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COMMENTS OF THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL VACCINE INJURY PROJECT ON THE PROPOSED CHANGES TO APPENDIX J OF THE RULES OF PROCEDURE OF THE UNITED STATES COURT OF FEDERAL CLAIMS (VACCINE RULES)

Submitted By:

Professor Peter H. Meyers, Director
Jeni S. Pachovska, Student Director

These comments are respectfully submitted by the George Washington University Law School Vaccine Injury Project with respect to the proposed changes to Appendix J of the Rules of Procedure (hereafter "Vaccine Rules" or "Rules") of the United States Court of Federal Claims. These comments suggest changes in three areas of the proposed Rules.

The **first** area is the authority of special masters to grant reconsideration of their own decisions, as well as relief from their judgments, and the issue of jurisdiction of special masters versus Claims Court judges to grant such relief. While we believe that the new authority given to special masters under the proposed Rules is highly desirable, we suggest that certain changes must be made in the manner in which the authority is implemented in the proposed Rules. The changes we suggest affect proposed Rules 10, 23, and 36.

The **second** area concerns the filing of a notice not to seek review under Rule (11)(a) and an election to accept judgment under Rule 12(a). We believe there would be a substantial saving of time on behalf of the parties and the court if the Rules authorized these two pleadings to be consolidated into one pleading when appropriate.

The **third** area is a proposal for an amendment to Rule 8 to establish an appropriate standard for the sequestration of witnesses during Vaccine Act hearings.

I. Jurisdiction of Special Masters to Reconsider Their Decisions

One important and desirable change contained in the proposed Rules is found in paragraph (c) of Rule 10, which authorizes special masters, upon a motion filed by either party, to reconsider a decision rendered in a vaccine case. However, the filing of a motion for reconsideration does not suspend the time for filing an appeal. This rule should be modified to specify that the filing of such a motion **does** suspend the time for filing an appeal, consistent with the uniform procedure followed in other cases involving Claims Court judges, as well as all other federal district court judges.

Reconsideration in vaccine cases may only occur prior to the filing of a Rule 23 Motion for Review, whereby jurisdiction over the case is transferred from the special master to a judge,[1] or prior to the expiration of the 30-day period following the special master's decision, at the conclusion of which (if no motion for review has been filed) the decision of the special master becomes final.[2] In these two circumstances, the special master loses jurisdiction over the case, unless and until the case is subsequently remanded to the special master by a Claims Court judge. Prior to the occurrence of either of those two events, the special master apparently has the authority to withdraw his decision and issue a new one, a practice followed in a number of cases.[3]

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[1] See 42 U.S.C. § 300aa-12(e)(1).

[2] See Patton v. Secretary of HHS, 25 F.3d 1021 (Fed. Cir. 1994).

[3] See, e.g., Taylor v. Secretary of HHS, No. 90-792V, 1991 WL 146258 (Cl. Ct. Spec. Mstr. July 18, 1991); Gomez v. Secretary of HHS, No. 90-3801V, 1995 WL 73396 (Fed. Cl. Spec. Mstr. Feb. 3, 1995); Wilcox v. Secretary of HHS, No. 91-186V, 1996 WL 18458 (Fed. Cl. Spec. Mstr. Jan. 4, 1996).

The Rules Committee intends to embody this practice through its changes to Rule 10, [4] and to give the special masters a new authority to grant relief from judgment pursuant to Rule 60 of the Rules of the United States Court of Federal Claims ("RCFC"). We view these proposed changes as desirable and in furtherance of the stated goal of the Vaccine Act to create an expeditious, non-adversarial, and fair system of claims resolution.[5] However, to give full effect to those proposed changes, the issue of jurisdiction of the special master needs to be further addressed.

