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SSA ETHICAL RULES – MOUNTAINS or MOLEHILLS?**Constance R. Somers**

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SSA ETHICAL RULES -- MOUNTAINS OR MOLEHILLS?

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Changes and Trends Affecting Special Needs Trusts

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The Social Security Administration has specific rules governing fees for attorneys and non-attorney representatives who represent claimants in proceedings before SSA. This paper will explore how those rules may or may not govern attorneys or representatives who both create special needs trusts (SNTs) and those who counsel or represent claimants who are dealing directly with SSA in connection with those SNTs.

NAELA member David Lillesand presented an excellent and very thorough paper on this subject at the April, 2015, NAELA conference in Houston. I urge all of you to review his paper since it has a more complete explanation of the statutory authorities than is set out here, as well as citations to the highly respected treatise, *Social Security Disability Practice*, by Thomas E. Bush, published by James Publishing. I will draw on Mr. Lillesand's materials and explain where I agree, or disagree, with his conclusions and/or suggestions.

This paper presents some of my own opinions as to the interpretation of the rules but my opinions should not be relied upon as guaranteed to jibe with SSA's interpretations.

I. What are the Questions?

We will attempt to answer the following questions:

- A. Do you need SSA fee approval to create or amend an SNT?
- B. Do you need fee approval to present an SNT to SSA on behalf of your client?
- C. Do you need fee approval to file an SSI disability claim for a claimant in which part of the packet is the claimant's SNT documentation?

D. Do you need fee approval to meet with a claimant who has asked you to represent him, and you review his file but ultimately decide not to represent him?

E. Do you need fee approval to meet with a claimant and counsel him about his pending claim without accepting representation of him? What about ghostwriting an application or appeal?

F. Do you need fee approval to administer an SNT trust or to advise the trustee on allowable expenditures?

In suggesting answers to these questions, I will try to rate the ethical dilemmas on a scale of molehill vs. mountain.

II. Fee Approval Process: Agreement, Petition, or Review

Before we get to those questions, we need some background. The SSA rules provide three methods of fee approval. By far the most commonly used is the “fee agreement” process. There, the attorney and client sign a relatively standardized fee agreement (my own version, with its Addendum, is attached as Exs. A and B), providing for a fee of 25% of retroactive benefits, up to a cap which has been set at \$6,000 since 2009. That fee agreement is approved automatically and the attorney is paid directly by SSA from funds withheld from the claimant’s back pay.

The fee agreement procedure is easy and predictable but it obviously won’t work if there isn’t going to be any back pay – for instance, if you are fighting a threat of benefit cessation or an overpayment, or if your job is simply to furnish documentation such as an SNT to SSA for approval. It also doesn’t work if the back pay is going to be a very small amount, which is often the case in SSI claims. Therefore, in those cases we usually employ a fee petition. Once the work on the case is finished, the attorney completes the fee petition form (SSA 1560, attached as Ex. C), to which he attaches a detailed list of time entries. Ideally, the claimant, or the claimant’s guardian or payee, signs the 1560 form indicating his agreement with the amount of the requested fee. The fee petition may be filed with the field office, with the ALJ who decided the case, or with the Payment Center, depending on what type of claim it is and at what level it was approved.¹ The decision makers on fee petitions usually focus on the hours

¹ You file the fee petition with the ALJ or the Appeals Council, respectively, if the case was approved at those levels. File the petition at the local field office for an SSI approval at the initial

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