COMMENT OF PUBLIC JUSTICE AND THE NATIONAL CONSUMER LAW CENTER

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ITS FIVE ADVISORY COMMITTEES ON POSSIBLE RULE AMENDMENTS FOR FUTURE EMERGNCIES

June 1, 2020

Public Justice, P.C., the Public Justice Foundation (collectively, "Public Justice"), and the National Consumer Law Center respectfully submit this Comment to the Advisory Committee on Civil Rules in response to the request for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

INTRODUCTION

Public Justice, P.C. is a national public interest law firm that pursues impact litigation to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. We have one of the most diverse public interest litigation portfolios in the country. We protect consumers, employees, civil rights, and the environment. We litigate to stop sexual assault and bullying in schools, to promote a more sustainable and safe food system, to safeguard water sources from pollution, and to provide consumers and employees with access to the courts. Public Justice works extensively to protect access to justice, and has long fought to preserve access to court proceedings and records, frequently representing members of the public and the press in intervening to combat unnecessary or overbroad sealing orders. The list goes on, but our litigation has one common theme: it aims to protect the underprivileged and the powerless by ensuring access to justice for all who have been wronged by those in power.

The Public Justice Foundation is a not-for-profit charitable membership organization that supports the work of Public Justice, P.C. and educates lawyers, judges, and the broader public about critical social and economic issues that affect the public interest. Its almost 2,600 members, from all fifty states, represent plaintiffs in a broad range of personal injury, employment

discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial, and civil rights cases.

The National Consumer Law Center ("NCLC") is a national non-profit research and advocacy organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. NCLC pursues these goals through policy advocacy, litigation, expert-witness services, and training for consumer advocates throughout the United States, and does so on a wide range of issues, including consumer protection, access to justice, unfair and deceptive acts and practices, privacy rights, civil rights, and employment. Since establishing its own litigation practice in 1999, NCLC has brought or co-counseled over 140 consumer cases. NCLC also prepares and publishes a twenty-one volume Consumer Credit and Sales Legal Practices Series, including Consumer Class Actions (10th Ed. 2020). The organization has sponsored an annual Consumer Rights Litigation Conference for 29 years and an annual Class Action Symposium for 20 years.

For over fifty years, NCLC has been a leading source of legal and public policy expertise on consumer issues for courts, Congress, state legislatures, agencies, consumer advocates, journalists, and social service providers. Throughout its history and during the COVID-19 pandemic, NCLC has sought strong and effective enforcement of consumer protection and civil rights laws and worked to ensure equal access to justice.

During the COVID-19 pandemic, Public Justice and NCLC have continued to litigate their cases to the extent possible. Public Justice has been in constant communication with its membership, and Public Justice and NCLC have gathered examples of court disruptions resulting from the pandemic and some of the creative solutions litigants and courts around the country have employed to resolve some of these issues. The following comments are drawn from this experience.

These comments propose a number of concrete and specific changes this Committee should consider in anticipation of future emergency conditions like COVID-19, including (a) changes to Rules 30 and 32 to facilitate the taking and memorializing of remote depositions, (b) a rule and accompanying comment to ensure that public access to court proceedings is preserved, even in times of emergency, and (c) a suggestion to facilitate the admission of counsel pro hac vice to federal courts when their respective

state courts may be experiencing disruptions that affect counsel's ability to secure needed documentation, like certificates of good standing.

I. RULE CHANGES ARE NEEDED TO FACILITATE THE TAKING OF DISCOVERY DURING EMERGENCIES LIKE COVID-19.

a. The Committee should consider changes to Rule 30 to facilitate the taking of remote depositions.

Challenge: There are two ambiguities in Rule 30 that may present difficulties in encouraging the taking of depositions remotely during an emergency: Rule 30(b)(4)'s requirement that the "court may on motion order" that a deposition be taken by remote means, and Rule 30(b)(5)(A)'s requirement that depositions be conducted "before" a Rule 28 officer.

