenting on behalf of the defendant. She drew the Committee's attention to the comments on (d)(2), discussed on page 111. She read the text of the rule as it went out for public comment (page 129 of the agenda book):

> (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.

The committee note explained that the proposed rule recognizes emergency conditions may disrupt compliance with the rule that requires a defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents to ensure there's a record of the defendant's consent to this procedure. The amendment provides two options. Defense counsel may sign for the defendant if the defendant consents on the record. Without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. Both alternatives require defense counsel to do something, to sign and file the consent, or to file an affidavit attesting to the defendant's consent. It is not something the court can do with one exception. The last sentence of the rule says that if the defendant is pro se, the court may sign for the defendant.

Professor King said that's what the rule requires. Defense counsel has to file something, and that requirement generated the comments that we received. Judge Cote recommended that line 45 of the text of the rule, on page 129, be amended to read "defense counsel or the court" may sign for the defendant if the defendant consents on the record. Her concern, articulated on page 111, was that there is an adequate record if the defendant consents on the record, and defense counsel often asked the judge to add the defendant's signature to the form or expressed relief when the judge volunteered to do so. What is essential, Judge Cote argued, is that the consultation occurred, that it was knowing and voluntary, and that there is an adequate contemporaneous record of the consultation and assent. The Federal Magistrate Judges Association agreed and argued that magistrate judges often had to obtain oral consent on the record, especially at first appearances and initial presentments. The FMJA urged the committee to consider more flexibility.

One thing to keep in mind when we discuss this, Professor King said, are the various points in the rules that require a defendant to consent in writing or file something that he's

signed. So we're talking about not just the new rule that requires a written request for video conferencing of pleas and sentencing. We are also talking about existing rules that require the defendant's signature or written waiver: Rule 23 waiver of a jury, Rule 10(b)(2) waiver of appearance at arraignment, Rule 43(b)(2) consent to trial of a misdemeanor by video or in absentia, and Rule 20(a)(1) transfer of case to another district, as well as the written request for video conferencing for pleas and sentences. Those are the situations where the rules now, and the new provisions in Rule 62, would require this to happen.

The subcommittee considered the concerns raised by the commenters and it recommended no change to the published rule, in light of the benefits of having defense counsel sign instead of the judge. Those benefits were articulated by Judge Dever, who then chaired the subcommittee, and were considered at the Fall 2020 meeting. First, the written document creates a record that the defendant consented, a record beyond the transcript of whatever video proceeding is taking place. If the consent is later challenged, there is that written consent signed by defense counsel. Second, insisting on a writing from defense counsel reduces the chance that courts will pressure the defendant into consenting, or that the defendant will perceive such pressure. It ensures that the judge is not in the position of asking a defendant directly for consent but must go through defense counsel.

The subcommittee concluded that these advantages—avoiding later claims that the judge's signature did not reflect consent, ensuring that the judge was not in the position of asking defendant directly for consent but rather must go through counsel, preserving the duty of counsel to determine whether the defendant consented, and avoiding departure from existing rules unless necessary—were more important than the concerns about delay or inefficiency raised by the judges.

The subcommittee also recognized that only judges and not defense counsel seemed concerned about potential difficulties defense counsel would have or have had in providing a written consent or waiver to the court. Defense counsel suggested this rule requiring that counsel sign at the 2020 miniconference, where the practitioners said this is how we are doing this and that it was working well. No one objected then to having the counsel sign. The subcommittee considered that as well when recommending no change in this provision.

Judge Kethledge invited discussion.

One member said she had served on the original subcommittee and was part of the extensive deliberation about this provision. She said she had called a number of magistrate judges in her district and to her surprise two of them were quite open about their frustration and anger about not being able to force a defendant to go forward virtually. It was a very small sample size, but it settled the question for her. (She added later in the discussion that the judges were reacting to what she gathered they thought was an incredibly irrational decision.)

The member also noted that a signature adds a dimension of formality to the conversation that is necessary and prompts a defendant to ask questions. The consent is informed and is of a different quality. Having a client affix a signature on a piece of paper yields a different

conversation. In her view, it is the best way to achieve informed consent. If an emergency creates reasons why that can't happen, the next best thing would be for the lawyer to affix a signature to an affidavit.

The member said she agreed with NACDL's recommendation that informed consent must take place in an unhurried manner, and before a virtual proceeding. Without advocating that the Committee adopt that language, she thought the concept was extremely important. The alternative is a conversation between lawyer and client that takes place while everybody else is waiting, and then they put the consent on the record. She did not think that was appropriate at all.

The member noted, however, that she had also spoken with judges whose districts have a much larger geographic scope than hers. One judge from a very large district said that some of the detention facilities that she works with are over 200 miles away from the court, and that appointed counsel often cut corners and don't go visit. Those state and county facilities are less likely to have any form of acceptable technological access. What then tends to happen is that the informed consent takes place virtually, when the judge and others are waiting and the lawyer scrambles to have the conversation with the client. So that's an infrastructure failing, something the rules do not address. The judge was not optimistic that the infrastructure problems would be solved anytime soon, which is tragic. But in the member's view the rule should not be watered down to accommodate what is a really painful and horrific failing in many places in the country as far as providing defendants and counsel any kind of reasonable access to one another and to the justice system.

Judge Furman spoke in favor of Judge Cote's recommended change, or a variation of that recommendation. He said he shared her experience and definitely found that having the flexibility that she describes was very helpful, if not necessary, particularly in the early days of the pandemic. If it's on the record, he said, it seems far-fetched to imagine a judge overcoming a defendant's lack of consent, because the record would reveal it. Also, this rule would not prevent a judge from finding the defendant consented and directing counsel to sign for the defendant, so it is not a failsafe. As an alternative that would provide additional safeguards, he suggested allowing the court to sign if both the defendant and defense counsel consent on the record. Early in the pandemic, Judge Furman said, there were times when defense counsel was not in a position to sign something or provide it to the court immediately, so having the ability to sign things on behalf of the defendant when that was confirmed on the record and then having it filed was definitely helpful.

Judge Kethledge asked for more explanation of the logistical difficulty, assuming defense counsel is able to consult with the defendant—as mandated in another provision—and there is going to be some remote proceeding in which the defendant is participating, so the defendant can consent on the record to counsel signing. Is the concern about the additional step that counsel then has to submit electronically the document with that signature? That counsel is not going to be able to submit? There is no particular time deadline. If there isn't a time deadline, then what really is the insuperable obstacle to this additional step of counsel electronically submitting something?

Judge Furman explained that there are circumstances in which the court should have the document at the time of the proceeding and be able to say on the record, "I've now fixed the defendant's signature and we'll file it as part of the record," as opposed to expecting defense counsel to follow up days or weeks later. But given the flexibility in the rule, he said, he didn't feel as strongly about this as he did about another comment Judge Cote made that would be coming up later in the meeting.

Mr. Wroblewski stated that one of the reasons that the Department of Justice had not weighed in strongly on this issue was because in their experience the most important thing is actually the colloquy. It's not the actual piece of paper. The paper without the colloquy is vulnerable to attack. The case law suggests this is pretty ministerial. The most important part is the part that the Department asked for in the note where it mentions the colloquy.

Judge Bates made what he called a broader observation. A big place where this consent is needed is video conferencing. In his district in most cases going to a plea there is a provision in the plea agreement, signed by the defendant, consenting to video conferencing. This will not be something that comes up at the moment of the entry of the plea. It's something that will occur in the context of entering the plea agreement and will be signed by the defendant. And that's what we'll see for the most part. The plea agreement basically says, "I consent to plea and sentencing occurring by video conference."

