

New POMS on Attorney’s Fees:

Is Every Attorney Who Drafts a Special Needs Trust Required to Obtain the Social Security Administration’s Permission to Be Paid or Risk Going to Jail?

By Kevin Urbatsch

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A. Introduction

On June 25, 2019, without fanfare or notice, the Social Security Administration (SSA) issued updates to its Program Operations Manual System (POMS) regarding when an attorney's fee for performing legal services may be subject to SSA's fee authorization process. *See* POMS GN 03920.007. Social Security employees use the POMS to process claims for Social Security benefits.

At first blush, the new POMS appears to mimic the previous POMS in that fee authorization is required only for those attorneys who represent claimants before SSA. However, when reviewing the examples in the new POMS, concerns arise that SSA, for the first time, included several situations that may require attorneys to submit an SSA fee authorization request when they draft or amend trusts "for the purpose of affecting [their] clients' eligibility for benefits." The new POMS examples (when read in isolation) do not appear to limit application of

fee authorization to those attorneys who represent claimants before SSA and may even include attorneys who simply consult with a person with a disability, those who draft a special needs trust (SNT), and possibly those who prepare a single third-party SNT for the parents of a child who may one day be eligible for Supplemental Security Income (SSI).

This article presents the author's analysis of the new POMS rules as they stand now, but I encourage all practitioners to carefully study the rules to reach their own conclusions on how best to proceed. The overwhelming concern is that if SSA broadly interprets its new POMS rules and is aggressive in enforcement, violation of SSA's fee authorization process could result in various consequences for the attorney — a misdemeanor conviction, a \$500 fine, **up to 1 year in jail for each occurrence**, and likely loss of the attorney's license to practice law — for the purported crime of conducting special needs planning for persons with disabilities.

After extensive review of the new POMS rules and existing rules, the author is still unable to articulate a set of rules for attorneys to follow to comply with the new POMS. Under prior rules, SSA did not require attorneys who drafted SNTs to submit fees for authorization. In several SSA regions, SSA officials expressly stated that the fee authorization process was unnecessary for attorneys who drafted SNTs and had no intention of representing the client before SSA. Since the release of the new POMS, SSA has issued no additional guidance to assist practitioners in clarifying whether the new POMS represents:

- A huge change in policy requiring SSA attorney fee authorization in nearly all special needs planning situations,
- A small change in policy clarifying that SSA fee authorization is only required for certain attorney's services that directly involve a claim before SSA, or

- A continuation of existing policy that no fee authorization is required except in cases in which the attorney agrees to represent the SSI recipient before SSA on a claim.

In reviewing the new POMS, the following question comes to mind: Does SSA have the authority to regulate fees for attorneys who draft SNTs but never intended to represent an SSI recipient in an SSA claim? Unfortunately, the answer is unclear. To better understand this issue, a deeper dive into the Social Security Act is necessary.

B. When the Social Security Act Requires SSA Authorization of Attorney's Fees

The starting point for any analysis of SSA authorization of attorney's fees is the Social Security Act's governing statute at Title 42 U.S.C. § 406, which states in part:

The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void.

The original version of the Social Security Act enacted in 1935 made no provision for attorney's fees. 49 Stat. 620 (1935). Within 4 years, Congress amended the Act to permit the Social Security Board to prescribe by regulation the maximum fees attorneys could charge for representation of claimants before the agency. Soc. Sec. Act Amends. Of 1939, 53 Stat. 1372, codified at Title 42 U.S.C. § 406. This section was later updated, and the legislative history of this section of the Act reveals that Congress was deeply concerned that benefits awarded to Social Security claimants not be eroded by contingent fees sought by attorneys that could reach one-third to one-half the claimant's accrued benefits, an amount Congress perceived to be "inordinately large." See Sen. Comm. On Fin., *Hearings on H.R. 6675*, 89th Cong., 513 (1965).

SSA's attorney fee authorization provision was attacked as unconstitutional. An attorney claimed that the provision deprived claimants of the right to counsel, was an encroachment on the judiciary, and was an improper delegation of legislative power. The U.S. Supreme Court, however, affirmed the provision as constitutional. *Randolph v. U.S.*, 274 F. Supp. 200, 203–204 (M.D.N.C. 1967), *aff'd*, 389 U.S. 570 (1968). The *Randolph* court stated:

Even assuming *arguendo* that the plaintiff's conclusion, that claimants are effectively deprived of counsel under these fee restrictions is correct, this Court cannot accept the plaintiff's initial premise, which is that claimants for social security benefits have a constitutionally protected right to counsel in pursuing their claims through the administrative procedures of the social security system. ...

Within the bounds of reasonable action, the social security system is a child of Congress and, as such, subject to its regulation. If for a valid reason, Congress can prohibit attorneys completely from the administrative processing of claims, then certainly Congress can subject attorney's fees to regulations.

As a practical matter, attorneys should be encouraged to assist in the presentation of complicated claims. The attorney's absence in such cases is lamented in a number of opinions which comment on the chaotic records of such cases on appeal to the Federal Courts [citation omitted]. Nevertheless, if such fee restrictions place too great a burden on attorneys, the change in such restrictions should be attempted through legislative channels and should not be accomplished through judicial fiat when such restrictions do not offend due process. ...

[T]hese restrictions do not relate to the regulation of fees of attorneys prosecuting claims before the courts which might raise the question of encroachment on the judiciary. These restrictions relate only to attorney's fees in connection with claims before an executive officer, thus precluding any question of judicial encroachment.

The argument, that 46 U.S.C. § 406 is an unconstitutional delegation of legislative power because it provides the Secretary with full discretion to regulate attorney's

fees, is without merit. It is well accepted that while Congress may not delegate the discretion of what a law shall be, it may lawfully delegate the discretion of how a law will be administered. ...

Congress intended to allow the Secretary the discretion of setting maximum fees for services performed in connection with any claims before his Department. To require a strict standard to be set by Congress, would rob the Executive officer of the flexibility needed to properly administer the statutory scheme embodied in the Social Security Act.

SSA's attorney fee authorization provision has been reviewed numerous times since the 1960s. The attorney fee provisions of Title 42 U.S.C. §§ 406(a) and (b) establish the exclusive regime for obtaining fees from Social Security claimants. *Gisbrecht v. Barnhart*, 535 U.S. 789, 795–796 (2002). In a different matter, the U.S. Supreme Court described the sections requiring fee authorization as follows:

As an initial matter, subsections (a) and (b) address different stages of the representation. Section 406(a) addresses fees for representation “before the Commissioner,” whereas § 406(b) addresses fees for representation in court. Because some claimants will prevail before the agency and have no need to bring a court action, it is unsurprising that the statute contemplates separate fees for each stage of representation. *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019).

Title 20 Code of Federal Regulations at § 416.1520(a) (representation of parties) provides additional information on the fee request for SSI recipients, which states, “A representative may charge and receive a fee for his or her services as a representative only as provided in paragraph (b) of this section.” Section 416.1520(b) then states:

(1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.

(2) We decide the amount of the fee, if any, a representative may charge or receive.

(3) Subject to paragraph (e) of this section, a representative must not charge or receive any fee unless we have authorized it, and a representative must not charge or receive any fee that is more than the amount we authorize.

The Code of Federal Regulations supports the interpretation that the SSA fee authorization process is limited to those attorneys hired by an SSI claimant to represent the claimant before SSA:

Representational services means services performed for a claimant **in connection with any claim the claimant has before us, any asserted right the claimant may have for an initial or reconsidered determination**, and any decision or action by an administrative law judge or the Appeals Council.

Representative means an attorney who meets all of the requirements of § 404.1505(a), ... and **whom you appoint to represent you in dealings with us**. 20 C.F.R. at § 416.1503 (first emphasis in each paragraph in original, second emphasis added).

C. When the POMS Requires SSA Authorization of Attorney's Fees

The SSA POMS describes SSA's fee authorization process. The POMS, which is SSA's internal policy guidebook to help its employees evaluate POMS rules, is not legally binding on SSA or the courts. *See Parker for Lamon v. Sullivan*, 891 F.2d 185, 190 (7th Cir. 1989).

However, the U.S. Supreme Court has stated that the POMS cannot be ignored entirely. *See Wash. St. Dept. of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 385 (2003) ("While [POMS] administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect[.]"). Historically, the courts have accorded *Skidmore* deference to the POMS on SSA's interpretation of the statutes and regulations, which affords discretion to

an agency's interpretation of such statutes and regulations. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Under the *Skidmore* standard, the court must determine whether the agency's interpretation is persuasive. *U.S. v. Mead*, 533 U.S. 218, 228 (2001). In making this judgment, the court must consider a number of factors: whether the agency has consistently maintained its position; how thoroughly the agency considered its position; whether the agency's reasoning is valid; and whether other factors make the interpretation persuasive. *Id.* In the special needs planning context, the courts have deferred to the POMS concerning SNTs. As the U.S. Court of Appeals for the Eighth Circuit noted, "[T]he POMS provisions demonstrate valid reasoning; that is, the detailed process required for establishing qualifying special-needs trusts contained in the POMS is consistent with 'Congress's command that all but a narrow class of an individual's assets count as a resource when determining the financial need of a potential SSI beneficiary.'" *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015).

POMS GN 03900.000 through GN 039990.040 concern representation and representative's fees. "Claimant' ... refers to claimants at any stage of the administrative appeals process, and to beneficiaries whose benefit rights are the subject of post-entitlement or post-eligibility (PE) actions for which they seek representation." POMS GN 03910.010.A. "Representative' ... means an individual person who meets the qualifications ..., and whom the claimant appoints to act on his or her behalf in pursuing his or her claim or asserted rights before SSA." POMS GN 03910.020.A.

