From: Sai
To: RulesCommittee Secretary
Subject: Comment re 19-AP-C report dated Sept. 24, 2020
Date: Tuesday, February 09, 2021 5:23:50 PM

Dear FRAP and Standing Committees —

I write in response to the IFP subcommittee's Sept. 24, 2020 report regarding my proposal on IFP forms and rules, 19-AP-C.

1. Qualification standard

First, because the Committee has repeatedly misconstrued this, I must reiterate: the qualification standard must be sufficient, not necessary. If someone meets this standard, then they qualify.

If they don't meet the standard, then nevertheless they may qualify, depending on the circumstances. The standard should try to cover the majority of cases, but obviously it cannot account for everything. This should be emphasized, lest judges fail to take special circumstances into account in a situation the standard failed to foresee.

I broadly agree with Prof. Hammond's proposal that anyone at ≤150% FPL should qualify. I also agree that someone currently receiving means-tested government benefits should be excluded on that basis alone, without requiring any further test.

I disagree with Prof. Hammond's asset test, however, for two reasons:
a. It's almost never a good idea to put a specific dollar amount in a policy — and certainly not here. Any asset test should be tied to FPL, just like income. I suggest that it be set at one year's worth of the qualifying income, both for simplicity of administration, and because this is a reasonable amount of savings for people to have (especially when they are inherently at risk of financial instability).
b. It fails to exclude other property that should be excluded. See the LSC's standards at 45 CFR Part 1611.

My own proposal, below, applies the dual 125% / 200% test used by the LSC. I am of course not opposed to a more generous standard for what FPL percentage should be pegged.

The LSC's rulemaking received far more input and scrutiny than Prof. Hammond's paper. Its dual standard incorporates multiple considerations for other circumstances that I believe are important and should be followed, regardless of whether the lower threshold is set at 125% or 150% FPL.

I don't believe the LSC's standards are perfect — if you compare closely, you will see that my proposal makes a few tweaks and additions — but they are a solid basis to work from.

2. The proposed forms are improvements, but still violate 28 USC 1915(a)(1) or have other problems.

a. Hammond form

For a non-prisoner, the *only* lawful part of this form's content is the first paragraph.

Literally none of the suggested questions are in any way authorized by the IFP statute. The law is extremely clear that it requires only an affidavit, not any detail.

Even for prisoners, nothing in 28 USC 1915(a) authorizes any question at all about income, expenses, or dependents. Those simply are not "assets", by any definition.

If a court wants more information, it can issue an order to show cause why the affiant should not be held in contempt for perjury. Such an order may require, under 18 USC 6002(1), whatever further details are appropriate to the situation.

A sworn affidavit is either sufficient evidence in itself, or a crime. If the court has no reason to accuse the affiant of perjury, it has absolutely no business demanding further proof of what was sworn to. Such inquiry cannot be justified as merely a routine response to applying for IFP status.

It is irrelevant whether an applicant is represented by a legal aid organization per se. If that legal aid is a means-tested program whose qualification standards are equivalent, like LSC-funded legal aid programs, then *that* is the relevant fact. Any such program should be permitted as an automatic IFP qualification.

On the plus side, the Hammond form is at least *less* illegal than the current AO forms, because it does not ask questions about the affiant's spouse, creditors, debtors, etc. (as I've detailed previously), and the amount of detail it asks is far less intrusive.

In short, it's illegal and inapt — but nevertheless substantially better than AOUSC's current forms.

b. Ohio form

Nothing in the IFP statute, or indeed any federal rule of procedure I'm aware of other than bankruptcy, authorizes a court to routinely ask an applicant their date of birth or any part of their SSN. In fact, the AOUSC adopted, and the Supreme Court promulgated, my proposal 15-AP-E that the former SSN question be removed from FRAP Form 4.

The number the applicant's *dependents* is relevant to automatic qualification under the Federal Poverty Guidelines (which are based on the family size of a head of household).

However:
i. non-dependent cohabitants are not relevant to the FPGs
ii. the residence and identity of third parties is private information and may not be disclosed like this
iii. a dependent's age is irrelevant
iv. a dependent can be someone other than a spouse or child
v. again, 28 USC 1915(a)(1) simply does not authorize a court to ask for this kind of information.

The appropriate solution is to simply set forth a table of qualifying amounts, explaining that the affiant should refer to the line corresponding to the number of their defendants, and let the affiant swear that they meet the relevant criterion.