Proposed Solution 1: Amend Rule 30(b)(4) as follows:

> *By Remote Means.* The parties may stipulate—or the court may ~~on motion~~ order—that a deposition be taken by telephone or other remote means. [1]

Proposed Solution 2: Amend Rule 30(b)(5)(A) as follows:

> *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. **[A deposition may be deemed to have been conducted "before" such an officer if that officer participates by such means that he or she can hear (if conducted via audio) or see and hear (if conducted via videoconference) the deponent.]**

Rationale:

For decades, the federal rules have allowed for the taking of depositions by telephone or "other remote means." During the COVID-19 pandemic, this flexibility has proven invaluable. With states and counties across the country issuing stay-at-home orders, and gatherings of even small groups presenting opportunities for virus transmission, remote depositions have become the only way for many cases to move forward.

[1] In this document, proposed new text appears in **[bold and in brackets]**. Proposed deletions appear in ~~strikethrough~~.

Unfortunately, some parties have sought to delay depositions, and have bucked the broader trend towards permitting remote depositions. Moreover, ambiguities in Rule 30 present potential barriers to the taking of remote depositions in some cases during this emergency, and have caused confusion for some courts and litigants. The rule changes proposed above would remove these barriers.

Rule 30(b)(4) allows the parties to stipulate, or the court to order, that a deposition be taken by telephone or other remote means. But, in the absence of a stipulated agreement, the rule may be read to require a motion before the court may make such an order. During the COVID-19 pandemic, many state court systems issued blanket orders encouraging the taking of all depositions by remote means. *See, e.g.*, 151st Civil District Court Harris County, Texas Order Regarding Remote Oral Depositions by Videoconference (March 24, 2020) (providing that all oral depositions may be taken, and oaths administered, remotely via videoconference); 129th Civil District Court Standing Order No. 1 Regarding Remote Depositions (March 30, 2020) (same); Supreme Court of New Jersey Omnibus Order (March 27, 2020) ("To the extent practicable through April 26, 2020, depositions should be conducted remotely.").

Such blanket orders are an efficient and effective way of preserving judicial resources while ensuring that cases continue to move along where possible during an emergency such as the current pandemic. If Rule 30(b)(4) is read to require a motion before a federal court can issue such an order, it stands as a barrier to the court's efficient administration of justice during such times. Public Justice and NCLC therefore propose that the "on motion" requirement be excised from the rule, to provide courts with the flexibility to order that depositions be taken remotely, without motion, during any future emergency.

Rule 30(b)(5)(A) requires that "[u]nless the parties stipulate otherwise, a deposition must be conducted *before* an officer appointed or designated under Rule 28." (emphasis added). Questions about whether the "conducted before" requirement permits the Rule 28 officer to participate remotely, or whether the deponent and the officer must be physically located in the same place, throw a potential wrench into the works. Public Justice and NCLC therefore urge this committee to consider clarifying this requirement, to make clear that the deponent and the officer need not be physically located in the same place. The fix could be as simple as an additional sentence in the rule or a clarifying comment, stating that a deposition may be deemed to

have been conducted "before" such an officer if that officer participates by such means that he or she can hear the deponent if the deposition is conducted via teleconference and see and hear the deponent if conducted via videoconference.

This question was presented to a number of federal courts during the COVID-19 pandemic. For example, in two separate cases, the Southern District of New York was forced to clarify this requirement under the federal rules. In both *In re Keurig*, No. 14-md-2542 (VSB) (SLC), ECF No. 85 (March 16, 2020), and *Sinceno v. The Riverside Church in the City of New York*, No. 18-cv-2156 (LJL), ECF No. 50 (March 18, 2020), judges of the Southern District clarified that "[f]or avoidance of doubt, . . . a deposition will be deemed to have been conducted 'before' an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants." *See also SAPS, LLC v. EZCare Clinic, Inc.*, No. CV 19-11229, 2020 WL 1923146, at *2 (E.D. La. Apr. 21, 2020) (same).