POMS GN 03910.040.A states, “A claimant’s appointment, or revocation of an appointment, of a person as his or her representative must be in writing, and must be filed with SSA.” POMS GN 03920.001.A describes the SSA’s fee authorization process as follows:

A claimant may appoint an individual, attorney or non-attorney, to represent him/her in matters before SSA. A representative who wants to charge or collect a fee for services provided in any proceeding before SSA under the Social Security Act must first obtain SSA’s authorization, except when the conditions described in GN 03920.010 are present.

However, SSA’s policy expressed in the POMS is that the fee authorization process may be required even in situations in which an attorney is acting as a claimant’s representative but did not follow the proper procedures to be appointed as one. This is a concerning provision because if what SNT attorneys do is part of “services provided in proceedings before SSA,” there may not be a defense under the POMS by claiming that the attorney had no agreement to act as representative, the attorney had no contact with SSA, or the attorney’s fees were paid by a third party. *See* POMS GN 03920.005.B, which states:

A representative, attorney or non-attorney, must obtain SSA’s authorization to charge and collect a fee for services provided in proceedings before SSA irrespective of whether (among other things):

- **the services result in an allowance, reinstatement, or disallowance action by SSA;**
- **the attorney/non-attorney was ever recognized by SSA as a claimant’s representative, or the individual did not deal directly with or actually contact SSA; or**

- **the fee is charged to or collected from the claimant or a third party (e.g., an insurance company), unless the requirements in GN 03920.010B. are met** (emphasis added).

POMS GN 03920.005.C defines the types of proceedings before SSA that the agency considers a claim:

SSA considers any claim or asserted right . . . , which results in the following, to be a proceeding before SSA for fee purposes:

- an initial, revised, or reconsidered determination or action by a field office or processing center; or
- a decision or action by an Administrative Law Judge or an Administrative Appeals Judge, including a decision issued after a court remand.

POMS GN 03920.005.D describes a nonexclusive list of proceedings before SSA in which an attorney is required to comply with the fee authorization process:

Proceedings that require SSA's fee authorization include, but are not limited to, services in connection with:

- an application for Social Security monthly benefits, supplemental security income (SSI) payments, or a lump-sum death payment;
- an application for hospital insurance benefits or supplemental medical insurance benefits;
- a request to establish or continue a period of disability;
- a request to modify the amount of benefits;
- a request to reinstate benefits;
- a request to waive recovery of an overpayment, or an appeal of an overpayment waiver denial determination; and
- a request to revise an earnings record.

It is reassuring to know that preparing SNTs and advising on SNT administration do not appear on the nonexclusive list of services that require SSA fee authorization. The POMS rule at issue appears at POMS GN 03920.007, Legal and Specialized Services Not Subject to Fee Authorization. Ironically, as discussed below, the policy actually describes services that confuse special needs planning attorneys of when fee authorization is actually required. Before this discussion, it is important to understand whether SSA required fee authorization before the new POMS was issued.

D. SSA's Previous Position on Requiring Special Needs Planning Attorneys to Submit Fees for Authorization

Prior to issuance of the new POMS, SSA did not require special needs planning attorneys to submit their fees for authorization. Attorney Constance R. Somers, certified as a specialist in social security disability advocacy, issued a well-written treatise titled *SSA Ethical Rules — Mountains or Molehills?* as part of her presentation at the University of Texas 13th Annual Changes and Trends Affecting Special Needs Trusts program on February 9, 2017. In her paper, she discussed whether the SSA fee authorization process is required for special needs planning. She conducted a thorough review of the rules before the new POMS was issued and identified several practices requiring further analysis, the most difficult being the practice of many special needs planning attorneys to submit a copy of the SNT with a cover letter to SSA after the trust is established and funded. Her well-reasoned opinion is that for the establishment and administration of SNTs, no SSA fee authorization is required.

In her treatise, Ms. Somers also identified several SSA officials who stated that SSA fee authorization is not required for special needs planning. She quoted (and provided a copy of) a

letter from the operations manager at the Houston SSA field office, who stated, “The establishment of a supplement[al] needs trust is considered a civil action, as opposed to an ‘action before SSA.’” The official also stated that attorneys from the SSA regional offices in Dallas and Denver concurred with this statement. Ms. Somers then asked the manager of the San Antonio field office if fee authorization is necessary for the creation of an SNT. The Dallas regional office sent a reply letter, which Ms. Somers quoted:

Thank you for submitting this inquiry — this issue has come up before. The establishment of a Special Needs Trust (SNT) is a personal matter of the individual, i.e., it is not agency business. Consequently, we do not authorize fees for work that an attorney does on an SNT or any other trust. Any fee payment related to the establishment or administration of a trust is a personal matter between the individual and the attorney, and the attorney should not submit a request for fee authorization to SSA.

The author is aware of other attorneys around the country who have periodically attempted to obtain SSA authorization of their fees for establishing SNTs, and SSA has responded that it is not necessary to ask for authorization on trust-related work. The author’s practice is not to seek SSA fee authorization for special needs planning work, except under limited circumstances in which he represents an SNT beneficiary whose SNT was found countable by SSA due to a purported defect. The author represents the SNT beneficiary/SSI recipient before SSA to either defend the SNT as written because SSA is incorrect about the defect, or if SSA is correct, the author drafts an SNT amendment to correct the defect. In these circumstances, he does the work either pro bono or seeks his fee through SSA fee authorization.

Ms. Somers’s treatise was in part a response to an argument that fee authorization may be required for certain aspects of special needs planning, relying primarily on an Eastern District of

Tennessee case that was later issued as a Social Security Ruling (SSR). In this case, an accountant was held criminally liable for violating SSA's fee authorization provision by amending back tax returns to qualify a claimant for benefits assumed to be "in connection with" the claim for benefits itself. The case is *U.S.A. v. Lewis*, 235 F. Supp 220 (E.D. Tenn., 1964), which states:

In light of the issue now before the Court, it is apparent that the significant language in the above statute is the phrase "services performed in connection with any claim before the Secretary." The word "services" does not necessarily exclude tax services. Neither does it necessarily include tax services. Rather, such inclusion or exclusion must depend upon the facts of the particular case. Whether a fee charged for preparation of the self-employment tax return would or would not be subject to regulation would depend upon whether, under the facts of the particular case, such service might properly be considered a "service performed in connection with any claim before the Secretary." If the real purpose of determining self-employment income was to knowingly further a claim then made or to be made before the Social Security Administration, such would constitute a "service" the fee for which may be regulated. On the other hand, if there was no evidence that the real purpose of the service performed in the determination of the self-employment income was knowingly performed in furtherance of a claim then made or to be made before the Social Security Administration, such work would not constitute a service the fee for which was subject to regulation.

In the wake of *Lewis*, SSA issued SSR 65-33c, which tracked the language of the decision in *Lewis*. According to SSA, SSRs are "a series of precedential decisions relating to the programs administered by SSA and are published under the authority of the Commissioner of Social Security." It is important to note that SSRs do not have the same force as actual laws or regulations. They are, however, binding on all SSA components and are used to adjudicate

Social Security cases. In SSR 65-33c, SSA added its own spin to the decision with the following preamble:

Whether the services performed in the preparation of a self-employment tax return are services performed in connection with a claim before the Secretary for which the charging of a fee would be subject to regulation by the Secretary under section 206 of the [Social Security] Act, depends upon whether the real purpose of determining the self-employment income is to knowingly further a claim then made or to be made before the Social Security Administration.

Although the *Lewis* case and SSR 65-33c do indicate that SSA (on a case-by-case basis) believes it can require a fee for services indirectly related to a claim, no reported decisions exist, and the author is unaware of SSA ever claiming that preparing an SNT is such a service. Ms. Somers argued in her treatise that the *Lewis* case and SSR 65-33c are distinguishable from attorneys who draft and establish SNTs:

[*Lewis*] was a criminal case against an accountant who had prepared fraudulent amended self employment tax returns for the client to submit to SSA for the express purpose of fraudulently establishing [Social Security] quarters of coverage. The U.S. attorney who prosecuted the case included, as a lesser included offense, the charging of fees not authorized by SSA for services performed in connection with [a Social Security] case. Note the SSA itself did not bring this action and was not prosecuting the attorney for the supposed transgression of its fee approval rules. Nevertheless, SSA promulgated SSR 65-33c, which quoted the *Lewis* court's decision without further comment. ...

I suggest that if either the *Lewis* case or SSR 65-33c has any precedential value more than 50 years after the fact, it would be limited to a set of very narrow facts involving the preparation of fraudulent tax returns, but it seems like a far stretch to apply it to the creation of a perfectly legal SNT.

After Ms. Somers' treatise, SSA rescinded the SSR on September 14, 2018, and stated:

We are rescinding these SSRs, which address due process rights to counsel; fees for representational services; and judicial review of representative fees, because the information provided therein either reflects well-established legal principles and is already reflected clearly in the Social Security Act or regulations, or has since been clarified in our regulations and subregulatory guidance. ... As such, these SSRs are redundant, outdated, or obsolete. (83 Fed. Reg. 46771 (Sept. 14, 2018))

It appears that the well-established legal principle at the time SSR 65-33c was rescinded was that SSA did not require fee authorization for the establishment of SNTs. Into these comforting waters, however, SSA, on June 25, 2019, issued a new POMS that threw everything into chaos.

