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## The Last Days of Social Security Disability: How the Social Security Administration's Policies on the Submission of Adverse Evidence and Non-Attorney Representation Have Contributed to Its Institutional Failure

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## COMMENT

### **The Last Days of Social Security Disability: How the Social Security Administration's Policies on the Submission of Adverse Evidence and Non-Attorney Representation Have Contributed to Its Institutional Failure**

THOMAS KATSIOTAS<sup>†</sup>

#### INTRODUCTION

The Social Security disability<sup>1</sup> system is dying. This system has been considered “the largest adjudicatory system in the world,”<sup>2</sup> and millions of disabled Americans rely on it for ongoing support. Nearly 6% of the American population receives disability payments from the Social Security Administration (“SSA”) every month.<sup>3</sup> Even though more

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1. For this Comment, when I refer to Social Security disability, I am referring both to claims under Title II (including claims for Disability Insurance Benefits) and Title XVI (Supplemental Security Income) of the Social Security Act.

2. Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (2007) (citing *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983)).

3. In 2013, Senator Tom Coburn testified before the United States House of Representatives Committee on Oversight and Government Reform that “1 in 17 Americans today collect a disability check through the Social Security system.”

than 161 million Americans<sup>4</sup> contribute more than 503 billion dollars into the system each year,<sup>5</sup> this may not be enough. By best estimates, the trust fund reserves that support benefits payments will be depleted by 2016, at which point there will only be enough money to pay 80% of benefits.<sup>6</sup>

At the same time that the fund is going broke, SSA has attracted public attention for its institutional failures,<sup>7</sup> stoked by reports that too many able individuals are collecting disability checks.<sup>8</sup> In 2011, the United States Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations, spearheaded by Senator Coburn, launched an investigation into the quality of benefits award decisions.<sup>9</sup> The resulting 2012 report, based on a sample of 300 claims, found that more than 25% of benefits award decisions "failed to properly address insufficient, contradictory, or incomplete evidence."<sup>10</sup> This 25% error rate is consistent with the 22% error rate found by SSA itself in an internal audit conducted in 2011.<sup>11</sup>

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*Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing Before the Subcomm. on Energy Policy, Health Care & Entitlements of the H. Comm. on Oversight and Gov't Reform, 113th Cong. 2 (2013) (statement of Sen. Tom Coburn, M.D.) [hereinafter 2013 Oversight Hearing].*

4. THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, THE 2013 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 2 (2013) [hereinafter 2013 BOARD OF TRUSTEES REPORT].

5. *Id.* at 6.

6. According to the 2013 annual report from the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, "the [Disability Insurance] Trust Fund reserves become depleted in 2016, at which time continuing income to the [Disability Insurance] Trust Fund would be sufficient to pay 80 percent of [Disability Insurance] benefits." *Id.* at 4.

7. *See generally* U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, MINORITY STAFF REPORT, SOCIAL SECURITY DISABILITY PROGRAMS: IMPROVING THE QUALITY OF BENEFIT AWARD DECISIONS (Sept. 12, 2012) [hereinafter MINORITY STAFF REPORT].

8. *Id.* at 1.

9. *See id.* at 2-3.

10. *Id.* at 3-4.

11. *Id.* at 4.

The nearly one-quarter error rate in awarding benefits is especially alarming considering that once an applicant is awarded disability benefits he will receive approximately \$300,000, on average, over the period he collects benefits.<sup>12</sup> Further, once on the disability rolls, an individual will “almost never return to the active workforce.”<sup>13</sup>

So how has the system gotten to this point? The answer is attributable to a confluence of factors, two of which are addressed in this Comment. These factors are two of SSA’s policies: (1) SSA’s rules regarding the submission of adverse evidence, discussed in Part II; and (2) the eligible non-attorney representative program initiated in 2004, discussed in Part III. Equally important to the discussion of these two policies is an understanding of the system in which these two policies exist. This includes a discussion in Part I of the system of claims adjudication under SSA and how the 2008 financial crisis affected that system.

I will argue that the two policies addressed have contributed to a growing base of representatives able to exploit the system for profit. Specifically, SSA’s policy for the last several years on the submission of adverse evidence has given these representatives the tools to do so, and its policy on non-attorney representation has created a class of representatives to use these tools. It is my contention that the two policies are inapposite to SSA’s disability adjudication system, which places great responsibility on claimant representatives. As is explained below, the current system is non-adversarial. The government is not represented and relies on claimant representatives for developing the record in hearings before Administrative Law Judges (“ALJs”). Further, SSA only pays fees to representatives if they win a claim, and, in recent years, has been focused on granting disability claims. There is no room

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12. See U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, STAFF REPORT, HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY’S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM 5 n.9 (Oct. 4, 2013)[hereinafter CONN LAW FIRM CASE STUDY]; Drew A. Swank, *Money for Nothing: Five Small Steps to Begin the Long Journey of Restoring Integrity to the Social Security Administration’s Disability Programs*, 41 HOFSTRA L. REV. 155, 170 (2012) [hereinafter Swank, *Money for Nothing*].

