RESOLVED, That the American Bar Association (1) supports the continuation of effective representation and access to justice for Social Security disability claimants; (2) supports the current system by which the Social Security Administration administers payment of attorney fees in disability insurance cases by authorizing and establishing reasonable fees, and withholds a portion of past-due benefits from successful claimants in order to make direct payment to attorney representatives; and (3) opposes efforts to impose a $2,500 fee limitation in administrative proceedings.
REPORT

BACKGROUND

The Social Security Act permits a claimant to appoint an attorney or other qualified individual to serve as a representative in a proceeding before the Social Security Administration. Since its inception, the Act has provided a mechanism by which the SSA (1) authorizes fees for attorney and non-attorney representatives in successful claims for disability insurance benefits under Title II of the Act, and (2) pays fees directly to attorney representatives.

In the early days of the program, the maximum fee for representatives in disability insurance cases was set at $10; it was later raised to $20 (or $50 for an administrative appeal). Representatives seeking to charge a higher fee were required to file a petition and obtain agency approval of the fee. There were no limits on the amount of the fee that could be approved, and no agency mechanism for facilitating payment of the fee. In 1965, Congress added the stipulation that the fee requested in the petition be reasonable, and set 25% of past-due benefits as a ceiling on the fee that could be approved by a court for representation in proceedings before the court.

Until 1965, the representative was responsible for collecting the approved fee directly from the claimant. That year, Congress authorized the SSA to withhold a portion of the claimant's past-due benefits to pay the fee to attorney representatives in cases in which the claim was appealed to federal court. In 1967, withholding for payment of attorneys' fees was extended to claims decided at the administrative level. No provisions for withholding or direct payment were made for non-attorney representatives. In a 1988 Report to Congress, the Social Security Administration noted that the rationale behind these amendments was two-fold -- "to ensure that claimants had access to effective legal representation, and [that] fees

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2 The fee approval and withholding process described in this report also applies in claims for Black Lung benefits, which are administered by the Social Security Administration. No past-due benefits are withheld from Supplemental Security Income (SSI) awards, on the premise that it would not be appropriate to reduce benefits in a means-tested program in order to pay an attorney. Social Security Administration Draft REGO II Legislative Proposal, May 10, 1995.

3 Congress was concerned about reports of excessive fees being charged to claimants, who were viewed as particularly vulnerable. Social Security Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess. 512 (1965). For a complete discussion of the legislative history, see Alison M. MacDonald & Victor Williams, In Whose Interests? Evaluating Attorneys' Fee Awards and Contingent-Fee Awards in Social Security Disability Benefits Cases, 47 Admin. L. Rev. 115,145 (1995).
resulted in fair compensation.\textsuperscript{4}

A second procedure by which representatives could request a fee was introduced in 1991. This fee agreement procedure was simpler than the old fee petition procedure, and was limited to claims decided at the administrative level; it also included a cap on the allowable fee - the lesser of 25\% of the past-due benefits or $4000.

As it now exists, the system for authorizing and paying fees to representatives in disability insurance cases is an effective mechanism for securing representation. The amount of the fee depends on whether the representative is an attorney, whether the claim is resolved at the administrative or the judicial level, and the method under which the fee is authorized.\textsuperscript{5}

1. Fee Agreement.

The fee agreement process is available to both attorney and non-attorney representatives. At the commencement of the representation the representative and the claimant sign a fee agreement, which is filed with the SSA. When the case is completed the agency approves the fee, if it is reasonable, up to 25\% of the past-due benefits or $4000, whichever is less.\textsuperscript{6} This is a relatively simple process, as no time records need be maintained, and as a practical matter the agreed upon fee will likely follow the statutory language.

2. Fee Petition.

The fee petition process also is available to attorneys and non-attorneys, and may be used in either administrative or judicial proceedings. At the end of the case in which the claimant has been awarded benefits, the representative files a petition requesting a fee. To be approved, the fee must be reasonable, taking into consideration the complexity of the issues, the time spent, the skills needed and the results achieved. Who authorizes the fee, and the actual amount of that fee depends on whether the representation occurred in administrative or court proceedings.

A representative seeking approval of a fee for representation before the agency, files the petition with the SSA. When the fee petition is for representation in administrative


\textsuperscript{5} Representatives may waive the right to charge a fee. Those who do not waive the fee must notify the SSA of the intention to charge a fee.

proceeding, there is no ceiling on the amount of the fee that may be awarded. When the
petition is for representation in court proceedings, the court determines the amount of
the fee. The fee for representation in court proceedings, however, cannot exceed 25%
of the past-due benefits.  

3. Withholding and Payment of Fee.
If the representative is an attorney, the SSA withholds the approved fee for
payment directly to the attorney. No more than 25% of the claimant’s past-due benefits
can be withheld in this manner. If the approved fee exceeds the amount withheld, the
attorney may collect directly from the claimant. No such withholding is available if the
representative is not an attorney; non-attorney representatives must look to the claimant
for the fee.  

