January 17, 2018

Honorable Judge David G. Campbell
United States District Judge
Chair, Committee on Rules of Practice and Procedure
United States District Court for the District of Arizona
Sandra Day O'Connor Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue NW
Washington, DC 20001

RE: Invitation for Comment on Proposed Social Security Rules

Dear Judges Campbell and Bates and Members of the Social Security Subcommittee:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), submits these comments in response to an invitation to comment on the *Special Procedural Rules for Social Security Litigation in District Court* (hereinafter *Special Procedural Rules*) recommended by the Administrative Conference of the United States ("ACUS") for development by the Judicial Conference of the United States. AAJ, with members in the United States, Canada and abroad, exists to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including those seeking disability benefits, receive their constitutional right to their day in court under fair, just and reasonable rules of procedure and evidence.

AAJ offers 18 practice sections, including a Social Security Disability Law Section, to enhance trial techniques and train attorneys to provide their clients with the best possible representation. Members of AAJ's Social Security Disability Law Section have taken a notable special interest in the *Special Procedural Rules* and has helped provide the content for AAJ's comments. It is important to note that, unlike many plaintiff attorneys, AAJ members representing Social Security claimants usually have a highly-specialized practice that is primarily focused on disability law, and while highly-specialized, these attorneys typically represent clients with a

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variety of disability claims, including ERISA, workers' compensation, Social Security Disability Insurance, Supplemental Security Income, and Veterans' Administration benefits.

I. New Rules Will Not Decrease the Remand Rate, Nor Should They

AAJ strongly submits that a change in the national remand rate should not be a marker of efficient and fair rules of procedure. While rightfully absent from the ACUS's justifications for the *Special Procedural Rules,* at the June 2017 meeting, the Advisory Committee alluded that the "high remand rate" might be a "problem" justifying a potential rulemaking. AAJ believes that the current 45% remand rate shows fairness in the current process, and should not be considered "high" or abnormal.

Further, many of the attorneys specializing in Social Security cases believe that none of ACUS's suggestions will decrease the remand rate, a sentiment shared by the authors of the report that prompted the *Special Procedural Rules.*[1]

There is a deeply held belief among AAJ member attorneys that addressing these procedural issues at the district court level will fail to address the real problems with Social Security cases, which start long before cases are reviewed by a district court judge. Many improvements are inherently substantive and can only be addressed by Congress. Nevertheless, with regard to procedural changes, it is important to recognize that disability cases are extremely time-consuming for disabled persons waiting for relief. Only the most tenacious of plaintiffs have enough stamina to wade through the grueling process to reach district court. Further, considering that most of these disability cases are for relatively low-dollar amounts, most attorneys only take the cases in which they have the greatest likelihood to prevail on appeal. The current fee structure incentivizes Social Security claimants' attorneys to only accept the strongest cases.

AAJ submits that the reason for the 45% remand rate is due to the highly-specialized nature of these cases. Plaintiffs' attorneys have become experts at screening for which cases have the best chances of being remanded.

Second, a remand rate of 45% generally translates into claimants winning slightly less than half of the cases in district court, which seems a fair rate. It is important to remember that at the district court level, these cases are essentially appeals. No lawyer is going to take an appeal unless they have a 50/50 chance of success. Recognizing the rate changes in different districts and circuits, an overall 45% national average remand rate seems fair and is to be expected.

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[1] Jonah Gelbach and David Marcus, *A Study of Social Security Litigation in the Federal Courts*, page 8, n. 6 (July 28, 2016), available at: https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf (hereinafter Gelback and Marcus Study') ("It is possible that the overall remand rate would not change much—or perhaps even would rise—if such compositional changes were great enough.")

Third, AAJ would highlight the findings of Jonah Gelbach and David Marcus' *Study of Social Security Litigation in Federal Courts* that "[a]t first blush, this rate might seem quite high . . . the remand rate, viewed statically, says little meaningful about the strictness of judicial review or the quality of agency decision-making."[2] There are many different considerations that go into a decision to remand, and it is not prudent to make any generalizations about Social Security cases based on this average national rate alone.

Lastly, AAJ members believe that an average remand rate of 45% remaining constant for over the past several decades shows its inherent fairness. The concept of a stagnant remand rate is reinforced in the Gelbach and Marcus study. As the authors of the study try to explain why this rate has remained so "stagnant":

> *A stagnant remand rate could possibly mask a more robust record of agency success in the federal courts. As noted, ALJ allowance rates have declined significantly, while Appeals Council agree rates have increased. The agency maintains that this change has resulted from an improvement in ALJ performance. Assuming that this explanation is accurate, it still leaves a larger set of potential appeals from which claimant representatives can pick their cases. The ALJ allowance rate has dropped from 70% to 45%. Even if ALJs now correctly deny four out of every five claims that would have been allowed previously, the 20% error rate could increase the number of flawed ALJ decisions to challenge by thousands. If the Appeals Council does not catch all of these errors, and if the private social security bar cannot expand to keep pace with the increased number of potential appeals, then the strength of each appeal to the federal courts, on average, could increase. If federal judges are applying the same standard of review as they were applying, say, five years earlier, and assuming that the entire pool of claims has not changed significantly in its composition, then the remand rate should be higher than 45%.*[3]

In short, a remand rate around 50% is to be expected in Social Security cases, and a decades-constant national average remand rate of 45% seems fair and reasonable. A decrease or change in the national remand rate should not be an objective or goal of any potential rulemaking.