13. Swank, *Money for Nothing*, *supra* note 12, at 179.

in such a system for SSA polices that allow representatives to submit only favorable evidence and allow unqualified nonattorneys essentially unfettered by any regulation of misconduct to practice. The existence of these two policies within SSA's system of claims adjudication has invariably led to its institutional failure, as accelerated by the impact of the 2008 financial crisis.

## I. BACKGROUND

In order to understand the background in which the two polices addressed by this Comment operate, it is necessary to understand both the basic adjudicatory structure of Social Security disability claims and how the 2008 financial crisis stressed and changed that structure.

### A. *The Basic Adjudicatory Structure of Social Security Disability Claims*

The process of claims adjudication starts when a claimant files a claim for disability benefits.<sup>14</sup> This claim is then processed by a local SSA office, which will issue a first determination on the claim; this is the Initial Level.<sup>15</sup> If that determination is unfavorable, in some states, a second person will take a look at the application and issue a second determination; this is the Reconsideration Level.<sup>16</sup> Once a final unfavorable determination has been made by the local SSA office, either at the Initial or Reconsideration levels, a request for a hearing before an ALJ can be filed.<sup>17</sup> That request is an appeal to the Hearing Level, and the case will be transferred from the local SSA office to an Office of Disability Adjudication and Review ("ODAR").<sup>18</sup> At the

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14. 20 C.F.R. § 404.603 (2014).

15. *See id.* § 404.900(a)(1).

16. *See id.* § 404.900(a)(2).

17. *See id.* § 404.900(a)(3).

18. Each ODAR services the multiple local SSA offices that fall under it. For example, the Buffalo ODAR serves the Batavia, Buffalo, Dunkirk, Jamestown, Niagara Falls, Olean, and Ridge Road local SSA offices. *Hearing Office Locator, Office of Disability Adjudication and Review*, SOC. SEC. ADMIN.,

Hearing Level, a claim generally results in a hearing before an ALJ, who will issue a decision on the claim.<sup>19</sup> If this decision is unfavorable or partially favorable, the claimant may file a request for the review of the ALJ's decision to the Appeals Council; this is the Appeals Council Level.<sup>20</sup> The Appeals Council can then take one of three actions: (1) vacate the ALJ's decision and remand the claim back to the Hearing Level for a new hearing; (2) deny the request for review, making the ALJ's decision the final decision of SSA; or (3) vacate the ALJ's decision and issue its own decision—an outcome that very rarely occurs.<sup>21</sup> If the Appeals Council denies the request for review or issues its own decision, that decision becomes the final decision of SSA.<sup>22</sup>

Most of the discussion in this Comment will deal with issues that arise at the Hearing Level, the level in which representatives and ALJs interact and in which most claims are awarded.<sup>23</sup> Though an appeal to the Hearing Level will often result in a hearing before an ALJ, the process is decidedly distinct from what we normally think of as a court proceeding. The process is inquisitorial and non-adversarial,<sup>24</sup> and the normal rules of evidence do not apply.<sup>25</sup> As Justice Thomas has explained:

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although “[m]any agency systems of adjudication are based to a significant extent on

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[http://www.socialsecurity.gov/appeals/ho\\_locator.html#vt=1](http://www.socialsecurity.gov/appeals/ho_locator.html#vt=1) (last visited Mar. 3, 2015).

19. 20 C.F.R. § 404.929.

20. *Id.* § 404.967.

21. *See id.*

22. *See id.* § 404.981. The preceding paragraph is an abbreviated summary of the process a claim takes from inception to final decision. While in reality there are far more nuances and potential complications, this abbreviated summary provides all the information necessary for a basic background understanding of the process required to understand the issues presented in this Comment.

23. *See 2013 Oversight Hearing, supra* note 3, at 72-73.

24. 20 C.F.R. § 405.1(c)(1) (“In making a determination or decision on your claim, we conduct the administrative review process in a non-adversarial manner.”); *see also* *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000).