Judge Furman said that was not the procedure in his district. Rather, they use a separate waiver form that that the defendant executes.

Judge Bates asked if the signed consent was in the plea agreement, wouldn't that satisfy the rule? It is a writing signed by the defendant.

Judge Kethledge responded that the defendant would have to consent on the record in a colloquy that he's OK with the signature.

Professor King noted that the topic of consent for videoconferencing is also addressed later in the reporters' memo, in connection with the written request for waiver of presence and consent to video conferencing for pleas and sentencing. Section (d)(2) is more general—it is not just for video conferencing. She thought a signed plea agreement would satisfy (d)(2) for some of the other waivers. But the defendant has to request video conferencing for pleas and sentencing. So maybe not if the defendant has to request it. The plea agreement may not satisfy it.

Judge Bates responded that "maybe not" raised concerns if the Department of Justice is going to be applying this rule every day in determining what to enter into a plea agreement. They could word it to say that defendant has requested. Professor King agreed.

Judge Kethledge suggested shifting back to a focus on this (d)(2) requirement that counsel for defendant do the signing rather than the court, noting the conversation about video pleas would be coming up later in the discussion.

Judge Bates suggested you're never going to reach the question of whether defense counsel or the court signs, because in all those cases there will be a signature by the defendant already in the plea agreement. Judge Kethledge said that sounded right. But the question is not whether that satisfies the signature requirement. It's whether it satisfies the request requirement, a different question coming up later. He asked for more comments on (d)(2), and comments about allowing the judge to sign for the defendant rather than counsel.

A member said she was having a very difficult time understanding under what circumstance a judge could have fixed a signature to a document and a defense attorney could not. When would it ever arise, unless maybe there are initial proceedings or initial appearances where some courts don't require defense attorneys to appear?

Mr. Wroblewski commented that his memory of the early part of the pandemic was that the defense attorney is part of the proceeding, but not physically present, and the defendant is part of the preceding but not physically present. The judge may be sitting in her courtroom watching all of this, and everybody consents on video. But there needs to be a piece of paper and Judge Cote wants to pull out the piece of paper, sign on behalf of the defendant, file it, and it's all done, as opposed to the defense attorney finding the piece of paper, signing it, scanning it, emailing it, or filing it.

The member then asked whether to get to the proceeding in the first instance, doesn't the defendant have to request to proceed remotely?

Judge Kethledge responded that the request requirement applies only to pleas and sentencing. But (d)(2) applies more broadly to instances where a defendant must sign.

Another member added that there are many, many times where the defendant can just consent on the record with no writing, and there are only a few instances where there's a writing. She thought that in a lot of those cases there wouldn't be a court hearing necessarily on the spur of the moment. The waiver of a jury trial seems like something defense attorneys should be able to discuss with their client in advance of appearing for the bench trial and actually sign that. There aren't many that would be spur of the moment. A lot of these documents are available online as PDFs from the Administrative Office or from the Department of Justice. Lawyers had all gotten used to putting our electronic signatures on the form. The defense attorneys are as able to do so as the judges working from their homes. We can download the form, put our signature on it, and file it right then with the court through ECF, so it's not as cumbersome as it used to be where you might have to scan something and copy it.

Keeping the protection that the defense attorney signs is an important protection, she continued. It does avoid some of the problems that were discussed earlier about the appearance that the judge might be somehow interfering with the attorney-client relationship. There aren't that many instances where a form would need to be signed in the courtroom—a Rule 20 transfer or a Rule 5 where the defendant's being prosecuted in a different district and they're agreeing that they want to be kept in this district. But that's an important moment, and the attorney should have talked to the client about that in advance. They're going to plead guilty if they stay in this

district and there's a form they have to sign. She thought the attorney would want to have that form in front of them when they talked to the client even if it's just by phone in the court right beforehand. Again, 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. She agreed with the earlier comments that we shouldn't adopt this change.

Another member offered an example of a scenario she had seen where a lawyer couldn't sign for the defendant. The lawyer didn't have power or electricity to be able to file but could pick up the phone and attend the phone conference and appear in court.

A different member responded that even in that scenario, the judge could grant 10 or 14 days to file the piece of paper. He said he agreed 100% that these protections are important, and he didn't see any gains in efficiency that would countervail them.

Judge Kethledge asked if anyone cared to make a motion as to this suggestion to change (d)(2). Hearing none, he moved on to the next issue—consultation with counsel.

Rule 62(e)(1)

Professor King introduced this issue on page 114 of the reporters' memo and the three comments received. First, the Federal Magistrate Judges Association commented that by adding the requirement to provide an opportunity for confidential consultation for proceedings that already permit videoconferencing under Rules 5, 10, 40, and 43, draft Rule 62 implies that the obligation to provide an opportunity to consult does not exist in non-emergency times. Second, Judge Cote has suggested that the requirement for consultation between counsel and client be changed so that it doesn't require confidential consultation before and during but only requires consultation either before or during, but not both. The concern Judge Cote raised was that during the pandemic it has been difficult for the defendant and defense counsel to arrange for that consultation, and when an adequate opportunity for consultation is provided either before *or* during that should be sufficient. Finally, NACDL supported retaining the dual consultation requirement before and during a proceeding, but specified that the adequate opportunity should be defined to include an unhurried and confidential meeting between the accused and counsel that occurs well before and whenever feasible not on the same day as the preceding itself.

Professor King noted that the subcommittee agreed from the beginning that providing consultation before and during the proceeding was important, this Committee agreed, and the Standing Committee had accepted it. The subcommittee discussed Judge Cote's request to change it and recognized that one consultation would be potentially more efficient, as requiring an opportunity to consult both before and during might mean delay. But the subcommittee didn't think that any difficulty in providing these opportunities justified the change given the important interest at stake. The subcommittee also rejected NACDL's request for more detail about consultation. Although there was sympathy on the subcommittee for this idea, the subcommittee believed judges should have the flexibility to adapt consultation opportunities to varying circumstances.

Professor King asked if anyone shared the concern by the Federal Magistrate Judges Association that adding the consultation requirement for Rules 5, 10, 40, and 43(b) when emergency conditions impair that consultation, implies that it doesn't exist in non-emergency times. There was no response.

Judge Kethledge asked for comments as to whether we ought to require only consultation before or during as opposed to before and during. At the mini-conference we heard an awful lot about problems counsel were having consulting with their clients, and the Committee felt very strongly that that was one of the ways in which the emergency had eroded an important safeguard.

Judge Furman said he was not sure he agreed with his colleague Judge Cote, stating he believed this was important, and wasn't sure that as a practical matter it is a serious obstacle. The experience throughout the pandemic and especially in the beginning is that communication between counsel and defendants who were detained in particular was very difficult and oftentimes impossible to arrange before a proceeding. What they did in those circumstances was not start the proceeding until the lawyer had an opportunity to talk with the client before the proceeding began. That would satisfy the before requirement, assuming that that was adequate to whatever the proceeding was. So in that sense it is not a serious problem, and given the importance of it he thought we should leave the rule as it is.

Judge Kethledge asked if anyone had concerns about the current text of the rule on this point. Hearing none, Judge Kethledge moved to the next suggestion.

Rule 62(e)(3)(B) – requiring a written request from the defendant for video pleas or sentencing proceedings

Professor King introduced the next issue, concerning the written request from the defendant in 62(e)(3)(B), mentioned during the earlier discussion of (d)(2). Judge Cote and Judge Hornak requested changes in this aspect of the rule.

