



NATIONAL ORGANIZATION OF  
SOCIAL SECURITY CLAIMANTS'  
REPRESENTATIVES  
ESTABLISHED 1979

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*Executive Director*

**Barbara Silverstone**

September 16, 2020

The Honorable David G. Campbell  
Chair, Committee on Rules of Practice and Procedure  
Judicial Conference of the United States

Dear Judge Campbell,

Thank you for the opportunity to comment on proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). NOSSCR is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudicative process. Since 1979, NOSSCR has been providing continuing legal education to its thousands of members and public policy advocacy on behalf of its members and the people with disabilities they represent.

### **Are Supplemental Rules Necessary?**

We first wish to reiterate NOSSCR's longstanding position that national uniform procedural rules for Social Security cases in federal district court are unnecessary. Social Security cases represent approximately 7% of the federal docket,<sup>1</sup> but there is no compelling reason for them to be treated as lesser or different than the other 93% of cases, many of which also involve review of agency decisions.

The existing Federal Rules of Civil Procedure (FRCP) plus local rules or standing orders can accommodate Social Security cases without the inflexibility of uniform national rules for specific case types. Thus, NOSSCR members oppose amending the FRCP in a way that sets Social Security cases apart from other federal court cases. Although NOSSCR members prefer the rules in some districts to others (for example, joint statements of facts are widely unpopular), they are not eager to trade local flexibility for standardization, given that some judges may feel such idiosyncratic practices are necessary for them to provide prompt and accurate decisions.

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<sup>1</sup> [http://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_0.pdf#page=209](http://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf#page=209)

Having different rules in different districts or circuits is no more onerous than having different precedent in different districts or circuits. Model local rules and/or bench-bar dialogues in each court can also help adapt local rules in a manner that maximizes efficiency for judges, court staff, the plaintiffs' bar, and SSA without the need for amending the Federal Rules of Civil Procedure.

NOSSCR does not believe that differing local rules reduce access to representation for Social Security claimants. NOSSCR shares the skepticism of several Advisory Committee members about SSA's assertion that uniform procedural rules would save SSA's attorneys two hours per case. We agree with Joshua Gardner's comment during the November 1, 2018 meeting of the Advisory Committee on Civil Rules (the "Committee Meeting") that if SSA assigned Assistant United States Attorneys or other litigators to Social Security cases in specific districts or circuits they would be better able to handle differences in local rules.

Although prompt adjudication of federal court cases is an important goal, NOSSCR notes that SSA could do more to ensure policy-compliant adjudication of claims before the Commissioner, so that fewer appeals to federal court are necessary. NOSSCR agrees with the comments made by Advisory Committee members during the Committee Meeting that most of the delays in adjudicating Social Security disability claims occur within the agency. SSA recently introduced an additional step before claimants can request Administrative Law Judge (ALJ) hearings (the "reconsideration" phase) in ten states that had eliminated it for decades. The average time from requesting an ALJ hearing to receiving a decision exceeded 500 days in Fiscal Year 2019. It takes additional time for SSA's Appeals Council to process requests for review of ALJ decisions, and of the cases appealed to federal court, SSA requests voluntary remand of approximately 15%,<sup>2</sup> indicating that the agency could have resolved these matters far sooner, and without the need for federal court litigation at all.

### **Comments on Proposed Supplemental Rules**

Although we do not support the concept of issue-specific supplemental rules, NOSSCR greatly appreciates the efforts of the Judicial Conference in making several rounds of revisions to these rules before they were formally proposed. The proposed rules are clearer and more neutral than what were originally considered. However, we have several outstanding concerns.

#### *Rule 2: Complaint*

Inclusion of the last four digits of the Social Security Number (SSN), in combination with a person's name and county of residence, creates a risk of identity theft. In situations where cases are filed and served electronically, NOSSCR members have fewer concerns about including a portion of the SSN on complaints, given that only the counsel of record would have access to the complaint. When the complaint is completed on paper and/or served by mail, NOSSCR members believe that no part of the SSN of either the plaintiff or the person on whose wage records benefits are claimed should be included on the complaint. Given that SSA is currently moving towards using Beneficiary Control Numbers (BCNs) and other alternative forms of identification, it would be better for 2(b)(1)(B) and (C) not to require use of any portion of the SSN. As an alternative, SSA could either put a BCN on each Appeals

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<sup>2</sup> Gelbach and Marcus, ACUS Report, "A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS" (July 28, 2016) p.31. <https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf>

Council denial or other place where it informs claimants about their right to appeal to federal court, or contact the plaintiff to obtain the SSN in a private way. Inclusion of the SSN in the complaint should not be forbidden, however, for litigants who choose to do so.

NOSSCR strongly supports allowing plaintiffs to plead in more detail than the “short and plain statement” proposed in (b)(2). With SSA requesting voluntary remand of approximately 15% of Social Security cases in federal district court,<sup>3</sup> it is useful for the Commissioner to be aware of all issues that might affect whether the agency chooses to defend itself or request remand.

Failing to plead any of the required elements, such as omitting the title or titles under which the claim is brought, failing to identify the plaintiff’s county of residence, or neglecting to mention that relief is sought under §405(g) are all mistakes that could easily be made, especially by pro se plaintiffs. They should not be grounds for dismissal; at most, plaintiffs should be given leave to amend their complaints. The Committee Note expresses this sentiment, but it may be more appropriate to include it directly in the rules or in a footnote.