25. *See Richardson v. Perales*, 402 U.S. 389, 400 (1971).

the judicial model of decisionmaking, the SSA is “[p]erhaps the best example of an agency” that is not. “The most important of [SSA’s modifications of the judicial model] is the replacement of normal adversary procedure by . . . the “investigatory model[.]” Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits . . . . The Commissioner has no representative before the ALJ to oppose the claim for benefits . . . .<sup>26</sup>

The role of an ALJ in a Social Security hearing is to consider the evidence brought before him, not to protect the government’s interest. In fact, as Justice Thomas noted, there is no party present at the hearing to represent the government’s interest.<sup>27</sup> However, the opposite is not true. While claimants need not be represented,<sup>28</sup> they may be, and most in fact are.<sup>29</sup> In practice, a claimant’s representative conducts most record development, and the vast majority of the evidence before an ALJ deciding a claim has been submitted by a claimant’s representative. For this reason, most ALJs consider the role of claimants’ representatives necessarily integral to the process of adjudication, and they rely on these representatives for guidance in deciding claims.

Generally, representatives earn fees based on fee agreements with their clients that must be approved by SSA. These fees are earned on a contingency basis; representatives only get paid if a claimant is granted benefits. Fees are allowed up to 25% of a claimant’s retroactive benefits

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26. *Sims*, 530 U.S. at 110-11 (internal citations omitted).

27. *See id.*

28. *See, e.g., id.* at 118 (Breyer, J., dissenting); 20 C.F.R. § 405.1(c)(2) (“To help you present your claim to us, you may have someone represent you, including an attorney.”); Rains, *supra* note 2, at 364.

29. According to the Social Security Advisory Board (“SSAB”), in 2010, attorney representatives were present at 74.6% of ALJ hearings, and non-attorney representatives were present at 19.3% (2010 is the most recent year for which data is available). *See* SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 60 fig. 55 (Feb. 2012) [hereinafter SSAB DATA], available at [http://www.ssab.gov/Publications/Disability/GPO\\_Chartbook\\_FINAL\\_06122012.pdf](http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf). Most recently, at the June 27, 2013 Oversight Hearing, Deputy Commissioner of Disability Adjudication and Review for SSA, Glenn E. Sklar, testified that up to 90% of all claimants are represented. *2013 Oversight Hearing*, *supra* note 3, at 158-59.

award—the amount in past due benefits they are owed for the period beginning from up to one year prior to their filing through when their claim is ultimately granted<sup>30</sup>—to a maximum set by law, which is currently \$6000.<sup>31</sup> If SSA approves a fee agreement, those representatives who are eligible—which includes attorneys and certain non-attorneys, as discussed in Part III—are paid their fees directly from SSA out of the portion of retroactive benefits withheld.<sup>32</sup> It is this fee withholding and direct payment that makes representation of Social Security disability claimants a financially attractive practice. In the absence of withholding and direct payment, a representative would simply be an unsecured creditor of a claimant who may have accrued several such creditors in the years it has taken for his claim to resolve. The prospect of a representative recovering a fee in that situation is expectedly low.

*B. The 2008 Financial Crisis and the Social Security Administration's "Paying-Down-the-Backlog" Policy*

Looking historically at claims adjudication under Social Security, there are really two disability systems: the one that existed before the 2008 financial crisis and the one that exists now. One of the effects of the 2008 financial crisis was a massive influx of applicants into the Social Security disability system. The chart on the next page displays the number of Disability Insurance applications filed from 2004 through 2010.<sup>33</sup>

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30. Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 520 (2004).

31. *See* Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080, 6080 (Feb. 4, 2009).

32. *Id.*

33. SSAB DATA, *supra* note 29, at 6 fig. 1a (“Disability Insurance and Supplemental Security Income Disability Applications—Calendar Years 1975 to 2010.”).

Year	Total DI applications	Total DI insured 15-64	Total Social Security Area Population 15-64	DI applications as percent of DI insured	DI applications as percent of Area population 15-64
2004	2,137,500	143,678,500	200,919,056	1.5%	1.1%
2005	2,122,100	145,351,700	203,629,140	1.5%	1.0%
2006	2,134,100	147,083,200	206,299,496	1.5%	1.0%
2007	2,190,200	148,652,600	208,817,317	1.5%	1.0%
2008	2,320,400	149,549,100	211,167,333	1.6%	1.1%
2009	2,816,200	150,630,157	212,662,737	1.9%	1.3%
2010	2,935,800	151,666,246	214,111,887	1.9%	1.4%

