Administrative Conference of the United States

SOCIAL SECURITY LITIGATION IN FEDERAL COURTS

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No agency action results in nearly as many appeals to the federal courts as decisions of the Social Security Administration (SSA) denying disability benefits. In 2015 alone, SSA disability appeals comprised approximately 7% of district courts' civil dockets, or just over 18,000 cases. The figures have been even higher in previous years. This is not surprising. As the Supreme Court has observed, SSA runs the world's largest adjudicative system.

Nearly half of all disability cases appealed the federal courts are sent back to the agency for further proceedings or an award of benefits (sometimes at the request of SSA). But not all districts remand the same percentage of their disability cases. Remand rates vary considerably, from a low of nearly 21% in one district to a high of 76% in another. Adding another layer of complexity, although the disability program is a national program, circuits are split on issues involving substantive legal doctrine, and appeals to district courts are decided under a patchwork of local procedural rules.

For claimants, all of this means that the rules under which they litigate and their chances of being awarded benefits may differ depending on where they live. For federal courts, the upshot is a large volume of cases and sometimes frustration with how the agency responds to courts' concerns about program administration. For the agency, tasked with the fair and uniform administration of a program that received a staggering 2.7 million disability claim applications in 2015 alone, high and variable court remand rates and inconsistent procedural rules and doctrine can exacerbate backlogs, create inefficiencies, and increase costs.

As a step toward addressing these issues, SSA asked the Administrative Conference of the United States (ACUS) to study federal court review of Social Security disability cases. ACUS is an independent federal agency within the executive branch tasked by statute with improving administrative procedures and related judicial review by making recommendations to Congress, agencies, and the Judicial Conference of the United States. ACUS consultants David Marcus, Professor of Law at the University of Arizona Law School, and Jonah Gelbach, Professor of Law at the University of Pennsylvania Law School, conducted the study. Their report, *A Study of Social Security Litigation in the Federal Courts* (Marcus-Gelbach Report), is available at https://www.acus.gov/research-projects/ssa-federal-courts-analysis. The Marcus-Gelbach report reflects the views of its authors and not necessarily those of ACUS. This short report is based on and highlights several of its important findings.

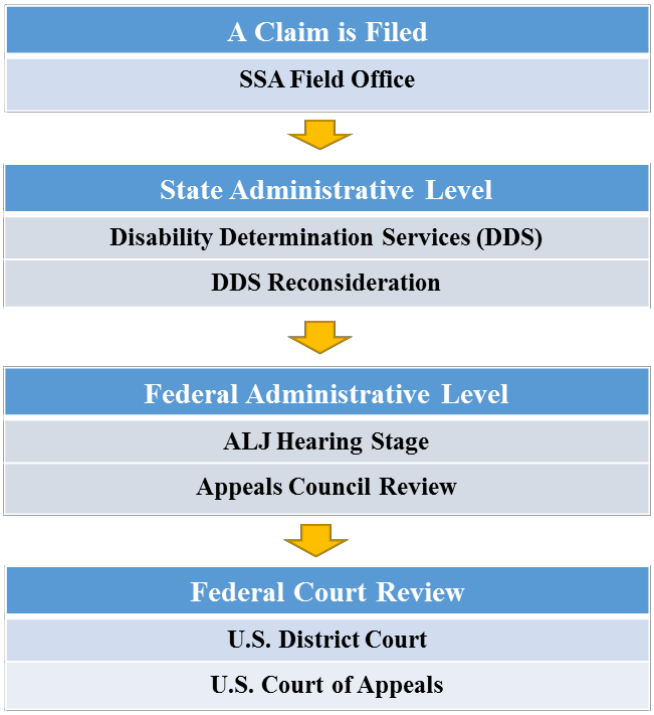
This report is divided into four sections. The first explains how a disability claim makes its way through the agency and into federal court. The second discusses what factors may explain the magnitude and variation of federal district court remand rates. The third highlights efforts by SSA to improve its decision-making. The fourth (and final) describes how federal court procedural rules governing disability cases vary and the effect of this variation. It also discusses a recommendation by ACUS's Assembly on procedural rules within federal district courts. (The ACUS Assembly is the voting membership of ACUS, which consists of members of government agencies and members of the public, typically leading authorities in administrative law, public administration, or other areas of interest to ACUS.)