Under Rule 10(c) as proposed, a party must file a motion for reconsideration "[w]ithin 21 days of the issuance of the special master's decision, if neither a judgment nor a motion for review of the special master's decision has yet been filed." According to Rule 23, the motion for review must be filed within 30 days of the issuance of the special master's decision. Assuming the motion for reconsideration is filed shortly before or on the 21st day after the decision, the special master will have only about a week and a half within which to seek a response from the non-moving party, to review any such response, and to render a decision either granting or denying the motion for reconsideration. This is obviously too rushed a period of time to require a decision on the motion to reconsider, and if the special master does not act within that period of time, the special master will lose jurisdiction over the case when a party files a motion for review (within the required 30 days) or the judgment takes effect with the issuance of the court's mandate.

We propose that the court adopt the same procedure for dealing with motions for

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[4] See Rules Committee Note to Proposed Rule 10.

[5] See 42 U.S.C. § 300aa-12(e)(2)A.

reconsideration that all other federal trial courts, including the Court of Federal Claims, have adopted for dealing with the problem of jurisdiction being taken away from the lower court and given to the higher appellate court before the lower court has had a reasonable opportunity to render a decision and correct its own possible mistake. A number of post-judgment motions, including a motion for reconsideration and a motion for relief under Rule 60 of the Federal Rules of Civil Procedure (FRCP),[6] suspend the running of the appeal period.[7] Upon the entry of an order disposing of the last such motion, the appeal period revives, and a party has 30 days therefrom to file a notice of appeal.[8]

There are two reasons why this change should be adopted for Vaccine Act cases. First, such a rule avoids duplication of effort by special masters and Claims Court judges, and makes for a more orderly, fair and efficient use of judicial resources. If the process for reconsideration is allowed to work effectively, it may obviate the need for appealing the special master's decision, and complete the proceedings in a much more expeditious manner. Alternatively, the special master's ruling on the motion for reconsideration may clarify the decision, such as in the case of typographical errors, which will greatly assist the Claims Court judge in ruling on an appeal.

Second, the rule makes even more sense in the context of vaccine injury cases where filing an appeal is not done by a mere one-paragraph notice of appeal, typical of the other federal court tribunals, but requires a thorough presentation of the entire argument of the appealing

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[6] FRCP Rule 60 is identical to RCFC Rule 60.

[7] See Federal Rules of Appellate Procedure (FRAP) Rule 4(a).

[8] Id.

party. It is inefficient and unfair to a party to have to undergo this process, when the decision may be corrected faster and easier by the special master, who issued the decision in the first place, and is therefore usually in the best position to make such a correction.

Other Proposed Changes. There are also some smaller changes which we strongly urge be adopted. First, the language of Rule 10(c), stating that "[t]he special master *may* seek the non-moving party's response to such a motion, determining the method of and time schedule for any such response,"[9] seems to give an unbounded discretion to the special master to allow or not allow a response from the non-moving party. We think it fundamentally unfair, and would be a denial of due process, if a motion for reconsideration were granted without giving the other side a reasonable opportunity to respond. Our suggestion for correcting this is to modify the above-quoted language to state that "[t]he special master may seek the non-moving party's response to such a motion, determining the method of and time schedule for any such response, and shall seek the non-moving party's response before granting such a motion."

Second, in Rule 10(c), no time is specified within which the special master shall rule on a motion for reconsideration. We propose that the special master be required to rule on any such motion within 30 days from receipt of the motion or the response of the non-moving party, whichever is later, unless exceptional circumstances require a longer time period.

Third, the language of proposed Rule 36, which gives the special masters authority to grant relief from judgment pursuant to RCFC Rule 60, provides that "[i]f the petition has previously been before a judge of the court upon review pursuant to Vaccine Rule 23, then the motion shall be referred to that judge." This is ambiguous. It is unclear whether this provision

[9] See Proposed Changes to Vaccine Rules (May 2000), Rule 10(c) (emphasis supplied).

is meant to include situations where the judge has remanded a case back to the special master, or situations where a notice of appeal pursuant to Vaccine Rule 23 has just been filed. The rules should be clarified to allow a motion filed pursuant to Rule 36 to go to a special master who has issued a decision on remand from a Claims Court judge.

