19-AP-C
19-CR-A
19-CV-Q

Dear AOUSC Committees on Civil, Criminal, and Appellate Rules —

There are four major problems with the current civil, criminal, and appellate IFP[1] rules and forms:

1. There is no publicly known definition of what financial standards qualify a person for IFP status.
2. There is no clear rule as to when an IFP litigant needs to update the court about a change in their financial conditions.
3. The IFP forms use ambiguous terms, for which the courts have not given clear definitions.
4. The IFP forms ask for information outside the legitimate scope of 28 U.S.C. § 1915.

All poor litigants deserve to know the rules for IFP qualification, definitions of terms used in forms, and when they must update a court about a change in their financial circumstances; to have uniformity in IFP determinations, know, and to be free of invasive questions that are unnecessary to making IFP determinations. Third parties also have rights to not have their information disclosed without consent; making an IFP application does not convey any right to violate others' privacy.

Pursuant to the Rules Enabling Act and APA, I hereby petition the Committees for rulemaking to cure each of the above, as detailed below. I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[2]
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[1] For the purposes of the criminal rules, I use "IFP" synonymously with "CJA".
[2] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

1. **Financial qualification rules for IFP status**

Not one court in the country has given a clear statement of the rules for IFP qualification, such as an objective standard of counted assets or income, qualifying thresholds, or discretionary elements.

This is despite the fact that two appellate courts — the Third Circuit[3] and Fifth Circuit[4] — permit *clerks* to grant IFP applications (and in the Fifth, to *deny* them as well). Since clerks have no Article III authority, and it would be improper for them to be vested to exercise discretion, we can infer that both courts have a policy dictating the qualifying standards. Neither court has published it.[5]

Certainly, courts have a duty to guard the public purse from improper claims of poverty. That duty extends to IFP applicants as well, to not *make* an IFP claim unless it is justified — but with no clear standard, it is impossible for potential IFP applicants to make an informed decision.

Contrast the Legal Services Corporation regulations, 45 C.F.R. Part 1611, which implement an identical duty and for an identical purpose. The LSC is a Federal 501(c)(3) corporation, which grants Federal funds to pay for legal aid for millions of poor people throughout the United States. It has promulgated regulations to determine financial eligibility including multiple discretionary factors, excluded assets, etc. It delegates to local LSC organizations determinations such as asset thresholds, costs of living, and assistance programs (e.g. SSI, SNAP, TANF, or Medicaid) whose recipients automatically qualify. *See* e.g. Utah Legal Services' Financial Eligibility Guidelines.[6]

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[3] 3rd Cir. standing order of January 22, 1987

[4] 5th Cir. R. 27.1.17

[5] Courts must publish all "rules for the conduct of the business", "order[s] relating to practice and procedure", and "operating procedures". 28 U.S. Code §§ 332(d)(1), 2071(b), & 2077(a). *See In re Sai*, No. 19-5039 (1st Cir. *filed* May 15, 2019).

[6] https://www.utahlegalservices.org/sites/utahlegalservices.org/files/Financial%20Eligibility%20Guidelines%202.19.pdf

The LSC's regulations for financial qualification for government-funded free legal services are reasonable, well-tested, regularly updated[7], and Congressionally approved. They set out clear asset and income thresholds, asset carve-outs for e.g. work supplies and homes, etc. They were thoroughly debated with low-income legal aid advocates, and were promulgated through notice and comment rulemaking.[8] They therefore make for a very easy and clear reference by which the judiciary can craft a fair and uncontroversial rule, already well familiar to the judiciary, which needs little to no further elaboration: "if you qualify for LSC, you qualify for IFP".

Adopting these standards would protect IFP litigants' privacy, while simultaneously making decisions more transparent than they are now. Court orders granting IFP status could simply say "[litigant] has demonstrated IFP qualification under the standards set forth in 45 C.F.R. § 1611.3(c)(1) + (d)(1)". No further detail of the applicant's finances is needed, and this names a clear standard.

