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Rebecca A. Womeldorf, Esq.
Secretary, Standing Committee and Rules Committee Chief Counsel
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Dear Ms. Womeldorf,

We write to recommend that the Advisory Committee on Rules of Civil Procedure consider adding to its agenda the issue of petitions to proceed *in forma pauperis* (IFP).

This letter makes three points. First, there is wide variation in the procedures used by the 94 federal districts with respect to IFP petitions. Second, there is wide variation in the grant rates for IFP petitions across and within districts. Third, IFP is a proper subject of study for this committee.

[1] There is wide variation in IFP procedures.

In *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478 (2019), Professor Andrew Hammond at the University of Florida cataloged IFP procedures for the 94 district courts. At the time of writing, Hammond found that 22 districts accept form AO 239, 37 districts accept AO 240, and 46 districts have developed their own forms. *Id.* at 1496. Among the bespoke forms, there is substantial variation in information requested and depth required. Simple explanations such as geography do not account for this variation. *Id.* at 1496-1500.

Federal judges receive little guidance on how to evaluate the data included on these forms. According to Hammond, “All the forms currently in use in the federal courts—the AO 239 form, the AO 240 form, and the district-court-specific forms—leave judges with no benchmark for deciding how much income is sufficiently low, how many expenses or debts are sufficiently high, and how many assets are sufficiently few. With no articulated threshold on any *in forma pauperis* form, judges must identify some means test (such as the federal poverty guidelines) or create their own. Few federal courts provide any guidance for judges presented with an *in forma pauperis* motion.” *Id.* at 1500 (internal notes omitted). This status quo makes IFP determinations labor intensive for judges and unpredictable for litigants.

[2] There is wide variation in IFP results.

Professor Adam Pah and colleagues have used data-science algorithms to evaluate the IFP grant rates for districts and judges. Two findings merit attention here.

First, Pah and colleagues found wide variation in the grant rate for IFP petitions across districts. Looking at cases filed in 2016, Pah and colleagues found that federal district courts that received at least 25 IFP petitions had a mean grant rate of 78%, with a standard deviation of 15% and a range of 68 percentage points. *See* Email from Pah to Clopton, Jan. 15, 2021 (on file). This inter-district variation could be justified on any number of bases. We present it without judgment for this Committee's information.

Second, Pah and colleagues also found wide variation in the IFP grant rate *within districts*. According to their recent article, "At the 95% confidence level, nearly 40% of judges—instead of the expected 5%—approve fee waivers at a rate that statistically significantly differs from the average rate for all other judges in their same district. In one federal district, the waiver approval rate varies from less than 20% to more than 80%." *See* Adam R. Pah, et al., *How to Build a More Open Justice System*, SCIENCE (July 10, 2020), <https://science.sciencemag.org/content/369/6500/134.full>.

[3] IFP procedure should be on this Committee's agenda.

The ability to have one's day in court is a fundamental aspect of the American justice system. Filing fees put a price tag on that right, but the right to petition to proceed *in forma pauperis* should ensure that those who cannot pay can still access our federal courts.

The administration of the IFP procedure is within the mandate of this committee. First, this Committee could propose a Federal Rule of Civil Procedure related to IFP, consistent with the Rules Enabling Act of 1934. Second, without adopting a rule amendment, this Committee could offer guidance to local rules committees in hopes of encouraging convergence on a consistent approach. Third, this Committee could work with the Administrative Office to revise the existing forms to provide guidance to federal judges.

When considering these tasks, we would encourage this Committee to keep in mind two sets of considerations. First, we think there is value in standardization across and within districts. A Federal Rule or guidance from this Committee would go a long way in that direction. Second, we encourage this committee to consider the procedural and substantive values at stake when proposing national IFP standards. IFP standards should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts. *See generally* Hammond, *supra* (describing these values and offering potential standards).

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For the foregoing reasons, we encourage this committee to add IFP to its agenda. If we can be helpful, we would be delighted to assist this Committee on its work on this and other important issues. Please direct any correspondence to Professor Clopton at zclopton@law.northwestern.edu.

Sincerely,

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Professor of Law
Northwestern Pritzker School of Law

Andrew Hammond
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University of Florida Levin College of Law

cc: Hon. Robert M. Dow, Civil Rules Committee Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter