



## Update from AAJ Linda A. Lipsen

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# AAJ defeats extreme tort reform proposal in Senate

COVID-19 TORT REFORM WOULD HAVE BEEN A DISASTER FOR INDIVIDUAL CIVIL RIGHTS

## WASHINGTON UPDATE

The Senate recently rejected the most extreme tort reform proposal ever considered by Congress, as part of the latest COVID-related stimulus package. This bill was defeated in a vote of 52-47.

The bill would have:

- moved all COVID-19 exposure, injury, or death claims to federal court;
- heightened the gross negligence standard so that plaintiffs must prove that a business acted with conscious disregard;
- raised evidentiary burdens for plaintiffs, including proving their cases by “clear and convincing” evidence;
- preempted all state tort law except for those that are less protective of individuals;
- suspended federal employment and disability rights statutes such as the ADA, the Civil Rights Act, and the Fair Labor Standards Act for five years;
- eliminated joint and several liability in most COVID-19 cases; and
- eliminated or severely limited non-economic damages in many health-related claims including nursing home claims.

AAJ has been fighting efforts to include corporate liability immunity in COVID-related bills for several months. In fact, this is the fifth time since the start of the pandemic that Congress has voted on these issues, and we have defeated overly broad immunity each time.

## The fight continues

We will remain vigilant because the fight is not over. There may be further attempts to cram corporate immunity into another COVID-19 stimulus package or into the Continuing Resolution that must pass by September 30 to continue funding the federal government.

We will continue to hammer home that liability remains the most effective protection and that workers, patients, and consumers must encourage businesses to act reasonably and promote safety.

I assure you that AAJ will fight to protect your practices and ensure that workers and families will have a remedy when corporations fail to act reasonably. We will keep you updated on this issue.

## Federal rules update

We will continue to keep you updated on federal rule changes, as the same rules often are adopted at the state level.

## Rules going into effect December 1, 2020

AAJ and its members recently shaped two approved rules changes:

- FRCP (30)(b)(6): After starting with a very broad proposed rule, the final rule imposes a simple meet and confer requirement on the serving party and the organization. The meet and confer must occur before or promptly after the notice of subpoena is served, must be in good faith, and is limited to the matters for examination. The following conferral requirements were removed from the adopted rule: the requirement to confer regarding witness identity; the requirement to “continue as necessary”; and the requirement to confer about “the number and description” of the matters for examination.

- FRE 404(b): The rule governs the admissibility of evidence of other crimes, wrongs, or acts. The amendment makes several changes, including clarifying prohibited and permitted uses of evidence of other crimes by the prosecution. Further, the pretrial notice of use of this evidence must be provided in writing. Notice must be provided in time to allow the defendant a fair opportunity to meet the evidence, unless the court excuses the requirement for good cause. The good cause exception applies not only to the timing of the notice, but also to the articulation requirements for the evidence.

For additional information on these rules changes, please contact Susan Steinman at [susan.steinman@justice.org](mailto:susan.steinman@justice.org).

## Proposed amendments in formal rulemaking

AAJ has noted four proposed rules changes that may be of interest to you:

- New supplemental Social Security rules for filing claims and responses in district court
- A proposal to amend FRCP 12(a)(4) relating to Government Immunity Defense
- A proposed amendment to Appellate Rule 25 to extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases
- A proposed amendment to amend Criminal Rule 16 to more closely match FRCP 26 regarding expert witness disclosures

For more information on each proposed amendment, please contact Susan Steinman at [susan.steinman@justice.org](mailto:susan.steinman@justice.org).

The formal comment period runs through February 16, 2021, and comments must be submitted electronically. Information on how to submit a comment can be found at [uscourts.gov/rules-policies/proposed-amendments-published-public-comment](https://uscourts.gov/rules-policies/proposed-amendments-published-public-comment). There is also an opportunity for public comment at hearings held on designated dates, provided that written notice is sent – 30 days prior to the hearing – to: [RulesCommittee\\_Secretary@ao.uscourts.gov](mailto:RulesCommittee_Secretary@ao.uscourts.gov).

## Fall rules agenda

All five of the Advisory Committees will meet this fall. The Advisory Committee on Civil Rules will meet on October 16, 2020, and the Advisory Committee on Rules of Evidence will meet on November 13, 2020. AAJ expects the Advisory Committee on Civil Rules to begin consideration of draft rule amendments to the FRCP for handling of matters during emergencies, such as a pandemic.

In addition, that committee will consider a revised disclosure rule that would make it easier to determine the citizenship of LLCs and other business entities. The Advisory Committee on Rules of Evidence is expected to review revised draft rules on FRE 702 (overstatements of expert opinions) and FRE 106 (completely witness statement over hearsay objection).

## Fighting for you and your clients

Thank you for your support. Despite these difficult times, AAJ continues to fight all attempts to deny access to justice. We will keep you informed about important developments and welcome your input. You can reach me at [advocacy@justice.org](mailto:advocacy@justice.org).