Again, if a court has reason to believe that the affiant made a false statement, it can inquire pursuant to an OSC. But it cannot simply ignore the plain text of the statute and impose utterly atextual disclosure requirements.

As I've stated before, a spouse's resources are completely irrelevant. Cohabitation neither implies nor denies access to joint financial resources. The court should state simply that if the affiant has actual access to joint resources, the affiant must include such resources when comparing themselves to the FPG-based income/asset standard.

Even if they were authorized by law — which they are not — many of the questions are far too invasive for a document that is not sealed. Veteran status, alimony, expense profile, debts, taxes, etc. are all private information.

Most (or indeed all) of this information is potentially a 5th Amendment violation as well. If there's a discrepancy, even an innocent one, with the affiant's IRS, SSI, alimony, etc. filings, that can potentially be used as evidence against them.

Courts have extremely clear authority to make the 5th Amendment issue moot: the grant of use immunity pursuant to 18 USC 6002(1). All IFP affidavits are, in essence, submitted as a condition of the constitutional right to access the courts, i.e. under a kind of duress. IFP litigants can hardly be expected to recognize what might be used as evidence against them, know what use immunity is, and push back against a court's demand for information.

See Simmons v. United States, 390 US 377, 394 (1968) and United States v. Kahan, 415 US 239, 243 (1974). (These are as to CJA affidavits, not IFP, but there is no relevant difference here.) As far as I know, the Court has never decided the issue of privilege to IFP/CJA affidavit content, but the lacuna carved out could not be clearer, since it matches the exact distinction that is made in 6002(1): perjury on an affidavit can be used, but the content is likely privileged.

There's a very simple and clearly established way to cure this: all IFP forms should be *automatically* considered as orders issued pursuant to

6002(1), and all responses to them given use immunity.

3. Features of my proposal, and of your review

I suggest that the AOUSC adopt the definitions, exclusions, qualification standards, and related rules that I've set forth below.

They address all issues that have been raised by myself, Prof. Hammond, and all Committee members' comments on the record to date.

They provide judges and applicants with clear, objective standards that will cover the supermajority of situations — as well as flexible rules for situations that those will inevitably fail to foresee. These standards are consistent with, and quote from, the Supreme Court's ruling in Adkins.

They're consistent with the LSC standards — as well as those of every state whose rules I've seen. (E.g. Arizona C.J.A. 5-206 & A.R.S. 12-302, 22-281, 25-355.) Please note that Ariz. S.B. 1111, Ch. 358, 2148-54 (41st) was explicitly the basis for the PLRA, which was introduced by Arizona's Sen. Kyl. The PLRA is what introduced the obvious drafting error in 28 USC 1915(a)(1) that is the sole statutory basis for courts' demand of IFP affiants' information.

They exclude income and assets that are legally protected; necessary for a person's livelihood or living; controlled by third parties or adversaries; or not actually available to the applicant to pay court costs.

They provide for notification to the court on substantive changes, consistent with the LSC standards, litigants' duty of candor to the tribunal, and the threat of dismissal "at any time" under 28 USC 1915(e)(2)(A).

They provide for *partial* waiver, consistent with 28 USC 1915(e)(2)(A), 1915(b)'s scheme for prisoners' payment installment plans, similar provisions under state law (such as Arizona's), and the general principles of proportionate, equitable relief.

They provide clear definitions of the terms to which an affiant is expected to swear.

They provide for courts to determine what government programs qualify prima facie, without reference to an individual's circumstances. This means that the list of qualifying and non-qualifying programs will stay up to date without having to change the Rules, and without making every applicant re-litigate pure questions of law of this sort. The Federal Poverty Guidelines are uniform across all states except Alaska and Hawaii, so only 3 variations will be required to track the FPG for all 50 states. The Judiciary should not attempt to reinvent what HHS has done for decades.

They provide for courts to make *categorical* decisions where possible when the basic standards fail and discretion is required. This will prevent the extremely wide variation documented by Prof. Hammond and

attested to by Committee members. By making the issue a question of law that can apply to *anyone* in similar circumstances, rather than every single case having one-off determination, there will emerge case law that can both address unusual situations and be consistent for everyone. This is necessary for the reliance interests of affiants, clear notice to prospective litigants of what will or won't qualify in all situations other than ones that are truly novel, and the fundamental due process right to equal treatment.

They proactively cure the 5th Amendment issues signaled by the Supreme Court in Simmons and Kahan, to ensure that applicants are not put in an unconstitutional dilemma of choosing between one right and another.

