COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
June 12–13, 2017

Supplemental Materials

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Addendum to the Report of the Advisory Committee on Appellate Rules

DATE: June 11, 2017

I. Introduction

Following publication of the Agenda Book for the June 12 meeting of the Standing Committee, the Advisory Committee on Appellate Rules decided to recommend minor revisions to the text of the proposed amendments for final approval to Appellate Rule 25 and 41. This memorandum describes and explains those revisions. The complete revised text of the proposed amendments for final approval of these rules are attached to this memorandum.

Also attached to this memorandum is the text of proposed amendments for final approval to Rules 28.1 and 31. Although the Advisory Committee's Report presents and describes these proposed amendments, separate copies of their texts were not included in the Agenda Book.

II. Revisions to Appellate Rule 25

The Advisory Committee recommends revising three subdivision headings in Appellate Rule 25 so that they match the corresponding headings in Civil Rule 5 (see Agenda Book at 423). The recommended revisions are as follows:

- The header for subdivision (a)(2)(B)(i), as shown in the Agenda Book at 121, lines 70-71, should be changed from "**By a Represented Person—Required; Exceptions**" to "**By a Represented Person—Generally Required; Exceptions**."

- The header for subdivision (a)(2)(B)(ii), as shown in the Agenda Book at 121, lines 78-79, should be changed from "**Unrepresented Person—When Allowed or Required**" to "**By an Unrepresented Person—When Allowed or Required**."

- The header for subdivision (a)(2)(B)(iv), as shown in the Agenda Book at 122, line 95, should be changed from "**Same as Written Paper**" to "**Same as a Written Paper**."

The Advisory Committee also recommends revising the subdivision of Rule 25 addressing electronic signatures to match the corresponding provision in Bankruptcy Rule 5005(a)(2)(C). Rule 25(a)(2)(B)(iii), as shown in the Agenda Book at 122, lines 89-94, provides:

> An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

The recommended revision is to delete the word "authorized" so that the subdivision would provide:

> A~~n authorized~~ filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

II. Revision to Rule 41(b)

The Advisory Committee also recommends minor revisions to the version of Rule 41(d) shown in the Agenda Book at 139-141. Based on comments from the Style Consultants and further reflection by the Committee, the Advisory Committee recommends adding headings to subdivisions (d)(1), (d)(2), (d)(3), and (d)(4) and rewriting subdivision (d)(2). The changes would not alter the substance of the proposal. As revised, the recommended final text of Rule 41 is as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

(d) **Staying the Mandate Pending a Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in

the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) ~~unless~~ the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition for a writ of certiorari in the Supreme Court has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) **Security**. The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) **Issuance of Mandate**. The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Attachments

1. Revised Text of Proposed Amendments to Rule 25 and 41 for Final Approval (Including Summaries of Public Comment).

2. Text of Proposed Amendments to Rule 28.1 and 31 for Final Approval (Including Summaries of Public Comment)

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) **Nonelectronic Filing.**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C)(A)(iii). A paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's

internal mail system on or before the last day for filing and:

~~(i)~~ it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~ the court of appeals exercises its discretion to permit the later filing of a declaration or notarized

statement that satisfies Rule 25(a)(2)~~(C)(i)~~(A)(iii).

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Generally Required; Exceptions.** A person

represented by an. attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(iv) **Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not

presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days~~; or~~.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means

that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Changes Made After Publication and Comment

- In subdivision (a)(2)(C), the location of the proposed additional words "not filed electronically" are moved because of amendments to this subdivision that became effective in December 2016.
- Subdivision (a)(2)(B)(iii) is rewritten to change the standard for what constitutes a signature.
- Subdivision 25(c)(2) is rephrased for clarity.
- The headings of subdivisions (a)(2)(B)(i),(ii), and (iv) are revised.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—In proposed rule 25(c)(2), a comma is needed after "user"; a comma is needed after "system"; and the word "served" should be inserted after "person."

Ms. Cheryl L. Siler, Aderant CompuLaw (AP-2016-0002-0009)—Subdivision 25(c)(2) should be revised to be uniform with proposed Civil Rule (5)(b)(2).

Mr. Michael Rosman (AP-2016-0002-0010)—Subdivision 25(a)(2)(B)(iii) does not define "user name" or "password." A person filing a paper might not yet be an attorney of record. The subdivision does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties.

Heather Dixon, Esq. (AP-2016-0002-0014)—The signature provision should be revised to make it clear that the attorney's user name and password are not to be included in the signature block.

New York City Bar Association (AP-2016-0002-0017)— Rule 25(a)(2)(B)(iii) could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed.

