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REPORT BY THE FEDERAL COURTS COMMITTEE

**COMMENTS ON POSSIBLE EMERGENCY PROCEDURES PROPOSED BY THE
JUDICIAL CONFERENCE'S COMMITTEE ON RULES OF PRACTICE AND
PROCEDURE THAT COULD AMELIORATE FUTURE
NATIONAL EMERGENCIES' EFFECTS ON COURT OPERATIONS**

The New York City Bar Association (“City Bar”) greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure (the “Committee”) on the subject of possible rule amendments that could ameliorate future national emergencies’ effects on court operations.

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The City Bar includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar’s Committee on Federal Courts (the “Federal Courts Committee”) is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the subject of the request for input on possible emergency procedures.

On balance, the City Bar has been impressed with the speed and flexibility with which the federal courts have adapted to the conditions forced upon judges and court personnel by the COVID-19 crisis. The use of electronic filing and remote court conferences by video and telephone have allowed cases to proceed as much as possible despite the unavailability of in-person proceedings. To a considerable extent, these proceedings have taken advantage of the fact that the Federal Rules of Civil Procedure afford discretion to the judges to fashion proceedings that advance the goal of a “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. While protective of the constitutional rights of the accused in criminal cases during the COVID-19 crisis, courts in both civil and criminal cases have nevertheless made recourse to the use of technology to maintain some of the ongoing work of the federal courts during this time.

We offer the following suggestions as areas for possible rulemaking in light of what we have observed during the past several weeks. We do not propose specific rule amendments, and some of these proposals may be better taken as suggestions for clarification of existing rules in

order to make express what already may be implicit. We hope that these suggestions are useful to the Committee:

- Remote proceedings: The federal rules should be amended to make clear that, upon the declaration of a public health emergency by federal, state or local officials, the chief judge in a particular district court or circuit court can shift from in-person court appearances to remote proceedings. The courts should permit those proceedings to be conducted on video or by telephone. In order to make such proceedings effective and open to the public, the judiciary should license software that meets the following requirements: (i) the judge and court staff have the ability to allow participants to speak or to mute them, as appropriate; (ii) each speaker can be identified; (iii) court appearances can be recorded on audio in case the court reporter loses their connection to the proceeding; (iv) members of the public can listen to the proceedings, in order to protect the right of access to court proceedings; and (v) to the extent necessary, Federal Rule of Criminal Procedure 53 should be amended to make clear that such remote proceedings are not considered “the broadcasting of judicial procedures from the courtroom.” We also suggest that the courts consider encouraging the routine use of remote proceedings in civil cases even outside of a public health emergency, particularly where more efficient scheduling is possible or cost savings can be achieved and the need for an in-person appearance is minimal (such as a pretrial conference to discuss the status of civil discovery).
- Automatic and global extensions of time: In the immediate aftermath of the COVID-19 crisis, on March 16, 2020, the U.S. Court of Appeals for the Second Circuit issued a general extension of time of 21 days for all cases that had deadlines between the date of the order and May 17, 2020. This extension of time accomplished two ends. First, it made sure that lawyers and clients who were dealing with the business and personal exigencies created by the public health crisis would have the time necessary to complete their briefs. Second, it also ensured that, with a modest delay, appeals would continue to be briefed and cases moved along in the appellate process. The Court also gave discretion to individual panels to direct the parties to follow a different schedule as deemed necessary in a specific case. While extensions of time are already permitted, this approach should be formalized, giving chief judges the option of adjourning all dates by three weeks (or more, as appropriate) in the Courts of Appeals and the District Courts in the event of a public health emergency, except to the extent that such would be contrary to the constitutional rights of the accused in criminal proceedings or as appropriate for the particular exigencies of a given case (for example, a motion for a preliminary injunction or temporary restraining order).
- Electronic filing and service of all papers: One of the key elements that allowed federal courts to continue their business during the COVID-19 crisis was the use of electronic filing and service of papers. The federal rules are generally supportive of service of court filings by ECF, see Fed. R. Civ. P. 5(b)(2)(E), but not all important litigation papers are filed in court. For example, discovery objections, interrogatory responses, and notices of deposition are not filed in court and therefore cannot be sent to opposing counsel by email without the consent of counsel. See *id.* The rule should be modified

to permit service of all papers by email to opposing counsel using whatever email address that the recipient uses for their ECF filings. There are reasons to require consent from pro se litigants, who may be less accustomed to the court rules, but counsel of record should be required to accept all papers by email after the inception of a case. There is no reason to limit this proposed procedure to emergencies.

- Criminal defendants' choice of remote proceedings: Federal Rule of Criminal Procedure 43 requires the defendant's presence at most critical stages: initial appearance, arraignment, plea, trial and sentencing. These are waivable rights, however, and courts should facilitate virtual proceedings for those defendants who wish to plead guilty or be sentenced without making an in-person court appearance, due to a public health emergency. Rule 43 should be amended to allow courts to provide this option to defendants so long as the proceedings permit them to proceed knowingly and intelligently with their case and with the assistance of counsel. We do not, however, recommend requiring that defendants participate in such proceedings by remote means. Important interests of notice and advocacy are often served by conducting such proceedings in person, even if it results in some delay.

We thank the Committee for considering these suggestions and we look forward to providing comments on any amendments that are proposed in the future.

Federal Courts Committee
Harry Sandick, Chair