I therefore petition that the Rules Committees promulgate rules stating that a § 1915 IFP applicant shows sufficient[9] basis for qualification if they meet any of the Legal Services Corporation's standards[10] of financial qualification, 45 C.F.R. Part 1611, as elaborated by the applicant's local[11] LSC recipient(s) per § 1611.3(a).

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[7] https://www.federalregister.gov/documents/2019/02/04/2019-00889/income-level-for-individuals-eligible-for-assistance (84 FR 1408 (2019), adjusting for 2019 federal poverty guidelines)

[8] https://www.federalregister.gov/documents/2005/08/08/05-15553/financial-eligibility (70 FR 45545 (2005), revising 45 C.F.R. Part 1611 in entirety)

[9] This is deliberately phrased as "sufficient" — not "necessary". Courts would retain discretion to grant IFP status under circumstances not covered by LSC's standards — so long as they state the standard that they have applied with enough clarity to enable IFP litigants to comply with their obligation to update the court (*see* below).

[10] Part 1611 has *multiple* distinct standards: (1611.3(c)(1) or 1611.5(a)(1–4)) plus (1611.3(d)(1) or (d)(2)); or 1611.4(c).

[11] For applicants living outside the United States, the court should substitute the LSC recipient in the court's jurisdiction with a population most socioeconomically analogous to the applicant's.

2. Requirements to update the courts on change in circumstances

It is neither feasible, nor desirable to anyone, that IFP litigants update courts of *every* change in financial status. Nobody cares if an IFP litigant receives a Christmas gift of $100, or if their expenses in a given month vary a bit from what they set out in their IFP application. Filing updates about minor changes would risk sanctions for "multipl[ying] the proceedings in any case", 28 U.S.C. § 1927, burden courts with immaterial filings, and expose litigants to unnecessary invasion of privacy..

Yet if an IFP applicant were to unexpectedly win a million dollars one month after they receive IFP status, they surely must update the court, withdraw from IFP status, and pay the fee. Failure to do so would subject the previously-IFP litigant to the severe sanction of dismissal "at any time" if "the allegation of poverty is untrue", 28 U.S.C. § 1915(e)(2).

Somewhere between these two extremes lies a threshold triggering obligation. The obvious place for this trigger is at the qualifying threshold. This is the rule used by the LSC, 45 C.F.R. § 1611.8.

I therefore petition that the Rules Committees promulgate rules stating that a person with IFP status

A. need not update the court so long as they remain within the standard under which they qualified, but
B. must update the court when they become aware that they no longer meet that standard.[12]

[12] This does not mean automatic disqualification — the litigant may still qualify under a different standard, e.g. one which requires a discretionary exemption, under 45 C.F.R. § 1611.5(a)(4) — but it does create a clear point at which the court should reëxamine financial qualification.

This necessarily also implies that a court granting IFP status must *clearly state* the standard under which it granted IFP status. It is impossible for a litigant to comply with their obligation to update about a change that might alter their qualification unless they know the standard that was applied.

3. Ambiguous terminology in IFP forms

The courts have given no precise definition of the specific terms in the standard IFP affidavits..

Certainly the terms in the IFP affidavits, such as "income", *can* have clear, specific meanings.

The problem is that they don't have any specified meanings in *this* context — and they are amenable to multiple reasonable interpretations.[13] In fact, many of them *do* have specific meanings in other contexts, such as under IRS or Social Security regulations — and those meanings differ between agencies, proving that they are facially vague.

IFP applicants have a due process right to know the precise meaning of terms to which they are expected to swear under penalty of perjury. They risk an unjust accusation of perjury — and dismissal — if their interpretation differs from a court's (thus far secret) interpretation. Without clarification, the IFP forms are unconstitutionally vague.