Sai (AP-2016-0002-0018)—The amendments should (1) remove the presumptive prohibition on pro se use of electronic filing and instead grant presumptive access; (2) treat pro se status as a rebuttably presumed good cause for nonelectronic filing; (3) require courts to allow pro se access on par with attorney filers; (4) permit individualized

prohibitions for good cause, e.g,. for vexatious litigants; (5) change and conform the "signature" paragraph with Federal Rule of Civil Procedure 5.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The elimination of the requirement of a certificate of service for electronically served documents should be made. The proposed rule on filing by unrepresented parties is satisfactory. The proposed amendment overlooks an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay~~

~~of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) ~~unless~~ the party who obtained the stay ~~files a petition for the writ and so~~ notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition for writ of certiorari in the Supreme Court has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) **Security.** The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately ~~when~~on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Three changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it

seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Under the new subdivision (d)(2)(B)(i), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time

fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Changes Made After Publication and Comment

- In subdivision (b), the proposed additional sentence is deleted. The proposed sentence would have provided that a court may extend the time when the mandate must issue only in extraordinary circumstances.
- A new clause is added to subdivision (d)(2) that extends a stay automatically if the time for filing a certiorari petition is extended.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—A court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. For example, when a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit (AP-2016-0002-0006)— All the active judges of the U.S. Court of Appeals for the Second Circuit and all the senior judges who have had the

opportunity to review Judge Newman's comment endorse his call for reconsideration of Rule 41(b).

Zachary Shemtob, New York City Bar Association (AP-2016-0002-0006)—We agree with the comments submitted by Judge Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b).

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The "extraordinary circumstances" standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in capital cases.

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Changes Made After Publication and Comment

None.

Summary of Public Comments

- **The Pennsylvania Bar Association (AP-2016-0002-0012)**—The amendments are reasonable in light of the December 1, 2016 amendment to Rule 26(c).

- **National Association of Criminal Defense Counsel (AP-2016-0002-0019)**—The additional days for filing reply briefs will enhance the ability of practitioners to manage their workloads and improve the quality of reply briefing.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Changes Made After Publication and Comment

None.

Summary of Public Comments

- **The Pennsylvania Bar Association (AP-2016-0002-0012)**—The amendments are reasonable in light of the December 1, 2016 amendment to Rule 26(c).

- **National Association of Criminal Defense Counsel (AP-2016-0002-0019)**—The additional days for filing reply briefs will enhance the ability of practitioners to manage their workloads and improve the quality of reply briefing.

replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court's electronic filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that ~~the user name and password of an attorney of record serves as the attorney's~~ a filing made through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief. No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members. Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons. A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.	• 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice. Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action. Appeals courts must permit appeals from an order granting or denying class certification. (Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs. A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements. (Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	**H.R. 720** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	• 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
	S. 237 *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **Summary (authored by CRS):** This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.	• 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **Summary:** (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016." **Report:** None.	• 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* **Poe (R-TX)** *Co-Sponsors:* **Conyers (D-MI)** **DelBene (D-WA)** **Lofgren (D-CA)** **Sensenbrenner (R-WI)**	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	• 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	**S. 1134** *Sponsor:* **Cornyn (R-TX)** *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/16/17: Introduced in the Senate; referred to Judiciary Committee
Back the Blue Act of 2017	**H.R. 2437** *Sponsor:* Poe (R-TX) *Co-Sponsors:* Graves (R-LA) McCaul (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 7, 2017

Honorable Kevin McCarthy
Majority Leader
United States House of Representatives
Washington, DC 20515

Dear Mr. Leader:

I write regarding H.R. 985, the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017," which is scheduled to be considered on the House floor this Thursday, March 9, 2017. Given the short timeframe since its introduction, we have not had time to analyze this legislation thoroughly. Nonetheless, please find enclosed my letter of February 24, 2017, to the Chairman and Ranking Member of the Committee on the Judiciary, which offers some initial observations regarding this legislation. Please also find enclosed a letter dated February 14, 2017, from the Judicial Conference's Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Additional comments may be submitted to Congress after a more in-depth analysis can be undertaken by the relevant Judicial Conference committees. Although these letters are not expressions of support or opposition to this legislation, I hope they are helpful as the House of Representatives considers this important legislation.