### *Rule 3: Service*

NOSSCR appreciates that the proposed rule includes a statement waiving Civil Rule 4’s requirements. Were this rule to be implemented, SSA would likely have to change its own regulations about how the agency is to be served. SSA appears aware of the need to make this change based on the agency’s comments it submitted to the draft rules.

The Committee Note says “Filing sent by the court suffices for service, so long as it provides a means of electronic access to the complaint.” Some NOSSCR members note that in the district courts where they practice, notice to SSA’s OGC and the US Attorney did not permit access to the Court’s e-folder: the Clerk’s office took the position that it could send notice of the suit being brought to the US Attorney and OGC but it could not share the contents of the filing since no one had appeared for the Commissioner. A change in the Standing Order was needed to give the government full access to the Complaint. NOSSCR recommends that this issue be resolved with clerks of all courts before any rule is finalized. One option is to use a statement like the one in Connecticut’s standing order that a blanket consent by the US Attorney to service by electronic means will be deemed proper service:

In lieu of service of process of the Complaint and related documents by certified mail or in hand, the Clerk of the Court shall provide service via the Court’s CM/ECF system to the Commissioner of Social Security by electronically serving the Notice of Filing along with a pdf copy of the Complaint on the Social Security Administration’s Office of the General Counsel and the United States Attorney’s Office for the District of Connecticut. If this process is followed the Defendant has agreed that it will constitute adequate service of process.

This type of statement makes clear that the rules do not do away with service but instead that CM/ECF service is agreeable to the Commissioner, as memorialized by a blanket consent filed by the US Attorney. If the Commissioner or Attorney General so wished, they could file a nationwide blanket consent.

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<sup>3</sup> Gelbach and Marcus, ACUS Report, “A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS” (July 28, 2016) p.31. <https://www.acus.gov/sites/default/files/documents/2016.07.28%20Report%20-%20A%20Study%20of%20Social%20Security%20Litigation%20in%20the%20Federal%20Courts.pdf>

#### *Rule 4: Answer*

NOSSCR members support a rule allowing the Commissioner to submit the certified administrative record (CAR) and any affirmative defenses as **part** of an answer. But the Commissioner should be required to respond to all claims and allegations in the complaint as well; proposed rule 4(b) is not acceptable. NOSSCR members feel that if the complaint and answer process, including FRCP 8(b), is appropriate for other cases adjudicated using the FRCP, it is also appropriate for Social Security cases. Were proposed rule 4(b) to be finalized, it would not allow plaintiffs enough information about SSA's position on issues raised in the complaint to write thorough and concise briefs. The Commissioner has a variety of mechanisms, such as general denials, to simplify the process of writing an answer. One option for the final version of any supplemental rules would be to state that filing of the CAR will be deemed a general denial to all allegations except those specifically admitted, and a waiver of all affirmative defenses listed in FRCP 8(c).

Although NOSSCR members are generally supportive of the idea that a motion for voluntary remand can be made at any time during a case, they believe that the CAR should be filed with such a motion if the record has not been filed already.<sup>4</sup> This rule, along with a requirement that the Commissioner provide notice before filing a motion to remand, will ensure that plaintiffs can make informed choices about whether to consent to voluntary remands.

#### *Rule 6, 7, and 8: Plaintiff's Brief; Commissioner's Brief; Reply Brief*

NOSSCR's previous comments recommended that if there are supplemental rules imposing deadlines for the submission of plaintiff's motion for relief and brief, defendant's response brief, and plaintiff's reply brief, the deadlines should be 60, 60, and 21 days, respectively. We continue to recommend those time frames. They are especially important if the Commissioner's answer is not required to respond to claims and allegations asserted against it in the plaintiff's complaint, because the plaintiff will need to anticipate how the Commissioner could respond, and then use the reply brief to address how the Commissioner actually does respond.

The briefs from the plaintiff and Commissioner and plaintiff's reply briefs are dispositive in the vast majority of Social Security cases; giving litigants sufficient time to prepare them will provide judges with better information on which to rule. Although the Committee Note states "The court may revise these times when appropriate" and while some litigants will likely request extensions no matter the deadline, longer deadlines will likely reduce requests for extensions and thus increase efficiency. Providing 21 days for plaintiff's reply brief is strongly preferred to 14 days or less; when deadlines are already short, each day matters more and will likely have a larger effect on reducing requests for extensions.

#### **Conclusion**

Federal courts are the guarantors of due process for disability claimants. The current FRCP combined with local rules are effective; special rules for Social Security litigants are unnecessary. However, if

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<sup>4</sup> The one exception should be situations where the Commissioner is filing a Sentence 6 motion to remand the case because the CAR cannot be found. In such cases it would obviously be impossible for the Commissioner to file the CAR with the motion.

specialized rules are added to the FRCP, we hope that our comments help the Judicial Conference provide Social Security litigants the same balances between efficiency and accuracy, and between parties, as any other cases adjudicated in federal courts.

Thank you again for the opportunity to comment on these proposed rules. NOSSCR staff and members are glad to discuss these comments with you if that would be helpful and plan to participate in the upcoming hearings on civil rules.

Sincerely,

Barbara Silverstone  
Executive Director