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[13] For example: Is an unmarried, unregistered partner a "spouse" or "family"? What about common-law spouses (and by which jurisdiction's definition)? Do Patreon donations constitute "self-employment income"? Does Bitcoin constitute "cash" or "other financial instrument", and how does one treat its appreciation or depreciation? Is a Bitcoin exchange, or PayPal, a "financial institution"? Are outgoing donations "support paid to others"? Are domain names, software, inventions, etc. "assets"? Is "value" the original price, currently obtainable resale price, cost to re-acquire, depreciated value by some formula, hypothetical market value, velc.? Is PACER research "expenses … in conjunction with this lawsuit"? Are art, disability-related modifications, musical instruments, appliances, printers, etc. "ordinary household furnishings"? Is an expense occurring once every few years, such as purchase or repair of a computer, a "regular" expense? Does a UOCAVA "voting residence" count as a "legal residence"? Are sales taxes, VAT, or the NHS healthcare surcharge "taxes"? Are visa costs "expenses"? What of joint property? Are litigation settlements or fee/cost awards "income"? What is a large enough change to be "major"?

All of the above are actual questions that I personally must know the answer to in order to correctly fill out FRAP Form 4, but for which there is no available answer in the context of an IFP application.

This clarification can be very readily provided, by simply adopting the definitions of dedicated regulatory bodies as defining the terms used in IFP forms.

The LSC defines "assets" and "income", 45 C.F.R. 1611.2. Crucially, both are limited to what is "currently and actually available to the applicant". This rule was adopted in preference to making a distinction between "liquid" and "non-liquid" assets, and focus on the practical requirements that apply to poor people seeking legal aid. 70 FR 45545, 45547 (2005).

The IRS defines virtually all other financial terms that could be relevant to an IFP application, including e.g. "household" (26 C.F.R. § 1.2-2), "self-employment" (26 C.F.R. § 1.1402(a)-1), "spouse" (26 C.F.R. § 301.7701-18), "gifts" (26 C.F.R. § 25.2503-1), etc. It has also issued guidance for evolving issues such as Bitcoin (IRS Notice 2014-21).[14]

I therefore petition that the Rules Committees:

A. promulgate rules stating that every term used in FRAP Form 4, AO 239, AO 240, and CJA 23 is defined to be identical to those terms' definitions in regulations that the Committees identify;
B. give preference to LSC and then IRS regulations; and
C. amend FRAP Form 4, AO 239, AO 240, and CJA 23 to add an appendix listing the regulatory definition for each term used, by citation.

[14] https://www.irs.gov/pub/irs-drop/n-14-21.pdf

4. Courts' IFP forms request information not authorized by 28 U.S.C. § 1915.

The IFP statute contemplates that courts will assess a prisoner's assets and income, and all IFP affiants' general poverty. However, the IFP forms go much further than the statute permits. *See*[15] e.g.:

A. spouse's income, assets, or debts (unless the affiant has a legal right to expend them for litigation, e.g. if jointly owned), or employment history
B. identities of third parties (spouse, debtor, creditor, financial institution, credit card company, department store, supporter or supportee, etc.)
C. employment & employment history (rather than just current income)
D. sources that can't be used to pay litigation costs (e.g. non-fungible/unavailable[16] or exempt[17])
E. expense breakdowns more detailed than broad categories (e.g. "mandatory costs", "costs of living / working", "exempt", or "discretionary / luxury")
F. make, model, year, and registration # of vehicles
G. legal residence (except as relevant to cost of living & poverty guidelines[18])
H. phone number
I. age
J. years of schooling

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[15] *See also* FRAP Form 4 question re SSN last 4 digits, removed pursuant to my proposal to AOUSC, suggestion 15-AP-E, and promulgated by Supreme Court order of April 26, 2018.
[16] 45 C.F.R. § 1611.2(d): ""Assets" means cash or other resources of the applicant or members of the applicant's household that are *readily convertible to cash*, which are *currently and actually available to the applicant*." (emphasis added)
[17] § 1611.2(i): "··· [Income] do[es] not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute."
[18] Only Alaska & Hawaii are distinguished. https://aspe.hhs.gov/poverty-guidelines

These questions are not limited to assessing the affiant's actual, current poverty. Many serve only to pass judgment on the affiant's lifestyle, assess the affiant's ability to earn money (which is not the standard), or otherwise exercise a paternalistic inquiry into the affiant's finances. These are not authorized objectives under 28 U.S.C. § 1915.