It is unlawful for any representative, whether attorney or non-attorney, to charge or to collect a fee
beyond that authorized by SSA or a federal court, and a representative who violates these rules may be
suspended from further practice before the agency.

CURRENT PROPOSALS
As part of the “reinvention” of the federal bureaucracy, the Social Security Administration plans
to seek legislation to:

1. Eliminate the SSA’s role in authorizing fees under the fee agreement and fee
petition processes.

2. Repeal provisions allowing the SSA to withhold a portion of a claimant’s past-due
benefits for direct payment of the attorney’s fee.

3. Repeal the statutory limitation of 25% of past due benefits on the amount a

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8 42 U.S.C. §406 (b).
9 42 U.S.C. §406 (a)(4)(A). Discussions at the time the withholding mechanism was instituted appeared to
focus on Congress’ interest in codifying an incentive for attorneys to handle disability benefits cases. MacDonald
federal court can award for service before the court.\textsuperscript{11}

Instead, the Social Security Administration will seek legislation to:

1. Impose a statutory limit of $2500 on the fee a representative may receive for services rendered in administrative proceedings, in all programs administered by the agency.

2. Allow a court rendering a favorable judgment on behalf of a claimant represented by an attorney to set a reasonable fee for the judicial representation, and require the attorney to inform the court whether he or she will charge a fee for representation at the administrative level, or if the claimant had other representatives at that level.

3. Ensure that claimants and their representatives are provided with written notification of decisions and of the statutory limit in administrative proceedings. Provide that if a representative attempts to collect a fee in excess of the $2500 statutory limit, the claimant could file a complaint with the agency, and the agency could suspend or disqualify the representative from representing people before the agency.\textsuperscript{21}

The Social Security Administration argues that these statutory changes would allow claimants the freedom to contract for representation before the agency just as they do for other legal services; that the $2500 fee cap for administrative proceedings would protect claimants from excessive fees; and that the agency would save administrative costs and free up staff to handle priority workloads.\textsuperscript{19}

**EXISTING ASSOCIATION POLICY**

The American Bar Association has endeavored for many years to improve access to justice, especially for those members of our society who are generally least able to protect their own rights – low-income persons, individuals with disabilities and older people. The Association has demonstrated its commitment to this goal by fostering improvements within the entire justice system, and by advocating for

\textsuperscript{11} This recommendation does not take a position on the proposed statutory repeal of the 25% fee limitation per se; rather it seeks to preserve the fee approval and payment system as a whole.


\textsuperscript{13} Id.
adequate funding for, and timely access to, each element of that system, including administrative agencies.

Recognizing that the quality of decisionmaking by the Social Security Administration can have a profound effect on the lives and well-being of millions of Americans, this Association has worked actively over the years to promote increased efficiency and fairness in the Social Security administrative process. In 1985 the ABA joined with the Administrative Conference of the United States (ACUS) to sponsor a symposium on the Social Security Administrative Appeals process. The symposium produced a set of recommendations that resulted in the development of an extensive policy statement adopted by the House of Delegates in 1986. Also in 1986, in an amicus curiae brief in the landmark U.S. Supreme Court case, Bowen v. City of New York, the Association argued successfully that the Social Security Administration should reopen the cases of thousands of mentally disabled claimants who were denied disability benefits because they failed to meet sub rosa requirements and appeal deadlines.

The 1986 policy was augmented in 1991, when the House of Delegates adopted a resolution aimed at further improving the disability claims process and protecting the rights of persons who are already receiving or who may be entitled to benefits. These policies formed the basis for the Association's advocacy on issues such as improving the quality of medical and vocational evidence at the initial stages of the disability review process; recommending that the SSA make vigorous efforts to compile necessary documentation and to supplement reports which are not sufficiently detailed or comprehensive; and recommending that the SSA increase its efforts to educate the medical community regarding eligibility criteria used in the disability program, and the kind of evidence required to establish eligibility for benefits.

The ABA has argued that, to ensure that the disability review process is efficient and fair, the SSA must afford claimants the opportunity to review their files, and must provide them with notice of any information not in the file, which normally should have been included, and an opportunity to submit further evidence in support of their claim. Our policies support face-to-face interviews between claimants and decision-makers at the early stages of the process; elimination of the reconsideration level of appeal; and protection of the Administrative law judge's role as a factfinder. The Association also has urged Congress to enact the Homeless Outreach Act, requiring SSA to undertake affirmative efforts in locations where homeless people congregate, to ensure that eligible individuals receive the benefits to which they are entitled.

