COMMENT OF THE NEW YORK CITY BAR ASSOCIATION ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The New York City Bar Association (the "Association"), through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I.Comment on Proposed Revision to Federal Rules of Appellate Procedure 25

The Appellate Rules Committee has proposed revisions to Appellate Rule 25 to follow the proposed revisions of Civil Rule 5, which address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Federal Rule of Appellate Procedure 25(a)(2)(B)(iii), which addresses electronic

signatures. As currently drafted, proposed Rule 25(a)(2)(B)(iii) specifies that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." That could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 25(a)(2)(B)(iii):

> (iii) **Signing.**
> The attorney's name on a signature block serves as the attorney's signature, provided the paper is electronically filed using the user name and password of that attorney of record.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record's name on a signature block, suffices as a "signature" under the meaning of this rule.

Additionally, the Committee proposes that a committee note be added to mirror the language of the note that follows FED. R. CIV. P. 5, which states:

> Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

II. Comments on Proposed Revisions to Federal Rules of Appellate Procedure 41

We are concerned about the proposed amendment to Rule 41(b) that would apply the Supreme Court's "extraordinary circumstances" standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion. We agree with the well-reasoned comments submitted by Judge Jon. O. Newman and recommend that the Committee

delete the proposed last sentence to Rule 41(b). *See* USC-Rules-AP-2016-0002-0006 (posted Dec. 29, 2016).

Federal Rule of Appellate Procedure 41 governs the timing for the issuance of the mandate after a court of appeals issues an opinion, with provisions governing a host of procedural postures. Rule 41(d)(2)(D) provides that if the mandate of the court of appeals has been stayed by virtue of the filing of a petition for certiorari, the court of appeals shall issue the mandate "immediately" after the Supreme Court files an order denying certiorari. In *Ryan v. Schad*, the Supreme Court construed this last provision, and held that if a court of appeals has any discretion to stay the issuance of a mandate following denial of certiorari notwithstanding Rule 41(d)(2)'s use of the word "immediately," the court could exercise such discretion only under "'extraordinary circumstances,'" such as in the event of "'grave, unforeseen contingencies.'" 133 S. Ct. 2548, 2551 (2013) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). Even though both *Ryan* and *Calderon* involved death penalty sentences, no such "extraordinary circumstances" were present in either case. *Id.*

The proposed amendment to Rule 41(b) would apply this "extraordinary circumstances" standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion, regardless of whether the U.S. Supreme Court has denied certiorari. In particular, this Committee is concerned that the proposed amendment to Rule 41(b) could disrupt the panel rehearing and en banc procedures of the courts of appeals.

As Judge Newman aptly explains, the proposed "extraordinary circumstances" standard is a poor fit for Fed. R. App. 41(b). In cases in which no petition for panel rehearing or rehearing en banc is filed, there are situations in which a court of appeals acts well within its discretion to delay issuance of the mandate. For instance, delaying the mandate may be appropriate where a

member of the court is considering whether to call for a vote to rehear a case en banc even when no petition for rehearing en banc has been filed, or because the court has ordered a rehearing en banc on its own motion and no en banc opinion has yet been issued. Such en banc deliberation is an ordinary part of full appellate review, which need not be justified with regard to an "extraordinary circumstances" standard developed in an entirely different context, with different interests at stake. *See Ryan*, 133 S. Ct. at 2550 (after the U.S. Supreme Court has denied certiorari, the mandate must issue immediately absent extraordinary circumstances precisely because the mandate was stayed "solely to allow th[e] Court time to consider a petition for certiorari") (quoting *Thompson*, 545 U.S. at 806)); Fed. R. App. 41(d)(2)(D). Rule 41(b) recognizes that the mandate need not issue if a petition for panel rehearing or rehearing en banc has been filed. This reflects the sound policy justification that a mandate need not issue if the original opinion may be withdrawn. These same considerations support allowing the court to delay issuing the mandate if the court determines that en banc consideration or panel rehearing may be appropriate.

Dated: February 15, 2017

New York, New York

Respectfully submitted,

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** Did not participate in this report.

COMMENT OF THE NEW YORK CITY BAR ASSOCIATION ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

The New York City Bar Association (the "Association"), through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Criminal Procedure.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Criminal Procedure. The Federal Courts Committee generally supports the amendments and respectfully submits the following comment to clarify one of the proposed amendments:

I. Comment on Proposed Revision to Federal Rules of Criminal Procedure 49

The Criminal Rules Committee has proposed revisions to Criminal Rule 49 to address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Federal Rule of Criminal Procedure Rule

49(b)(2)(A), which addresses electronic signatures. As currently drafted, proposed Rule 49(b)(2)(A) specifies that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." That could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 49(b)(2)(A):

(A) **Electronically.**

Article I. A paper is filed electronically by filing it with the court's electronic-filing system. The attorney's name on a signature block serves as the attorney's signature, provided the paper is electronically filed using the user name and password of that attorney of record. A paper filed electronically is written or in writing under these rules.
Article II.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record's name on a signature block, suffices as a "signature" under the meaning of this rule.