By requiring such questions of IFP applicants, courts violate applicants' privacy and dissuade qualified litigants from filing for IFP status.

Furthermore, it is often illegal to answer questions identifying third parties, let alone stating anything about their finances.[19] As a US citizen residing in the UK, obligated to obey UK and EU law, I am subject to very strict legal restrictions under the EU GDPR and UK Data Protection Act 2018. Courts must not demand information that is illegal to give. Here, there is no valid statutory basis for requesting third-party information at all. § 1915 only talks about the *applicant's* poverty; it says nothing about their spouse, creditors, debtors, supporters, etc.

I therefore petition that the Rules Committees amend FRAP Form 4, AO 239, AO 240, and CJA 23 to remove or amend all questions requesting information listed above.

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[19] Under 12 U.S.C. § 3403 (Right to Financial Privacy Act), 5 U.S.C. § 552a(g) (Privacy Act), 18 U.S.C. § 1030(g) (Computer Fraud and Abuse Act), 15 U.S.C. § 1681b *et seq* (Fair Credit Reporting Act), 15 U.S.C. § 1692c *et seq* (Fair Debt Collection Practices Act), and 47 U.S.C. § 227(b)(3) (Telephone Consumer Protection Act), disclosure of such information without consent is unlawful.

Third parties' information disclosed on an IFP affidavit, as with affiant's spouse, creditors, and debtors, also implicate independent privacy rights. *See Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). An IFP affiant publicly disclosing creditor or debtor information may violate the FDCPA, §§ 1692b, 1692c, & 1692k. This information is also a "consumer credit report", for which public disclosure would likely be actionable under the FCRA. *See* 15 U.S.C. §§ 1681b, 1681n, & 16810.

From: Sai
To: RulesCommittee Secretary
Subject: "Non-REA" AOUSC Forms
Date: Thursday, March 25, 2021 10:38:08 AM

Dear AOUSC and Standing Committee on Rules —

In the FRAP IFP Subcommittee's last report — FRAP April 2021 Agenda tab 5J — it explicitly disavowed any Rules Enabling Act or Rules Committee responsibility for "forms created by the Administrative Office".

Under this interpretation, the Rules Committee is responsible for FRAP Form 4 — but not for its FRCP equivalents.

I find this interpretation rather surprising, inconsistent both between FRCP/FRAP and with voluminous case law, a violation of reliance interests, opaque as to "REA" vs "non-REA" form status, and an abdication of AOUSC's rulemaking responsibility. See #4 below.

I urge that it be utterly rejected — and that the Rules Committee clearly state that it is responsible for all of the Forms (i.e. everything designated "AO _" or "FR_P Form _" and published on uscourts.gov), and that all such Forms come under the REA.

In the alternative, however, I have a few questions, set forth below.

The first question I respectfully submit no matter what the Committee's response may be.

The rest are moot if the Committee adopts the rejection that I urge, and respectfully submitted otherwise.

I hope that you will show me the respect of giving direct answers to clear and serious questions; arising directly from the Committee's own report; affecting its own jurisdiction, interpretation, and procedure (or at least what courts and litigants nationwide certainly perceive to be so); and not addressable by any other entity (except perhaps by litigation).

If you really do insist on refusing such courtesy, I can reframe this as a suggestion for a change to the Committee's own rules of procedure (or as a simple incorporation to force a change in status, if indeed some form is currently outside the Rules). That is an approach that you could not refuse.

I'd really rather avoid it, however, as it would likely come off as me being adversarial to the AOUSC, which I am not.