Fourth, if a Rule 36 motion is granted, and the court's order modifies the amount of compensation to be awarded to petitioner, such modification should be made effective as of the date that judgment was originally entered in the case, not the date of the order granting Rule 36 relief. This would insure that petitioners receive the correct amount of compensation to which they are entitled. The interests of justice require that any correction in the special master's judgment, which originally contained an erroneous amount or a typographical error in the amount, will be corrected so that the petitioners receive the correct amount, including any interest which should have accrued on that amount.

II. Consolidation of Notice Not to Seek Review and Election to Accept Judgment

It is also respectfully suggested that the new Rules authorize the joining of a notice not to seek review under Rule 11(a), and an election to accept judgment under Rule 12(a), into a single filing. The proposed rules do not change current practice of requiring the filing of these two pleadings separately. However, there appears to be no good reason for requiring the filing of two separate documents. It duplicates the work of counsel and the court. Moreover, it delays final judgment being entered until the court first processes the notice not to seek review, and then after counsel files a separate election to accept judgment, the court must process that pleading as well. The preferred solution is to authorize these two pleadings to be consolidated

into one pleading when appropriate.

III. Sequestration of Witnesses

The proposed Rules should also adopt an appropriate standard for the sequestration of witnesses during Vaccine Act hearings. During typical evidentiary hearings held by special masters under the Vaccine Act, all witnesses generally remain in the courtroom during the entire proceeding, including the testimony of all the other witnesses. In contrast to Vaccine Injury Act practice, however, virtually all other litigation proceedings routinely exclude witnesses upon a motion to sequester witnesses made by either party. In civil, criminal, and administrative proceedings, a party may "invoke the rule on witnesses" to exclude a witness from the courtroom during another witness's testimony. The special masters in Vaccine Act cases must surely have similar discretion to sequester witnesses in appropriate circumstances. The broad flexibility that the Vaccine Act, the Vaccine Rules, and the Guidelines provide to the special masters to conduct proceedings under the Act allow the special masters to sequester witnesses in appropriate cases.

A. This Court Should Adopt "The Rule on Witnesses," and Sequester Expert Witnesses During a Proceeding Upon Request by a Party

Exclusion of expert witnesses during the testimony at trial of other expert witnesses serves three purposes. First, the rule exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses. See Geders v. United States, 425 U.S. 80, 87 (1976) (citing 6 J. WIGMORE, Evidence § 1837 (3d ed. 1940)). Second, the rule aids in detecting testimony that is less than candid. Id. Finally, the rule on witnesses prevents improper attempts to influence a witness's testimony in light of the testimony already given. See Perry v. Leeke, 488 U.S. 272,

281 (1989); Geders, 425 U.S. at 87; FED. R. EVID. 615 Advisory Committee note. The rule of sequestration prevents the shaping of testimony by witnesses, and assures that a witness will testify as to his or her own knowledge.

The merit of such a rule has been recognized "since at least biblical times." See Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996). Sequestration of witnesses "already had in English practice an independent and continuous existence, even in the time of those whose earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law." Geders, 425 U.S. at 87 (citing 6 J. WIGMORE, Evidence § 1838 (3d ed. 1940)); see also Perry, 488 U.S. at 282 n.4 (exclusion of witnesses from the courtroom is a "time honored practice designed to prevent the shaping of testimony by hearing what other witnesses have to say")(citation omitted). It is now well-recognized that sequestering witnesses "is one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." Opus 3 Ltd., 91 F.3d at 628 (citing 6 J. WIGMORE, Evidence § 1837, at 455-56).