At the 1994 Midyear Meeting, the Association went on record in support of the goals, objectives

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14 ABA Resolution No. 126A (August 1986).
and priorities of the Supplemental Security Income Modernization Panel. This panel called for a comprehensive evaluation of the SSI program, with the following priorities: increasing Social Security Administration staffing; increasing the benefit levels; discontinuing the inclusion of in-kind support as income for a beneficiary living in the household of another; and raising the resource limits and streamlining the exclusions. Most recently, at the 1995 Annual Meeting, the Association voiced support for establishing a single standard for decisionmaking at all levels of the disability claims process; encouraging disability claims managers to consult with legal as well as medical resources; and ensuring that each claimant be entitled to a due process hearing, on the record, before an administrative law judge appointed pursuant to the Administrative Procedure Act.

The House of Delegates has not considered the specific issues presented by the Social Security Administration’s current proposal to eliminate the existing fee payment system, but the House has established relevant policy in analogous situations. In 1965 the House approved a resolution opposing legislative and administrative changes that would have imposed arbitrary and unreasonable limitations upon attorneys’ fees for services rendered in federal court and administrative agency proceedings. In 1976, and again in 1977, the House expressed its support for legislation that would empower the federal courts to review decisions of the Veteran’s Administration and to lift the $10 limitation on attorneys’ fees. In 1980, the Association adopted policy urging Congress to enact legislation that would establish uniform principles for the regulation of attorney’s fees for services rendered in proceedings before administrative agencies; would provide for reasonable fees; and would implement these principles through the administrative rulemaking process.

Each of these policies has been used to reaffirm the Association’s commitment to the principle of access to the justice system. Indeed, the report accompanying the 1977 resolution underscores this principle, stating, “this restriction [the $10 fee] has made it all but impossible for private attorneys to participate in VA adjudications. As a result, a number of veterans have been denied benefits to which they were entitled either because they were unable to detect procedural or substantive abuses, or because they simply were unable to successfully assert their claims.”
PROPOSED RESOLUTION

The Association is not being asked to take a position that is self-serving, or that is designed to pit the private bar against the public, or lawyers against non-lawyer advocates. The issue involves access to the legal system, and the fair and equitable treatment for one of our society’s most vulnerable groups.

For most claimants, the Social Security disability insurance claim is the single most important legal event in their lives, and indeed for many claimants, Social Security benefits constitute the sole source of income and access to health care. Social Security disability insurance benefits are paid to those persons who have worked sufficiently to be insured, and who meet the strict definition of disability under the Social Security Act. These claims often involve complex legal, medical and factual issues that are best resolved with the vigorous representation of an experienced advocate. Many disability claimants, moreover, find themselves in severe financial difficulty due to ill health and loss of employment, and do not have the resources to retain counsel to represent them in the pursuit of their claims.

The SSA has explained that the current fee approval and payment system, mandated by Congress, has a dual purpose. First, by providing a mechanism for the approval and payment of fees, it ensures that claimants who choose to be represented have access to qualified representatives, including lawyers. Second, the current system protects claimants by assuring that the fee is reasonable and that they are not overcharged. However, the changes proposed by the SSA will frustrate those purposes and should be opposed for the following reasons:

1. **Adverse Effect on Incentive to Handle Disability Cases.**

   The role of the private bar has become increasingly important with the increase in applications for disability benefits. It has become even more crucial in the current legal services crisis where funding for legal services programs would be drastically cut, or eliminated, and the kinds of cases legal services programs can handle would be severely curtailed, if pending legislative proposals become law.

   Disability practice historically has been one in which legal services programs have worked in partnership with the private bar. Many legal services programs, because of resource limitations and the fee-generating nature of disability claims, for years have referred these cases to the private bar. Yet in the absence of direct payment by SSA, lawyers would have no capacity to collect fees because the Social

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25 U.S. Dept. of Health & Human Services, Social Security Administration, Report to Congress, supra note 4 at 12.
Security Act prohibits transfer or assignment of benefits. As a result, the typical contingent fee arrangement — or indeed any arrangement that allows payment of the fee from past due benefits — that assures low income people access to counsel, cannot apply to these claims. The Social Security Administration argues that its proposal will leave claimants in the same position as other consumers of legal services. This is incorrect. In comparable areas of contingency fee representation (such as workers compensation and personal injury cases), insurance companies issue either a check to the lawyer as fiduciary, or a two-party check to the lawyer and the claimant.

2. Adverse Effect on Setting a Reasonable Fee.

The second purpose of the present system — allowing the Social Security Administration a role in setting a reasonable fee — is also of vital importance. The present system allows a representative to select the process by which the SSA will approve a fee for services rendered. In administrative appeals the representative chooses whether to file a petition requesting a reasonable fee at the completion of the case, or whether to use the fee agreement system, in which the fee is set at the lesser of 25% of past-due benefits or $4000. Under the fee petition process, the representative is permitted to collect the difference between the amount withheld from past-due benefits and the amount actually approved. In federal court proceedings, the attorney files a fee petition, and the fee for services rendered is capped at 25% of past-due benefits. In neither situation is the representative permitted to collect a fee beyond that which is approved.