II. What Is the Compelling Reason to Treat Social Security Cases Differently?

While Social Security cases may make up a greater percentage of the federal docket than appeals from other government programs, AAJ questions the notion that these cases require special rules more than other sorts of cases, including other types of benefit denial cases. Concern over increased dockets is not a compelling justification for specialized changes in federal procedure, and AAJ would highlight the concern that such specialized rules inherently "give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends," an illegitimate use of rules amendments as recognized by ACUS in making its recommendations.

AAJ encourages the Social Security Subcommittee to have an in-depth discussion about the specific goals of any potential rulemaking. Specifying the objectives will help ensure carefully

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[2] Gelback and Marcus Study at page 44.
[3] *Id.* at 54.

and narrowly crafted rules. Is the goal of the recommended rules to lower the docket load of the district courts? To create efficiency to the court and to the parties? To lower the remand rate (a justification AAJ would reject out-right)? To create uniformity and reduce "localized procedures" in handling the cases by the district courts? Or is it some combination of goals?

If uniformity is the true goal, AAJ would ask the Subcommittee to review the arguments for specialized rules for the courts not only in terms of efficiency for one type of case but also consider the best course of action overall for claimants who have been denied government benefits beyond Social Security benefits, such as veterans' benefits. Is there only to be uniformity or specialized rules for Social Security claims because it includes a large volume of the caseload? Does that make sense from both a claimant's perspective and a judicial management perspective?

To help clarify the specific goals and objectives for this potential rulemaking, AAJ suggests that the Subcommittee consider other research beyond the Gelbach and Marcus Study. While empirical data are certainly hard to come by, and the Gelbach and Marcus Study was quite extensive, AAJ encourages the Committee to review recent data from Professors Alexandra Lahav and Peter Siegelman from the University of Connecticut School of Law. The working draft of their paper, which is currently undergoing peer review and available on SSRN, is entitled, "The Curious Incident of the Falling Win Rate," and looks at the overall win rates for plaintiffs in federal court.[4] In short, the study finds, "[f]or 40 quarters starting in 1985, the plaintiff win rate in adjudicated civil cases in Federal courts fell almost continuously, from 70 percent to 35 percent, where it remained—albeit with increased volatility—for the next 15 years. We explore, and largely reject, several possible explanations for this surprising finding,"[5]

This research suggests that some of the concerns that gave rise to this suggested rulemaking may be part of a larger phenomena. The authors' study specifically includes data on Social Security cases in district courts. The authors write that part of what is driving the drop in overall win rates for plaintiffs in federal court is the "falling success rate for claims brought against the U.S. government,"[6] which would include Social Security benefit cases.

The study has some important data on Social Security cases. The researchers found a declining win rate[7] for Social Security cases, from 63 percent in 1984 to only about 10 percent by 1996; after that point, however, Social Security win rates trend back up to about 35 percent.

In 1985, there were 1,189 Social Security Disability cases in federal district court and plaintiffs had a win rate of 44.8%. In 2009, the number of cases had risen to 1,644, an increase of 38%, but the win rate had declined to 23.8%, contributing to an overall decline in the plaintiffs' win

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[4] The dataset is the Administrative Office of the U.S. Courts (AO) Civil Terminations dataset, and the win rate is defined as the set of all adjudicated cases.

[5] Alexandra Lahav and Peter Siegelman, "*The Curious Incident of the Falling Win Rate*", Draft as of July 1, 2017, available on SSRN.

[6] *Id.* at p. 19.

[7] It is important to note that the authors believe that the data in their study is orthogonal to the Gelbach and Marcus study.

rate of 47.0%.[8] While win rates in some types of litigation declined by higher percentages, of the 28 categories of cases measured in the study, only six categories of cases had higher declines in the win rate than Social Security Disability cases.[9] As the researchers note:

> *The bottom line is that Social Security cases "explain" part of the overall story of declining win rates, but since they constitute such a small share of all adjudications, there must be much more going on than just a drop in the success rate of Social Security plaintiffs.*[10]

Importantly, Lahav and Siegelman reject the idea that a decline in the quality of cases has resulted in a decline in the win rate, stating, "*We also reject the idea that a reduction in the quality of filed cases over time explains the decline and subsequent volatility in win rates.*"[11] While the researchers are unable to conclude what exactly is causing lower plaintiff-win rates overall, they do dismiss certain explanations, and their collected data and observations (and also their calls for more specific research on the causes of plaintiffs' falling win rates) may be helpful to the Subcommittee in exploring the goals and objectives of any potential rulemaking.

Upon further reflection of the goals of rulemaking, AAJ is optimistic that the Advisory Committee will come up with a proposal that can serve the needs of all parties in the system. Many of the existing problems are systemic requiring changes unrelated to rules amendments.