They are not, however, perfect.

I am quite certain that the Committee will find things to nitpick. I am not an expert, let alone on the law of martial community property, bankruptcy, attachment, taxation, or the like. I will surely have made errors; there will be phrasing that can be made more clear; etc.

Don't hold my proposal to an impossible standard. It's better than what you've set forth so far; it addresses all the issues I enumerate above, which your proposals do not. It's clearer than what *any* Federal court has set forth to date on IFP standards.

You cannot reasonably ask for more.

Please try to work with it as a draft. Ask yourselves whether a different proposal — including the proposal of rejection — would better solve the issues I've enumerated. Let the proposal that best solves them prevail.

And, again, please bear in mind that, right now, courts are routinely violating 1915(a)(1).

The plain text, and the entire legislative history of the PLRA — whether you're a textualist or otherwise — gives no basis to demand non-prisoners to provide anything more than a two-sentence affidavit that quotes the text in the statute, and explains the nature of the case. Nothing else is allowed.

Even for prisoners, the only addition is a statement of the "assets such prisoner possesses" — not non-assets, nor the property of others. There is simply no textual defense for the current forms.

Try to imagine that this were a regulation by the Executive.

The current forms could not survive Chevron review. Current practice by judges would be enjoined as arbitrary and capricious, and thoroughly lacking notice, consistency, reliance, transparency, or basis in statutory authority. They've survived this long only because they target an extremely vulnerable group of litigants.

I know that's a bitter fact to swallow, but it's the truth, and it's

long past time for the AOUSC to admit — and correct — its error in promulgating rules and forms that have no basis in law.

The Judiciary must hold its own regulatory rulemaking to a higher standard.

4. Text of my proposal

A. Definitions

1. Assets
  a. “Assets” means cash or other resources that are readily convertible to cash.
  b. “Assets” excludes
   i. assets which are not currently and actually available to the applicant to pay for the fees or security for which waiver is sought,
   ii. assets which the court determines should be exempt in the interests of justice,
   iii. the applicant's principal residence,
   iv. a vehicle used by the applicant for transportation,
   v. assets used by the applicant in producing income,
   vi. assets received by the applicant under any Governmental poverty assistance program,
   vii. assets exempt from bankruptcy under 11 U.S. Code § 522, and
   viii. assets exempt from attachment under State or Federal law.

2. Income
  a. “Income” means gross income, as defined in 26 U.S. Code § 61 and Internal Revenue Service regulations.
  b. “Income” excludes
   i. income which is not currently and actually available to the applicant to pay for the fees or security for which waiver is sought,
   ii. income which the court determines should be exempt in the interests of justice,
   iii. income that is committed to medical or nursing home expenses,
   iv. income that is not taxable, as defined in 26 U.S. Code § 63 and Internal Revenue Service regulations, and
   v. assistance under any Governmental poverty assistance program.

3. Assets and income that are not “currently and actually available to the applicant” include those that are
  a. owned, whether or not jointly with the applicant,
   i. by an opposing party,
   ii. by a person accused by the applicant of domestic violence towards the applicant, or
   iii. by a person against whom the applicant has a relevant, adverse legal interest; or
  b. owned non-jointly by another person, such as applicable local law of martial property.

B. Qualification standard

1. In general

An applicant is “unable to pay” if:

a. the applicant’s assets total no more than one year of 125% of the Federal Poverty Guidelines, and the applicant’s income is no more than 125% of the Federal Poverty Guidelines;

b. the applicant’s income is no more than 200% of the Federal Poverty Guidelines, and
i. the effect of the case, if won by the applicant, is to maintain or obtain benefits under a governmental poverty assistance program;
ii. the effect of the case, if won by the applicant, is to maintain or obtain governmental benefits for persons with disabilities; or
iii. the court determines that significant factors — such as the applicant’s legal claims, or the applicant’s current or prospective assets, expenses, debts or obligations, costs of living, unreimbursed medical expenses, age or disability related expenses, or taxes — indicate that the person is unable to pay; or

c. the court determines that, under the circumstances,
i. the applicant is not able to pay all expected costs and sureties, or
ii. paying all expected costs and sureties would cause the applicant to be unable to provide themselves and their dependents with the necessities of life, or cause the applicant to become a public charge, such as by being so poor as to qualify for government assistance.

