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Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendment to Federal Civil Rule 25

To Whom This May Concern:

I write today to ask you to consider an amendment to Federal Civil Rule 25(a)(1) that would permit courts to initiate the 90-day dismissal process *sua sponte* when undisputed evidence indicates that a party has died.

Background

Rule 25(a) addresses substitution of a party when the party dies. In short, the substitution process requires formal notice of the death and then a motion for substitution that proposes a successor. The full text of Rule 25(a)(1) currently reads as follows:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1). The first sentence establishes the core substantive principle in Rule 25(a)(1): Courts have the power to substitute deceased parties. The omission in the first sentence

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[1]I am a law clerk in the federal judiciary. Any opinions expressed in this letter are entirely my own.

of any *sua sponte* substitution authority creates the need for the second sentence: Courts have the power to substitute deceased parties, but that power is limited to orders on motions for substitution. Neither the first nor the second sentence requires a statement or "suggestion" of death before a motion can be filed. The third sentence addresses one scenario that can arise after the death of a party: If a remaining party does serve a statement of death, and no party or prospective successor makes a motion for substitution within 90 days, then the action by or against the decedent must be dismissed. "The rule was drafted on the assumption that, most commonly, successors or representatives will move to substitute promptly and voluntarily." 6 Moore's Federal Practice - Civil § 25.12 (Lexis 2021).

Discussion of the Problem

What happens, though, when the assumption behind the rule fails? The following table summarizes how Rule 25(a)(1) addresses only three of four possible scenarios that can occur after the death of a party:

Scenario Following Death of Party	Outcome
Statement of death and motion to substitute (within 90 days)	Court rules on motion
No statement of death but motion to substitute	Court rules on motion
Statement of death but no motion to substitute within 90 days	Dismissal
No statement of death AND no motion to substitute	???

The original version of Rule 25(a)(1) implicitly addressed the fourth scenario but in a different context. The original version limited a court's power to substitute to a period of two years after the death occurred. Once two years passed, "[i]f substitution is not so made, the action shall be

dismissed as to the deceased party." Fed. R. Civ. P. 25(a)(1) (1938). Following what was regarded as a rigid application of the two-year period in *Anderson v. Yungkau*, 329 U.S. 482 (1947),[2] the Advisory Committee proposed an amendment in 1955 that would have eliminated the two-year period and would have modified the consequence of a delay in substitution as follows: "If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party." Fed. R. Civ. P. 25(a)(1) (proposed 1955 amendment), *in* 6 Moore's Federal Practice - Civil § 25 App. 4 (Lexis 2021). In the Committee Note to the proposed amendment, the Advisory Committee observed that, even without a rigid deadline for substitution, "[p]rovision has been made for dismissal of the action if substitution is not made within a reasonable time; thus to the extent that the period for substitution is not otherwise limited by applicable state or federal law, the trial court is left free to consider the circumstances of the particular case in determining whether substitution has been delayed so long that the action should be dismissed as to the deceased party." *Id.* (Committee Note). The proposed 1955 amendment was not adopted. In the Committee Note to its 1963 amendment, which introduced the 90-day deadline following a statement of death, the Advisory Committee created the assumption of prompt substitution by noting that "[a] motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so

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[2] Although not relevant to my proposal, I note that *Anderson* created disagreements over whether courts, as opposed to legislatures, could create rules that operated like statutes of limitations. *Compare, e.g., Perry v. Allen*, 239 F.2d 107, 111 (5th Cir. 1956) ("Such a limitation may be placed solely by the legislature and is beyond the competence of a court exercising its power to formulate rules of procedure.") *with Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959) (substitution outside two-year limit affirmed, where defense counsel waived any statute of limitations by failing to advise timely of his client's death).

made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record." Fed. R. Civ. P. 25(a)(1), Committee Note to 1963 Amendment, *in* 6 Moore's Federal Practice - Civil § 25 App. 7 (Lexis 2021). Hence the fourth scenario in my table above was born.