III. AAJ Does Not Oppose Some Additional Uniformity

While AAJ requests clarification on the exact purpose, objectives, and goals of any rulemaking, AAJ does not generally oppose some of ACUS's proposed recommendations. While specific details on the proposed changes may change AAJ's position, many AAJ members believe that several of the recommendations would be fairly easy to implement and may potentially benefit Social Security litigants, including:

- A rule requiring the claimant to file a notice of appeal instead of a complaint;
- A rule requiring the agency to file the certified administrative record instead of an answer;
- A rule requiring the parties to exchange merits briefs instead of motions; and
- A rule establishing deadlines and page limits.

However, AAJ does have concerns regarding whether it makes sense to establish strict page limits for Social Security cases when potential limits may well be different for other cases, even cases involving appeals of benefit denials from other agencies, often in the same district courts. AAJ would ask the Subcommittee to consider these Social Security-specialized-rules in light of the litigant who may have other disability benefits pending in the same court.

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[8] *Supra.* at 27.
[9] Those case categories are Disability Insurance (58.1%), Prisoner Civil Rights (63.1%), Other Civil Rights (52.3%), Other Personal Injury (50.3 Percent), and Bankruptcy and Appeals (50.2%).
[10] *Id.* at 21.
[11] Id. at 4.

IV. Other Considerations Regarding Uniformity and Simplification

Simplification has its own potential downsides. While no one is arguing for a complicated process, the current rules ensure that the number of *pro se* litigants is low. The current process is lengthy, complicated to navigate, and thus, serves as a screening function. If that screening function is eliminated and the number of benefit denials continues to be high, the courts may very well have uniformity and an uptick in the number of *pro se* litigants and "appeals" to federal court. Many AAJ member attorneys are convinced that some of the proposed changes to "simplify" filings may result in an increased number of case filings in district court, because it would become easier for claimants to represent themselves in "appeals," resulting in an increase in district court cases. These claims are less likely to be brought to district court under the current regime merely because lacking an attorney, these plaintiffs choose to not challenge the agency decision. In short, AAJ members believe that the current system results in greater screening of district court claims, and AAJ asks the Subcommittee to consider how simplifying some of these rules may increase the number of *pro se* litigants in district court.

Additionally, there is a general sense of concern that if some of these suggestions are adopted, a new push for additional rules would follow. While some clarification or uniformity may well be useful, providing rules for every aspect of Social Security disability cases would undermine judicial independence, result in cookie-cutter handling of cases, and could undermine the specialized training and representation provided by the members of the Social Security plaintiff's bar.

Of particular concern is the effect that the draft model rules from the Social Security Administration (SSA), found in the Advisory Committee on Civil Rules November 2017 Agenda Book, would have on Social Security cases, such as on routine extension requests and the filing of Equal Access to Justice Act (EAJA) fees.

For example, the SSA draft model rules contain a section providing for an "Extension of Time" under Motions Practice. The provision states:

> *Extensions of time. On request, the court shall grant a 30-day extension of the deadline to file Defendant's response to Plaintiff's petition for review and of either party's first briefing deadline. Any other extension requests may be granted at the court's discretion. If the court grants an extension of time for any brief or motion under these Rules, the opposing party will automatically receive an extension of the same amount of time to file a responsive brief or motion party may request an extension at any time, including on the original due date.*

While the provision is seemingly balanced in the sense that if one party receives an extension, the opposing party is to receive the same extension, the proposed rule would almost routinely build-in an automatic first round extension of time for the Social Security Administration. Since one of ACUS's purported goals of a rules amendment is efficiency, AAJ members remain wary about any proposal that would formalize the routine acceptance of extensions into rules of procedure.

With respect to EAJA, the law on fees is clear, established, and uncontroversial. Yet, SSA's draft model rule on fees is quite substantial. The ACUS comment is silent on EAJA and there is

no reason given as to why the statute and court interpretation of the statute are insufficient. Indeed, there is no mention of the need for a rule or changes to fees at all in the Gelbach and Marcus study, which is the basis for the ACUS recommendations. In fact, the study justifies the current EAJA fee structure, recognizing that the current fee structure incentivizes lawyers only to appeal the most-worthy of cases to district court.[12]

Further, EAJA is a statutory creation of Congress. AAJ has concerns about any procedural rule impacting this important federal statute, and like any other suggestion that could potentially alter a substantive or statutory right, AAJ submits that such substantive changes are not within the proper jurisdiction of the Advisory Committee. For these reasons, AAJ would recommend that the Subcommittee not use the SSA draft model rules as a general starting point on any potential rulemaking.

V. Conclusion

AAJ appreciates the opportunity to provide some early feedback on this important discussion. Please note, AAJ's concerns and suggestions will continue to evolve as the potential rulemaking progresses and as AAJ considers both additional specifics on the proposed amendments and feedback from AAJ membership. If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel at the American Association for Justice at susan.steinman@justice.org.

Sincerely,

Kathleen L. Nastri
President
American Association for Justice

[12] Gelbach and Marcus at p. 56, "The opportunity cost of federal litigation adds to this risk of nonpayment and may further refine the metrics lawyers to select appeals."