Judge Cote recommended the written request requirement be omitted and urged that if the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by video conferencing then that should be enough. She argued there was no need for a written request before the proceeding, and that the rule should allow the court to sign for the defendant. Professor King noted that the Committee had discussed allowing counsel but not the court sign for the defendant earlier in connection with (d)(2). Judge Cote said even if the rule envisions that defense counsel may sign the written request on behalf of the defendant (which it does), defense counsel may in many emergencies find it difficult to create the writing and transmit it. These issues, Professor King said, we already covered.

Judge Hornak also argued that this was a problem. On page 117, the next to last full paragraph at the end, he concluded that allowing counsel to sign the required writing would not

solve the problem that he identified because the existence of the emergency would almost always impede counsel's access.

Both of these judges raised concerns about the written request requirement, not just on the basis that counsel would not have access to the client, but also that counsel might find it difficult to get that written request filed with the court.

The subcommittee considered the other situations in which counsel signing for the defendant was required and decided that this situation—plea and sentencing by video conferencing—was just as significant as those, and saw no reason to come up with a different solution here than for the other waivers (trial jury and others) that we reviewed earlier. So the subcommittee rejected these requests to scale back on the requirement that the request by the defendant be written and signed.

Judge Kethledge stated that this suggestion raises a concern about the writing requirement here and the ability of counsel to sign and then transmit a writing in which this request would be made. We just covered that same logistical concern. He suggested the Committee set that to one side for the moment, and focus on the new concern as to this provision in particular, which is that the defendant request that the plea or sentencing proceeding be remote.

He emphasized that conducting pleas and sentencing remotely was the biggest concern that the Committee had about these remote proceedings. It was the consensus of the Committee that it is truly a last resort to sentence a man to prison for 20 years through an iPad. The Committee's concern was that the defendant not feel at all pressured to proceed with these exceptionally important proceedings by video, unless the defendant wants to do that, and that there not be a dialogue with the judge, where the person who is going to sentence the defendant proposes that the proceeding be conducted in a certain manner. Our 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 that defendant otherwise would not agree. The issue here was whether the Committee thought it was important that the defendant must initiate, must make the request or whether that's something that could be initiated by the judge. That was the issue on the table. We received two very thoughtful comments. He asked for additional comments.

Judge Bates began by noting that it is not always going to be a question whether it's the defendant initiating or the court initiating. It's most likely going to be initiated either by the prosecutor or the defense counsel, not by the defendant. Is the contemplation really that it has to be an original idea to the defendant? He thought that was never going to occur. Does request in writing mean something different than consents?

The reporters responded that it is different. As the note states, "the substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence."

Judge Bates asked if it has to be the defendant who initiated thinking of it. Can it come initially from the prosecutor, saying to the defense counsel, "Let's do this by video" and counsel says to the defendant, "I'm gonna suggest that we do this by video, is that alright with you?"

Judge Kethledge thought it was different, because it has to come from the defendant. Request is different than consent.

Judge Bates asked then what is the judge looking for? Is the judge going to say, "Miss Jones, is this your idea? Are you requesting it?"

Judge Kethledge responded that it has to be a document submitted to the court, saying, "I want my proceeding to be remote." "I request," or "I want" this, rather than just "I agree." Consent can be just going along with something, as opposed to wanting it. That is the distinction here. The defendant has to say, "I want this," not the court, saying "Do you have a problem with this?"

A member stated that he conceived of this requirement as trying to build into the system that the default does not become video hearings. Two years into the CARES Act it would be fair to say that video change of pleas has become the default. He is seeing that a defendant will file a motion saying that I've reached an agreement and want to change a plea. The next thing is an order from the court setting a video conference change of plea and making the usual CARES Act finding, and then asking the defendant to say later informed consent. This rule would require the defendant at the beginning to say "I'm the one who wants to have this by video." This whole mechanism would not start until that happens. If you believe that the default should be in person, then this serves a useful function.

Mr. Wroblewski asked if the reporters had the same understanding, that it needs to be at the beginning? Judge Hornak also says that in his comment. He says the requirement of an advanced writing signed by the defendant. Mr. Wroblewski did not read the rule that way. He read the rule to allow, as Judge Bates said, if the two lawyers get together and they have an agreement, the defense lawyer goes and talks her client and the client says, "Yeah, that's what I want to do." Then they set the proceeding for video. They all meet by video proceeding and the defendant's lawyer gets up and says this is the way we want to proceed. There is a writing that reflects that and does not have to be filed in advance.

A different member commented she agreed with the earlier member who spoke in favor of the requirement. With the really vast improvements in technology, we'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. It's important in reading this to pull back and read the very beginning of that section under subsection 3, where it says for a felony proceeding under Rule 11 or 32, a court may use video conferencing only if, in addition to the requirements of (2)(B), and then it sets out three things. The first is the chief judge's finding that this is emergency. Second, the defendant, after consulting with counsel, requests in writing signed by the defendant that the proceeding be conducted by video conferencing. And

third, the court finds that further delay in the particular case would cause serious harm to the interests of justice. Those three subdivisions have to be read together, and they signal the importance of the presumption these proceedings be done in person unless all of the findings are met.

The member added that she 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.

Judge Kethledge said that the defendant has to come to the court with a written request to do this remotely. There's no waiting period. It's not that the request has to come in a certain period of time beforehand. But you can't start a sentencing hearing and then say "OK, do you agree with this? You'll file something afterward." That probably doesn't work.

The member continued that in practice, unless the court has that consent or that request in writing, the court doesn't even schedule the change of plea hearing.

Judge Furman said that comment gets to the heart of his concern, and he felt more strongly about this issue. It's a question of timing and involves the difficulties of arranging for times for counsel to confer with the client in advance of a proceeding. It was often easier to schedule a court proceeding, and then provide time at the outset of the proceeding for counsel to confer with the defendant. He said he was not a big fan of request versus consent. We allow defendants to waive all sorts of rights as long as it is knowing and voluntary. We allow them to waive fundamental rights. The heart of the matter is the timing. He urged the Committee to allow for scheduling the plea proceeding without a written request in advance. At the outset of the proceeding, the writing can be satisfied whether it's called consent or request. That's just a function of what the form says.

Judge Furman proposed that the note be amended to state that as long as the defendant has had an opportunity to consult with counsel, the writing requirement can be satisfied at the outset of a proceeding. It should be at the very beginning, making it clear that the proceeding would not go forward without a request. There were scenarios in the pandemic where it was very difficult to make these arrangements in advance of scheduling. He didn't read the rule to speak to the timing question and thought what he proposed was consistent with the language of the rule itself. He proposed making it clearer in the note that the written request may be signed at the outset of the proceeding itself.

Judge Kethledge said that if a court scheduled something called a plea hearing or a sentencing hearing and the guy hasn't asked for it yet, that would seem to violate what this currently says.

Judge Furman said that as a practical matter the way this often works is counsel speak to one another. They say, "We're prepared to plead," "We're ready to plead," or "We need to plead now." There are circumstances where it's time sensitive and needs to happen quickly. The defendant is prepared to do it remotely, but there is not an ability for defense counsel to confer with the defendant in advance to get the writing signed and filed. Why should a court be prohibited from proceeding if at the outset of the proceeding defense counsel has an adequate opportunity to confer with the defendant and after that opportunity either the defendant or counsel signs a thing that says, "I'm requesting to proceed with this proceeding remotely"? It seemed to him that there are enough circumstances that could arise that we should give that level of flexibility. He stated that before the pandemic the Second Circuit had held that a defendant can actually consent to remote sentencing, and it doesn't need to be in writing, as long as the consent is knowing and voluntary and on the record. It is *United States v. Salim*, where there was a consent through counsel.