1. The Social Security Appeals Process*

The path of a Social Security disability claim involves multiple levels of review within the agency and the courts. A short description of that process, highlighting those aspects with which judges and law clerks have expressed a lack of familiarity, follows.

Path of a Social Security Disability Claim

A claimant who seeks disability benefits must file a disability application online, by telephone, or in person with one of SSA's 1,300 field offices. An SSA claims representative then prepares a disability report with the claimant's work history, alleged disability onset date, and medical providers. The claim is then forwarded to a state-run agency, the Disability Determination Services (DDS), where a disability examiner gathers the claimant's medical records and determines whether the claimant is disabled. In most DDS offices, a medical or psychological consultant is a member of the team, along with the disability examiner, that makes the disability determination. In the majority of states, if a claimant is dissatisfied with the initial determination, he or she can ask for reconsideration by a different team of DDS examiners and consultants.



If a claimant is dissatisfied with the DDS determination, he or she may request a hearing before an SSA administrative law judge (ALJ). These requests are handled by SSA hearing offices in different geographical locations. A quarter of hearings proceed by video teleconference. More than three-fourths of claimants are represented at hearings.

Many ALJs will review the claimant's case a day to a week in advance of the hearing. Several factors compel this "just in time" approach, including the frequency with which claimant representatives submit voluminous medical records up to and even after the hearing. (To address this problem, SSA recently issued a final rule requiring claimants to inform an ALJ about or submit written evidence at least five business days before the date of the hearing. *See* Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 90,987 (Dec. 16, 2016). The rule does not apply to post-hearing submissions.) Records submitted after the hearing might prompt an ALJ to request a consultative exam by a physician or psychologist, which may result in the claimant getting a supplemental hearing.

* Marcus-Gelbach Report, at 16-43.

After the hearing, ALJs prepare instructions for decision writers, typically attorneys or paralegal specialists, who prepare draft ALJ decisions. The Findings Integrated Template (FIT), a tool used since 2006 to ensure that all decisions meet a certain threshold of quality and completeness, is used to create the framework of the decision. FIT generates boilerplate language within which the decision's rationale is inserted. Since 98% of decisions are written using FIT, almost every ALJ decision contains some boilerplate. The draft decision is then reviewed and completed by the ALJ.

The claimant may seek review of the ALJ's decision from SSA's Appeals Council. The Appeals Council may deny review, or it may grant review and either issue a decision or remand the case to an ALJ. An Appeals Council analyst will review the ALJ's decision to determine whether to recommend review. A recommendation to deny review proceeds to either an appeals officer or an administrative appeals judge; a recommendation to grant review goes to two administrative appeals judges.

If the Appeals Council denies review, the ALJ's decision becomes the Commissioner's final decision, and the claimant may seek judicial review in federal district court. If the Appeals Council issues a decision, that decision is the Commissioner's final decision, and the claimant likewise may seek judicial review in federal district court.

SSA lacks independent litigating authority, so Social Security disability litigation is nominally handled by the U.S. Attorneys' offices. Lawyers from the U.S. Attorney's office collaborate with SSA's Office of the General Counsel (OGC), but in most cases, OGC lawyers do the bulk of the work. OGC lawyers can also be designated as "Special Assistant U.S. Attorneys," enabling them to litigate on behalf of the U.S. Attorney's office.

When OGC lawyers determine that it is necessary, they may seek to voluntarily remand a case before the court considers the merits. Around 15% of claimant appeals to the federal district courts are voluntarily remanded annually.

When a claimant appeals, district courts review ALJ factual findings to determine whether there is substantial evidence on the record to support the ALJ's decision. Claimants or SSA can then appeal an adverse district court decision to the circuit court of appeals.