Dated: February 15, 2017

New York, New York

Respectfully submitted,

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§ Did not participate in this report.

COMMENT OF THE NEW YORK CITY BAR ASSOCIATION ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

The New York City Bar Association (the "Association"), through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Bankruptcy Procedure.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Bankruptcy Procedure. The Federal Courts Committee is generally supportive of the proposed amendments and respectfully submits one clarifying suggestion:

I. Comment on Proposed Revision to Federal Rules of Bankruptcy Procedure 5005

The Bankruptcy Rules Committee has proposed revisions to Civil Rule 5 to address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Rule 5005(a)(2)(C), which addresses electronic signatures. As currently drafted, proposed Rule 5005(a)(2)(C) specifies that when a paper is

filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." That could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 5005(a)(2)(C):

> (C) **Signing.**
> The attorney's name on a signature block serves as the attorney's signature, provided the paper is electronically filed using the user name and password of that attorney of record.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record's name on a signature block, suffices as a "signature" under the meaning of this rule.

Additionally, the Committee proposes that a committee note be added to mirror the language of the Committee Note that follows FED. R. CIV. P. 5, which states:

> Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant.

Dated: February 15, 2017

New York, New York

Respectfully submitted,

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‡ Did not participate in this report.

COMMENT OF THE NEW YORK CITY BAR ASSOCIATION ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The New York City Bar Association (the "Association"), through its Committee on Federal Courts ("Federal Courts Committee"), greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Civil Rules.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Civil Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. Comment on Proposed Revision to Federal Rule of Civil Procedure 5

The Civil Rules Committee has proposed revisions to Civil Rule 5 to address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Federal Rule of Civil Procedure Rule 5(d)(3)(C), which

addresses electronic signatures. As currently drafted, proposed Rule 5(d)(3)(C) specifies that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." That could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 5(d)(3)(C):

> (C) **Signing.**
> The attorney's name on a signature block serves as the attorney's signature, provided the paper is electronically filed using the user name and password of that attorney of record.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record's name on a signature block, suffices as a "signature" under the meaning of this rule.

II. Comments on Proposed Revisions to Federal Rule of Civil Procedure 23

A. Rule 23(e)(2)'s Multi-Factor Analysis To Evaluate Settlements

The proposed Rule 23(e)(2) lays out a multi-factor analysis to evaluate the fairness, reasonableness and adequacy of proposed class action settlement agreements. The Committee is generally in favor of this proposal and we believe it helpful that the Rule lays out a specific framework for evaluating whether a court should approve a class action settlement. While many Circuits have a multi-factor test to guide courts' inquiry in determining whether to approve

settlement,* the specific criteria in the proposed Rule will minimize distinctions between the Circuits, which we support.

We propose a small edit to the Committee Notes following Rule 23 to avoid confusion regarding the submissions parties shall present to the court in seeking approval under Rule 23(e)(2). We also offer a comment regarding the introductory language in Rule 23(e)(2) concerning the Court's consideration of specific criteria and propose a small edit. Finally, we offer some comments regarding the specific criteria listed in proposed Rule 23(e)(2) and propose edits.

First, the Committee Notes following proposed Rule 23(e)(2) state that the "amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary consideration and substantive qualities." We support this focused inquiry on the shorter list of factors identified in proposed Rule 23(e)(2). We are concerned, however, that the statement in the Committee Notes that the "goal of this amendment is not to displace any of these [the circuits'] factors," may cause confusion. We suggest that the committee delete that statement and instead state: "The goal of this amendment is not to displace any of the case law developed by the circuits because that case law remains relevant to determining whether a settlement meets the criteria for approval detailed in Rule 23(e)(2) itself. Because those same central concerns are embodied in the factors listed in Rule 23(e)(2), the amendment directs the parties to principally address the fairness, reasonableness and adequacy of the settlement to the court in terms that encompass the shorter list of core concerns, when all of those factors are appropriate."

* Our research has not located a defined set of factors in the First or D.C. Circuits. The remaining circuits have provided for defined sets of factors by case law.

Second, the proposed Rule 23(e)(2) may be read to require each of the factors to be considered even where they are inapposite. Specifically, proposed Rule 23(e)(2) states that a court may approve a class action settlement "only on finding that it is fair, reasonable, and adequate after considering whether," and then lists a series of factors. Accordingly, instead of the language just quoted, we suggest: "only on finding that it is fair, reasonable, and adequate after considering **factors including, where appropriate**, whether. . ."