E. When Attorney's Services Are Not Subject to SSA Fee Authorization

POMS GN 03920.007 defines when attorney's services are not subject to SSA fee authorization. Section A states:

Section 206 of the Social Security Act requires us to authorize a representative's fee when the representative's services are performed "in connection with" a claim before the agency. However, the statute does not specify what services might be considered to have been performed "in connection with" a claim.

In this section, we provide examples of some services we believe do not generally implicate this statutory requirement and for which we do not need to authorize the representative's fee. Certain services are so specialized and unrelated to our processes (e.g., filing taxes or preparing adoption papers) that we generally will consider them not performed in connection with a claim. However, there may be some exceptions even with these types of services. **If a representative performs one of the services identified in section B, below, but it is performed in connection with a claim**

before us, the representative or claimant must ask us to authorize the representative's fee via a fee petition or fee agreement before the representative can collect a fee (emphasis added).

The list of services that may not require SSA fee authorization includes “[e]stablishing a trust account.” POMS GN 03920.007.B. Looking at POMS GN 03920.007.A, an attorney would logically conclude that SSA fee authorization is not required for establishing an SNT unless the service is performed in connection with a claim before SSA. This is consistent with the author’s belief that the only time fee authorization is required is when the service is performed as part of a claim before SSA. POMS GN 03920.007.C provides a nonexclusive list of the types of services that generally are performed in connection with a claim and thus require SSA fee authorization:

Providing assistance with —

- Obtaining a replacement social security card;
- Obtaining a Medicare card;
- Applying for Social Security monthly benefits, Supplemental Security Income (SSI) payments, or a lump-sum death payment;
- A request to establish or continue a period of disability;
- A request to modify the amount of benefits or the reinstatement of benefits;
- The application [for] and obtaining [of] retirement benefits;
- A request to waive recovery of an overpayment, or an appeal of an overpayment waiver denial determination; and
- Obtaining an updated or revised earnings record.

POMS GN 03920.007.C and the Code of Federal Regulations sections describing the types of services performed in connection with an SSA claim are extremely important in determining when attorney fee authorization is required, which is the crux of the issue. If attorney’s services performed in connection with a claim are limited to applying for SSI benefits

or responding to an SSA notice of overpayment or denial of benefits, an attorney doing nothing else but drafting an SNT does not need to file for SSA fee authorization. It has been the author's understanding (and presumably SSA policy based on the letters received from the agency) that submitting fees for authorization is not required when an attorney drafts an SNT. An attorney still needs to file for SSA fee authorization if representing a claimant/beneficiary before SSA after the agency questions whether an SNT meets SSA requirements or finds the SNT countable due to a purported defect. SSA typically issues a denial of benefits or notice of overpayment in these cases.

It is also reassuring to know that the POMS does not expressly state that drafting SNTs and providing advice on SNT administration require SSA fee authorization. In fact, the POMS includes "establishing a trust account" in the list of services that typically do not require fee authorization. *See* POMS GN 03920.007.B. However, this is not fully determinative, because the heading of Section B states, "Types of Services **That May Not Require Us to Authorize the Fee**" (emphasis added). A reasonable conclusion can be drawn from all these factors that drafting an SNT is not a service connected with a claim, which requires SSA fee authorization.

Yet a counterargument has been explained to the author: Does a claim arise every time SSA conducts a resource evaluation of an SSI recipient on the first day of the month? If so, does the establishment of an SNT to hold funds that otherwise would be countable considered a service in furtherance of this monthly claim? If so, is the attorney, by drafting the SNT, serving as the claimant's representative? This appears to be a big stretch for the author, but others have posited that this is a possibility.

It also has been reported that some people in SSA hold this opinion while others do not. The author finds little support for this opinion in the POMS rules, but it certainly cannot be wholly discounted because even the POMS states that the list of services is nonexclusive. Further, if the monthly resource test is considered a claim and drafting an SNT is considered a service in furtherance of a claim, an attorney may unwittingly be required to file for fee authorization because SSA's policy asserts that *as long as someone is acting as a representative*, it does not matter whether he or she submitted the proper paperwork, spoke to or contacted SSA, or had his or her fees paid by third parties. *See* POMS GN 03920.005.B. This is a much more problematic situation, perhaps requiring attorneys who only draft SNTs to submit their fees to SSA for authorization. Understanding this subtle distinction is required to understand why the new POMS examples and explanations have created chaos for all attorneys who draft SNTs.

F. New POMS Examples That Directly Impact Attorneys Who Draft Special Needs Trusts

On June 25, 2019, SSA issued a new POMS and stated:

We are publishing this new section to clarify which services performed by an individual or an appointed representative are not representational services in connection with a claim, and which are, and must be authorized prior to the representative's charging and collecting them. Soc. Sec. Administration, *Administering Representatives Fees Provisions*, Transmittal No. 26 (June 25, 2019)

The main issue concerning practitioners who draft SNTs is that three of the new examples describe situations in which SSA believes that an attorney's fees require SSA authorization. The three examples and their explanations, which appear in POMS GN 03920.007.D, follow:

Example 1.

Mary Smith, a woman whom we have found disabled under title II and allowed monthly disability benefits, hires an attorney, Ms. Roberts, to establish a trust with \$10,000 in assets. We do not need to authorize Ms. Roberts' fee for the services provided to establish the trust.

- Explanation: An attorney may establish a trust for an individual who is already receiving benefits without the need of our authorization of the fee he or she seeks, so long as the trust was not established to protect continuation of SSI eligibility.

Example 2.

Sometime later, Ms. Smith applies for SSI. She also asks Ms. Roberts to revise her trust because she has changed her name. The attorney can again collect a fee for the services provided on the trust due to the name change without our authorization.

A month later, we notify Ms. Roberts that the trust language needs to be revised again, because as drafted it does not meet our requirements for exception to resource counting. She discusses the issue with the claims representative (CR), amends the trust, and submits the amended trust to the agency. The services related to amending the trust and communication with the agency are performed in direct connection with Ms. Smith's pending SSI claim, and fees for those services require our authorization.

- Explanation: If a representative assists a claimant or recipient to alter an established trust for reasons such as a name change or the death of a parent, we do not need to authorize the fee because the legal service is not performed in connection with a pending claim or future claim and the parties have not submitted a fee agreement or a fee petition. However, the second transaction affects whether the assets in Ms. Smith's trust are countable resources for SSI purposes, and therefore her potential eligibility for benefits, so we must authorize the fee the representative may seek for the preparation of documents or conducting business with us.

Example 3.

Clara Waters, a grandmother, establishes a trust for Rainbow, her granddaughter through Mr. Johnson, an attorney. Generally, we would not need to authorize Mr. Johnson's fee, so long as the trust was not established for the purpose of affecting his clients' eligibility for benefits.

- **Explanation:** An attorney may establish a trust for a minor child for many reasons. If a trust is prepared in order to affect someone's eligibility for benefits, we must authorize the representative's fee for preparation of the trust. However, if a trust is prepared for a reason unrelated to a claim for benefits, we may not need to authorize the fee charged for preparing the trust. Depending on the information in a claims file, we may need to obtain an explanation from the representative or claimant if there is a question about the purpose of the trust, or about why it was established. If a trust is prepared not in connection with a claim, but the parents later apply for benefits and enlist the assistance of an appointed representative (the same attorney or someone else) to prepare or provide information to us, we would authorize fees for only those services provided in connection with a matter before us.

POMS GN 03920.007.E, Handling Requests to Review Fees for Services Not Subject to

Our Authorization, states:

IMPORTANT: In some instances, a representative may provide both services that are provided in connection with the claim before us for which we must authorize a fee, and other services that are not provided in connection with a claim before us for which we do not need to authorize a fee. In these instances, we will only authorize fees for the services performed in connection with the claim before us. Any fees for other services do not need our authorization.

Some argue that SSA has exceeded its authority by subjecting fees paid from a source other than Social Security funds to authorization. The most common situation involves parents/grandparents who are using their own money to pay attorney's fees to create an estate plan that also creates an SNT for their child/grandchild. A person with a disability is never responsible for the fees in this transaction. Another common situation occurs when a person with a disability receives funds, typically from a litigation recovery or unexpected inheritance, that are then used to pay an attorney to help establish and fund an SNT. Special needs planning attorneys are not paid from any of the claimant's SSI or SSDI funds.

If the new POMS had been subject to the proposed rulemaking requirement (as are sections of the Code of Federal Regulations), the issues discussed below in this article could have been brought to SSA's attention before it issued the new POMS. Instead, because SSA issued the new POMS with no input from stakeholders, a host of assumptions and misunderstandings are inherent as to how and why SNTs are drafted and how attorneys are paid. This may be an area that needs to be explored further to determine whether SSA has exceeded its authority.

G. Little or No Guidance for Attorneys on When Fee Authorization Is Required in Special Needs Planning

It is difficult to separate these POMS examples into a list of clear guidelines that attorneys can follow to determine when fee authorization is required. On the one hand, there is a reasonable interpretation that the new POMS examples do not change policy but only clarify existing policy; that is, the only time fee authorization is warranted is in response to an actual claim before SSA (e.g., an application for benefits, notice of overpayment, denial of benefits).

