January 22, 2019

From: Alan Morrison

To: Ed Cooper

Re: Draft Rules for Social Security Cases

I have reviewed the memo and draft rules that were contained in the Civil Rules Agenda for the Nov 1, 2018 meeting. I have some comments on some of the questions raised and on the draft rules. In a few places I express agreement with a position taken, but I am not responding to all questions, and so the lack of a response should not be given any meaning other than I have nothing to add.

On the big issue of whether this proposal is a nose of the camel under the tent, I do not think that it is for several reasons. Social security review cases are very different from almost every other kind of case in the district courts, but are much more like appeals. Surely no one would suggest that if Congress gave 405(g) jurisdiction to the circuit courts, they should use anything like the Civil Rules for what are cases involving review of a fixed (for the time being) administrative record. The local rules of a number of courts have special rules for these cases, and whatever their problems, no one has suggested that they are invalid because they violate the Enabling Act because they are not trans-substantive. I also do not think that there are other areas of substantive law with cases now in district court that are likely to seek special rules like this because social security review cases are in a class by themselves.

Two other considerations should work in favor of their creation. Both the SSA and the claimant attorneys want special rules, which will not happen very often, and the ACUS committee (on which I served) did a very probing analysis and supports this change. Last, these rules are not a "change" in the sense that anyone's rights or obligations are changed. Rather, they are different and more properly tailored ways to accomplish what the Rules – especially Rule 56 – now do.

Now for some specifics.

ACUS did not focus on the format: a separate set of rules or just one or a few additions. The draft seems to work with one new rule and there is no reason not to go with that approach.

As to scope, the decision to stick with the core case of one claimant vs SSA is fine. If similar claimants have similar cases, courts can find a way to hear them together if that makes sense. Class actions could be included, but the decision to exclude them (at least for now) is probably wise and can be re-visited if warranted down the road.

As for page limits (or now word limits), I seem to recall that they were seen as desirable, but perhaps the committee notes could say, we were asked to include them, but we decided that there was no need for uniformity. And the notes could also say there would be no problem if local rules have them (as they do for various motions now, especially summary judgment).

As for barring local rules from requiring more than briefs, such as joint statements etc, I do not think that needs to be in the rule, but perhaps the committee notes could say that the record and legal arguments should be enough in all but the most unusual case and district courts should not add special rules that add procedural requirements that may burden either SSA or claimants. I agree that rulemaking by committee notes is undesirable, but I feel less strongly when the notes are directed to district judges & their rules, rather than to the conduct of litigants.

On attorneys' fees, the recent decision in *Culbertson v. Berryhill,* Jan 8, 2019, was decided in a way that, I believe, is likely to reduce the concerns about the need for a special rule, but others who are more familiar with this area may have a different view.

I agree that including even the last four digits of an SSN is not necessary or desirable. Various laws discourage public identification of SSN numbers, and it seems unnecessary for SSA to insist on having one on a public document with the name and address of the holder of even the last four digits. Surely, the date of the decision will narrow which John Smith is the plaintiff, and if it does not, SSA's lawyers can simply call plaintiff's counsel and ask.

I would not require plaintiff to include the title of the law at issue. It is likely to be a trap for some plaintiffs and is hardly necessary for SSA since it can get that information from its own decision. As for the basis for the lawsuit, a general allegation that the decision is in error ought to be enough for SSA, especially since the plaintiff will have to go first in making the legal arguments. The notes could say both that the plaintiff may plead more facts and also may state the legal basis – lack of substantial evidence and/or error of law. A reminder of the "short" part of Rule 8(a)(1) would be useful.

As for SSA's response, I am fine with having SSA just file the record and include any affirmative defenses, such as lack of finality or lack of timeliness. As to whether timing questions are jurisdictional, that is a matter of law and the committee should stay as far away as possible.

The idea that only SSA or its regional office needs to be served makes sense, and how that should be best accomplished and on whom should be largely decided based on SSA's preference, so long as it does not cause delays or create problems in making service. One issue that may not have been raised is whether district courts will insist on having someone from DOJ or an AUSA on the papers and in court for arguments. 28 USC 517 allows DOJ attorneys to appear in any federal court, but it does not apply to SSA attorneys. I recall cases in which district judges did not allow agency attorneys to appear without an AUSA at counsel table. Perhaps that is not a problem today, but I would ask SSA.