Similarly, numerous state systems issued orders making just such a change to their own rules. For example, the Supreme Judicial Court of the State of Maine issued an emergency order stating that "an officer or other person before whom a deposition is to be taken is . . . authorized to administer oaths and take testimony remotely, so long as that officer or other person can both see and hear the deponent via audio-video communication equipment or technology for purposes of positively identifying the deponent." State of Maine Supreme Judicial Court, Emergency Order for the Administering Of Oaths at Depositions via Remote Audio-Video Communication Equipment (March 25, 2020). The Maine court believed its order was necessary for the same reason Public Justice and NCLC believe this committee should act: "a situation in which the officer or other person before whom the deposition is to be taken is actually or impliedly precluded, by statute, rule, or otherwise, from administering oaths and taking testimony if not in the presence of the deponent." *Id.* Similarly, the Supreme Court of Wisconsin issued an order on the same date mandating that "the remote administration of an oath at a deposition via audio-visual communications technology pursuant to this order shall constitute the administration of an oath 'before' a court reporter under" Wisconsin law. Supreme Court of Wisconsin, In re the Matter of the Remote Administration of Oaths at Depositions via Remote Audio-Visual

Equipment during the COVID-19 Pandemic (March 25, 2020); *see also, e.g.*, Supreme Court of Florida Administrative Order No. AOSC20-17 (suspending "any actual or implied requirement that notaries, and other persons qualified to administer an oath in the State of Florida, must be in the presence of witnesses for purposes of administering an oath for depositions and other legal testimony, so long as the notary or other qualified person can both see and hear the witness via audio-video communications equipment for purposes of readily identifying the witnesses"); Commonwealth of Massachusetts Supreme Judicial Court Order For the Administering of Oaths at Depositions Via Remote Audio-Video Communication Equipment (same).

To avoid the need for such case-by-case clarifications during future emergencies in the federal courts, and to ensure the consistent application of the federal rules, Public Justice and NCLC therefore advocate that the Committee clarify the requirements of Rule 30(b)(5)(A).

b. The Committee should consider changes to Rule 30 and/or 32 to facilitate the admissibility of recordings of remote depositions.

Challenge: Rule 30 also presents a potential barrier to allowing litigants to produce admissible recordings of depositions taken remotely because it mandates that "the officer must record" the testimony, even though currently-available technology obviates the need for the officer to be responsible for the making of any recording.

Proposed Solution 1: Amend Rule 30(c)(1) as follows:

> *Examination and Cross-Examination*. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must **[ensure that]** ~~record~~ the testimony **[is recorded]** by the method designated under Rule 30(b)(3)(A). ~~The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer~~.

Proposed Solution 2: Issue a clarifying comment to Rule 32 stating that video or digital recordings of depositions held remotely, where they comply

with the notice and non-distortion requirements of Rule 30(b), shall be admissible.

Rationale:

As currently written, the Federal Rules present a potential barrier to the admissibility of recordings of depositions taken remotely during times of emergency. Rule 32 provides that "[u]nless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise." The Advisory Committee Notes make clear that this language "is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."

Under Rule 32(c), "a party may offer deposition testimony in any of the forms authorized under Rule 30(b)," so long as the party also provides the court with "a transcript of the portions so offered." Rule 30(b), in turn, provides for great flexibility in the manner of recording depositions, conferring "on the party taking the deposition the choice of the method of recording." And under Rule 30(b)(3)(B), "any party may designate another method for recording the testimony in addition to that specified in the original notice." No matter the form in which the deposition is memorialized, Rule 30(e) provides a safeguard against inaccurate content, requiring that the deponent have the opportunity to review the "transcript or recording" and offer necessary changes.

Rule 30(c), however, presents a potential limitation to the ability of parties to memorialize depositions in the most efficient manner during an emergency. Under this provision, the "*officer* must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer *personally* or by a person *acting in the presence and under the direction of the officer*." (emphasis added). And some courts have said that videos of depositions taken through technology operated by parties' counsel will not be admissible. *See, e.g., C.G. v. Winslow Twp. Bd. of Educ.*, No. CIV. 13-6278 RBK/KMW, 2015 WL 3794578, at *3 (D.N.J. June 17, 2015) (approving magistrate judge's ruling barring Plaintiffs' counsel from "videotaping the deposition himself on his laptop computer because he was

not an 'officer' within the meaning of the Rules"); *Schoolcraft v. City of New York*, 296 F.R.D. 231, 240 (S.D.N.Y. 2013), on reconsideration, 298 F.R.D. 134 (S.D.N.Y. 2014) ("Although the Plaintiff may take video recordings in depositions for his own purposes, those recordings taken by counsel will not be admissible.").