An example is the attorney agreeing to prepare and draft an amendment to an SNT in response to a claim by SSA that the existing SNT is defective. On the other hand, there is an interpretation that the new POMS substantially changes policy so that every time an attorney drafts an SNT, regardless of whether the SNT beneficiary is on SSI, fee authorization is required if part of the intent of creating the SNT is to qualify the beneficiary for public benefits, even if he or she is not the attorney's client. The difficulty in coming to any real conclusions is the fact that the new POMS examples are written so broadly that they are open to numerous interpretations.

1. Example 1

In reviewing the examples, a host of difficulties arise in following SSA's guidance. In Example 1, SSA states that an attorney does not have to obtain fee authorization for a trust established with \$10,000 unless it was established to protect continuation of SSI eligibility. The example identifies Mary as disabled for SSDI purposes. Under this example, SSA is saying that no fee authorization is required if the only benefit Mary is receiving is SSDI. This makes sense because SSDI does not have a resource test (as does SSI) and a trust and other resources would have no impact on this benefit. Further, it can be inferred that if a person is receiving SSI, an attorney is free to draft a trust that will disqualify the recipient from SSI and, thus, SSA will not require the attorney to seek fee authorization. This is because if the trust is not a qualifying SNT, the trust would be a countable resource and the \$10,000 would disqualify the SNT beneficiary from SSI (because asset limits are \$2,000 for an individual). Under this example, if Mary were on SSI, any trust drafted to keep her qualified for SSI would have to be a qualifying SNT established (at least in part) to protect continuation of SSI eligibility. In the explanation in Example 1, SSA states:

Explanation: An attorney may establish a trust for an individual who is already receiving benefits without the need of our authorization of the fee he or she seeks, **so long as the trust was not established to protect continuation of SSI eligibility** (emphasis added).

Without looking at any other part of the law, under the plain language of the bolded phrase, every SNT (whether first- or third-party, individual or pooled) for an SSI recipient is established in part to protect continuation of SSI eligibility. Does this mean that every time an attorney establishes an SNT for an SSI recipient, the attorney must submit his or her fees to SSA for authorization? If looking at the entire scope of the POMS rules concerning SSA fee authorization, a reasonable interpretation could be “no” because in the same POMS provision it states that fee authorization is not required unless the SNT is established “in connection with a claim before [SSA].” POMS GN 03920.007.A. In POMS GN 03920.007.C, SSA describes an SSA claim in terms of the attorney assisting a claimant in applying for SSI, requesting modification of benefits, or waiving recovery of overpayments.

While SSA states that the list of services is nonexclusive, it is reasonable to conclude that if this issue is such a profound change in policy, SSA would have included the drafting of SNTs in its list. Therefore, perhaps this rule is not as overreaching as it first appears because it could be stated that the broadly worded phrase “established to protect continuation of SSI eligibility” is limited by the early statement “in connection with a claim before [SSA].” However, as described above, if SSA takes the position that the monthly resource test is a claim, does the drafting of the SNT trigger the SSA fee authorization process? Does the attorney become the de facto representative simply by agreeing to draft an SNT? It is impossible to know because there is no guidance on this and the rules are so vague that an attorney attempting to reconcile these examples with the other rules will find that either could equally be true. Even if this example is

broadly interpreted to require fee authorization, there are some SNTs for which it can safely be argued that no fee authorization is required:

- SNTs established for persons not eligible for SSI (perhaps due to other sources of unearned income) but eligible for Medicaid
- SNTs established for persons who qualify for SSDI but not SSI

2. Example 2

Example 2 answers some of our questions because it limits SSA authorization to fees for work that is performed solely for SSI eligibility purposes. The explanation in the example states:

Explanation: If a representative assists a claimant or recipient to alter an established trust for reasons such as a name change or the death of a parent, we do not need to authorize the fee **because the legal service is not performed in connection with a pending claim or future claim and the parties have not submitted a fee agreement or a fee petition.** However, the second transaction affects whether the assets in Ms. Smith's trust are countable resources for SSI purposes, and therefore her potential eligibility for benefits, so we must authorize the fee the representative may seek for the preparation of documents or conducting business with us (emphasis added).

The first situation described in Example 2 is reasonable. SSA states that attorney's services unrelated to SSI eligibility do not require SSA fee authorization. The problem is with the example's explanation. It begins reasonably enough by stating that no fee authorization is required for attorney's services unrelated to SSI eligibility (e.g., changing a name in the trust document). Yet SSA's explanation on why fee authorization is not required in this instance is not

because the service is unrelated to SSI eligibility but rather because it “is not performed in connection with a pending claim **or future claim**” (emphasis added).

A future claim? An SSA requirement for fee authorization for future claims opens up nearly all services attorneys perform on behalf of persons with disabilities who may become eligible for SSI sometime in the future. This also makes Example 1 moot because this rule swallows up the rule in the example, which is limited to persons currently receiving SSI. A host of attorneys’ services may lead to some type of future claim before SSA (e.g., an attorney drafting an SNT for a young child who may not be qualified for SSI now because of parental deeming but who may qualify for SSI when he or she turns age 18). Does this mean that if the attorney’s precognition skills are not accurate and there is a future application for SSI benefits in which the SNT is submitted to SSA for review that the drafting attorney will go to jail because he or she did not seek fee authorization for this potential future claim?

In addition, is there a time limit on the future claim? For example, does the rule apply only when application for SSI is made in a month, a year, 10 years, only when reasonable, or whenever? The explanation then adds another odd wrinkle by including the phrase “and the parties have not submitted a fee agreement or a fee petition.” Does this mean that the attorney escapes punishment because he or she did not seek fee authorization? So all pending claim and future claim issues can be avoided if attorneys do not seek fee authorization? What, then, is the purpose of the “pending and future claim” language if the issue simply can be avoided by not filing for fee authorization? It does not make sense. Is this simply poor writing, or is there an SSA interpretation of these phrases that escapes the author?

In the second situation in Example 2, SSA states that fee authorization is required for attorney's services that are directly related to an existing claim before SSA. In this situation, SSA notifies the attorney that the SNT did not meet SSA requirements, and the attorney drafts an amendment, submits it to SSA, and discusses the SNT with SSA. Again, this appears reasonable and in line with current practice that attorney's services performed before SSA require fee authorization. However, the explanation creates substantial confusion because it again opens up fee authorization for services well beyond the example. The SSA explanation states that attorney's services must be approved by SSA when:

- The preparation of documents affects whether the claimant's assets are countable for SSI purposes **even if the attorney's services only affect the claimant's future potential eligibility for benefits.**
- The attorney is conducting business with SSA **even if the attorney's services only involve the claimant's future potential eligibility for benefits.**

Again, what is clear in the example is made unclear by the explanation. Every SNT drafted will affect whether a trust is a countable resource, now or in the future. Under the explanation, all attorneys who draft SNTs will have to submit their fees for SSA authorization, even when drafting SNTs for those not yet on SSI. Or is this explanation not meant to cover situations other than the facts in the example? These facts are reasonable and easy to follow; it is the broadly worded explanation that leads to substantial confusion because if the rule applies, all attorneys who draft SNTs will be subject to SSA fee authorization. In addition, Example 1 and the second situation in Example 2 will be moot because this broadly worded rule subsumes them both.

3. Example 3

In Example 3, SSA describes a situation in which a grandmother establishes a trust for her granddaughter. SSA states that no fee authorization is required unless the trust is established for the purpose of affecting the client's eligibility for benefits. In this example, the immediate confusion is: Whose assets are being used to fund the trust? If the grandmother is setting up a trust for her granddaughter that will be funded with the grandmother's own money, this is considered a third-party planning situation. However, if the grandmother is setting up a trust as a "seed trust," accomplished by minimally funding the trust with her own assets and then having the granddaughter's assets placed in the trust, this is considered a first-party planning situation. The analysis of this example substantially changes depending on whether there is a third-party or first-party planning situation because the rules for the two situations are substantially different. However, this example never explains this crucial fact.

The next area of confusion is: Who is the attorney's client? Typically, a grandparent and attorney enter into an attorney-client representation agreement for preparation of a grandchild's SNT to be funded with the grandparent's assets (e.g., upon the grandparent's death, during the grandparent's lifetime as part of a gifting strategy to lower his or her estate taxes). The more common similar scenario is when the attorney enters into a representation agreement with parents to develop their estate plan, a part of which is to prepare an SNT for a child with a disability. It is extraordinarily rare for an attorney to represent the child or grandchild in a situation in which the money funding the trust is coming from a parent or grandparent, but if the attorney represents the child or grandchild, perhaps Example 3 makes more sense. However, it is such a rare occurrence that it likely will never come up in an attorney's practice, thus making this example pointless.

If the attorney's client is the grandmother, a much more common situation, it is uncertain how the grandmother's benefits would be affected by the establishment of a third-party SNT for her granddaughter. It is challenging to envision any situation SSA is trying to describe in this scenario that would impact SSI eligibility. Perhaps the grandmother could immediately gift her own assets into the third-party SNT to qualify for SSI, but frankly, such a situation will likely never happen for a host of reasons. So we have a factual scenario that makes little sense concerning SSI eligibility. SSA's explanation of the example leaves us no better off and leaves attorneys with even more questions:

Explanation: An attorney may establish a trust for a minor child for many reasons. If a trust is prepared in order to affect someone's eligibility for benefits, we must authorize the representative's fee for preparation of the trust. However, if a trust is prepared for a reason unrelated to a claim for benefits, we may not need to authorize the fee charged for preparing the trust. Depending on the information in a claims file, we may need to obtain an explanation from the representative or claimant if there is a question about the purpose of the trust, or about why it was established. If a trust is prepared not in connection with a claim, but the parents later apply for benefits and enlist the assistance of an appointed representative (the same attorney or someone else) to prepare or provide information to us, we would authorize fees for only those services provided in connection with a matter before us.