Judge Kethledge said Judge Furman's hypothetical involved a discussion between prosecution and defense counsel. What the Committee was concerned about when it came up with this language is the discussion consultation between the *judge* and defense counsel. Something's underway and the judge says "Well, you know why don't we just proceed with the sentencing right now remotely? So why don't you talk to your client for a moment?" Now the client has just heard the judge say this. The judge has put this on the table. The Committee's concern has been that defendant will feel pressured to do what the judge just proposed in a hearing that began about something else. That's the concern.

Professor King asked Judge Furman about the scenario that concerned him. Is it when counsel have met and decided this would be a good idea, then defense counsel discusses it with the client, and the defendant says "Yeah, I want to request this?"

Judge Furman said that was not the scenario. His suggestion was to make clear that the written request can be executed at the outset of the proceeding. What happened very often is defense counsel had no opportunity to speak to his client in advance of the plea proceeding itself. These are detained defendants with practical limitations on communication. They couldn't speak before the proceeding itself. But the court was able to schedule a proceeding. So what would happen in those circumstances is counsel would confer, and say "We're ready to plead, our client is prepared to plead, but I haven't had an opportunity to speak to him about whether he's willing to proceed remotely. I'm quite sure he'll consent but I haven't had an opportunity to confer with him." The only way to confer is to do that at the outset of the proceeding before the proceeding begins. They speak, the defendant says, "Yes, I do want to proceed remotely" with the plea or with the sentencing or whatever.

Professor King said it seemed to her that the rule already allows the written request to be executed after the breakout room and defense counsel could file it then to comply with (d)(2), so no change is needed.

Judge Furman responded he is proposing adding to the note to make clear that the rule does permit that. A judge could read the rule to say it needs to be a written request and that we can't schedule the proceeding unless we have the written request in hand. We should have the flexibility to schedule the proceeding because it's often the proceeding that enables counsel to confer with the defendant to make that request.

A member asked Judge Furman what triggered the court setting a guilty plea hearing.

Judge Furman responded there were many scenarios where the only way of going forward was to do it remotely and the defense lawyer and client had spoken about one thing, but hadn't had an opportunity to speak about the other. There were plenty of scenarios in which the conversation about proceeding remotely happened as part of the proceeding itself.

Judge Kethledge asked in those instances, what was the proceeding on the calendar? What's it called? What brings everyone together?

Judge Furman responded that when he schedules something in a criminal case, he doesn't necessarily call it anything—just says parties shall appear at X date and that's it. What happens in the course of the proceeding is the defendant says "I'm prepared to plead," or "Let's proceed directly to sentencing."

Judge Kethledge asked, so a defendant goes to a hearing that doesn't have a particular agenda and counsel can confer and decide if they want to do something, but defense counsel can't consult with the defendant?

Judge Furman responded he was not advocating getting rid of consultation between client and counsel. But we should allow flexibility so that the consultation, the request, and the proceeding, are all done essentially as part of one scheduled appearance, because in his experience the consultation between counsel and the defendant was *enabled* by the court proceeding.

Another member offered his experience. We'll have a status conference, he explained. For the status conference the lawyer may not have had a chance to speak to this client about whether they agree to proceeding by video. But the lawyers have communicated with the courtroom clerk, saying "We want to talk about a possible disposition." So, it is set for a status conference and before the judge joins, defense counsel will have time with his client alone, to discuss the matter. Then he will come out, and the lawyer will say, "I'm here with so and so who has agreed to appear via video," and then he will confirm that fact. Later on, at least in this member's court, typically the public defender and her AUSA will reach out to the courtroom deputy, and say "We believe we've reached the resolution. We'd like to set this for a change of plea." And again, lawyer and client have time alone beforehand, because in the situation where the defendant is two hours away, and they haven't signed the waiver of video, they will talk

beforehand and confirm that it's OK to do it via video. Then the court will confirm it at the change of plea, and ask defense counsel if counsel can get it signed and put it on the docket at some point thereafter. Those are the scenarios. That's why this member agreed with Judge Furman that there needs to be that flexibility to do it at the time of the hearing because at least during the height of the pandemic, most defense counsel did not necessarily have the time to discuss with their client that specific issue beforehand.

Judge Kethledge said his sense of the current language was that you cannot have a remote sentencing or plea until the court has the request in writing. You can't actually take that step of saying, "Here's your sentence," unless the court has that. It can't be something after the fact.

After a break for lunch, Judge Kethledge continued the discussion on whether (e)(3)(B) or the note needs to be modified, specifically whether a court may schedule a remote plea or sentencing proceeding before the court has in hand a writing in which defendant requests the remote plea or sentencing. As this is currently written, Judge Kethledge stated, the court may use video conferencing only if, among other things, the defendant after consulting with counsel requests in a writing signed by the defendant that the preceding be conducted by video conferencing. He said that he would read that to mean that you cannot start something that is understood to be a plea or sentencing proceeding until the court has in hand that written request after consultation with counsel. As a practical matter, that will probably prevent a court from on the fly in a status conference saying, "Hey, why don't we just go ahead and enter a plea?" Logistically it may well be hard to do that. And that's by design.

If a judge broaches the question of a remote plea or sentencing, with the defendant observing, during for example a status conference, Judge Kethledge said the concern was that the defendant will feel pressured to go ahead and do that. Frankly, he said, there are many judges who want to do a lot of remote pleas and sentencings. Before the pandemic, the Committee got requests almost every year from judges who wanted to do this for reasons of their own. So that's the concern: if the defendant hears it from the judge first—and then that same day, or after a break, consents, with the document to be filed later—the defendant will have been pressured to plead guilty or to proceed with a sentencing, which are really the two most important things that happen in a United States District Court. He requested comments from the defense lawyers on the Committee, who had not yet spoken on this issue.

A defense member strongly supported the idea that the defendants should be in court for a plea and sentencing. It is an incredibly important moment and the rules require the defendant be present in the courtroom. During the pandemic, we've gotten used to maybe cutting some corners, but that doesn't mean that's the right thing to do. A new rule should try to get back to the formality and the dignity of what happens during a plea and a sentencing. This rule reaches the right balance. It does allow video conferencing, but the court has to make three different findings. Only one is related to the defendant's request and it's really protecting an important constitutional right of the defendant to be represented by counsel and to have counsel advise them of the plea.

If there are districts where the defendant and the defense attorney cannot talk before the plea, the member continued, so the defense attorney is not able to ask, "Do you consent and can I file, can I sign this request in writing and file it with the court?", then the member was concerned that they're also not talking about the plea language itself. That is a crisis, and the solution shouldn't be that we go forward and have the plea anyway after giving the defense counsel some time on video to talk to their client. The solution should be that we can't have a plea or sentencing in that kind of situation, and we need the court's help to make sure that defense attorneys can talk to their clients where they're in custody.

If a client is detained in a place that doesn't have phone access, the member said, we need the system to jump in and say, "This is not adequate, we can't have adequate representation, and the court proceedings cannot go forward when the defense counsel can't talk to their clients." This is a really important protection. We know from the pandemic that there have been all these structural barriers and there have been problems. But we don't want to write into a rule a belief that those barriers can exist, or that it's constitutional or appropriate to hold court proceedings when those barriers exist. We want the rule to protect the fundamental rights that we all want to see protected for the defendant and for the process. It's an important rule that we've written.

The member read the "request in writing" to mean in advance, so that the writing has to be on the docket before the court can set the plea hearing. It's a protection, so that if a defendant really wants to be in person, and the judges don't want to have in person hearings, there's a stalemate where we just say, "We don't want to have this by video so we're requesting an in person plea," and it's docketed and noted and maybe has to be appealed if that's where we are, but it's important.