B. A Rule Similar to Rule 615 of The Federal Rules of Evidence Should be Adopted for Vaccine Act Cases

Although the Federal Rules of Evidence do not apply to Vaccine Act cases, the purposes behind Rule 615 ("Exclusion of Witnesses") provides a persuasive argument to adopt a similar rule to allow the sequestration of witnesses in appropriate circumstances in Vaccine Act cases. Such a new rule could be added to proposed Rule 8(c), which specifies the procedure for the taking of evidence at Vaccine Act hearings.

Rule 615, which applies to virtually all civil and criminal cases filed in the federal courts, provides as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be "essential" to the presentation of a party's cause or those who are themselves a party to the litigation or a representative of an organizational party to the litigation.

Rule 615 gives a party the right to request the exclusion of a witness from the courtroom in order to prevent that witness from hearing the testimony of other witnesses. See Bruneau v. South Kortright Central School District, 163 F.3d 749, 762 (2d Cir. 1998). The rule addresses the concern that witnesses who are present in court may modify his or her testimony to comport with that of other witnesses. See United States v. Klaphake, 64 F.3d 435, 437 (8th Cir. 1995) (citing United States v. Agnes, 753 F.2d 293, 307 (3d Cir. 1985)). Under Rule 615, a party's request to exclude a witness from a trial must be granted as a matter of right, unless the party seeking to avoid sequestration of a witness proves to the court that the witness is essential to the presentation of the case, or that one of the other two exceptions applies.

Expert witnesses in Vaccine Injury Act proceedings will generally not meet the criteria of persons "whose presence is shown by a party to be essential to the presentation of the party's cause." FED. R. EVID. 615(3) (emphasis added). When invoking the exemption, the burden lies with the party seeking to exempt an expert witness from a sequestration order to show that the party could not effectively function in the witness's absence. See Klaphake, 64 F.3d at 437 (citing Agnes, 753 F.2d at 306-07).

In Vaccine Injury Act cases, however, this burden cannot generally be met. The justifications for expert exemption from sequestration are less compelling and arguably, non-existent. Specifically, two reasons undermine arguments that experts should be exempt from a

sequestration order in Vaccine Injury Act cases: (1) respondent's attorneys, who have substantial expertise in handling Vaccine Act litigation, do not need the presence of an expert for management of the litigation; and, (2) special masters presiding over vaccine injury cases are well-versed in the requirements needed to establish a compensable claim.

First, respondent's attorney is well-versed in vaccine injury cases. At most, the expert's presence and possible input would be "desirable" or "helpful," yet not "essential" to the respondent's case. A showing that the witness's presence would be helpful, however, is not enough. See United States v. Ortiz, 10 F. Supp.2d 1058, 1061 (N.D. Iowa 1998) (citing United States v. Jackson, 60 F.3d 128, 135 (2d Cir. 1995)); Agnes, 753 F.3d at 307; Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175 (3d Cir. 1977). What must be shown is that counsel could not effectively function without the presence and aid of the witness, or that the witness would be unable to present essential testimony without hearing the trial testimony of other witnesses. See Klaphake, 64 F.3d at 437; Agnes, 753 F.2d at 306-07. In the typical Vaccine Act case, respondent's attorney cannot establish that he or she cannot function in the absence of the expert witness's presence in the courtroom during the testimony of the petitioners' expert witnesses. See Klaphake, 64 F.3d at 437.

Thus, in most cases, when one expert is testifying, all other experts should be excluded from the hearing room. Under the proposed rule, all experts could listen to the testimony of the fact witnesses, which is the current practice, and would not change under the proposed Rule. The petitioners could also remain in the hearing room when others are testifying, a right they have as "parties" to the proceeding under the proposed Rule. The only change would be that generally one expert could not hear the testimony of the other experts in the case. This is

especially important when there are two or more experts for one side, which is not uncommon in Vaccine Act hearings conduced in recent years. In this circumstance, it does not promote fairness and the truthful testimony of the witnesses for all expert witnesses for one side to be present when one expert for that side is testifying.