If we can be of further assistance to you, please do not hesitate to contact me or the Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Director

Enclosures

cc: Honorable Bob Goodlatte

Identical letter sent to: Honorable Nancy Pelosi

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

February 24, 2017

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write regarding H.R. 985, the "Fairness in Class Action Litigation Act of 2017," which was ordered reported by your Committee on Wednesday, February 15, 2017. Not all of the relevant committees of the Judicial Conference of the United States have had sufficient time to analyze the bill thoroughly, but I offer the following initial observations for your Committee's consideration in addition to those provided by the Judicial Conference's Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure on February 14, 2017 (enclosed). These comments are not expressions of support nor opposition to the bill, but I hope they are helpful in your deliberations until a more in-depth analysis can be undertaken by the relevant Judicial Conference committees, after which additional comments may be submitted.

First, the proposed amendments to 28 U.S.C. § 1407 affecting Multidistrict Litigation (MDL) raise the following issues:

- Section 5(a)'s verification requirement would apply only to plaintiffs in personal injury MDL proceedings, a requirement not mandated by the Federal Rules of Civil Procedure in any other type of federal proceeding. The provision also imposes a short deadline for MDL judges to rule on plaintiffs' evidentiary submissions. The Judicial Conference strongly opposes the imposition time limitations on disposition of specific types of cases on the grounds that, among other things, proliferation of priorities means there will be no priorities. The imposition of such deadlines for substantive judicial decisions departs from the general approach of the Federal Rules, and, in large complex MDLs with hundreds or thousands of cases, could very well be unachievable.

- The amendment to include a "trial prohibition" provision appears to codify the current practice in multidistrict litigation in which trial of actions transferred to or

directly filed in an MDL is prohibited absent the consent of all parties. But, the provision as worded also may (a) eliminate trials entirely for certain actions directly filed in the MDL and properly venued in the transferee court; and (b) prohibit trial in any MDL unless all parties in the MDL, not just parties to the action proposed to be tried, consent.

- The proposed amendment to require the courts of appeals to accept interlocutory appeals from any order in an MDL where such appeals may materially advance the ultimate termination of one or more civil actions in the proceedings raises concerns. The proposed expansion of appeal avenues in MDL proceedings, particularly in the large and complex ones that generate a significant volume of motions, could introduce unnecessary delays and adversely impact the workload of the courts of appeals. Moreover, there is existing authority for interlocutory appeals under 28 U.S.C. § 1292(b).

Second, there are issues concerning section 4 of the bill which would amend 28 U.S.C. § 1447 (Procedure After Removal Generally), and add a new subsection on misjoinder of plaintiffs in civil actions in which two or more plaintiffs assert personal injury or wrongful death claims:

- The new provision would direct the federal court, when considering a motion to remand based on grounds that one or more defendants are citizens of the same state as one or more plaintiffs, to apply the requirements of 28 U.S.C. § 1332(a) to the claims of each plaintiff individually, as though each plaintiff were the sole plaintiff in the action. Under current law, the entire case would be remanded to state court if there is not complete diversity. Under the new provision, the court would be required to sever the claims that do not satisfy the requirements for diversity jurisdiction and remand those claims to the state court, but would retain the claims of other plaintiffs that satisfy the diversity requirement of section 1332(a), thereby expanding diversity jurisdiction and causing an indeterminate increase in the number of cases in federal courts. Further, the bill would create two cases out of one and place them in different judicial fora, thereby duplicating litigation and creating inefficiencies for both the parties and the courts.

Third, the following issues arise concerning amendments in the bill regarding class actions:

- Rule 23, Federal Rules of Civil Procedure, coupled with a large body of case law interpreting the rule and defining its terms, establishes a legally mature, step-by-step process leading to class certification or rejection of cases seeking class action status. By their nature, cases gaining class certification are complex and time consuming, with each case presenting a different set of procedural issues for the court to resolve through tailored and innovative measures. The provisions of H.R. 985 that would mandate required stays during discovery and place strict deadlines on judicial

consideration and place other limitations on judicial discretion, are likely to undermine the overall goals of the legislation.

- Provisions that would involve the courts in difficult post-settlement evaluations without the benefit of adversarial elucidation – already required in some situations – would require carefully crafted standards.

- Applying H.R. 985 to pending class litigation will likely disrupt existing practices and procedures successfully devised and put in place for the management of complex cases.

- The addition of new phrases or terms of art in the bill such as "same type and scope" without accompanying definition will invite interpretive litigation in almost every case until the law becomes settled which could create confusion for several years.

- The provisions requiring annual reports to be prepared by the Administrative Office of the U.S. Courts and the Federal Judicial Center could substantially affect the workload of both agencies thereby requiring additional resources.

* * *

Thank you for your consideration of these comments. I respectfully request that, if possible, this letter be included with your Committee's report to the House of Representatives.

If we can be of further assistance to you, please do not hesitate to contact me at 202-502-3000 or our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Director

Enclosure

cc: Honorable Charles E. Grassley
Honorable Dianne Feinstein

Identical letter sent to: Honorable John Conyers, Jr.

