

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

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