Furthermore, respondent's attorney cannot show that one of her experts cannot present essential testimony without having heard the trial testimony of the other expert witnesses. Respondent's counsel receives from petitioners' expert witnesses affidavits which lay out their opinions and conclusions prior to the evidentiary hearing. After receipt of these materials, respondent's counsel usually distributes both the affidavits and medical records to her expert witnesses well before the hearing. Therefore, an expert witness should already have the materials on which to base his or her opinion even before the evidentiary hearing begins.

The special master also performs his or her duties as a specialized fact finder and expert decision-maker in such cases. A special master is appointed by the U.S. Court of Federal Claims to adjudicate only Vaccine Injury Act cases, and has substantial experience with the scientific and medical materials and testimony related to vaccine injuries.

C. Current Vaccine Injury Act Practice Does Not Discourage or Expose Fabrication, Inaccuracy, and Collusion by Expert Witnesses

The routinely-invoked rule to sequester witnesses prevents a witness from tailoring his or her testimony in light of the testimony of other witnesses, and permits the discovery of false or implausible testimony. Current Vaccine Injury Act practice, however, does not discourage and expose fabrication, inaccuracy, and possible collusion among expert witnesses. Accordingly, in the exercise of this special master's discretion, all expert witnesses should generally be excluded

during the testimony of another expert witness. Alternatively, when two expert witnesses are testifying for the same party, the special master should generally prevent the experts from hearing each other's testimony.

An inherent natural tendency exists for witnesses called by one party to try to give testimony consistent with the other witnesses for that party. To ensure that the truth seeking function of the evidentiary hearing is met — by having each witness independently arrive at his or her opinion/conclusion, and without any unintentional collusion — the special masters should generally allow the parties to invoke the rule on witnesses.

Witnesses may also be influenced subconsciously to meld their stories; one witness may innocently adopt all or part of the testimony of a prior witness rather than relying on his own knowledge. See Handbook of Federal Evidence, § 615.1, Commentary (4th ed. 1996). In either event, the cross-examiner will find it much more difficult to expose fabrication, collusion, inconsistencies, or inaccuracies with respect to witnesses who have heard others testify. Id. Separation prevents improper influence during the trial. Id.

An expert witness's conclusion should be based on both the evidence presented at trial by any fact witnesses, and his or her independent evaluation of the medical facts presented in the materials submitted to the witness by counsel.

D. Current Vaccine Injury Act Practice Provides an Unfair Partisan Advantage to Respondent

Sequestration of expert witnesses not only fulfills the truth-seeking function, but also corrects an unfair advantage to the government that the current procedure perpetrates. Currently, respondent's experts generally sit through the entire proceeding, including the testimony of

petitioners' experts, and also generally consult with respondent's counsel in court and with the other expert for respondent before testifying. Thus, the government's experts have the substantial advantage of hearing all the testimony of all petitioners' experts before they testify. To insure fairness to the parties, and a "level playing field" for both sides, sequestration would be appropriate.

Thus, in most cases, when one expert is testifying, all other experts should be excluded from the hearing room. Under the proposed rule, all experts could listen to the testimony of the fact witnesses, which is the current practice, and would not change under the proposed rule. The petitioners could also remain in the hearing room when others are testifying, a right they have as "parties" to the proceeding under the proposed Rule. The only change would be that generally one expert could not hear the testimony of the other experts in the case. This is especially important when there are two or more experts for one side, which is not uncommon in Vaccine Act hearings conducted in recent years. In these circumstances, it does not promote fairness or the truthful testimony of the witnesses for all expert witnesses for one side to be present when one expert for that side is testifying.

CONCLUSION

The proposed changes to the Vaccine Rules are generally very desirable. However, there are several problems and concerns raised in the Rules which should be addressed and corrected before the proposed Rules are adopted. The George Washington University Vaccine Injury Project hopes that these comments have been helpful in making sure that the new Rules adopted by the court for Vaccine Act cases will promote, to the greatest extent possible, the fair and expeditious resolution of vaccine cases.