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

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

NEIL M. GORSUCH
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

February 14, 2017

Hand-Delivered

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: Fairness in Class Action Litigation Act of 2017 (H.R. 985)

Dear Mr. Chairman:

We are the current chairs of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"). We understand the Committee on the Judiciary will meet later this week to mark up the legislation known as H.R. 985, the Fairness in Class Action Litigation Act of 2017.

As you know, Rule 23 of the Federal Rules of Civil Procedure has governed the procedures for modern class actions since 1966. The rule has been studied and amended by the Advisory Committee several times since then, with the involvement and concurrence of the Standing Committee, the Judicial Conference of the United States, the Supreme Court, and Congress. In fact, a subcommittee of the Advisory Committee has been studying class action procedures for the last five years. That study has produced proposed amendments to Rule 23 that are now out for public comment under the procedures established by the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. The final public hearing on the proposed amendments will be held on February 16, 2017, after which the subcommittee and Advisory Committee will consider final changes to the proposed amendments before they are forwarded to the Standing Committee for

review this spring, and, if approved, to the Judicial Conference in September. If they are approved by the Judicial Conference, they will be forwarded to the Supreme Court for review and then, if the Court approves them, to Congress. The multi-year study has considered many of the issues addressed in H.R. 985.

The legislation proposed in H.R. 985 would effectively amend Rule 23 in several ways. Although it is not phrased in terms of direct amendments to the rule, it clearly would change class action procedures under the rule. In fact, section 3 of the legislation is titled "Class Action Procedures."

As you know, Rule 23(a) provides that a district court may certify a class action only if (1) it is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representatives will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4). The district court must also find that one of the three provisions in Rule 23(b) has been satisfied. Fed. R. Civ. P. 23(b)(1)-(3). The Supreme Court has instructed district courts to certify classes only after a "rigorous analysis" of whether the Rule 23 demands have been satisfied. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

The proposed legislation would change Rule 23 procedures. Section 1716 would introduce a new requirement for class certification – that the class representatives make an affirmative showing that class members have suffered the same type and scope of injury as the class representatives. This requirement overlaps and modifies the typicality and adequacy requirements of Rule 23(a)(3) and (4). Section 1717 would exclude certain persons from acting as class representatives, a modification to the adequacy requirement of Rule 23(a)(4). Section 1718(a) would add a new requirement of administrative feasibility for class certification. Sections 1718(b) and 1719 would add requirements to the attorneys' fees provision found in Rule 23(h). Section 1720 would amend Rule 23(c)(4) to add an additional requirement for issue classes, sections 1721 and 1722 would add new procedural provisions regarding discovery and third-party funding, and section 1722 would alter the appeal provisions in Rule 23(f). In short, H.R. 985 would make significant changes to Rule 23 procedures.

The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act. This has not been a matter of protecting "turf," but instead has reflected a strong preference on the part of the judiciary for the thorough and inclusive procedures of the Rules Enabling Act. Congress designed the Act in 1934, and reformed it in 1988, to produce the best rules possible through broad public participation and review by the bench, the bar, the academy, and Congress. The Act charges the Judicial Conference with the task of neutral and thorough analysis of the rules and their operation. The rules committees undertake extensive study, including empirical research, so they can propose rules that best serve the American justice system while avoiding unintended consequences. More than 80 years of experience has shown that the process works very well.

We strongly urge Congress not to amend the class action procedures found in Rule 23 outside the Rules Enabling Act process. If Congress wishes the Advisory Committee to consider specific amendments to Rule 23, we will gladly undertake that work. But we respectfully ask that changes be entrusted to the proven and well-established procedures of the Act, rather than direct legislation.

We understand that Administrative Office staff and other committees of the Judicial Conference are also studying H.R. 985. We know there are further concerns with the legislation, including provisions that affect multidistrict litigation and provisions that place time limits on actions by courts. You will receive additional communications from the Administrative Office or the Judicial Conference on these issues.

Thank you for considering the views of the Standing Committee and Advisory Committee. We look forward to continuing to work with you to ensure that our civil justice system fulfills its vital role efficiently and fairly. If you or your staff have any questions, please contact Rebecca Womeldorf, Secretary to the Standing Committee, at 202-502-1820, and we will be happy to respond.

Sincerely,

David G. Campbell
United States District Judge
District of Arizona
Chair, Committee on Rules of Practice and Procedure

John D. Bates
United States District Judge
District of Columbia
Chair, Advisory Committee on Civil Rules

Identical letter sent to: Honorable John Conyers, Jr.
Honorable Charles E. Grassley
Honorable Dianne Feinstein