In Example 3, SSA misunderstands the attorney-client relationship. If this is a first-party planning situation, the attorney-client representation agreement would likely be with the granddaughter. If the granddaughter is an adult, she would be expected to sign the representation agreement. Yet this example presumes that the granddaughter is a minor and therefore lacks the legal ability to execute the representation agreement with the attorney.

So who is attorney's client: The grandmother, a legal guardian appointed by the court, or someone else? The answer is critical because the attorney owes fiduciary duties only to his or her client. Further, if the grandmother establishes the SNT for the granddaughter and the SNT will be funded primarily with the granddaughter's assets, someone with legal authority over the granddaughter's assets is required to transfer her funds into the seed trust. For a minor, this typically can only be done by court order. If the court orders the transfer, it also usually approves the attorney's fees in its order. Is this an exception to the SSA fee authorization provision? Each of these issues is critical in determining what duties the attorney owes to the client. Yet Example 3 leaves out these critical facts that allow some reasonable attempt at understanding it.

It also appears that SSA is unfamiliar with the duties of loyalty and confidentiality and the fiduciary duties an attorney owes to a client. SSA states, "If a trust is prepared in order to affect someone's eligibility for benefits, we must authorize the representative's fee for preparation of the trust." If this is a third-party planning situation, the client typically would be the grandmother; therefore, the attorney-client representation agreement would be with her. The granddaughter (the one eligible for SSI) would likely never meet or talk to the drafting attorney. The granddaughter may not even be aware that a trust has been drafted on her behalf. The granddaughter is certainly not hiring the attorney to represent her before SSA.

Under the ABA Model Rules of Professional Conduct, substantial conflict of interest issues exists with the attorney representing both the grandmother and granddaughter. The attorney also likely has no intent to ever represent the granddaughter before SSA in any pending or future claim. If SSA is allowed to require an attorney to submit fees for drafting a third-party SNT for a nonclient for SSA authorization, under this language, every third-party SNT drafted for a minor (whether he or she receives SSI or not) will be subject to SSA fee authorization. If

that is the case, it will directly affect the attorney-client relationship and fiduciary duties an attorney owes to a nonclient. If effective written waivers are not executed, the attorney could be in trouble with the state bar regarding licensing.

SSA attempts to limit fee authorization by claiming that trusts are drafted for minors for many reasons, but that is not really a limitation in the common special needs planning situation. Every SNT drafted is prepared, at least in part, to affect the beneficiary's eligibility for benefits. That might only be a small reason the trust is drafted, but it is always a consideration. So does this new example imply that every attorney drafting an SNT is required to submit a fee authorization request even if the attorney does not represent the person with a disability?

Third-party SNTs are often drafted by tens of thousands of traditional estate planning attorneys across the country who may draft only a few SNTs a year and likely have no idea that SSA could even be involved in their representation. This rule will create a tsunami of fee authorization requests and likely substantial noncompliance by these attorneys, many of whom are not even aware that such a rule exists. Will this rule lead to a host of respectable attorneys attempting to do the right thing going to jail, losing their law licenses, or otherwise being punished for failing to comply with a fee authorization process they may not even know exists because they never had any intention of representing anyone before SSA? Or do these attorneys escape the fee authorization process because they do not know the rule exists, while attorneys trained in special needs planning are held to a higher standard? This example opened a Pandora's box of ills but forgot to provide hope.

Also, many SNTs drafted are revocable and unfunded (or as SSA calls them, "dry trusts") or minimally funded with \$10 to comply with state law. Such an SNT would typically not

become irrevocable until the grandmother dies or is funded with significant assets. If the SNT remains unfunded (or minimally funded), must the attorney abide by SSA's fee authorization process because a small part of the subjective intent was to preserve eligibility for SSI, now or in the future? If so, does the mere fact of drafting a third-party SNT create a claim before SSA in which the attorney is serving as the granddaughter's unwitting representative?

SSA states, "However, if a trust is prepared for a reason unrelated to a claim for benefits, **we may not need to authorize the fee** charged for preparing the trust" (emphasis added). Again, this explanation makes little sense and provides small comfort. The client in nearly every situation would be the grandmother, and she would likely never have a claim in which a trust created for her granddaughter would be relevant. It would only be the granddaughter — an individual who is likely not the attorney's client — who may or may not have an existing SSA claim. If this is a first-party SNT, preparation of the SNT is always done (at least in part) for preservation of public benefits. Does the mere creation of an SNT create a "claim for benefits?" Again, the practitioner is left with no guidance.

SSA goes on to explain, "Depending on the information in a claims file, we may need to obtain an explanation from the representative or claimant if there is a question about the purpose of the trust, or about why it was established." This limitation means there is an active pending claim with SSA and SSA is only interested in reviewing SNTs that are being established in connection with that claim. This sounds more reasonable but still leaves a lot of unanswered questions. Do attorneys still need to submit a fee authorization request, except they may be able to wait, even when there is an active claim because of the information in the SSA official's claim file? Should the attorney wait until SSA investigates and decides that fee authorization is required? Does this additional statement mean that the earlier statement that requires fee

authorization for all SNTs no longer applies? This explanation provides inadequate guidance to attorneys to determine when fee authorization is required.

4. Intent Problem

As if that were not enough, a huge and unresolved subjective intent problem exists with all three examples and their explanations. Each example requires fee authorization when the intent in establishing the trust is to affect public benefits eligibility. But whose intent is relevant and how much intent is required? In trust law, it is always the settlor (the person who creates the trust) whose intent is important in interpreting trust provisions. In Example 3, the settlor is the grandmother. She may have had multiple reasons for setting up the trust. Maybe one minor reason was for SSI eligibility purposes, but the main reasons may be for tax planning, asset management, and professional oversight over her granddaughter's lifetime financial needs. In all three examples, does the fact that one of several reasons for establishing the SNT is SSI eligibility mean that authorization is required for the entire attorney's fee? To determine whether SSA fee authorization is required, does SSI eligibility only have to be 1 percent of the intent, 50 percent of the intent, or more?

In Example 3, what if there are competing intents, the granddaughter believes the SNT was drafted for SSI eligibility purposes, but the grandmother's intent was asset management because she thinks her granddaughter is a spendthrift? Is the attorney going to jail because SSA believes the granddaughter? What if the intent of establishing the trust is to preserve eligibility for Medicaid, because neither the granddaughter nor grandmother care about SSI eligibility? Does the fact that they had no subjective intent to preserve SSI eligibility mean that the attorney does not need to file for fee authorization even though the SNT also happens to protect SSI

eligibility? This would be true in numerous situations when a fully discretionary spendthrift trust is established that meets SNT technical requirements but accomplishes many other special needs planning goals. It is difficult to believe that SSA will be able to properly investigate the subjective intent behind the SNT to determine whether fee authorization is required. SSA's examples and explanations certainly provide little or no guidance for attorneys in attempting to discern when fee authorization is required and leave a lot of difficult, unanswered questions.

5. One Final Problem

SSA throws a final curveball at the attorney attempting to discern when fee authorization is required. Example 3 states, "If a trust is prepared not in connection with a claim, but the parents later apply for benefits and enlist the assistance of an appointed representative (the same attorney or someone else) to prepare or provide information to us, we would authorize fees for only those services provided in connection with a matter before us." This again leads the attorney to believe that fee authorization may be required only when there is a pending claim before SSA (e.g., an SSI application, as in the example).

However, what if the attorney has no idea that an SSA claim has been presented? For example, what if the granddaughter's parents submitted a claim for SSI while the grandmother's attorney drafted the SNT for the granddaughter? The attorney would likely have no idea what the parents were doing on behalf of their daughter. Perhaps even the grandmother may be unaware that the parents made an SSI application. What if the attorney does not submit fees for authorization and the granddaughter has a pending claim for benefits? Is that attorney going to jail because he did not insist that his client, the grandmother, keep him apprised of her children's and granddaughter's (nonclients) actions when submitting a claim to SSA?

SSA still does not properly explain the situation because it states, “[W]e would authorize fees for only those services provided in connection with a matter before us.” This again begs the question: What services are considered to be provided in connection with a matter before SSA? Is simply drafting an SNT considered a service in connection with a claim before SSA, as stated several times in these three examples? Or are services in connection with a claim limited by the facts in the scenarios presented in these examples (e.g., an attorney responding to a denial of benefits because an SNT is countable and is preparing an amendment, as in Example 2; an attorney submitting a claim for SSI eligibility, as in Example 3)? It would seem more reasonable that an attorney only would be required to follow the SSA fee authorization process in circumstances in which the attorney agrees to represent the claimant before SSA in defending or correcting an SNT because SSA is questioning the SNT’s validity.

The whole concept of an attorney becoming an unwitting SSA representative for a claimant through a torturous path of analysis is unsettling. What responsibilities does an attorney have if he or she becomes an representative of an SSI claimant? Do other issues of notice, hearing, and other information arise by becoming a representative? If the purpose of these examples and explanations is to make it clear when an attorney is required to file for fee authorization, they failed miserably. The examples and explanations are so muddled and unclear that this author has no idea when fee authorization is required and when it is not.