She responded to the earlier question about how the plea gets set. She said that in her district if the defense wants to enter a change of plea, the defense will email the courtroom deputy, copying the prosecutor and the pretrial service officer, and say "we're ready in this case to set a change of plea." And the court will set a change of plea. So this rule would be a change for us, where we would have to say, "and I'm filing the written request to have this be by video" or the presumption would be this is a change of plea that's happening in person. That is a presumption for her district now, as we move out of the pandemic that if we set a change of plea, it's in person.

Another defense member said she agreed with everything that the other member just said. As Judge Kethledge mentioned earlier, the Committee has received requests from judges to amend the rules to allow routine video proceedings for the court's convenience, and she has always spoken against that. That process of taking a plea or sentencing, with a defendant being in the courtroom, being present, we've all known of situations where defendants have changed their minds, where circumstances occur, and the defendant is once again reminded of his protections from the court. And all of that being in person. You just cannot capture that on video. She was concerned that the default is moving toward video and we will lose a great deal of that protection for our process, not just for the defendant, who has a right to have counsel representing him or her, but also for the public. It is very important, particularly for those two proceedings, that this

has to be brought up by the defendant. The defendant has to understand he has a right to be there in person, what that means, and that he's giving that up to proceed.

The member explained that the situation early on in the pandemic was more difficult. She said she comes from a rural area where defendants are housed in different states with different rules as to where and how counsel can visit them. It eventually got worked out, after a lot of communication between the courts, between the Marshals Service, even relocating defendants to other prison locations, so that they could have better communications with their attorneys. Functionally how it worked was if one of her clients or a client of another attorney in her district wanted to go forward, because they were facing 6 months, 8 months or whatever and needed to that proceeding to go forward, they entered into a plea agreement through discussions with the government, and they signed that plea agreement. Unless it's signed there's not a plea hearing set. At the moment that the government would file a motion to schedule a guilty plea based on a written plea agreement with the defendant's signature on that plea agreement, defense counsel would file a motion for that plea hearing to be held by video. So that's how the request has worked in her district, and it had not seemed to be a significant impediment.

She concluded by saying that when this first began she was CJA representative for the district, and there was considerable concern among CJA panel members about being pressured by the courts to get their clients in the system, to get them pled, and out of whatever jail system they were in. The attorneys themselves felt that pressure. So having that barrier between the client and the court is a very important protection. She supported not making any changes to the rule as it is currently written.

A third defense member said she echoed what the others have said but wanted to pick up on the concept of pressure. She spoke of the pressure that a defendant feels when he is consulting with counsel in the moments that have been carved out for him or her, knowing that everybody's waiting. To be able to focus on what your lawyer is explaining to you as far as what you're giving up in a plea, that is just not adequate. That pressure, knowing that everybody wants to move this forward is eliminating a really meaningful relationship between the attorney and the client. She said she felt very strongly that establishing some distance between the request in writing and the plea hearing was really important to give the attorney the opportunity to explain to the client what it is the client is about to give up. Because those rights are substantial.

In her district (she said she was basing her comments on what her friends had told her because she had not had anybody who was incarcerated and agreed to this), the government files a change of plea motion, so there's a motion on the docket with a signed plea agreement in hand. So she didn't see a reason, if the defense counsel can provide the government with a signed plea agreement, why there wouldn't easily be an opportunity to request in writing that the process take place virtually.

A judge member added that the committee note emphasizes the seriousness of this and its last resort status. The proposed note says that 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 three prerequisites for using video conference are the chief judge's declaration, the written request, and the finding. Then the note goes on to say that "The defendant must request in writing that the proceeding be conducted by video conferencing after consultation with counsel. The substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence." The member said those aren't adding to the words of the text other than explaining both its uniqueness, its intended rare use, and the prerequisites that must be done before any hearing gets started. It all supports no change to the language.

Judge Furman said he agreed with most of what the defense counsel said about the importance of physical presence for pleas and sentencings and that this should be a last resort. He said he was not advocating for change of the rule language itself. He wouldn't read the current proposal to preclude what he is suggesting it allows. Namely, at the outset of that proceeding, as long as there was an opportunity for the defendant and counsel to go in a breakout room, speak to one another, then come back into the proceeding, then defense counsel, with the defendant's consent on the record, could say "I'm now signing a written request to proceed with this proceeding remotely." He thought the rule permits that.

Judge Kethledge asked if Judge Furman was envisioning that a request in writing would be filed.

Judge Furman responded that plea agreements are not filed in his district on the docket, they're retained by the government. He did envision that it would be filed, but that goes back to the timing issues discussed before. The rule doesn't require that it be filed in advance of the proceeding. It doesn't say anything about the timing. In his scenario, defense counsel would sign it, and then at some point within 10 days, 14 days, who knows, they would file that on the docket, so the record would be complete. In other words, the writing is done at the time. He wouldn't read the current rule to preclude that. To suggest that the rule shouldn't be changed to allow that, he thought, was reading into the rule things that are not there. The rule ought to be clear.

Judge Kethledge said that if the rule says defendant requests in writing, isn't the implication that the court must have the writing? Request is a transitive verb, you're making a request to an entity.

Judge Furman asked if the judge should not be permitted to proceed if, in the video proceeding, counsel confers with the client and then comes back to the public part of the video and says, "I'm now signing the written request, representing on the record that I've signed the written request." Then the judge says, "OK, file that within the next 3 days." The requirements of the rule have been satisfied. The rule doesn't talk about filing. It doesn't talk about in "advance" or "before" the thing is scheduled that it be signed.

Judge Kethledge said it was an interesting question worth talking about because it affects our respective understandings of whether any change is needed. He said he didn't think one makes a request of a court in writing unless one submits the writing to the court. It's not enough to say, "Judge, I'm writing this down and let's just go ahead." For a felony proceeding to

proceed by video conference, the defendant must request it in writing. He said if he got a case raising this issue, his interpretation would be that you request something in writing, not by writing it at home, not by calling the judge and saying, "Judge, I'm writing a request here." The whole point of a written request is the court must get the request and have the request in writing rather than somebody telling the judge verbally, "I'm writing a request."

Judge Furman responded that counsel says, "I'm writing the request. Here's the written request. I'm showing it to you on the screen." It's not in the judge's hands. It's not filed on the docket. Yet is that a written request to the court? It is.

Judge Bates asked whether the scenario is one in which they are going into a breakout room to consult beforehand. If so, that means they are probably not in the same location. So there is actually not going to be the signature on a written request at the time because the defendant isn't with the defense counsel.

Judge Furman responded it would have to be a (d)(2) signature by counsel. He said he agreed about the importance of it not being at the pressure of the court. But what about the following hypothetical: Counsel says, "My client is prepared to plead, but I haven't had an opportunity to discuss proceeding remotely." I say, "OK, why don't you go into a breakout room and discuss that, and under the rule if you make a request then I have authority to proceed." Is that then impermissible because as the judge I have suggested the idea?

Judge Kethledge responded it was impermissible.

Judge Furman asked is it impermissible forever thereafter, because I raised it?