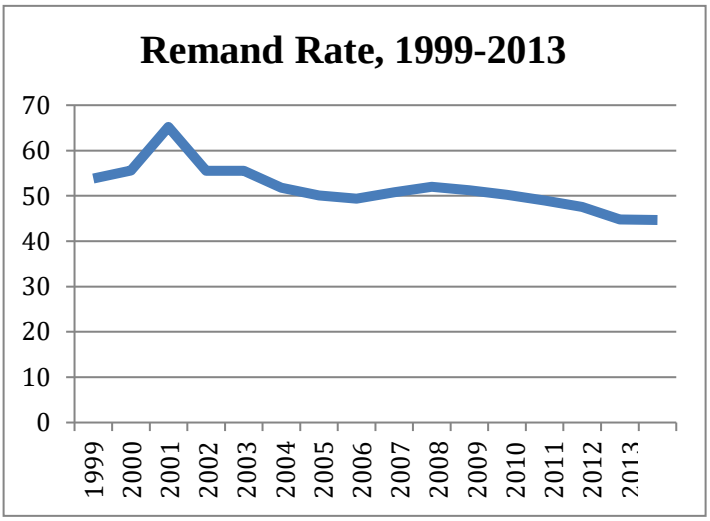
If an OGC attorney wishes to appeal, he or she drafts an appeal request, which is sent first to a supervisor and then to OGC headquarters, then to a line attorney working on the appellate staff at the Department of Justice's Civil Division, then to the head of the Civil Division, then to a line attorney at the Solicitor General's office, then to the Deputy Solicitor General, and finally to the Solicitor General. This elaborate approval process makes it difficult for the agency to appeal. Circuit courts receive approximately 650 Social Security appeals every year—no more than a few of which are appeals by the agency. Consequently, the appellate docket is largely dominated by claimants.

2. Federal Court Remand Rates*

Federal district courts remand nearly half of the cases they review. But some districts remand cases at a much higher rate than others. What explains these remand rates?

Overall Remand Rate

An overall remand rate of 45% may appear high, but it is not exceptional from a historical perspective. The agency now fares better in the federal courts than it has since the late 1990s, as illustrated by the chart to the right. ALJs can expect court remands in only about 3% of their decisions, or half-a-dozen cases per year. Nevertheless, some notable commentators have raised questions as to whether a remand rate of nearly fifty percent is consistent with the substantial evidence standard of review provided by statute.



The Marcus-Gelbach report concludes that the remand rate in disability cases likely results from an unavoidable clash between the two institutions, such that even if both are performing adequately, federal courts will continue to rule against the agency in a significant number of cases. The institutional differences Professors Gelbach and Marcus identify include:

- ***Amount of Decision-maker Time.*** SSA tries to meet a quality threshold, but it must also timely adjudicate a large number of claims. The agency received approximately 730,000 requests for ALJ hearings in 2015. The number of cases pending for a hearing decision has grown to over one million cases. To address the volume, SSA now employs 82% of the federal government's ALJs, and necessarily needs each of its ALJs, on average, to render somewhere between 500–700 legally sufficient written decisions annually. ALJs might be able to generate better decisions with fewer claims to adjudicate, but claimants would wait longer for a hearing. While district courts generally entertain sizeable caseloads, they do not shoulder the same obligation to generate decisions as quickly as ALJs. Many judges and their clerks take much longer on a Social Security claim than what all personnel at the agency can spend in total. The amount of time decision-makers have to deliberate is an institutional variable that affects decision-making but is independent of the quality of the particular decision-maker.

- ***Consistency in National Program.*** SSA must administer a national program uniformly. In general, it cannot treat claimants in one jurisdiction more favorably than claimants in another because of differences in circuit law. (SSA does from time to time issue acquiescence rulings, by which the agency accepts a circuit decision that it finds is inconsistent with its interpretation of the statute or regulations as binding for decision-makers within that circuit. But the agency's

* Marcus-Gelbach Report, at 44-80, 81-126.

general policy is to apply a single national standard to all claims.) District and magistrate judges, in contrast, must follow their circuit's precedent. This difference generates remands. To maintain consistency, the agency cannot easily tailor its position to doctrinal differences developed by circuit or district courts.