Without more direction from SSA, it is impossible to know when SSA requires fee authorization and when it does not. It appears from much of the language in the examples and explanations that SSA intends to limit fee authorization to times when the attorney agrees to represent the claimant during an actual claim before SSA (e.g., an initial claim for SSI benefits, a denial of benefits because the SNT is countable). Yet if an SSA claim includes the monthly

resource determination of benefits, there is likely sufficient language that requires fee authorization any time an SNT is drafted, for a client or nonclient, even if the SNT beneficiary is not receiving SSI. At a minimum, practitioners who wish to comply with the POMS rules will have to change their current practices and draw their own conclusions on how best to proceed.

In practice, it is likely that SSA will have great difficulty reviewing fees for attorneys who prepare SNTs. According to Stacy Cloud, deputy director of government affairs for the National Organization of Social Security Claimants' Representatives (NOSSCR):

The law is clear on fee approval for those who represent claimants before the agency and much less so for those who do collateral work like SNTs.

- Fee authorization makes more sense in connection with direct payment of fees; most claimants' representatives whose clients are awarded benefits are then sent their authorized fee by SSA, but this would not be the case for SNT attorneys, who would already have the money in their trust accounts.
- Claimants appoint a representative to assist them with matters before the agency but not with SNTs or other issues.
- It will be very difficult for SSA to authorize fee agreements when they are for people who have no pending matter before SSA (people who have not yet applied for SSI and may never do so, or the family members of claimants and beneficiaries) — their systems are just not set up for this.

H. If a Third Party Pays or a Court Order Authorizes the Attorney's Fee, Does the Attorney Still Need to Comply With SSA's Fee Authorization Process?

Because SSA's examples and explanations in the new POMS are too vague to possibly include every action a special needs planning attorney encounters, perhaps there are exceptions to the fee authorization process that would apply for the practitioner to side step this issue. The most common exceptions include when a third party pays the attorney's fee or a court order authorizes the attorney's fee for services.

Unfortunately, both approaches present issues for the special needs practitioner.

- If a third party pays the attorney's fee, the exception only applies if the third-party payer is an entity or a federal, state, county, or city government agency; the SSI recipient is not liable to pay the fee, directly or indirectly; and the attorney submits paperwork to SSA stating that he or she will not seek any fees, directly or indirectly, from the SSI recipient. Thus, having a parent, grandparent, or any other person pay the attorney's fee for services is not an exception. Having the SNT trustee pay the fee is not an exception. Finally, having an entity pay the attorney's fee and later seeking reimbursement from the SSI recipient's trust also is not an exception to the fee authorization process.
- If a court order authorizes the attorney's fee request, the exception is arguably only for a court-appointed legal guardian or conservator, not their attorney. This may mean that only those persons appointed as legal guardians or conservators are eligible for the exception while their attorneys are not.

1. When a Third Party Pays the Attorney's Fee

Title 20 Code of Federal Regulations at § 404.1520(e) provides the exceptions to fee authorization if a third party pays the fee for an SSI recipient as follows:

We do not need to authorize a fee when:

(1) An entity or a Federal, State, county, or city government agency pays from its funds the representative fees and expenses and both of the following conditions apply:

(i) You and your auxiliary beneficiaries, if any, are not liable to pay a fee or any expenses, or any part thereof, directly or indirectly, to the representative or someone else; and

(ii) The representative submits to us a writing in the form and manner that we prescribe waiving the right to charge and collect a fee and any expenses from you and your auxiliary beneficiaries, if any, directly or indirectly, in whole or in part

POMS GN 03920.010.B further describes this exception as follows:

1. General provisions of authorization of fees for representatives

A primary purpose of SSA's statutory authority to authorize fees for representation is to protect claimants against unreasonable fees.

However, when a third-party entity pays for the representative's services, the risk of claimants' liability for unreasonable fees is eliminated. Therefore, when a third-

party entity pays the representative's fees and certain conditions are met, we do not need to authorize the representative's fee.

2. When we do not need to authorize a fee

Our regulations at 20 C.F.R. §§ 404.1720 and 416.1520 do not require fee authorization by SSA under the following conditions:

- The claimant and any auxiliary beneficiaries are free of direct or indirect financial liability to pay a fee or expenses, either in whole or in part, to a representative or to someone else; and
- A third-party entity, or a government agency from its own funds, pays the fee and expenses incurred, if any, on behalf of the claimant or any auxiliary beneficiaries; and
- The representative submits to SSA a form SSA-1696-U4 (or a written statement) waiving the right to charge and collect a fee and expenses from the claimant and any auxiliary beneficiaries as specified in GN 03920.020B.3.b.

Title 20 Code of Federal Regulations at § 416.1503 defines the term "entity" as follows:

Entity means any business, firm, or other association, including but not limited to partnerships, corporations, for-profit organizations, and not-for-profit organizations (emphasis in original).

The rule on a third party paying the attorney's fee is so limited that no individual can pay the fee and avoid the rule. Thus, in looking at Example 3 of the POMS, if the grandmother paid

the attorney's fee for creating the granddaughter's SNT and if SSA's new policy is that the service of SNT drafting automatically triggers fee authorization, having the grandmother pay the fee does not exempt the attorney from the rule. This is known by some inside SSA as the "Uncle Billy" rule, meaning that SSA wants to avoid having a third party pay the fee. This is because, historically, the concern has been that if a third party pays the attorney's fee when the SSI recipient receives his or her lump sum amount from SSA after an appeal, it is believed that the SSI recipient will refund the payer the amount of the attorney's fee from his or her SSI check, thus circumventing the rule. This is not the case in the typical special needs planning situation when a parent/grandparent is required to pay the fee for his or her own estate planning or the funds received from the SSI recipient come from an outside source (e.g., an unexpected inheritance, a litigation recovery). Unfortunately, this rule still controls without taking into account the different transactions that arise in the special needs planning context.

Further, the exception for payment from a third-party entity does not include a trust. Thus, if the attorney waits to be paid by the SNT trustee, the attorney does not avoid the fee authorization requirement. Perhaps a nonprofit trustee of a pooled SNT paying the attorney's fee would meet the exception; however, to comply with this requirement, the nonprofit cannot directly or indirectly be refunded from the beneficiary's trust assets. The nonprofit has to pay the attorney's fee in total with no reimbursement. Further, the attorney must submit a Form SSA-1696 (or a written statement) to SSA waiving the right to charge and collect a fee and expenses from the SSI recipient or any auxiliary beneficiaries. It is doubtful many nonprofits would agree to take on this responsibility.

2. When a Court Approves the Attorney's Fee

The court order exception for SSI recipients is explained in Title 20 Code of Federal Regulations at § 416.1525(e) as follows:

We do not need to authorize a fee when: ...

(2) A court authorizes a fee for your representative based on the representative's actions as your legal guardian or a court-appointed representative.

POMS GN 03920.010.D further describes this exception as follows:

We do not consider the services in proceedings before state or Federal courts (even if the state court action was to establish relationship or death) to be services provided in connection with proceedings before us; therefore, the fee authorization provisions do not apply to court proceedings. ...

Title 20 Code of Federal Regulations at § 416.1503 defines the terms "legal guardian" and "court-appointed representative" as follows:

Legal guardian or court-appointed representative means a court-appointed person, committee, or conservator who is responsible for taking care of and managing the property and rights of an individual who is considered incapable of managing his or her own affairs (emphasis in original).

POMS GN 03920.010.E further describes this exception as follows:

A legal guardian, committee, conservator, or other state court-appointed representative (hereinafter "legal guardian") may ask the court to approve a fee for services provided in connection with proceedings before us. **If the court orders a fee, we do not need to authorize that fee.**

- **If a legal guardian asks us for information regarding fees, advise the legal guardian to ask the state court to approve a fee for all services, including**

those provided in connection with proceedings before us (emphasis added).

- If a legal guardian files a fee petition, advise the legal guardian that we do not act on the fee request until the state court has acted.

If this exception is limited to court-appointed representatives and legal guardians only, and not their attorneys, this exception is of limited use. It would be the rare situation in which the attorney drafting an SNT would also be the court-appointed representative or legal guardian. What the author has not been able to determine is this: If the attorney represented the court-appointed representative or legal guardian and had his or her fee approved for that representation by court order, does this meet the exception? For example, in California, if a minor or adult who lacks capacity receives a litigation award, California law requires that the settlement be approved by court petition, an SNT be established and approved by the court, and any attorney's fees incurred to establish the SNT be approved by the court. *See* Cal. Prob. Code §§ 3600 et seq.; Cal. R. of Court 7.903.

Thus, an attorney must petition on behalf of the guardian ad litem or conservator of the estate of the person with a disability for approval of the terms of an SNT to hold the litigation proceeds. The court then requires the SNT to be under ongoing court jurisdiction requiring the trustee to be bonded, regular court accountings to be submitted, investment authority to be limited, and attorney's fees to be submitted for court approval prior to payment. From personal experience, these fees are rigorously reviewed and often reduced at the court's discretion. Would this process meet the court order exception because the attorney represents the court-appointed guardian ad litem or conservator during this process? Or is it so strictly limited to the situation of an attorney being appointed to manage the affairs of an individual? It hardly makes sense to

allow fees in the one case but not the other. If this applies, it may be relatively easy to comply with the fee authorization process in certain situations.

The court-ordered fee exception for SSI recipients is further explained in Title 20 Code of Federal Regulations at § 416.1528 as follows:

(a) Representation of a party in court proceedings. We shall not consider any service the representative gave you in any proceeding before a State or Federal court to be services as a representative in dealings with us. However, if the representative also has given service to you in the same connection in any dealings with us, he or she must specify what, if any, portion of the fee he or she wants to charge is for services performed in dealings with us. If the representative charges any fee for those services, he or she must file the request and furnish all of the information required by § 416.1525.