Third, we offer the following comments on specified factors listed in Rule 23(e)(2):

- "the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required." Rule23(e)(2)(C)(ii). This type of factor has not been regularly analyzed in the Circuits, so there is a concern that district courts could apply it inconsistently. Thus, the comments should note that this factor does not require a specific method or absolute standard for distribution. Additionally, in the context of non-monetary relief, this suggestion of reviewing effectiveness of the method before the method is used might restrict creativity in tailoring relief to the needs of class members. At a minimum, the comments should indicate that this factor may be inapposite for proposed settlements which provide non-monetary recovery.

- "class members are treated equitably relative to each other." Rule23(e)(2)(D). The comment to this factor should make clear "equitable" is not the same as "equal" and that, where there are subclasses, it is understood that members of different subclasses may receive different relief.

Fourth, we believe an additional factor should be "the nature of the class members' and objectors' reaction." The Court will only be well-positioned to determine whether to approve a settlement if it fully considers the views of absent class members who were not at the bargaining

table. We suggest listing the factor as the "nature" of the reaction because too often courts look at the number of objections or exclusions. A qualitative analysis of the class's reaction and the objections is far more important.

Finally, if the amount of money and/or injunctive relief in the settlement compared with the best case at trial, and the likelihood of collecting on the judgment, are meant to be subsumed under "risk" of trial and appeal, the commentary should make that clear. If they are not, they should be delineated as a separate factor. Similarly, the notes should make clear that the strength of the claims and defenses/difficulties of proof is subsumed within the "risks" of trial factor (Rule 23(e)(2)(C)(i)).

B. **Rule 23(e)(5) Amendments Regarding Payment to Objectors**

We agree with the Committee's decision to require Court approval before payment to objectors or objector's counsel. However, we do not believe a court hearing is necessary in all circumstances, and believe that the district court is in the best position to determine whether the request should be resolved based only on written submissions. Accordingly, we recommend not requiring a hearing and propose the following addition: "Unless approved by the court after a hearing **or, if the Court deems it appropriate, based solely on written submissions on notice to all interested parties**, no payment or other consideration may be provided to an objector or objector's counsel in connection with . . . ."

C. Committee Notes to Rule 23(e) Concerning Reviewing Claims Rates

The committee notes suggest twice that courts review claims rates in assessing fee applications. We agreed that such review is generally appropriate, but believe the notes should be edited to be clear that such review is not always appropriate.

The suggestion that courts review claims rates appears twice in the committee notes—once as to Rule 23(e) generally and once as Rule 23(e)(2)(C). Rule 23(e) contemplates a motion to approve the issuance of notice to the class. In determining whether the settlement is adequate, this new subsection (iii) directs the Court to consider, among other factors listed in other subsections, "the terms of any proposed award of attorney's fees, including timing of payment." The committee notes explain that while attorney's fees are independently evaluated under Rule 23(h), courts should still look at the "relief actually delivered to the class in determining the appropriate fee award." Courts can do this by requiring counsel to report back "to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known."

This idea is echoed in the committee notes concerning Rule 23(e)(1), which more generally address the decision as to whether to give notice of a proposed settlement. There, the notes state, "In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results."

We agree that it is generally a good idea to assess "likely claims rates" in class settlements, and to treat that information as a data point in determining whether a settlement delivers meaningful relief. Tying "actual claims experience" to fees incentivizes the parties to: 1) implement automatic distribution of settlement proceeds where possible; 2) implement a robust notice program to reach class members if automatic distribution is not possible; and 3) create a simple, easy-to-understand claim form and process.

However, there are settlements in which claims rates are difficult to determine because the overall size of the class – the denominator – is difficult to determine with precision. It is potentially a waste of judicial resources – particularly where there is no indication of a failure of the notice program and the relief made available through the claims process is substantial and non-illusory—to delve into claims rates. It could also increase the work done by the claims administrator, with the class likely bearing those costs.

For those reasons, we suggest the following edits to the note to Rule 23(e)(1): "**It may** ~~In some cases, it will~~ be important **for the Court to consider** ~~to relate~~ the amount of an award of attorney's fees **in relation** to the expected benefits to the class and, **when it is feasible and cost-effective to measure the claims rate,** to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results."

Similarly, in the note to Rule 23(e)(2)(C) and (D), we suggest the following addition: "Provisions for reporting back to the court about actual claims experience, **where it is feasible and cost-effective to do**, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement."

Dated: February 15, 2017

New York, New York

Respectfully submitted,

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