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REPORT BY THE FEDERAL COURTS COMMITTEE

**COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO
THE FEDERAL RULES OF APPELLATE, CIVIL AND CRIMINAL PROCEDURE
PUBLISHED AUGUST 2020**

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Appellate, Civil and Criminal Procedure.¹ The Association, founded in 1870, has over 25,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in virtually 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 Committee on Federal Courts (the “Federal Courts Committee”) is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the proposed amendments.

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

The Advisory Committee on Appellate Rules (“Appellate Rules Advisory Committee”) has proposed to revise Rule 25 of the Federal Rules of Appellate Procedure (“Rule 25”) to give parties seeking judicial review in Railroad Retirement Act benefit cases, which are initiated directly in the court of appeals, the same privacy protections that Rule 5.2(c) affords parties seeking judicial review in comparable Social Security benefit cases, which are initiated in the district court. The proposed revision is limited to benefits decisions—as distinct from other decisions, such as decisions under the Railroad Unemployment Insurance Act, or non-benefits decisions under the Railroad Retirement Act—by the Railroad Retirement Board. The Appellate Rules Advisory Committee’s proposal would add a clarifying sentence to Rule 25(a)(5) to make clear that the “provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.”

¹ Available at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

The Federal Courts Committee believes this limited change is both sensible and narrow, and we therefore support it.

II. Comment on Proposed Supplemental Rules of Social Security Review Actions under 42 U.S.C. § 405

The Advisory Committee on the Civil Rules (“Civil Rules Advisory Committee”) has proposed a new set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405 (“Supplemental Rules”). According to the May 27, 2020 Report of the Civil Rules Advisory Committee (“Report”), virtually all of the 17,000 to 18,000 social security review proceedings brought annually are “pure appeals on a closed administrative record” pursuant to 42 U.S.C. that merit “uniform review procedures.” The Supplemental Rules comprise a streamlined set of procedures that address filing and serving a complaint seeking review by an individual under § 405(g) (Supplemental Rules 1, 2 and 3), answering the complaint (Supplemental Rule 4), and presenting the action requested for decision with supporting briefs (Supplemental Rules 5, 6, 7 and 8).

The Report specifies that key issues identified by the Civil Rules Advisory Committee for public comment include the wisdom of adopting “substance-specific rules,” and “whether a particular proposal for procedures that apply only to a specific subject matter promises gains sufficient to overcome the grounds for caution.” The Federal Courts Committee agrees that a simple and uniform procedure “that recognizes the essentially appellate character of actions that seek only review of an individual’s claim on a single administrative record” is desirable. The Federal Courts Committee has not identified any risks that the Supplemental Rules, as drafted, will modify any substantive rights or favor any special interests. Accordingly, the Federal Courts Committee is persuaded that generic concerns about trans-substantivity do not overcome the benefits of the procedures set forth in the Supplemental Rules and supports their adoption.

III. Comment on Proposed Revision to Federal Rule of Civil Procedure 12(a)(4)

The Civil Rules Advisory Committee has also proposed revisions to Rule 12(a)(4) of the Federal Rules of Civil Procedure (“Rule 12(a)(4)”) to extend the time for a responsive pleading after notice that the court has denied a Rule 12 motion from 14 days to 60 days in cases where “the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.” The Report explains that the amendment was suggested by the Department of Justice (the “Department”) for two reasons. First, the Department often represents officers and employees sued in individual capacity actions and “needs more time than most litigants” to determine whether to provide representation and to provide such representation. Second, additional time may be necessary if the official or employee sued individually invokes an official-immunity defense because the collateral-order doctrine permits appeal from the denial of a motion to dismiss based on qualified or absolute immunity, which the Department may need time to assess and to seek authority from the Solicitor General to pursue.

The Federal Courts Committee supports this minor change, particularly given that the court retains its authority to set a different time for the responsive pleading—including a shorter time, if expedition is appropriate.

IV. Comment on Proposed Revision to Federal Rule of Criminal Procedure 16

The Advisory Committee on the Criminal Rules (“Criminal Rules Advisory Committee”) has proposed a draft amendment to Rule 16 of the Federal Rules of Criminal Procedure (“Rule 16”) to address the scope and the timing of expert discovery.