- ***Number of Cases Processed.*** ALJs handle a much larger sample of disability cases than federal judges. An ALJ may therefore draw a different line for what she believes qualifies as a disability than a federal judge. This gives ALJs and federal judges different perceptions of the claimant's evidence of disability. For instance, ALJs and decision writers report routinely seeing letters from the same physicians that use the same phrases to describe patients with strikingly similar problems. ALJs may discount these physicians' opinions in their decisions, perhaps sometimes in a manner inconsistent with agency policy. Likewise, claimants can testify in an obviously coached manner, feeding ALJ skepticism. With a smaller sample of cases to draw upon, federal judges may have a different view of medical evidence or claimant testimony. ALJ skepticism and federal judge credulity, whether warranted or not, may clash and produce remands.

- ***Different Obligations.*** ALJs must conduct hearings in an inquisitorial manner and develop the record by exploring all of the evidence. No attorney represents the government in hearings, while more than three-fourths of claimants are represented. ALJs must thus both aid claimants with their presentations and probe for inconsistencies and otherwise test the adequacy of a claim for benefits. A federal judge, presiding over an adversarial process, can rely on the agency's lawyer to make the case that a claimant is not entitled to benefits. ALJs, who shoulder this task themselves, may become skeptical of claimants, even though such an attitude is inconsistent with agency policy. With no obligation to search for defects in a plaintiff's case, a federal judge has no institutional reason to approach cases in the same manner as an ALJ.

- ***Missed Opportunity of Appellate Review.*** The agency must receive approval from many reviewers, culminating in the Solicitor General, to appeal an adverse district court decision. This process has effectively given claimants complete control over the appellate dockets. In 2014, for instance, the agency filed only one appeal. This asymmetry has a number of likely effects. First, it prevents the agency from addressing concerns over whether an issue should be characterized as a question of fact or of law and from correcting obvious errors. Second, it probably produces a pro-claimant drift in circuit precedent because claimant attorneys typically pursue only the strongest cases and ask appellate courts to construe governing law in a more claimant-friendly way than the district court and ALJ did. Third, asymmetric access may also encourage pro-claimant tendencies in district and magistrate judges, even if no applicable circuit case law exists, because claimants can credibly threaten to appeal while the agency cannot. Finally, the agency is limited in its ability to address any circuit splits that currently exist.

Remand Rate Variation

Remand rates vary among federal districts, ranging from a low of 21% to a high of 76%. The Marcus-Gelbach report considered several possible explanations for this variation, as described below.

- ***Circuit Boundaries.*** Circuit boundaries are associated with district-level variation. Circuits can be broadly grouped into low-remand, broad-spread, and high-remand circuits. Almost all of the districts in the Fifth, Sixth and Eleventh Circuits have remand rates below the mean. The districts within the Third, Fourth, Eighth and Ninth Circuits have remand rates that are spread across the mean. And nearly all districts in the Second, Seventh and Tenth circuits have remand rates above the mean, while most of the districts in the First Circuit also have above-mean remand rates. The chart below illustrates the remand rates over all cases for these groups.

	Circuit	Remand Rate
Low-remand Circuits	Fifth, Sixth, Eleventh	36.9%
Broad-spread Circuits	Third, Fourth, Eighth, and Ninth	45%
High-remand Circuits	First, Second, Seventh, and Tenth	58.2%

  The placement of a district within a circuit accounts for approximately 45% of the variation in district-level remand rates. What accounts for the rest of the variation is not clear.

- ***Outlier District Judges.*** There is also considerable variation in remand rates across judges. Nevertheless, the behavior of single outlier judges does not appear to explain why some districts have especially high or low remand rates by comparison to the national average. Very few individual judges have decision patterns that depart significantly from what their district colleagues produce.