The fourth scenario that I have described has forced courts to choose either to pretend that a deceased party remains fully capable of appearing and developing the record—a situation that I am tempted to call "zombie cases"—or to halt a case indefinitely. Zombie cases are particularly problematic when the deceased party is a sole or principal plaintiff. An extreme example of a zombie case appears in *Ciccone v. Sec'y of Dep't of Health & Human Servs.*, 861 F.2d 14 (2d Cir. 1988), where the plaintiff died during proceedings before the District Court. Whether counsel had authority to represent a deceased client was unclear. The District Court nonetheless ruled against the deceased plaintiff; the deceased plaintiff somehow filed an appeal; and the Second Circuit went as far as to issue an opinion affirming the judgment—all of this justified because "no suggestion of death was made to the district court." *Id.* at 15 n.1 (citation omitted). *See also In re Ketaner*, 17 F.3d 1434 (4th Cir. 1994) (table case) (citing *Ciccone* to "dispense with oral argument" and to affirm a judgment against a *pro se* litigant who died after filing his appeal). Effectively the same problem occurred in *Atkins v. City of Chicago*, 547 F.3d 869, 874 (7th Cir. 2008), where the Seventh Circuit reversed a dismissal and ordered reinstatement of a deceased plaintiff (one of two plaintiffs, who were brothers) because plaintiffs' counsel did not serve a statement of death on the decedent's wife. In contrast, confusion over how to handle the fourth scenario led to a lengthy delay in *Rea v. Mut. of Omaha Ins. Co.*, No. 16-CV-73-FPG-HBS, 2018 WL 3126749 (W.D.N.Y.

June 26, 2018). In *Rea*, the plaintiff commenced her action on January 28, 2016 and died several months later, in October 2016. Counsel—who, in the District Court record, questioned whether he had authority to proceed—never filed a statement of death and, sadly, could not identify any potential successor. In September 2017, the defendants moved to dismiss under multiple rules including Rule 25(a)(1). In a decision issued on June 26, 2018—nearly two years after the plaintiff died—the court denied relief under Rule 25 solely because no statement of death was ever filed. *Id.* at *2. In the alternative, given the lengthy delay that occurred, the court granted relief under Rule 41(b) for failure to prosecute. The fourth scenario was pushed to an extreme in *McMurtry v. Obaisi*, No. 18-CV-2176, 2020 WL 3843566 (N.D. Ill. July 8, 2020), where plaintiff's counsel argued that Rule 25(a)(1) did not apply because no one filed a statement of death, even though the plaintiff died before the filing of the action and the court called repeated attention to the death on the record. In frustration, the court in *McMurtry* declared its own minute order referring to the death to be a statement of death that started the 90-day clock under Rule 25(a)(1); concluded that the necessary 90 days passed without substitution; and then dismissed the case. The case law contains other examples of courts wrestling with the fourth scenario, and I do not intend any criticism of the judges or attorneys involved in the cases that I have cited. I have cited the above cases only to demonstrate that the fourth scenario that I have described is a real problem and not just a theoretical gap in the text of Rule 25(a)(1). Courts across the country should not have to improvise inconsistently to address a problem that can hamper fair adjudication of meritorious claims.

To address the problem created by the fourth scenario, I propose amending Rule 25(a)(1) to allow a court to commence the 90-day clock *sua sponte*. To ensure full procedural safeguards, and to minimize the scope of the amendment by fitting it within the current framework, I propose that a court's invocation of *sua sponte* authority here would begin with the receipt of information, in any form, that would satisfy the standard for judicial notice under Federal Rule of Evidence 201. Once the court is satisfied that it could take judicial notice, an order would issue that would function as the statement of death. I have no opinion as to how widely such an order should be served; perhaps the Committee can take this opportunity to address the Seventh Circuit's observation in *Atkins* that "Rule 25(a)(1) requires service, though it does not say which nonparties must be served . . . obviously not every person in the United States who happens not to be a party to the lawsuit in question. But nonparties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) or personal representative ([if] it has not been), should certainly be served." 547 F.3d at 873 (citations omitted). Finally, once proper service of an order occurs, the 90-day clock can run in the ordinary course. The combination of judicial notice, a formal order, and appropriate service should suffice to allay any due-process concerns while allowing courts to break the logjam when the fourth scenario presents itself.

Thank you for taking the time to consider my proposal, and do not hesitate to contact me if you wish to discuss it with me further.

Cordially,

Giuseppe A. Ippolito