Table 1

The number of applications increased by 5.9% from 2007 to 2008, then by a massive 21.4% from 2008 to 2009, and then by 4.2% from 2009 to 2010—the total increase from 2007 to 2010 being more than 34%. Additionally, the data shows that the number of applications filed as a percentage of the insured population and the number of applications filed as a percentage of the eligible population<sup>34</sup> spiked in 2008 and continued to increase through 2010—the last year for which data was available—reaching the highest percentages recorded since the Social Security Advisory Board began keeping such statistics in 1970.<sup>35</sup>

This unprecedented influx of applicants put increased pressure on SSA's already limited resources.<sup>36</sup> SSA was already dealing with substantial delays in processing hearing requests, resulting in a massive "backlog."<sup>37</sup> In 2007, this backlog meant a 512-day average wait from when a

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34. The population from ages fifteen to sixty-four covers the vast majority of individuals who could potentially be eligible, but not all.

35. See SSAB DATA, *supra* note 29, at 6 fig. 1a.

36. MINORITY STAFF REPORT, *supra* note 7, at 2.

37. See, e.g., 2013 Oversight Hearing, *supra* note 3, at 57 (statement of Glenn E. Sklar, Deputy Comm'r, Office of Disability Adjudication and Review); MINORITY STAFF REPORT, *supra* note 7, at 14.

request for a hearing was filed to when an actual hearing occurred.<sup>38</sup> This meant that a claimant was waiting, on average, nearly one and a half years to have his claim heard by an ALJ, in addition to the amount of time that passed while the claim was processed at the local SSA office. The new influx of applicants during the financial crisis acted like sand being poured into the top of an already full hourglass: claims began to pile up as the rate of adjudication stayed the same.

Due to the massive backlog and the negative publicity it attracted, SSA made reducing the backlog a main priority.<sup>39</sup> This presents the question: how does an administrative agency faced with a shrinking budget and an unprecedented influx of claims start processing claims faster? In a non-adversarial system where a claimant's interests are represented—often zealously—and the government's are not, the answer is obvious: eliminate the backlog by paying as many claims as possible. That is exactly what SSA did. It prioritized speedy adjudication over accurate adjudication and established what has been called a “paying-down-the-backlog” policy.<sup>40</sup> In 2008, more than 85% of all Social

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38. *Clearing the Disability Backlog: SSA's Administrative Law Judge and Hearing Office Performance*, OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN. <http://oig.ssa.gov/newsroom/congressional-testimony> (last visited Mar. 4, 2015).

39. MINORITY STAFF REPORT, *supra* note 7, at 20 (“In recent years, . . . a concerted effort was made to reduce the growing backlog of undecided disability applications . . .”).

40. See *2013 Oversight Hearing*, *supra* note 3, at 43 (statement of Hon. Larry J. Butler), 57 (statement of Glenn E. Sklar, Deputy Comm'r, Office of Disability Adjudication and Review).

Security disability claims decided<sup>41</sup> were awarded,<sup>42</sup> and the backlog began to decrease.<sup>43</sup>

One of the first steps in implementing the paying-down-the-backlog policy was to put pressure on the ALJs deciding the claims. SSA began by strongly encouraging ALJs to decide at least 500 cases per year.<sup>44</sup> However, as Senator Coburn explained, such a high requirement is problematic: “Since most cases contain several hundred pages of documents—many over 1,000 pages, including complex medical documents—making a proper decision and producing a high quality written description of that decision on more than one case per day is difficult.”<sup>45</sup> The result has been the glut of low quality favorable decisions,<sup>46</sup> of which approximately 25% are erroneous.<sup>47</sup>

Another logical step SSA took in implementing its paying-down-the-backlog policy was to encourage high-producing ALJs. For example, one particular ALJ drastically increased his already high production, deciding 1846 cases in 2008 and 1722 in 2009.<sup>48</sup> Senator Coburn’s investigation

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41. This number refers to the number of claims decided and does not include cases that were dismissed at the Hearing Level (i.e., claims that were filed late or voluntarily withdrawn). The percentage of claims awarded out of all claims filed is still greater than 75%. See *infra* note 42.

42. See SSAB DATA, *supra* note 29, at 12 fig. 7. This chart shows that 36% of claims were awarded at the Initial Level; 14% of claims were awarded at the Reconsideration Level; and 72.8% of the remaining claims were awarded when decided at the Hearing Level.

43. 2013 Oversight Hearing, *supra* note 3, at 57 (statement of Glenn E. Sklar, Deputy Comm’r, Office of Disability Adjudication and Review).