The proposed amendments are the first set of changes—and the most sweeping ones—to criminal expert discovery in more than twenty-five years. In these changes, while sustaining the constitutionally-tested reciprocity discovery obligations, the Criminal Rules Advisory Committee focused on the long-overdue issues concerning the timing and the contents of expert disclosure, though it also addressed other important issues including signing of expert disclosure by the expert witness and supplementing and correcting the disclosure. These changes, which balance the prosecution’s and the defense’s interests, are a welcome development. The changes effectively provide some real and workable parameters to sometimes *ad hoc* (and unnecessarily reactive) criminal expert discovery practice, without adopting all the strictures of the civil expert discovery practice which would not structurally work in criminal practice.

To begin, new Rule 16(a)(1)(G)(i) and (iii) provide that, at the defendant’s request, the government must disclose, in writing and pursuant to Rule 702, 703, or 705 of the Federal Rules of Evidence, a “complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed.” Under the new rule, the required contents of the disclosure incorporate certain parts of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure (requiring the complete statement; the bases and reasons for the witness’s opinions; the witness’s qualifications, including a list of all publications authored in the previous 10 years; and a list of all other cases in which during the previous 4 years, the witness has testified as an expert at trial or by deposition). The new romanette (ii) of the subsection states that the time to provide expert disclosure would be provided by the court, through an order or local rule, but “must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government’s evidence.”

In the remaining section, the amendment provides that if a report was previously provided under Rule 16(a)(1)(F) (for reports of examinations and tests), such report “may be referred to, rather than repeated, in the expert-witness disclosure.” Rule 16(a)(1)(G)(iv). Also, the new rule allows expert disclosure to be prepared by someone other than the expert witness (such as a member of the prosecution team), as long as the witness approves and signs the disclosure. Rule 16(a)(1)(G)(v). Finally, the new rule has amended the duty to supplement or correct the disclosure so as to conform more similarly with such provision in many of the civil discovery rules. Rule 16(a)(1)(G)(v).

Next, in keeping with the reciprocity in the existing discovery practice under Rule 16, as authorized under *Williams v. Florida*, 399 U.S. 78 (1970), the defendant, at the government’s request and if the government has complied with the new requirements of Rule 16(a)(1)(G), must provide reciprocal expert disclosures to the government under the same rules as described above for the government’s disclosure obligations. This is important, as keeping the formalized reciprocity rule will likely promote efficiency in expert discovery in federal criminal practice—perhaps cutting down on frequent trial continuances by avoiding last-minute expert disclosures.

The Federal Courts Committee supports these proposed changes as a starting point to standardize the federal criminal expert practice. We think, however, that the Criminal Rules Advisory Committee should have gone further. In particular, we think that the Criminal Rules Advisory Committee should have set, as it originally contemplated, a default deadline for when the initial expert disclosure should be made (whether 45 days before trial, which the Criminal Rules Advisory Committee considered, or some other number), instead of leaving the timing of such disclosure to the discretion of a particular court or a local rule. Setting a default deadline, as many state jurisdictions have done—including New York (60 days prior to trial), Colorado (35 days), and Ohio (21 days)—will give parties greater certainty than they would have in the absence of some default deadline. Some members of the Committee pointed out that this default deadline should not be set too far in advance of trial, in order to prevent the government from having to undertake unnecessary preparation in a smaller case that will likely not go to trial. We suggest that the specific default deadline be set bearing this in mind, leaving to judges the discretion to increase or decrease the disclosure time period in particular cases.

In federal practice, providing such a standard default deadline, which would be subject to modification by the Court or for good cause, would also facilitate the efforts of the parties, particularly the government, to move more quickly and efficiently to a fair and just resolution, whether through trial or otherwise. The government, however, would not be unfairly prejudiced by such a deadline, as law enforcement experts or other specialized consultants are frequently engaged to assist the prosecution during the course of its complex investigations, before any indictment is returned. And, to the extent that experts in more commonplace subjects such as firearms or narcotics, who frequently testify at trial (and who are not always countered by any opposing experts), are involved, the issue, as the Criminal Rules Advisory Committee's notes recognized, is not whether the government requires additional time to consider the need of such expert; rather, it is the availability of a particular expert witness from a law enforcement agency such as ATF or DEA. The Criminal Rules Advisory Committee already addressed this issue by explaining in its notes that the government may seek a modification of the disclosure date under Rule 16(d) to delay the identification of the expert witness in such circumstances.

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