Quite the contrary: I've worked for the Judiciary (externed in CA9) and have a genuinely strong interest in structurally principled meta-law. I'm enough of a law nerd that Eskridge's "Statutory Interpretation" is actually one of my favorite books, which I read purely for fun, not because any class required it. I've participated, by invitation, at both the European Parliament & Council of Europe, on structural governmental reform issues. And, well, I write AOUSC

proposals regularly, simply because I believe it's morally right to do so. As for their quality, I suppose you can judge for yourselves. In short, I'm a neutral; I do this because I care and have intellectual, principled interests.

Anyhow, it is of course your choice whether to respond or not. I realize that the REA does not provide a mechanism for seeking something akin to an advisory opinion about its own practices (as would be true for most executive agencies), and that the FOIA exempts the judiciary.

I can and do, however, request the courtesy.

If you choose not to answer, please at least do me the token courtesy of an email saying that you refuse.

Formalities and backstory disposed of, on to the questions:

1. What is the official position of the AOUSC or Standing Rules Committee on whether
* forms "created by the Administrative Office" and promulgated by the AOUSC — such as the district court IFP forms, or the PACER academic research fee waiver & waiver-of-rights form; (purportedly, "non-REA forms")
* as contrasted to forms "created by the Rules Committee" — such as the appellate and supreme court IFP forms, or the sample bankruptcy petition form ("REA forms")
— are
a) covered by the Rules Enabling Act (REA), and/or
b) within the responsibility of the Rules Committees?

I request a formal written response.

2. Could you please give me a complete list of which AO forms are within the REA, and which forms are not?

For those forms that are not within the REA, could you please tell me
a) what entity is responsible for it,
b) what law(s) authorize or restrict its issuance, or give it legal force, and
c) what law(s) apply to people seeking its revision?

For example, in an ordinary administrative agency, the main laws would typically be the APA, Paperwork Reduction Act, and Privacy Act, plus the enabling act of that agency.

In the judiciary, these would all normally be superceded by the REA — but given the premise that you disavow it, I am left wondering what laws you believe do apply.

3. Could you please tell me what administrative remedy or transparency there is for seeking revision "non-REA" AO forms, short of litigation — i.e. equivalent to the rules suggestion and public comment process under the REA or APA?

This is related to 2(c), but not equal, as it includes any non-statutory remedy or procedure — e.g. by any formal or informal internal policies of the responsible entity you name per 2(a), or its parent (etc) entities.

4. Could you please tell me the AOUSC's official position as to the legal status of "non-REA" forms — and in particular, whether they carry any imprimatur whatsoever of approval by the AOUSC or Rules Committee, or of judicial authority?

Courts give great deference to all AO forms and guidance.

A trivial search of case law will find, for instance, many district courts insisting that non-prisoner IFP affiants fill out all of the fields on the supposedly "non-REA" district court AO IFP forms, including fields having no textual basis whatsoever in 28 USC § 1915(a)(1), explicitly on the sole authority of the AOUSC — or denying a petition, for failure to do so.

Similarly, there are several cases regarding PACER fee waivers, both for IFP and academic research purposes. The courts in these cases functionally treat the AO's guidance and PACER fee waiver application form — which includes statements e.g. that a research project ought to be limited in scope, for a defined time period, etc. — as a rule. Tellingly, they even cite the AO form as if it were an actual judicial authority like any other.

I, at least, have never seen a court make a distinction between an "REA" and "non-REA" form. Perhaps I have missed something, and you will be kind enough to give me a citation or two in your response pointing me to a court having made such a distinction in a holding.

Are courts wrong to give any deference to such "non-REA" material, if they are indeed merely administrative effluvia with no sanction, responsibility, review, transparency, oversight, or public input, created in an entirely non-judicial capacity?

If not, what is the basis for such deference — if not the imprimatur, review, and permanent caretaking responsibility by the Rules Committee under the REA?

If there is a tertium quid that I am missing, what is it?

I look forward to reading your response.

Sincerely,
Sai