- ***Application of the Substantial Evidence Standard.*** Questions of fact in disability cases are reviewed under the substantial evidence standard of review, which asks whether the agency's decision is supported by such evidence that a reasonable mind would accept as adequate to support a conclusion. A court fails to apply this "very deferential" standard if it simply reweighs the evidence or draws inferences that differ from those reasonably drawn by ALJs. This surely occurs, at least on occasion. But complicated legal issues surround the application of the substantial evidence standard, such as whether courts may create presumptions for recurring evidentiary situations, or whether alleged errors are better characterized as ones of fact or law. Such issues complicate any determination of whether federal judges do or do not exceed their authority under the substantial evidence standard.

- ***Quality of Inputs.*** Interviews conducted with federal judges, law clerks, and agency personnel within three different districts (a 'high remand,' an 'average remand,' and a 'low remand' district), as well as with government and private lawyers who litigate in those districts, suggest that the quality of decision-making within the agency is uneven. Hearing offices within SSA contrast in ways that may have implications for judicial confidence in agency decisions, with some offices likely producing stronger decisions than others. However, the Marcus-Gelbach report notes that there was insufficient data to test this theory quantitatively.

3. SSA's Efforts to Improve Quality of Inputs[*]

Over the last 15 years, SSA has undertaken initiatives aimed at improving its decision-making, including developing decisional tools, providing tailored feedback to ALJs, collecting structured data, and collaborating with ACUS on several projects.

- ***Decisional Tools.***

  - **eCAT.** The electronic case analysis tool (eCAT), used by all state-level DDS offices since 2012, walks disability examiners through the initial disability determination to ensure all agency policies are followed.

  - **ACAT.** The Appeals Council uses the appeals case analysis tool (ACAT), developed and enhanced over the last 15 years, to deconstruct ALJ decisions. The tool requires Appeals Council analysts to answer a set of questions to verify that an ALJ's decision complies with agency policy. It works by employing a decision tree that maps all of the paths that may be followed to reach an outcome that complies with agency policy.

  - **FIT.** FIT (discussed above) has been used since 2006 to ensure ALJ decisions meet a threshold of quality. The tool uses various templates to create a framework for ALJ decisions. Decision writers and ALJs insert the rationale for a decision into the boilerplate language generated by the tool's templates.

  - **eBB.** The electronic bench book (eBB) has been used by approximately 15-20% of ALJs since 2013. It is designed to improve decision-making by enabling ALJs to organize exhibits, take notes on them, assign weight to particular medical opinions, and make preliminary findings. The eBB also generates instructions for decision-writers.

  - **Natural Language Processing**. The most recent addition to the agency's toolbox is a natural language processing application, currently being rolled out, that parses ALJ decisions to identify errors, such as findings of fact that are inconsistent with each other. The tool does not write the decision; it provides instantaneous feedback to adjudicators when it finds an anomaly, allowing decisions to be fixed on the spot.

- ***Feedback to ALJs.***

  - **Focused Reviews.** In 2008, SSA began capturing data on reasons for Appeals Council and district court remands and using it to identify potential problems in ALJ decision-making. When this analysis shows that something is happening on a consistent basis nationally, it suggests a problematic policy that the agency can fix through a ruling or rulemaking. These analytics also identify outlier ALJs and why their decisions fare poorly on review. SSA can then undertake a "focused review" of closed cases to determine what might be causing the problem. SSA can sample an ALJ's closed decisions, whether appealed or not, for a variety of issues, including an unusually high or low allowance rate. The agency can then provide guidance tailored to individual ALJs.

[*] Marcus-Gelbach Report, at 36-42.

- **How MI Doing.** Used since 2011, How MI Doing provides ALJs with information about the number of cases they decide, the rates at which the Appeals Council remands their decisions, and the top several reasons for remands. It also links to training modules so that an ALJ can quickly find how to correct issues that may have led to remands.

- ***Collection and Analysis of Structured Data.*** SSA captures structured data about the types of errors made by its adjudicators. It then aggregates the data and utilizes sophisticated visualization techniques to identify outlier behaviors and anomalies in decision-making that the agency can investigate and address.