If the attorney for a legal representative is authorized to follow this example, the court-ordered fee exception would be allowed as an exception. This would be a logical extension of the POMS rules and appears that SSA is in favor of extending the authority of the court to issue such rulings, but the plain language may not authorize this process.

I. How Does an Attorney Submit a Request With SSA for Attorney's Fees?

How difficult is it to comply with SSA's fee authorization process? The Social Security Act at § 406(a) provides two ways for an attorney to obtain fees for work performed before the agency: (1) the fee petition process and the (2) fee agreement process.

The fee petition process is governed by the Social Security Act at § 406(a)(1). When SSA acts favorably toward the claimant, § 406(a)(1) authorizes the agency to "fix ... a reasonable fee to compensate [the] attorney for the services performed by him [or her] in connection with such

claim.” 42 U.S.C. § 406(a)(1). The section requires that any such award be “reasonable” but does not otherwise limit it. *Id.* In addition, the agency “may authorize a fee even if no benefits are payable.” 20 C.F.R. at § 404.1725(b)(2). See POMS GN 03930.000 for detailed information on the fee petition process.

The fee agreement process is governed by the Social Security Act at § 406(a)(2). The attorney and the claimant enter into a written fee agreement and submit it to SSA before the agency determines the claimant’s benefits. 42 U.S.C. § 406(a)(2)(A). If the agency acts favorably toward the claimant, it “shall approve” the fee agreement at the time of the determination, provided the fee does not exceed the lesser of 25 percent of the claimant’s past-due benefits or \$6,000. *Id.* at § 406(a)(2)(A)(iii). The claimant or agency adjudicator can request agency review of the fees if either believes the agreed-upon amount is excessive under the particular circumstances of the case. *Id.* at § 406(a)(3)(A)(i).

The fee petition process likely will be the most common process used by special needs practitioners. If the fee authorization process is required when drafting a third-party or first-party SNT and no pending claim is before SSA, there most likely would be no past-due benefits owed because the SNT is drafted before SSI benefits are received. In addition, presuming SSA has no issue with the SNT, there never would be past-due benefits from which the attorney can be paid.

The other common scenario is drafting a first-party SNT upon the SSI recipient’s receipt of funds from a litigation recovery or unexpected inheritance before there is any loss of SSI. Again, there would be no loss of benefits from which the attorney can be paid. However, if SSA denies the validity of an SNT, SSA may issue a notice of overpayment for the months the SNT was in existence. Then the attorney can select the appropriate process to either be paid for his or

her hours or obtain a percentage recovery from the loss of benefits if he or she is successful in overturning SSA's decision.

It is relatively simple to file a request for fee authorization with SSA. A three-page form, SSA-1560, Petition for Authorization to Charge and Collect a Fee for Services Before the Social Security Administration, can be completed under the fee petition process. Instructions for completing the form are included in the PDF version.

The reported issues with the fee authorization process is that it often takes 12 to 18 months to receive a ruling; SSA is notorious for misplacing or losing the forms, forcing the attorney to constantly check the status and to possibly resubmit the form several times; SSA focuses almost exclusively on the time incurred (therefore flat fees need to be justified with actual hours submitted); and SSA reduces fees with no right to appeal the decision. The time spent on the fee authorization process is not billable; therefore, the attorney loses money on the entire process.

Attorneys who decide to comply with the fee authorization process will need to determine how the loss of revenue (for providing extra services in complying with the process), the risk of having SSA deny reasonable fees, and the loss of the time value of money (waiting 1 or 2 years for payment of their fees) will affect their ability to stay in this business. SSA does allow the attorney to place the funds in his or her attorney-client trust account pending SSA's decision. For example, if SSA believes that every third-party SNT requires fee authorization and the attorney charges a flat rate for drafting the SNT, the attorney can place that amount in his or her attorney-client trust account, submit the fee authorization request to SSA, and wait 12 to 18

months for a decision. If the decision is favorable and the fee is received, the attorney can move the entire authorized amount into his or her general account.

J. Jail Time — The Draconian Penalty for Failing to Comply With SSA’s Fee

Authorization Process

Practitioners are warned that if they ignore the SSA fee authorization process and establish SNTs that are covered by the process, they risk substantial penalties, including jail time. Title 42 U.S.C. § 406(a)(5) states:

Any person who shall ... knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commission of Security **shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both** (emphasis added).

“Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense.” *Gisbrecht v. Barnhart*, 535 U.S. at 796 (citing 42 U.S.C. §§ 406(a)(5), (b)(2); 20 C.F.R. at §§ 404.1740–1799). One case involved an attorney who was criminally indicted for knowingly agreeing to, charging, and collecting fees in excess of the fees permitted by law from various individuals in connection with their application for benefits under the Social Security Act. *U.S. v. McCormick*, 300 F. Supp. 1306 (E.D. Wis. 1969). The judge ultimately held, “If the fees collected by Mr. McCormick were based solely on his services for the various clients before the Social Security Administration, a violation of 42 U.S.C. § 406(a) has occurred.” In acquitting the attorney, the court issued the following conclusion of law:

In the view of this court, however, a violation has not occurred. If the services performed were not “in connection with any claim before the Secretary,” the fees charged are not subject to § 406 and the regulations issued thereunder. *United States v. Lewis*, 235 F. Supp. 220 (E.D. Tenn. 1964). In each instance, Mr. McCormick performed substantial legal services for the client which were not “services performed in connection with any claim before the Secretary” under the provisions of the Social Security Act.

Although the Secretary does have the authority to regulate attorney’s fees for services rendered at the administrative level, the Secretary has no power to pass upon the reasonableness of any fee for representation other than at the administrative level. *Britton v. Gardner*, 270 F. Supp. 412 (W.D. Va. 1967). Consequently, the failure of Mr. McCormick to make application for fees, although he in fact represented persons before the Social Security Administration, cannot be per se a violation of law.

I find that the United States did not prove beyond a reasonable doubt that Mr. McCormick knowingly charged fees “for services performed in connection with any claim before the Secretary” in excess of the maximum allowed by statute. The facts indicate that the fees received by Mr. McCormick relate to numerous other services performed by him which were entirely unrelated to the services he performed for his clients before the Social Security Administration.

In the *McCormick* case, the attorney escaped a guilty verdict. However, relying on this attorney’s practice to enter into fee agreements covering multiple legal tasks along with representing clients before SSA appears extremely risky. The attorney did represent these clients on several unrelated legal matters, but from the opinion, it seems clear that he represented his clients on matters before SSA that were actually claims before SSA. For the attorney who wishes to rely on this case, it is hoped that his or her case is heard before a judge such as Judge Reynolds in the Wisconsin District Court because it appears from the opinion that a different

opinion easily could have been reached and this attorney could have been found guilty of multiple misdemeanors that can lead to a year in jail for each act.

K. How Does an Attorney Determine When SSA Fee Authorization Is Required?

As noted above, there is truly little or no guidance attorneys can glean from the POMS examples and explanations SSA recently issued. Practitioners will need to come to their own conclusions on how to address the enormous gray area.

1. When Fee Authorization Is Absolutely Not Required

Although the new SSA POMS lacks clarity, in two situations, it is clear that SSA does not require authorization of attorney's fees:

1. The person with a disability is not eligible for SSI (nor will ever be eligible for SSI) but is receiving SSDI only or Medicaid only; and
2. The attorney's fees are for services unrelated to any type of claim before SSI concerning SSI eligibility.

2. When Fee Authorization Is Absolutely Required

In the following situations, it is absolutely clear from the new POMS that fee authorization is required:

1. The attorney represents the SSI recipient or applicant before SSA concerning the validity of an SNT or after SSA issues a denial of benefits or notice of overpayment because of the SNT.

2. SSA issues an opinion that an SNT does not meet its requirements of an exempt asset and an attorney discussed the matter with SSA and agreed to amend the SNT in response to the SSA determination.

3. When It Is Entirely Unclear Whether Fee Authorization Is Required

In many situations, it is unclear whether fee authorization is required. Some of these situations are as follows:

1. The attorney is retained by the client to establish a third-party SNT for a third party (e.g., the client's child or grandchild) who is now or may be in the future eligible for SSI, with no SSA claim pending except maybe the monthly resource test on the first of the month or the future application for benefits.
2. The attorney is retained by the client to set up for an SSI recipient a (d)(4)(A) SNT to be funded with inheritance or litigation recovery funds, with no claim pending except maybe the monthly resource test on the first of the month or the future application for benefits.
3. The attorney is retained by the client to review an existing (d)(4)(A) or third-party SNT for an SSI recipient, not in response to an SSA inquiry but instead to determine whether the SNT meets the requirements to be exempt.
4. The attorney is retained to amend an SNT and part of that amendment is to meet the SSI rules on an exempt trust but not in response to an SSA denial of benefits.

5. The attorney is retained by the client to assist with a joinder to a pooled SNT for an SSI recipient, with no claim pending except maybe the monthly resource test on the first of the month.
6. The attorney is retained to advise the client about the effect an inheritance or litigation recovery may have on SSI eligibility, with no claim pending except maybe the monthly resource test on the first of the month.
7. The attorney is retained to advise the SNT trustee on proper administration of the SNT, with no claim pending except maybe the monthly resource test on the first of the month.
8. The attorney drafts a (d)(4)(A) SNT and submits a cover letter to SSA notifying the agency of the establishment of the SNT and describes how it meets SNT requirements, with no claim pending except maybe the monthly resource test on the first of the month or the future application for benefits.