Judge Kethledge responded that he wouldn't say that. That scenario is not the one Committee has been worried about. It's not where counsel comes to the court and says, "Hey, I've talked to my guy separately and we want to go ahead and just do a plea." The concern is where the judge says, "Well, why don't we just go ahead with the plea now?" He noted that his knowledge was limited because he did not conduct these proceedings himself. But he thought if the rule allows for post hoc filing of the writing, it seems we're opening the door to the judge bringing this up and saying, "Why don't you do this, OK? Why don't we do this, go off and talk." And then, "OK your honor, I'll submit it afterwards." It opens the door to that, whereas if the court cannot commence a plea or sentencing hearing without the writing already, the theory is that it creates a space for that consultation to happen in a more meaningful fashion, likely without the court having in the last 15 minutes told or implied—or at least the defendant perceiving that the court has signaled—that the court wants this to happen. It's likely to be a less pressured and more meaningful consultation. It's a kind of prophylactic device in that respect.

Judge Furman agreed that should be the preference and said he had suggested some note language that would make that clear. Let's say in general that this should occur before the proceeding is even scheduled. The rule right now does not state a preference that it happens in advance unless you read "request" in the way Judge Kethledge was suggesting, which doesn't necessarily require that reading. We should (1) make clear that it can happen as part of the same proceeding, and (2) make clear the preference that it happen in advance.

Judge Furman said he was not that troubled if defense counsel says, "My guy is ready to plead but we haven't had an opportunity to discuss proceeding remotely," and I say, "OK, Why don't you go in a breakout room. If he's prepared to make the request, I'm prepared to proceed." This is where the colloquy is the more important thing. I would say "You understand you have a right to do this in person. You understand that you know you've had an opportunity to consult your lawyer. You've consulted with your lawyer. After doing that is it your desire to proceed?" We let people waive the right to a jury trial and plead guilty on the record without doing that in writing. We let them waive all sorts of rights.

Judge Kethledge responded that they waive those rights in person.

Judge Furman said not always. In the case of jury waivers, they are not in person.

Judge Kethledge said this is a departure from current practice.

Judge Bates asked if the rules currently prohibit a judge from going forward after a colloquy in which the defendant waives the right to jury trial with the signed waiver of the jury trial being filed by the end of the day or the next day. He thought that happens. And why is this of so much greater concern in terms of getting that filed before the proceeding is over?

Judge Kethledge said that once a person enters a guilty plea, he's guilty. But if he waives the jury trial, he has a trial in front of Judge Bates. The stakes are just higher if you plead guilty. We've all seen the pleader's remorse cases where they're trying to get out of that. And if all of this happens within an hour of lunch and then the next morning, the defendant thinks "I made a big mistake." It started as a status conference and he walked out guilty. That's the concern. Particularly if the judge was suggesting, "Hey? Why don't you plead guilty? Why don't you make yourself guilty before you leave here today?"

The Committee, Judge Kethledge continued, has not been worried about judges like Jesse Furman and John Bates. 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, Judge Kethledge commented, 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.

Another member posed a question for Judge Furman. She said she was having difficulty envisioning how often these impromptu change of plea proceedings would come up. Is it in instances where the defendant pleads to the sheet, where there's no written plea agreement?

Judge Furman said he didn't want to suggest that the scenario where everybody shows up and no one realizes until that moment that it's a plea happens with frequency. The more common scenario is where there's been advanced discussion, some opportunity for defense counsel to speak to the defendant, and they're able to say "I'm prepared to plead guilty." The scenario he was describing, which happened with some regularity, is when counsel comes to a conference and says, "I've had an opportunity to speak to my client. My client is prepared to plead guilty, but I didn't have an opportunity to talk about whether to proceed remotely." He didn't know whether this occurred because counsel neglected to raise the question of proceeding remotely, or because it was in the beginning of the pandemic, or because the opportunity to confer wasn't there, or because the conversation between the defendant and counsel was, "If the government will agree to this then I'm prepared to plead guilty," and they never got to the practicalities of what the proceeding would look like. He was not privy to the reasons why it occurred, but that scenario arose with some regularity.

You might say it shouldn't go forward, Judge Furman continued, that we should wait. But there are many circumstances where there's some time sensitivity to getting a plea done, and we are more often talking about pleas than sentencings. And at least in his district because of the scarcity of resources of court conference time on video and video conferencing or even telephone conferencing between counsel and defendant, if it doesn't happen when you're on the calendar, you have an opportunity to bring everybody together, you have an opportunity to have the defendant speak with counsel before it, if you don't do it all at that one moment, it's going to be another three weeks before you can reassemble and be prepared to go.

A member said she'd never heard of a status conference that turned into a guilty plea.

Judge Furman repeated that was not the scenario. He said he was surprised that defense counsel isn't more supportive of this and would guess if he called their federal defender's office that they would support what he was saying precisely for the reasons that he had articulated—namely that they were many scenarios in which the opportunity to have a meaningful conversation was facilitated by the court scheduling the proceeding itself. Perhaps they had unusually limited resources in New York.

Professor King asked Judge Furman if he thought he could still do what he has been doing under the existing rule language.

Judge Furman said he thought so, but Judge Kethledge didn't agree, so he might be reversed.

Judge Kethledge commented that he thought there is an assumption baked into the idea of making a request in writing to the court that the court receives the request. That's the difference from a verbal request accompanied with a promise to file something later about something that was done three days earlier.

Professor King asked about the situation where that the defendant and counsel are consulting at the beginning of the proceeding, they decide they want it by video conference, and they send the signed request to the court; they don't show it to the court on the video.

Judge Kethledge said that's OK.

Another member agreed that you could always do the proceeding at the beginning. You could call a conference, and you could have a breakout room before the judge even gets on the phone, they can consult, come back, and say it's coming. Is the problem the form? If the defendant is sitting in MCC or whatever and they can't get you the physical form beforehand?

Professors Beale and King said that no, the lawyer can sign it under (d)(2). The defendant does not have to sign. Judge Kethledge agreed.

The member continued saying then he reads the rule to allow what Judge Furman is asking, that there can be a conference at the beginning. Then you just file it. You have to file it.

Judge Furman said it doesn't say filed.

Judge Kethledge said that's where he and Judge Furman disagreed about what written request is.

The member said that if it's unclear and you have an appellate judge thinking it's no good, maybe we want to clarify it.

Judge Kethledge asked for further comments.

Professor Beale confirmed that Judge Furman thought the rule permits what he wants to do but would like to see clarification in the note.

Judge Furman agreed. We should clarify first that what he was describing can occur, but given the concerns that we heard from defense counsel here, we should also articulate that that should not be the preference. Right now, the rule does not state a preference between the two. The better practice is to do it in advance. He wanted to be clear about that. The advantage of writing something into the rule makes that preference clear, but also makes clear that in certain scenarios, in circumstances where it's impractical or otherwise, then the rule does permit what he is describing.

Professor Beale noted that the only public comments we received read it as requiring that the request had to be signed and sent in.

Professor King said she thought that the sending it in isn't the issue. It's the timing of that.

Judge Kethledge said you can't go forward with one of these things unless the court has it in hand. The defendant has filed a writing that requests this. It's got to be on ECF, on the docket.

Judge Furman said in some emergencies ECF may be down. What if the defense signs it and then holds it up on the screen and says, "Look judge. I've now signed the written request." Should he not be permitted to go forward in that scenario? That has complied with the written rule. And when it's filed is not dictated by the rule. The judge would tell defense counsel, "OK, when you can, file that on ECF." But he shouldn't be precluded from proceeding.

Professor Beale repeated that Judge Furman believes the text allows what he wants, but he wants something in the in the note that says that, and that also makes the point that all the defense lawyers have been saying, which is that it normally should be done the other way. She was not sure there is a problem.