- ***Collaboration with ACUS.*** ACUS has worked with SSA to issue several reports and recommendations aimed at improving agency decision-making. SSA has implemented or is in the process of developing and implementing several new rules and policies in keeping with the guiding principles emerging from these projects. For more information, see www.acus.gov.

  - **SSA Disability Benefits Programs: The Duty of Candor and Submission of All Evidence.** Identifies fundamental principles that should guide any effort by SSA to impose an affirmative obligation on claimants to submit all evidence related to their disability claims. In March 2015, SSA issued a final rule (Submission of Evidence in Disability Claims, 80 Fed. Reg. 14,828) based largely on the principles set forth in ACUS's report.

  - **SSA Symptom Evaluation in Disability Determinations.** Advises SSA on how to evaluate subjective symptoms when adjudicating claims to improve consistency in disability determinations, reduce complaints of adjudicator bias, and lessen remands attributable to credibility evaluation. In March 2016, SSA issued SSR 16-3p, Titles II and XVI: Evaluation of Symptoms in Disability Claims, implementing the report's recommendations to eliminate the use of the term "credibility" and clarify how adjudicators evaluate the intensity and persistence of a claimant's symptoms.

  - **SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region 1 Pilot Program.** Evaluates SSA's Region I pilot program and outlines factors for SSA to consider in deciding whether to expand the program. In December 2016, SSA issued a final rule (Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 90,987) to expand the program nationwide (with some modifications) in line with many of the principles in ACUS's report.

  - **Social Security Disability Adjudication (Recommendation 2013-1).** Recommends that SSA change the way it evaluates opinion evidence from medical professionals by eliminating the requirement that treating sources be given controlling weight in certain circumstances (the commonly called "treating physician rule") and by recognizing the value of certain non-physician medical sources. In January 2017, SSA issued final rules (Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5,844) to rescind the treating physician rule and recognize certain additional non-physicians as acceptable medical sources.

4. Variation in Procedural Rules and Standards*

Whether SSA has to answer a complaint, what sort of merits briefs the parties have to file, and many other procedural questions have answers that differ considerably from district to district and sometimes judge to judge. Some districts have promulgated local rules for disability cases that treat those cases as appeals to district courts. Others continue to employ procedures designed for cases of first impression. A small sample from various districts illustrates how the proliferation of rules has led to procedural differences at every stage of a case:

<table>
<tr><th colspan="3">Examples of Local Rule Variation</th></tr>
<tr><th colspan="3">Complaint</th></tr>
<tr><td colspan="2">The Eastern District of Wisconsin provides form complaints for use in Social Security cases.</td><td>The Western District of Wisconsin does not provide form complaints.</td></tr>
<tr><th colspan="3">Answer</th></tr>
<tr><td colspan="2">In the Southern District of New York, the agency files the certified transcript of the administrative proceedings (“CAR”) instead of an answer within 90 days of the complaint’s service.</td><td>In the District of Vermont, the agency files an answer with the CAR within 60 days of the complaint’s service.</td></tr>
<tr><th colspan="3">Extensions</th></tr>
<tr><td colspan="2">Some judges in the Central District of California give the agency an automatic 60-day extension to file its response to the complaint.</td><td>Other judges in the Central District of California only permit extensions upon a showing of good cause.</td></tr>
<tr><th colspan="3">Settlement Conferences</th></tr>
<tr><td>Judges in the Central District of California require the plaintiff to send a “written and detailed proposal of settlement” to the agency after service of the CAR. The parties must meet and confer over the proposal.</td><td>Judges in the Eastern District of California have a similar requirement, although pursuant to a different timeline.</td><td>In the Southern District of California, Social Security cases are exempt from a local rule requiring early settlement conferences shortly after an answer is filed, allowing parties to proceed to merits briefing without an attempt to settle.</td></tr>
<tr><th colspan="3">Timing of Merits Briefs</th></tr>
<tr><td colspan="2">In the Eastern District of Missouri, the plaintiff files a “brief in support of the complaint” within 30 days of the answer’s service. The agency files its “brief in support of the answer” 30 days after. The plaintiff then has 14 days to file a reply.</td><td>In the Western District of Missouri, the equivalent periods are 40 days, 40 days, and 21 days.</td></tr>
<tr><th colspan="3">Form of Merits Briefs</th></tr>
<tr><td>Some magistrate judges in the Central District of California require a “joint stipulation” in lieu of merits briefs.</td><td>Other magistrate judges in the Central District of California require motions for summary judgment, not joint stipulations.</td><td>In other jurisdictions, parties litigate the merits of the claimant’s appeal with filings that closely resemble what one would find in a court of appeals.</td></tr>
<tr><th colspan="3">Oral Argument</th></tr>
<tr><td colspan="2">Some judges hold oral argument in every or almost every case.</td><td>In some districts, “generally oral argument will not be heard.”</td></tr>
</table>