Such views appear outdated. Traditional rationales for requiring the officer to control the recordation device have little applicability to modern video and digital technology. With the taking of a traditional written transcript of an oral proceeding, "the operator interprets what people say into words and puts them on paper." *Rice's Toyota World, Inc. v. Se. Toyota Distributors, Inc.*, 114 F.R.D. 647, 651 (M.D.N.C. 1987). But the making of a "stationary video recording of a deposition which can be easily duplicated and given to all parties . . . does not involve any interpretation" on the part of the person who hits "record," greatly diminishing any concern for conflicts of interest. *Id*.

Particularly during emergencies like the COVID-19 pandemic, as discussed above, depositions should be permitted to go forward via remote means with the deponent, attorneys, and Rule 28 officer all appearing from different locations. Many of the technologies routinely used for remote depositions include integrated mechanisms for making high-quality, faithful audio or video recordings of the proceeding, presenting little to no risk that the resulting recording will present reliability issues. *Cf. Schoolcraft*, 296 F.R.D. at 240. And there is likewise little risk that there will be any need for interpretation in the recordation. Especially given the Rule 30(e) safeguards, there is no reason why the rules should require the officer to be responsible for pressing "record."

For these reasons, Public Justice and NCLC believe that this Committee should amend Rule 30 as stated above, making clear that the officer need not be the individual actually making the recording, and/or issue a clarifying comment to Rule 32, making clear that video or digital recordings of depositions held remotely, where they comply with the notice and non-distortion requirements of Rule 30(b), shall be admissible.

II. RULE CHANGES ARE NEEDED TO ENSURE THE SEAMLESS PROVISION OF PUBLIC ACCESS TO COURT PROCEEDINGS IN ANY FUTURE EMERGENCY.

Challenge: The court shutdowns necessitated by COVID-19 disrupted the ability of the public and the press to observe federal court proceedings.

Proposed Solution: A federal rule of both civil and appellate procedure stating that the sittings of the federal courts are open to the public, accompanied by an advisory committee note memorializing the best practices and minimum guarantees of openness that courts must meet, even in times of emergency like COVID-19.

- **Proposed Rule Language:**

  PRESUMPTION OF PUBLIC ACCESS TO COURT PROCEEDINGS. Court proceedings are presumptively open to and accessible by the public. This presumption of access applies equally to proceedings held in-person and those held via remote means. Where proceedings are held remotely or where the public is excluded from in-person proceedings due to an emergency condition, a court must provide an alternative form of real-time public access, which shall ordinarily consist of a live video feed or, if that is not technically feasible or the proceeding itself is audio-only, a live audio feed.

  ORDERS TO CLOSE A PROCEEDING. If a court determines that it is necessary to close a proceeding to the public, it must state its reasons on the public record and provide particularized findings of fact supporting its decision. A court may not close a proceeding unless it finds that closure is necessitated by a compelling interest, is narrowly tailored to serve that interest, and that no less restrictive means exist to protect that interest.

- **Proposed Comment:**

  The alternative forms of access required by this rule are especially crucial where a courthouse is physically closed to the public because of an emergency. In anticipation of emergency conditions that may affect the courts' ability to hold in-person proceedings and/or permit in-person public access to their proceedings, courts should maintain robust mechanisms to provide remote public

> access to their proceedings. Courts should provide real-time audio-video access to live proceedings wherever possible. Where audio-video access is not technically feasible or a proceeding is itself audio-only, courts shall at a minimum provide real-time public audio access. To maximize public access at all times, courts are encouraged to offer live remote audio or audio-video public access even when court proceedings take place in-person and no emergency is in place.

Rationale:

As this Committee is no doubt aware, the public and press have a First Amendment right to observe court proceedings and to access court records. This right of access attaches to proceedings including hearings and trials—any proceedings that have "historically . . . been open to the press and general public" and for which access "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 605-06 (1982). Openness in court proceedings "enhances both the basic fairness of the [proceedings] and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Super. Court*, 464 U.S. 501, 508 (1984). Public access to court hearings and records represents "an essential part of the First Amendment's purpose to 'ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.'" *Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) (quoting *Globe Newspaper Co.*, 457 U.S. at 604). It fosters public confidence in the fairness of the country's justice system, allows the public to operate as a check on potential judicial abuses, and promotes the truth-finding function of trials. *Globe Newspaper Co.*, 457 U.S. at 606; *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). In times of disruption like the COVID-19 pandemic, the principle of openness and the purposes it serves become more—not less—important.

