COMMENT

to the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
and its
ADVISORY COMMITTEES

**ENSURING CONTINUITY IN TIMES OF UNCERTAINTY:
THE NEED TO UPHOLD AND DEFEND THE RULES ENABLING ACT PROCESS
IF ANY RULE AMENDMENTS ARE NEEDED TO AMELIORATE FUTURE NATIONAL EMERGENCIES' EFFECTS ON COURT OPERATIONS**

June 1, 2020

Lawyers for Civil Justice (LCJ), DRI – The Voice of the Defense Bar (DRI), the Federation of Defense & Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC) respectfully write in response to the invitation by the Committee on Rules of Practice and Procedure (the "Standing Committee") and its five advisory committees for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

I. The Standing Committee Should Reaffirm the Rules Enabling Act Process

It is important for the Standing Committee and advisory committees to consider whether rule amendments are needed to ensure the continuing operation of the courts during future emergencies, and it is appropriate in that context to examine the challenges encountered during the COVID-19 pandemic and any solutions developed to deal with those challenges. Emergency situations may require some modifications of procedural rules. If modifications are necessary to rules promulgated pursuant to the Rules Enabling Act, which have the force of law,[1] then those modifications should be made pursuant to the Rules Enabling Act process. It would be very difficult, if not outright impossible, to draft a single federal rule (or even a set of rules) that would be able to encompass all emergency situations. Conversely, drafting a rule to give courts the power to create their own *ad hoc* rules which would alter existing procedural requirements would inject uncertainty into the judicial system,[2] so there are good

[1] *In re CVS Pharmacy, Inc., et al.*, No. 20-3075 (6th Cir. Apr. 15, 2020) (rules promulgated pursuant to the Rules Enabling Act are binding upon court and parties alike and have the force of law)(*citing Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *In re Pangang Grp. Co.*, 901 F.3d 1046, 1055 (9th Cir. 2018); *Winston & Strawn*, LLP v. McLean, 843 F.3d 503, 506 (D.C. Cir. 2016)).

[2] *Ad hoc* rulemaking is already a problem in particular areas of practice, notably in multidistrict litigation and expert evidence admissibility. *See* Letter from 48 Chief Legal Officers to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Oct. 3, 2019), https://www.uscourts.gov/sites/default/files/19-cv-aa-suggestion_from_45_companies.pdf ("MDLs have become less and less grounded in the widely accepted principles of procedural fairness and transparency that are the FRCP's hallmarks" and *ad hoc* MDL procedures are "inconsistent with the basic tenets of the FRCP"); Comment from Lawyers for Civil Justice to the Civil Rules Advisory Committee, *What MDL Problems Need to be Solved with Amendments to the Federal Rules of Civil Procedure?* (March 30, 2020), https://www.uscourts.gov/sites/default/files/20-cv-e_suggestion_from_lcj_-_mdl_proceedings_0.pdf (*ad hoc* practices in MDL cases are inconsistent with Rule 1's admonition that the FRCP

grounds for caution. For that reason, as part of this review, the Standing Committee and advisory committees should reaffirm the fundamental purpose of the rules of practice and procedure—fair, consistent, uniform practices—and their role in furthering adherence to those rules including during times of national emergency.

II. The Next National Emergency Could Look Vastly Different from the COVID-19 Pandemic

Although this examination of possible emergency rules will be influenced by the circumstances of the current pandemic, the next national emergency may present very different—indeed, inconsistent—needs. Modifications designed to avoid the spreading of a highly communicable disease might logically include allowing technological means for communicating from a distance such as video conferencing. Such technologies, however, may well be the source of danger, rather than a means of avoiding it, in a national emergency caused by a malicious cyber attack, or may simply be unavailable in an emergency relating to failure of the electrical grid. The impossibility of forecasting the nature of future emergencies counsels strongly for caution in undertaking to write rules that would apply in unknowable situations.

III. The Aim of Emergency Rules Should be to Ensure "Regular Order" of Judicial Process, Rather Than to Impose a Slowdown to be Followed by New Expedited Practices

Emergency rules, if any are needed, should aim to maintain as much "regular order" in the courts as possible. The contrary idea—rules requiring or allowing a prolonged cessation of process—likely would result in serious threats to fundamental fairness. Pauses create backlogs, and backlogs inherently produce pressure to expedite matters. As courts speed up to tackle backlogs, parties may experience pressure to waive jury trials, forego oral arguments, participate in depositions or trials by video conference, proceed with multiple-plaintiff trials, exclude "high-risk" categories of people from jury service—all of which can implicate fundamental notions of justice. The way to avoid such problems is to focus any emergency rules on helping to avoid the creation of backlogs in the first place, and to state explicitly in any emergency rule that the rights of parties should not be abridged.

IV. Emergency Rules Should Protect the Integrity of the Judiciary

Beyond ensuring continuation of operations, emergency rules also may be needed to protect people from misuse of the courts during crisis situations. Times of civic stress and chaos provide opportunities for people, whether maliciously or not, to take advantage of others by bringing litigation or pressing forward

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should "govern all actions and proceedings," so the FRCP should be amended to end the individualized practices in different courts by different judges); Letter from Amy Sherry Fischer, President of the International Association of Defense Counsel, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Oct. 30, 2019) ("without firm and predictable guidance in the form of rulemaking, MDL practice will continue to evolve into a process that is considered unjust by most observers"); Letter from 50 Companies to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (March 2, 2020), https://www.uscourts.gov/sites/default/files/20-ev-b_suggestion_from_50_companies_-_rule_702_0.pdf (Rule 702 should be amended to address judicial practices that diverge materially from the Evidence Advisory Committee's purpose when it drafted the rule); Lee Mickus, *Gatekeeping Reorientation: A Rule 702 Can Correct Judicial Misunderstandings about Expert Evidence*, WLF Working Paper No. 217 (May 2020), https://www.uscourts.gov/sites/default/files/20-ev-d_suggestion_from_washington_legal_foundation_-_rule_702_0.pdf ("Twenty years of inconsistency … have turned Rule 702 into a mosaic of standards in which the same testimony that one court excludes would be admissible in a sister court," and "the widespread inconsistency among the courts cries out for amendments to clarify the rule.").

aggressively at a time when their opponents may be unable to focus sufficient attention and resources to litigation due to the demands of the emergency situation. It therefore may be useful for courts to have a heightened ability to enforce Rule 11 and other ethical responsibilities during times of crisis.

V. The Use of Emergency Rules should be Determined by the Supreme Court

If the Standing Committee moves forward with consideration of any emergency rules, it should also consider creating an implementation mechanism that provides discretion to the Supreme Court. The CARES Act contemplates "emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act,"[3] but not all emergency declarations necessitate invoking emergency rules. There are at least three such designations in effect now (terrorism, border wall, and COVID-19), and the declaration relating to terrorism has been in effect since 2001. The Supreme Court should make the decision as to whether any emergency rules are invoked, and for how long.

VI. Conclusion

As the Standing Committee and its five advisory committees consider possible rule amendments that could ameliorate future national emergencies' effects on court operations, we urge the committees to focus on the goal of preserving the rule of law as contemplated by the Rules Enabling Act, due process, and fundamental fairness. The committees should proceed with great caution in drafting rules, if any, because of the unknown nature of any future emergency and because new rules implemented in a crisis could risk forcing parties to compromise their basic rights in the name of expediency or convenience.

[3] Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 15002(b)(6).