Before the new POMS was released, the author believed that the answer to each of these situations was that no fee authorization is required. The issue is whether a claim before SSA includes the future eligibility of a person for SSI or the monthly resource test of a person with a disability, whether the establishment of an SNT is a service in furtherance of that claim, and whether the attorney is then treated as the representative of the person who is (or may be) eligible for SSI, even if the attorney has no intent to ever represent the client before SSA. If this is true, the broadly worded language and confusing requirements in the new POMS could require fee authorization for each of these situations. For example, Example 1, states:

An attorney may establish a trust for an individual who is already receiving benefits without the need of our authorization of the fee he or she seeks, **so long as the trust was not established to protect continuation of SSI eligibility** (emphasis added).

If this is the standard and there is an SSA claim, every SNT that is established (at least in part) to protect continuation of SSI eligibility would be subject to the attorney fee authorization requirement. If, instead, an SSA claim is what has been commonly understood to be a claim (e.g., an SSI application, a notice of overpayment, a denial of benefits), no fee authorization would be required, even under the new POMS. However, there is simply not enough information to know how SSA will treat this issue; therefore, each attorney needs to come to his or her own conclusions.

L. Practical Suggestions for the Attorney Who Wants to Comply With the New POMS Rules

The author would not blame any attorney for throwing up his or her hands and walking away from this issue. How can attorneys be expected to comply with rules that are so poorly written that it is impossible to determine what to do to comply with them? Yet the penalties include jail time; therefore, most attorneys will want to do something to protect themselves from overzealous SSA officials. The author provides some steps that may provide some comfort for attorneys who are doing their best to comply with the new rules.

In addition to an unclear definition of how SNT drafting becomes part of a claim before SSA, the other real issue that the author has with the new POMS rules is that SSA seems to misunderstand how attorneys work with clients to prepare a special needs plan. The author has established thousands of SNTs over the years but has never established an SNT solely to

establish or preserve SSI eligibility, without the person with a disability needing Medicaid or other protection. The primary reason the author works with clients in establishing any type of SNT is to provide a system of protection and advocacy for persons with disabilities and to enhance their quality of life.

To accomplish this task, the attorney and client — commonly the person with a disability; his or her parents or other relatives; a friend, guardian, conservator, social worker, or community (if setting up a trust to hold donations) — do the following:

- Meet to discuss who will be the trustees and successors;
- Create a distribution standard on how the funds are to be used during the beneficiary's lifetime;
- Plan for appropriate housing, caregiving, transportation, education, and related items for the beneficiary;
- Create a system for advocacy and protection for the beneficiary;
- Comply with state probate code trust requirements;
- Comply with state trust laws on allowable investment standards, court supervision, court accountings, and court approval for attorney's fees;
- Comply with income tax rules for a grantor/nongrantor trust;
- Properly fund the trust; and
- Name those persons to receive the SNT's funds upon the beneficiary's death.

These issues do not concern SSI eligibility and instead are part of the consultation the attorney has with his or her client and the fee the attorney charges for establishing the trust.

The amount of time spent on SSI eligibility is miniscule compared with the amount of time spent on these much bigger issues that persons with disabilities face, especially after losing a parent. In effect, the typical special needs plan is an attempt to replace a parent who provided complimentary services that must be replaced by third parties, typically through a patchwork of family, friends, professionals, and others. The SSI monthly check (the maximum federal benefit rate being \$771 per month in 2019) does not typically require any substantial attorney time to preserve. The author's many page intake form for special needs planning devotes one sentence to SSI by asking whether the client is qualified and if so, for how much. The rest of the form concerns the major issues an attorney is retained to resolve for persons with disabilities. The counseling and drafting related to SSI eligibility is only a small part of special needs planning, at least in the author's extensive experience in this area.

The new POMS makes it clear that SSA is only interested in services concerning SSI eligibility. For attorneys who wish to protect themselves, pending any further guidance from SSA, following are a few tips to consider that may minimize the impact the new POMS will have on their practices and their ability to serve persons with disabilities and their families.

- The attorney may want to modify his or her existing fee agreement and add a paragraph stating that the attorney is not agreeing to represent the client before SSA on any pending or future claim with SSA and has no intent of being the client's representative before SSA without a clear explanation of duties. In addition, if the client needs assistance with Social Security issues, the agreement can state, "I will refer you to a Social Security attorney to handle any issues concerning a claim pending before SSA." This statement will make it clear that the attorney does not provide those services and has no intention of doing so. While self-serving, the statement has the benefit of being true. It may not

protect the attorney from an overambitious SSA official demanding formal fee authorization and months or even years of dealing with SSA, but it may protect the attorney who never had any intention of representing the client before SSA from going to jail.

- The attorney may want to allocate time between client services that have nothing to do with SSI eligibility and those that do concern SSI eligibility. As described above, in the author's practice, the amount of time he spends on dealing with SSI issues is small. For example, the attorney could divide services as follows: consultation and drafting related to housing, education, caregiving, spending, investing, naming remainder beneficiaries, and complying with state trust laws — 90 percent of the fee; consultation and drafting to comply with SSI eligibility and related services — 10 percent of the fee. The attorney can take the 90 percent immediately, place the 10 percent in the attorney-client trust account, and submit the fee authorization request to SSA for the 10 percent. Or the attorney could waive the 10 percent and simply submit SSA's fee authorization form stating that the attorney waives any fees associated with SSI eligibility or counseling.
- Instead of preparing one fee agreement, the better practice for the attorney may be to prepare two separate fee agreements: one that covers all services unrelated to SSI eligibility and another that covers all services related to SSI eligibility. For example, the attorney could draft a (d)(4)(A) self-settled SNT for a client. The fee for the first agreement could be a set fee to ensure that the trust complies with state trust laws, trust powers, remainder beneficiaries, successor trustees, Medicaid requirements, and so on. The fee for the second agreement could be a set fee (a) for ensuring that the trust complies with all SSI eligibility requirements and (b) for submitting the trust to SSA for

approval. The attorney would submit the second fee agreement listing all the services related to SSI eligibility and fees for such services to SSA.

There will likely be additional suggestions as more is known, but at this time, it is difficult to know how SSA will react to these fee petitions given the little guidance it has provided thus far.

M. What Are NAELA and Similar Organizations Doing About the Issues Arising From the New POMS?

The author, along with a group of professionals from NAELA, the Academy of Special Needs Planners, NOSSCR, the Special Needs Alliance, and similar organizations are meeting to discuss the best strategy for handling these difficult POMS issues. NAELA's public policy group has taken the lead in scheduling these meetings. Some members of the group have had preliminary discussions with SSA, urging the agency to suspend its new POMS until better guidance is provided. Unfortunately, such a change at this point looks unlikely. Organizations have also begun congressional outreach to raise concerns about how the issues could harm persons with disabilities' access to legal services.

If SSA does not rectify the issues with the new POMS, the only solution may be judicial. The author believes that SSA has created potentially illegal rules that are impossible to follow in practice. The organizations continue to work behind the scenes to try to resolve these issues, and more notices will be released as more is known. However, as of the time of this writing, the new rules are here to stay, in all their murky glory.

N. Conclusion

The new POMS caught special needs attorneys by surprise because it appears to be a solution in search of a problem. The author is unaware of any abuse that needs to be rectified by SSA's application of this rule. There has certainly been no widespread reports or concern that special needs attorneys are receiving unconscionable fees for their services. The author has not even heard anecdotal evidence of attorneys charging excessive fees for drafting SNTs.

The attorneys who specialize in this area commonly have a direct connection with a person with a disability (e.g., a family member with a disability). The author has a daughter with autism and knows the types of discrimination and marginalization people with disabilities are subject to every day. These attorneys are not gouging people with disabilities for money; they have a sincere, honest desire to use their services to create lifetime plans for them. The author has been working exclusively in this field for decades, and while no one is ever happy paying attorney's fees, the fees charged in this field have been reasonable in his experience.

Practitioners who want to take a wait-and-see approach should consider that nothing likely is going to happen anytime soon at SSA to resolve these issues. If SSA is aggressive in its enforcement, attorneys are at risk. Doing nothing may be dangerous. It is possible for these issues to go away, but the author is not betting his career, his freedom, or his reputation on that hope. Since the release of the new POMS, there have already been a couple of instances in which SSA officials sought information about an SNT attorney's fees. One attorney received a written notice from SSA asking for his attorney-client fee agreement in a matter involving assisting a client in joining a pooled SNT. Another attorney was asked by the SSA local office whether his fees for the establishment of an SNT had been authorized. Both of these instances occurred in the

Chicago region. These may be isolated instances from this one region; it is still unknown whether there will be widespread enforcement of the new POMS rules.

If you receive a request from SSA concerning any type of fee authorization, please send that information to Kevin@Urbatsch.com.

This new POMS has real implications. The author has already heard from several attorneys who now refuse to take on special needs planning work due to the uncertainty created by SSA. Others have increased fees to take into account the delay and risk in obtaining SSA fee authorization and yet others have taken a wait-and-see attitude; the author will certainly change his policy on how he handles special needs cases. He has already modified certain cases he was working on when this POMS was released. This new POMS has caught everyone unaware, and while we all do our best to scramble to comply with new rules, attorneys should be prepared to address these new rules or be the test cases needed to challenge SSA on the issuance of this new POMS.