As the COVID-19 pandemic ramped up in the beginning months of 2020, the federal courts and their state counterparts faced the difficult task of ensuring that the country's judicial system could continue operating to at least a minimal, constitutionally-mandated degree, while prioritizing public safety. For many courts across the country, this has meant physically closing courtrooms to the public, closing some courthouses altogether, canceling and postponing some appearances, and moving many proceedings to telephone

and video conferencing technology. Courthouses have been operating with reduced staff, with many judges, attorneys, and litigants appearing from home.

Through all of this, courts have struggled to prioritize public access to their proceedings. The result has been a kind of unplanned experiment in adoption of a variety of public-access mechanisms. This experiment has proven that a number of different mechanisms may be feasible, each with their own benefits and potential drawbacks. Learning from this experience, Public Justice and NCLC urge this committee to ensure that the capabilities to provide public access to remote court proceedings be fostered such that they can be brought online immediately when a future emergency or other circumstance necessitates remote proceedings. Wherever possible, courts should strive to provide more complete access, such as through live video-streaming technology. Where video may not be feasible, at a bare minimum, federal courts should build and maintain the capability to provide live, telephone or digital audio access to their proceedings.

In general, these remote access mechanisms can and should be kept in place at all times as part of federal courts' regular operations. Beyond providing constitutionally-required access to court proceedings in emergencies, these mechanisms can improve the practices of the federal courts by facilitating broader court access for those who may not be able to attend court proceedings in person for health or other reasons, regardless of any emergency conditions. For this reason, courts should be encouraged not only to provide remote access during court closures, but also to supplement in-person access to their courtrooms during the regular course of business, for proceedings held remotely or in person.

The experience of the courts during the COVID-19 pandemic has shown that providing live video, telephone, or digital audio access already is feasible for most courts. In recent months, many federal courts made their sittings available to the public via live video streams on the internet, or instituted public listen-only dial-in lines so that the press and public could access their proceedings. *See, e.g.*, Southern District of Illinois Administrative Order No. 263 (March 30, 2020) available at http://www.ilsd.uscourts.gov/Forms/AdminOrder263.pdf (last visited April 7, 2020) (providing that for "any traditional in-court proceeding that is conducted via video teleconference or telephone conference," "audio *and* video feeds will be available to the public and press to the extent

practicable") (emphasis added). Some made information about these dial-in capabilities available on specific case dockets, while others posted call-in information specific to each judge or courtroom. For example, the Northern District of California and the District of Minnesota each posted call-in numbers for hearings on their public dockets. *E.g.*, *Roe v. SFBSC Management, LLC*, No. 3:14-cv-03616-LB (N.D. Cal.) (publicly circulating dial-in conference number "which can accommodate up to 200 people"); *see also* Notice Regarding Press and Public Access to Court Hearings (Updated April 3, 2020), available at https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-hearings-april-3-2020/ (last visited June 1, 2020) ("[M]embers of the press and public will be permitted to hear and/or observe telephonic and video hearings, free of charge, to the extent practicable. Information on public and press access to telephonic or video hearings will be available on PACER."); District of Minnesota General Order No. 6 (March 31, 2020), available at https://www.mnd.uscourts.gov/sites/mnd/files/2020-0331_COVID-19-General-Order-No6.pdf (setting out instructions for members of the press and public to locate public access information on individual case dockets) (last visited June 1, 2020). Others, like the District Court of the Virgin Islands, provided call-in numbers for each sitting judge. Fifth Order Concerning Operations of the District Court of the Virgin Islands During the COVID-19 Outbreak Public Access to Court Proceedings (April 30, 2020).