A member said that she thought the notes already say that the preference is for in person appearances. She said if we want to be clear that we think it's going to be a filed request we could amend the rule to say the defendant after consulting with counsel files a request in writing. That is consistent with how others have interpreted the rule. Maybe that would require republication, but she did not think so because it has been discussed. With that change, it would be clear that the request must be filed and we won't have to talk about the timing. If in New York they let you file it after you've shown it on the video, we can address that problem when a defendant challenges the constitutionality of it. We could say the defendant after consulting with counsel files a request in writing.

Judge Kethledge offered "files a written request signed by the defendant that the proceeding be conducted," and so forth.

Judge Furman said he would not support that, because it would be even more restrictive.

Judge Kethledge said it would be removing ambiguity.

Judge Bates said he didn't think the rule could be interpreted as requiring a filing without added language, because right now there's nothing that says it has to be filed in advance. And there is something that does have to be filed in advance, and that's if the defense counsel is filing an affidavit with respect to the signature. That has to be filed in accordance with the language of the rule. A fair interpretation would be that filing is not a requirement of this "request." And he agreed with Judge Furman that would be a complication for some cases.

To some extent, Judge Bates said, it is a scheduling issue—having proceedings occur timely and on schedule and not having to reschedule. That's part of the concern here for district judges. Do we have to stop because even though the defense counsel is holding up the form, saying it's all signed and ready to go, but they can't get it physically filed until later in the day or tomorrow morning? If the judge would have to continue the proceeding, as Judge Furman says, in some jurisdictions that might be a several-week continuance.

Judge Kethledge added that the Committee has heard the stories about the difficulty of getting a slot for video and so on. On the interpretive point, (d)(2) does not have the word "request," and "request" is where he saw the idea that it has to be submitted to their court before it's a written request to the court.

Judge Kethledge said it boiled down to a concern about whether a district court can convert a non-plea or -sentencing proceeding more or less on the fly into a plea or sentencing proceeding. There are instances where it seems like everybody wants that conversion. And if the thing needs to be filed in advance, it is going to be inconvenient because you're going to have a second call or video conference to do the plea hearing. It's going to be hard to meet these

requirements and have that continuation of a hearing that then does the plea, if the writing must be submitted to the court before the court can proceed. Yes, we might have to have a second hearing in some instances, where everybody wants to go forward and no one has been pressured.

The concern that has animated this requirement is that there will actually be some forced conversions, pressured conversions that would not otherwise happen, if the defendant had to submit in writing a request before the hearing starts. You would have the space in between, where counsel can talk and the person can think, and it's not 15 minutes. That's the fear. There's an efficiency loss with the inability to convert stuff where everyone wants to convert it. But there's a danger of pressured conversions. That's where it comes out.

Judge Kethledge said our Committee has to make a decision and then the Standing Committee will decide whatever it decides. We are an advisory committee, and he said it was time to give our advice on this point. After asking for further comment and hearing none, Judge Kethledge asked if anyone wanted to make a motion to change the rule or the note with respect to (e)(3)(B).

A member made a motion that language be changed to read that "the defendant after consulting with counsel, files a request in writing signed by the defendant, that the proceeding be conducted by video."

Professor Beale clarified this would be on page 133.

Judge Kethledge suggested "files a written request." If our Committee is going to be clear about what we're recommending, then this would remove the strategic ambiguity that we currently have and clarify what we are really recommending. It's not meant to be provocative towards the folks who have a concern about this position.

The motion was seconded.

Judge Bates raised the question whether this change to the rule would require it to go back out for public comment.

Professor Beale said that to the extent that the comments received from Judge Cote and Judge Hornak essentially read it this way, and thought it was a problem for that reason, it would not require republication. But filing wasn't included.

Judge Bates commented that was the issue: that filing wasn't express in the rule, so is that something that the bar and the public might have a view on? And they have not yet had a chance to voice that view.

Professor Beale added that she thought the timing of when it has to be received is what they were responding to, not filing per se, but receipt in advance. And normally the way a court receives something in advance is it's filed.

Judge Bates said that was not true. Not everything a court receives is filed. The question is how far in advance. Back to that issue of the plea agreement containing the consent, that isn't filed until after the proceeding in his district and none of the plea papers that wind up on the

docket on the record get filed until after the plea is completed. They don't actually get filed in advance. They may be received by him in advance, and he's looking at them and inquiring of the defendant with respect to them and in a remote proceeding maybe holding it up, but they're not actually filed in advance.

The member who made the motion said the intent was to make explicit what he believed was implicit in the rule.

Judge Kethledge noted now we had a distinction between filed and received by the judge. Perhaps, he said, we ought to leave it as it is.

A member said the rule says counsel requests in writing, not files.

Professor Beale wondered if Professor Struve wanted to say something about republication, because that might affect members' view if it would take this out of the queue with the other emergency rules. Judge Kethledge agreed that would be a big consequence.

Professor Struve said that Judge Bates raised a good question because to the extent that commenters were weighing in, they did engage with the practicalities of how things are going to work. So to the extent that the explicit requirement of filing would be added, there was enough of a question about that that she thought it was well worth considering. It struck her as towards the borderline but she didn't have a strong sense of whether it would need to go back. She noted there was hydraulic pressure towards avoiding anything that would need to.

Professor Beale asked Professor Struve if she thought it was at least questionable whether it would require republication.

Professor Struve responded that with differing views on what the published rule text requires, on one hand, you don't want uncertainty persisting that could lead to reversals on appeal. On the other hand, if the concern is there was ambiguity as published and we need to fix it, then that suggests it's a change from the published version. So it's tough.

Professor Coquillette added he completely agreed this is a really close question and will have to be discussed at the Standing Committee. It could go either way.

The member who seconded the motion asked to withdraw the second because she believed the Committee should not separate Rule 62 from the other emergency rules.

Judge Kethledge concluded that the discussion on the subject appeared to be complete. He said it is a hard question, and the Committee had made a lot of progress in understanding it from both the policy and interpretative standpoints. It will be before the Standing Committee, and they can do what they think best.

Judge Kethledge asked the reporters to introduce the next agenda item.

Rule 62(d) – the contents of counsel's consultation

Professor King noted the next issue on page 118 of the agenda book concerns what the defense counsel must explain to the defendant about waiving in-person presence and going remote. She indicated the subcommittee had no interest in dictating what defense counsel should say to their clients, so passed on that recommendation from NACDL to spell that out. Professor Beale added that was consistent with other occasions, where the Committee has declined to try to provide anything in the rules about the content of advice provided by defense counsel. Judge Kethledge asked if there was any interest in discussing that, and hearing none, moved to the next item.

Rule 62(d)(4) – extending the time under Rule 35

Professor Beale said that regarding the provision in (d)(4), which allows extending time under Rule 35, the Department of Justice had expressed concern that there might be essentially frivolous requests to extend time from defendants whose time had run out for example, before the emergency began. The subcommittee thought the rule was clear enough and that possible attempts to misuse the extension language did not warrant express resolution in the committee note.

Mr. Wroblewski said they were satisfied with those deliberations, and he did not intend to renew the request.

A new subdivision to allow the extension of grand jury terms

Professor Beale continued to the last issue concerning Rule 62, the Department's new request to allow grand juries to be extended in emergency situations. Because that would require republication, the subcommittee decided it was not something it could do now. It appears later as a new suggestion in the agenda book. She noted that putting that aside for later consideration put the Committee in a position to make a final motion on Rule 62.

Approval of Rule 62

Judge Kethledge asked Professor Beale to state what the motion would be. Professor Beale stated the motion would be to approve transmittal of Rule 62, as revised, to the Standing Committee, with the recommendation that it move forward.

A member asked about the language added to the note. Professor Beale responded that was the tracked language and there had been a vote on that, so it would be reaffirming that earlier decision, otherwise approving of the rest of the rule as published, and agreeing to transmit it to the Standing Committee.