CONCLUSION

The SSA proposes to eliminate the current option to choose between the fee agreement and fee petition, to abolish the direct payment system for attorneys and to eliminate the 25% limit on fees for federal court representation, and to reduce the fee cap to $2500 in administrative proceedings. The cap would apply to every administrative case, without regard to the extent of the appeal or the size of the benefit. The ABA has worked for years to improve the quality of decisionmaking at the early levels of disability claims, and we continue to urge the Social Security Administration to institute changes at those levels that will encourage more timely, correct decisions. Certainly, in the best of all possible worlds, benefits would be awarded at the initial levels, and the representative’s fee would be lower. However, in practice, the appeals process can take months or even years, and can involve extraordinary efforts on the part of representatives. Cutting the maximum fee so drastically could only serve to drive competent lawyers out of this practice. On the other hand, if the agency retreats from its obligations to monitor the fee arrangement, claimants could become targets for unscrupulous representatives who charge them the

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27 A two-party check payable to the lawyer and the claimant has been proposed to the Social Security Administration as a feasible alternative, but has been rejected.
The proposed resolution would articulate the Association's firm support for the current system of authorizing and paying attorney fees in successful Social Security Administration disability insurance appeals. The system has produced a situation in which persons with meritorious claims can find lawyers willing to represent them. It not only works very well in preserving access to representation, it protects claimants from being overcharged. While the current system does involve some administrative costs, those costs are unquantified, and the benefits of access and protection of vulnerable persons outweigh those costs. The present system should not be eliminated.

Respectfully submitted,

John H. Pickering, Chair
Commission on Legal Problems of the Elderly

Victor Futter, Chair
Senior Lawyers Division

February 1996

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28 In a recent status report on reengineering efforts, the SSA estimated that implementation of the proposal would realize a savings of $80 million over five years. The status report includes neither a breakdown of costs, nor a comparison of the cost of alternate proposals such as issuing two-party checks. Social Security Administration RICO II Initiative October 18, 1995. Under the existing system, the acts of determining the amount of the fee and withholding and paying past-due benefits are conducted manually. It is not clear what savings could be realized by switching from a manual to a computerized system. Cost savings, moreover, are irrelevant to the fee limitation issue.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Legal Problems of the Elderly, Senior Lawyers Division

Submitted By: John H. Pickering, Chair, CLPE and Victor Futter, Chair, SLD

1. Summary of Recommendation(s).

This recommendation expresses the Association’s support for the existing statutory scheme for authorizing and paying representative fees in successful Social Security disability insurance appeals.

2. Approval by Submitting Entity.

The recommendation was approved by the Commission on Legal Problems of the Elderly at its meeting on September 29-30, 1995, and by the Senior Lawyers Division in November, 1995.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has adopted several policies aimed at improving the Social Security disability appeals process, and making it more equitable for claimants (8/86, 8/91, 3/94 and 8/95). The Association is on record opposing arbitrary and unreasonable limitations on attorneys fees for services rendered in administrative and federal court proceedings (8/65), supporting legislation to lift the $10 fee cap in appeals of Veterans Administration decisions (2/76, 8/77), and supporting uniform principles for regulation of attorneys fees for services rendered in proceedings before administrative agencies (8/90).

5. What urgency exists which requires action at this meeting of the House?

The Social Security Administration is rapidly moving ahead with its reengineering (REGO II) initiatives. As of October 18, 1995, the agency was working with the Office of Management and Budget to develop a legislative proposal that would implement changes to the fee authorization and payment system.
6. Status of Legislation. (If applicable.)

On December 6, 1995 the House of Representatives passed HR 2684, to raise the amount of
allowable earnings for Social Security retirees. HR 2684 contains provisions to limit attorneys fees
for administrative representation to $4000, and to eliminate the Social Security Administration's
withholding mechanism. A companion bill, S 1432, introduced in the Senate on November 29,
1995, is still pending. (NB a second bill, S. 1470, passed the Senate on December 15. 1470
contains the earnings test language, but not the attorney fee provisions.)


9. Referrals.
Standing Committee on Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Lawyers Public Service Responsibility
Consortium on Legal Services and the Public
Commission on Homelessness and Poverty
Commission on Mental and Physical Disability Law
Government and Public Sector Lawyers Division
Judicial Administration Division
Senior Lawyers Division
Section of Administrative Law and Regulatory Practice
National Conference of Administrative Law Judges
Federal Bar Association
National Bar Association

10. Contact Person. (Prior to the meeting.)
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11. **Contact Person** (Who will present the report to the House.)

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12. **Contact Person Regarding Amendments to This Recommendation.**

None at this time.