NOTE: See Adkins v. DuPont, 335 US 331, 339 (1948)

2. Automatic qualification

If the applicant currently receives benefits from a means-tested State or Federal poverty assistance program, such status constitutes automatic satisfaction of the income and/or asset thresholds of paragraph (1) corresponding to the test required by that program.

3. Partial waiver

If an applicant does not qualify for full waiver, the court may grant a partial waiver proportional to the applicant’s ability to pay.

Partial waivers may include periodic payments, deferred payments, payment from money awarded to the recipient in judgment, or similar arrangements.

C. Change in qualification status

If a person receiving a waiver no longer qualifies under the standard pursuant to which the waiver was granted, the recipient shall promptly notify the court, and may file a renewed motion for waiver.

If the court thereafter, or acting sua sponte, determines that the recipient no longer qualifies — or if the notification states that the recipient no longer qualifies — the recipient must pay such proportion

of waived fees or security as the court determines, or the court shall dismiss the case pursuant to 28 USC 1915(e)(2)(A).

If a person who paid fees or surety is subsequently granted fee waiver, the court shall refund all payments that would be waived.

D. Information required to be disclosed to the court in fee waiver applications

In general, the court shall only require an applicant to disclose the information enumerated in paragraph (E)(1), and to identify which qualification standard in this rule is relied upon by the applicant.

If the applicant is a prisoner, the court shall also require the applicant to disclose all assets the applicant possesses, as defined in paragraph (A).

If the applicant claims qualification under paragraph (B)(2), the court may require the applicant to identify the program relied upon.

If a court has previously determined, pursuant to 28 USC 1915(e)(2)(A), that the applicant made a false statement of poverty — or if the court issues an order to show cause why the applicant should not be sanctioned for perjury — the court may require such additional information as is proper under the circumstances.

If the applicant claims qualification under paragraph (B)(1)(b)(iii), (B)(1)(c), or (B)(3), the court may require disclosure of information that is necessary for its determination, and may request (but not require) such additional information as may reasonably affect the determination.

E. Separation, privacy, and use immunity of financial affidavits

a. Public affidavit

All applicants shall publicly file a sworn affidavit stating:
i. "I am unable to pay the fees or security ordinarily required by this court."
ii. "I believe that I am entitled to redress."
iii. "The nature of my action, defense, or appeal is that _____."
iv. (optional) "I am able to pay a part of the costs, or on an installment plan, as set forth in my sealed affidavit."

b. Sealed affidavit

Affidavits of any other information under this rule shall be filed separately, ex parte and under seal.

c. Use immunity

All affidavits required by this rule, or by any court rule or order requiring information under 28 USC 1915, are automatically granted use immunity pursuant to 18 USC 6002(1).

NOTE: See Simmons v. United States, 390 US 377, 394 (1968) and United States v. Kahan, 415 US 239, 243 (1974).

d. Access to sealed affidavits

i. The affiant may move to unseal their own sealed affidavit under this rule as of right, unless it discloses another person's private information.

ii. Anyone may move to unseal a sealed affidavit under this rule by a public motion, opposable by the affiant and anyone whose information is disclosed in the affidavit, demonstrating compelling reasons why the affidavit should be unsealed.

iii. The Government may additionally access a sealed affidavit under this rule, under seal and appropriate protective order, by a public motion, opposable by the affiant, demonstrating that

I. there is good reason to believe that the affidavit is perjured or contains a false statement, and

II. the Government intends to use that fact as evidence in a criminal case against the affiant pursuant to 18 U.S. Code § 6002.

F. Required court determinations and orders

1. Courts shall issue a rule or standing order determining what assistance programs do or do not qualify under paragraph (B)(2).

2. If an applicant claims qualification under a program not clearly addressed by the current rule or standing order, or challenges the program's qualification status, the court shall determine whether that program qualifies as a question of law, and update the rule or standing order accordingly.

3. At the time of granting any discretionary qualification under this rule, the court shall issue an order stating a clear, objective standard for when the recipient must notify the court of a change pursuant to paragraph (C). To the extent reasonably feasible, such orders shall state a categorical standard, without reference to the applicant’s particular details.

3. On a yearly basis, immediately after the publication of updated Federal Poverty Guidelines, the AOUSC shall revise all IFP forms to conform with the updated guidelines to state the current qualifying standards. Such FPG-tracking revisions are ministerial, and exempt from the procedural requirements of the Rules Enabling Act for substantive rules.

Sincerely,
Sai