Professor Struve confirmed, the motion is to approve as published, but with the change to the note. Judge Kethledge agreed and called for a vote.

The motion passed, with one vote against, by a member who then explained her vote. She said that it had been a terrific process, and there are many protections in the rule. But she thought that emergency measures have a tendency to evolve into permanent norms, and we should not

put an emergency rule into our rules. Nonetheless she appreciated the whole process and was objecting only on the basis that she did not want to include any emergency provision.

Judge Kethledge thanked the Committee for its work on Rule 62 and moved to the remaining agenda items.

Rule 49.1

Judge Kethledge provided a status report on Rule 49. Judge Furman suggested an amendment adding an introductory clause "subject to any right of public access" a court may rule that a filing be made under seal without redaction. The committee note currently says "the following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and then the list that follows includes financial affidavits filed seeking representation pursuant to the CJA. Institutionally, Judge Kethledge said, this Committee should not and does not take positions on substantive questions of law. The suggestion reflects the belief that this current note language does take such a position categorically as to financial affidavits and says that they may be sealed categorically. Judge Furman had a case where he ordered that affidavit be available to the public.

Judge Furman said his suggestion is based on the point that the current note does take a position on a substantive legal issue, and it shouldn't. More to the point, the note is inconsistent with pretty much all the existing case law, which is not uniform but all of which takes a more nuanced approach than the note on the question whether and when these things have to be public. Apropos of our earlier discussion about the constitutional right to public access to proceedings, Judge Furman said, we should avoid a scenario where the rule or the note is a trap for the unwary. As noted in his opinion, there was at least one case where one of his colleagues did go astray because of the note language. The problem is the note. But because we cannot amend the note without amending the rule, he had suggested a slight modification of the rule that would at a minimum just flag that there are concerns and issues that courts need to be sensitive to.

Judge Kethledge said that the subcommittee held one meeting by Zoom a few weeks ago with a decision to work on different options for note language that would try to embody this principle of neutrality, i.e., that the rule ought not to be taking a substantive position about whether this type of document is subject to public access or not. The reporters are going to work on some proposed language, and then the subcommittee will reconvene.

Judge Birotte, chair of the Rule 49.1 Subcommittee, added there had been some discussion about coordinating with the Committee on Court Administration and Case Management (CACM). Judge Kethledge had reached out to Judge Fleissig and fortunately it looks like there isn't any issue with us considering this change. Judge Kethledge agreed, saying that he and Judge Fleissig had a nice exchange, and she appreciated the heads up. CACM was independently looking at that guidance, and it had no objection to us proceeding and considering a change to a criminal rule.

Pro se e-filing

Professor Beale said the next item on page 155 of the agenda book was a brief status report on electronic pro se filing. It lets the Committee know that a working group led by Professor Struve, and involving excellent assistance from the Federal Judicial Center, is compiling data about what's actually occurring with pro se filing. The sense was that with the tremendous development technologically and changes during the pandemic, it was time to look at this rule. Professor Beale reported that the working group was nowhere near any kind of proposal and was still learning about different districts. The most interesting thing to the reporters so far was the practice in many districts of accepting filings from pro se litigants, including prisoners, in forms of electronic submission that are not CM/ECF—email, PDF upload, and so on. It appears that that the limiting factor on these being more generally adopted has been problems in getting the kind of infrastructure needed. So that may be something that we will develop over time, especially if this coordinated look nationwide reveals that these are helpful and working well. Some of the concerns about what might happen have proven to be unfounded in the districts. So there would be more to come on that.

Grand jury extension during rules emergencies

Professor Beale continued to the next agenda item on page 158. At the very end of the memo on Rule 62 the reporters had referenced the Department's request for an additional provision allowing the extension on grand jury terms. It could not be considered as part of the current draft of Rule 62 and would have to be an amendment that would come along later if there were interest in making this change. There is a timing issue. The advice that we have received is that it would be undesirable to muddy the waters to introduce an amendment to a rule that hadn't yet been adopted. That would potentially create some confusion on the part of courts, Congress, and the general public. We should wait on this until Rule 62 moves essentially through the process. That is the advice we received from Professor Struve and from Professor Dan Capra, the reporter responsible for coordinating all of the emergency provisions.

Judge Bates agreed that captured it.

Judge Kethledge agreed that it would go onto the study agenda rather than being taken up by a subcommittee now.

Rule 17

Judge Kethledge described the next item as a serious substantial suggestion by the White Collar Committee of the New York City Bar to overhaul Rule 17. They had obviously put a lot of work into it. Professor Beale noted it was only on the agenda today for determination whether a subcommittee would be appointed. She thought it is such a serious proposal that there will be a subcommittee.

Judge Kethledge asked for comments from the Department of Justice.

Mr. Wroblewski said he wanted everyone to know that a number of the authors of the proposal are former DOJ lawyers, many of whom he had worked with before. Early on several of

them contacted the Criminal Division, shared some of the ideas, and actually solicited some of the Department's views. When that happened, he called the reporters and let them know that that was happening. We had a very candid conversation about the proposal, and we expressed our preliminary view (and it is a preliminary view) that the proposal is no mere clarification. The Department views it as a very dramatic change to federal criminal practice. The proposal deals with the compulsory court process. It would change two things. It would first dramatically change the scope of what could be gathered under the court's compulsory process. There's very clear Supreme Court case law, he said, which is discussed in the letter about Rule 17 and the scope of what can be subpoenaed. It would dramatically change that. Second, and maybe more importantly, it would also take the court out of that process. It would say that that these materials could be subpoenaed without the court being involved at all. And so the Department thinks it's a very, very significant issue and it looks forward to the discussions.

Judge Kethledge commented that this proposal looked like it would be a lot of fun, just like Rule 16 did when it started (though that was not to say it's going to end that way). The first question is whether there is a problem. Is there a problem that needs to be handled? Second, if there is, what's the right way to address it? A lot of times the Committee ends up doing something nobody anticipated at the beginning. He agreed a subcommittee was needed, and said he would like to ask Judge Nguyen if she would chair that subcommittee.

Judge Nguyen said it would be her pleasure. Given the scope of the issues we're discussing here, she expected that it will be a lengthy and interesting time. Judge Kethledge agreed it is a meaty intellectual project and he looked forward to watching from the outside.

Rule 5

Professor Beale said there was just one more item on page 187. Magistrate Judge Bruce Reinhart suggested a change in Rule 5 to respond to the Due Process Protection Act, which now requires a reminder of prosecutorial obligations. The legislation requires the reminder to be given at the first scheduled court date where both the prosecutor and the defense are present. Judge Reinhart suggested this is confusing and it would be better to provide the reminder at the arraignment. As the reporters stated in their meeting memo, that might have been a better idea than what Congress enacted. But Congress did independently amend Rule 5. This suggestion would require us to delete the Congressional amendment to Rule 5 and put something in Rule 10. Even if it might have been a better idea, the reporters asked whether it would be appropriate at this time to try to revise something that Congress had recently enacted. That seemed unwise.

Judge Kethledge added that there's also no indication of any confusion or operational problem with the current language.

A member commented that he did think there has been confusion, but it is not preventing magistrate judges from giving those instructions at some point. He surveyed the other magistrate judges in his district, and if anything, because of the confusion, they are giving it more than once. Professor Beale said Congress would probably be pleased with that.

Professor Kethledge announced the next meeting would be on October 27, 2022, in Phoenix, Arizona.

The meeting ended with a rousing round of applause for the outgoing Chair, Judge Kethledge.