

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Executive Director
Barbara Silverstone

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Administrative Conference of the United States
Committee on Adjudication
1120 20th St NW, Suite 706 South
Washington, DC 20036

Jeremy Graboyes, Staff Counsel
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Dear Mr. Graboyes,

Thank you for the opportunity to observe the proceedings for the committee's project on Internet Evidence in Agency Adjudication. NOSSCR's thoughts on the topic, and on the proposed recommendation (titled "Independent Research by Agency Adjudicators in the Internet Age"), are based on our members' experiences representing claimants in adjudications before the Social Security Administration. We hope that these comments can be shared with the Assembly if the Council places these recommendations on the agenda.

We agree that "the nature of internet publication can make it more difficult for adjudicators to determine the authenticity and reliability of certain internet information. Moreover, the impermanence of web publication may affect the compilation of an exclusive record for administrative and judicial review." Social media, in particular, has risks associated with it, from the possibility of accounts or posts that purport to be from someone else, to the distinction between "liking" or "sharing" a post and endorsing its contents, to the ability to post old or inaccurate information.

We note that adjudicators have means of obtaining information other than performing independent research (on the internet or otherwise). These could include questioning parties or witnesses, including expert witnesses; soliciting legal opinions or other information from agency staff; or requesting that parties submit evidence or prepare briefs on specific issues. In many situations, these alternate forms of information-gathering are preferable to independent internet research, because they allow adjudicators to focus on decision-making rather than on combing the internet for the information. Adjudicators may lack the skills needed to confirm the accuracy of documents or information posted on the internet. And from a management perspective, it is difficult to discipline adjudicators who appear to be spending an excessive amount of time on the internet if they state they're performing research.

There is a spectrum of independent research, from looking up a dictionary definition of a word or verifying that a particular date fell on a weekday all the way to “friending” a person on social media and reading their posts. In situations on the former end of the spectrum, the adjudicator’s findings are likely to be uncontested, unchanging, and reproduced in many public and reputable sources. On the latter end of the spectrum, an adjudicator may find information that is difficult to verify and interpret, easy to edit or delete, and highly personal. To the extent that agencies allow their adjudicators to perform independent research at all, we encourage the final recommendation to suggest that agencies consider the different types of information that can be found through independent research and to issue guidance that is different for different types of information.

We appreciate that the proposed recommendation suggests agencies make policies on a variety of issues, but encourage any final recommendation approved by the Assembly to be more prescriptive and direct agencies to issue guidance that adjudicators identify instances where they offer official notice of a fact, or have used their own research (internet or otherwise) and gone beyond the testimony, exhibits, or other documents related to a case. In the Social Security context, this comports with Sections 205(b) and 1631(c) of the Social Security Act, which require an administrative law judge (ALJ) to base his or her decision on “evidence adduced at the hearing,” as well as regulations and subregulatory guidance about adding evidence to claims files.¹ Other agencies may operate under similar rules, and all require parties to receive due process.

Similarly, the final rules should direct agencies to require adjudicators to proffer the information they obtained through independent research before a decision is rendered and allow sufficient time for the parties to respond (in writing, by cross-examining or submitting interrogatories to witnesses, by supplying additional evidence, etc.) to such information. For some information, this could involve a simple citation to a Federal Register notice or a statement that “October 30, 2019 was a Wednesday.” For information that is more subject to interpretation or likely to be edited or removed from a website, we support recommendation #6, which recognizes the need to preserve any independently-gathered information in the case file in a stable way. This could be a pdf of a website, a downloaded and saved version of a video, etc. Including a permanent version of the information in the case file is important not just to the parties seeking adjudication, but to those who might be reviewing the case later, whether inside the agency (in SSA cases, this could include pre- and post-effectuation reviews of adjudicators’ decisions as well as Continuing Disability Reviews that occur years or decades after the decision), courts reviewing agency decisions upon appeal, or others.

We are deeply concerned about adjudicators using independent research to assess the credibility (or, as SSA states, to perform “subjective symptom evaluation”) of parties or witnesses. Social media posts may be made by people other than who they purport to be. They can include false, dated, or misleading information. Like other literal snapshots of a person’s life, they can also be of limited probative value—for example, a photograph of a disability claimant participating in the “Daddy-Daughter Dance” at his

¹ Documents that SSA ALJs or agency staff already frequently add to the file include results of queries of SSA databases, disability determination transmittals, evidence from prior claims files, previous decisions, medical evidence gathered by the agency, copies of notices sent to claimants and their representatives, resumes of medical and vocational experts, and reports of consultative examinations. The agency has detailed guidance on how evidence is to be added to files and how adjudicators can proffer evidence received after hearings.

child's school may say little about his ability to perform full-time work, and yet may be assigned significant probative value by an adjudicator.

Additionally, the very choice to perform independent research on some people or organizations rather than others, or performing different amounts and types of research on different parties and witnesses, allows adjudicators to demonstrate partiality and potentially bias. We would encourage any final recommendations to highlight the risks involved with independent research by adjudicators on credibility issues and indicate that agencies should either prohibit adjudicators from performing such research or promulgate strict guidance and oversight on how it should be done. We recommend that agencies not allow adjudicators to use social media to contact or communicate with parties or those who may know parties. This includes "friending" or otherwise initiating or responding to requests to connect with parties, witnesses, or others in a manner that allows the adjudicator to access more information than would otherwise be available. Agencies should consider rules about who (if anyone) is allowed to view or search the social media accounts of parties, witnesses, etc. In many situations it should not be the adjudicator, to avoid ex parte communication, to limit the risk that the research be used to assess credibility, to improve efficiency (adjudicators need to decide cases and not spend hours scrolling through parties' social media accounts), and to ensure that those who view and assess social media and other online information have the training and skills necessary to do so.

Thank you for considering our comments and concerns. We hope that if the proposed recommendation is added to the Assembly's agenda that they will be able to read these comments and revise the recommendation in a way that better supports parties' due process and other rights.

Sincerely,

Barbara Silverstone
Executive Director