* Marcus-Gelbach Report, at 127-42.

According to the Marcus-Gelbach report, such procedural differences have few benefits, create inefficiencies, and impose costs on SSA and claimants that manifest themselves in several ways:

- ***Inability to Economize Resources.*** Procedural variation makes economizing difficult. For example, cases routinely raise the same issues, so lawyers often borrow text from one brief for another. By testing arguments and redeploying them, lawyers can raise the quality of their representation and lower the cost of litigation. Agency lawyers can rarely afford to spend more than three days writing a merits brief. Claimant representatives must also work on a tight budget. Procedural variation forces lawyers to refashion successful arguments to fit different procedures. Compounding the problem, lawyers cannot adapt to procedural variations by reducing the number of courts in which they litigate. Many claimant representatives must litigate in multiple districts to earn a living. Similarly, each of SSA's OGC regions handle cases filed in a number of districts. Attending to procedural variation adds to these lawyers' workloads, increasing the cost of litigation.

- ***Different Treatment of Similar Cases.*** Localism can also result in similar cases not being treated alike. For instance, differences among rules and practices can create delay for certain claimants when agency and claimant lawyers prioritize cases with shorter deadlines or for which extensions will not be readily granted. Burdensome procedures adopted by some districts or judges can also increase litigation costs for some claimants, whereas other similarly-situated claimants do not have to bear those costs.

- ***Lack of Public Input.*** Localism might generate requirements without sufficient deliberation or opportunities for public input. A proposed amendment to the Federal Rules of Civil Procedure must proceed through several steps during which the public is given opportunities to comment. Local rules need to pass muster only in the eyes of the local rules committee for the district. Even more potentially problematic are "general orders" and judge-specific orders, which can be issued by a district or an individual judge with little or no process. The use of these devices can make it difficult or even impossible for the agency, the claimants' bar, and interested members of the public to provide input on the impact of a rule.

In an effort to alleviate these costs and inefficiencies, ACUS's Assembly adopted Recommendation 2016-3, Special Procedural Rules for Social Security Litigation in District Court, 81 Fed. Reg. 94,312 (Dec. 23, 2016). The recommendation encourages the Judicial Conference to develop a uniform set of procedural rules for Social Security disability and related litigation in federal district court. It also highlights areas in which such rules should be adopted and sets forth criteria for the promulgation of additional rules. ACUS's recommendation was forwarded by the Administrative Office of the Courts to the Chair and Reporters of the Advisory Committee on Civil Rules, and was docketed and posted on the Federal Rules of Practice & Procedure section of the uscourts.gov website as Docket No. 17-CV-D. The matter will be addressed at future meetings of the Civil Rules Committee.

* * *

The proportion of disability cases in the federal docket is significant. Courts, SSA, and claimants have an interest in making sure that these cases are litigated efficiently, under consistent legal and procedural standards. And all have an interest in ensuring that only qualified claimants

receive benefits. On average, each grant of benefits costs the federal treasury roughly between $260,000 and $270,000 over the lifetime of a claimant, and disability payments, in the aggregate, exceed the amount the federal government pays to service the national debt. Maintaining the integrity of the disability program will require all stakeholders to actively focus on improvements.