Even the U.S. Supreme Court began broadcasting live audio of its arguments for the first time in its history, to great success and public approval. *See, e.g.*, Editorial Board, *The Supreme Court sounds great. Keep the broadcasts coming*, The Washington Post (May 23, 2020), https://www.washingtonpost.com/opinions/the-supreme-court-sounds-great-keep-the-broadcasts-coming/2020/05/22/887895ba-9b04-11ea-89fd-28fb313d1886_story.html ("The broadcasts have been an unmitigated success"); Kalvis Golde, *Public approves of live access to Supreme Court arguments, polls show*, SCOTUSblog (May. 21, 2020), https://www.scotusblog.com/2020/05/public-approves-of-live-access-to-supreme-court-arguments-polls-show/ (citing polls showing that 83% of public approved of decision to provide live audio access, and nearly 70% believe that "all courts should allow cameras into the courtroom so that anyone who wants to watch oral argument can do so"). On May 29, 2020, in fact, Senators Charles E. Grassley and Patrick Leahy wrote to Chief Justice Roberts urging the Supreme Court not only to continue "providing live audio streams of *all* oral arguments" going forward, but also to build upon its

COVID-19 practices by providing live video access to its arguments. Letter to Chief Justice Roberts (May 29, 2020), available at https://www.grassley.senate.gov/sites/default/files/2020-05-29%20CEG%2C%20Leahy%20to%20SCOTUS%20-%20Transparency%20Following%20Pandemic.pdf.

Live audio and video streaming is not new. Many federal and state courts have been live streaming video or audio of their proceedings for some time. *See*, *e.g.*, United States Courts for the Ninth Circuit, Audio and Video, https://www.ca9.uscourts.gov/media/; U.S. Court of Appeals for the D.C. Circuit, Information Regarding Live Audio Streaming of Oral Arguments (Effective September 5, 2018), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+RPP+-+Information+Regarding+Live+Audio+Streaming+of+Arguments; Maryland Court of Appeals Live Webcasts, https://www.courts.state.md.us/coappeals/webcasts; Washington State Supreme Court, https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/ (all court hearings are "broadcast live online or televised by TVW, Washington's Public Affairs Station").

To ensure a more seamless transition in the event of any future emergency, and to foster broader access to the federal courts, this Committee should consider adopting the proposed rule and supplemental comment. The proposal is intended to codify existing Supreme Court law mandating open courts, and to apply to those proceedings to which the public has access under that jurisprudence. This proposal will ensure that federal courts uniformly provide a minimum degree of public access to any ongoing proceedings during times of physical court closures. The proposed rule and explanatory comment would effectively set a baseline, encouraging federal courts to provide video access to their proceedings but also ensuring that, at the very least, the public may listen in on the activities of their courts during times of crisis. And the comment is meant to encourage courts to allow remote access even in non-emergency times, to foster public access to court proceedings and the democratic accountability and civic engagement such access engenders.

III. PRO HAC VICE ADMISSIONS

Challenge: Attorneys have encountered difficulty accessing certificates of good standing during COVID-19 court closures.

Proposed Solution: An additional rule, or a comment to Rule 11 or other appropriate existing rule, providing that during times of emergency or when there may be disruptions to state court operations, counsel should be permitted to move for admission on the basis of a declaration that he or she is a member in good standing of the relevant state's bar, in lieu of providing a certificate of good standing. If needed, the rule or comment could require counsel that appears pro hac vice on the basis of a declaration to provide the court with a certificate of good standing from the relevant state's bar as soon as is practicable.

Rationale:

During the COVID-19 pandemic, state court systems and bars across the country shut down. Only a few state systems, like Washington, D.C., provide the certificates of good standing needed for many federal courts' pro hac vice admissions processes electronically. As a result, it became all but impossible to secure up-to-date documents and complete pro hac vice applications in a timely manner, even as some federal court proceedings, rightfully, continued remotely.

While pro hac vice admissions generally are handled through courts' local rules, in future moments of emergency like COVID-19 where conditions impede counsel's ability to secure such documents, the federal rules could resolve this problem uniformly by permitting counsel to move for admission on the basis of a declaration that he or she is a member in good standing of the relevant state's bar, in lieu of providing a certificate of good standing. Given counsel's role as an officer of the court, and the easily-verifiable nature of the information to be attested to, there would be little risk to such a procedure. Moreover, the requirement that counsel appearing pro hac vice on the basis of a declaration provide the court with the relevant certificate of standing as soon as is practicable, if included, would further minimize any risk.

CONCLUSION

Public Justice and NCLC thank the Committee for its time and attention to these important subjects.