44. MINORITY STAFF REPORT, *supra* note 7, at 20.

45. *Id.*

46. Senator Coburn’s investigation revealed

benefit award decisions at the ALJ level were fraught with significant problems. These problems ranged from basing decisions on evidence of questionable value, to citing insufficient evidence to support the decision made, misusing expert testimony, and holding perfunctory hearings. The result was a large number of poor quality decisions, raising questions about whether they were decided correctly.

*Id.*

47. See *supra* notes 8-12 and accompanying text.

48. MINORITY STAFF REPORT, *supra* note 7, at 72.

found that this ALJ's rate for "approving the award of disability benefits in the cases he reviewed was similarly high, ranging each year between 90 and 100 percent."<sup>49</sup> In fact, this ALJ denied less than 1% of claims he decided in 2008.<sup>50</sup> Notably, in years prior to 2008, this ALJ decided approximately half as many claims per year and had a denial rate more than ten times higher.<sup>51</sup> So how did SSA react to this ALJ, who was clearly operating well outside the normal range, deciding approximately one case per hour<sup>52</sup> and granting nearly all of them? They started shipping him even more claims from other offices so that he could grant them without hearings.<sup>53</sup> The ALJ was sent blocks of claims "from such cities as Houston, Texas; Atlanta, Georgia; Baton Rouge, Louisiana; Greenville, South Carolina; and Yakima, Washington[.]" including "500 cases from Little Rock, Arkansas—equivalent to a single judge's workload for a whole year."<sup>54</sup> Not surprisingly, the decisions issued by the ALJ that were reviewed in Senator Coburn's investigation were notable for poor quality.<sup>55</sup> They were found "not only [to] lack[ ] sufficient judicial analysis or evidentiary support, but were at times incomprehensible."<sup>56</sup>

Ultimately, the paying-down-the-backlog policy has achieved the result SSA wanted. As Deputy Commissioner Sklar has indicated regarding policy changes implemented to

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49. *Id.*

50. In connection with a Freedom of Information Act request made by *The Oregonian* in 2008, SSA released information on ALJ statistics covering a period ending in the late part of 2008. The data available for 2008 at the time showed that ALJ O'Bryan decided 1690 claims, of which he denied 10. *Social Security Database*, OREGONLIVE, (Dec. 29, 2008, 4:15 PM), [http://www.oregonlive.com/special/index.ssf/2008/12/social\\_security\\_database.html?appSession=30095760264353](http://www.oregonlive.com/special/index.ssf/2008/12/social_security_database.html?appSession=30095760264353).

51. *Id.*

52. The rate of approximately one case per hour assumes that this ALJ worked eight hours per day, Monday through Friday, did not take any days off from work, worked all federal holidays, and never took a lunch or any other break.

53. See MINORITY STAFF REPORT, *supra* note 7, at 75.

54. *Id.*

55. See *id.* at 72-87.

56. *Id.* at 72.

improve the timeliness of adjudication: “[t]oday, the results are clear—our plan has worked exceptionally well. . . . We steadily reduced the wait for a hearing decision from a high of 512 days in [fiscal year] 2007, to 375 days in [fiscal year] 2013.”<sup>57</sup> However, one of the lasting effects of this policy is undoubtedly the current financial distress of the Social Security disability system as a result of an over-enrollment of able individuals, facilitated and encouraged by the policies discussed in this Comment.

## II. THE POLICY REGARDING THE SUBMISSION OF ADVERSE EVIDENCE

The vast majority—and in some cases all—of the evidence in a disability claim heard by an ALJ has been obtained and submitted by the claimant’s representative. This arrangement works for both parties: the ALJ, who is limited by SSA’s resources in obtaining medical records; and the representative, who must provide sufficient evidence to establish his client’s disability in order to be paid. However, such an arrangement begs the question: what happens when a representative obtains evidence adverse to his client’s claim? Unfortunately, “what actually happens?” and “what should happen?” have yielded different answers in the past. However, the two questions are now being forced to resolution in a recent revision SSA has made to its regulations on March 20, 2015 (“the 2015 Revisions”).<sup>58</sup> To best address the complications and effects of SSA’s policy regarding the submission of adverse evidence this Comment will examine four areas. The first three areas are the practice, the law, and the policy in effect prior to the 2015 Revisions, and the fourth is a brief look at the 2015 Revisions themselves and how they change things.

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57. *2013 Oversight Hearing*, *supra* note 3, at 61 (statement of Glenn E. Sklar, Deputy Comm’r, Office of Disability Adjudication and Review).

58. *See* Submission of Evidence in Disability Claims, 90 Fed. Reg. 14,828, 14,828 (Mar. 20, 2015).

A. *The Practice*

The best way to illustrate problems with the practice of representatives on the issue of submission of adverse evidence is to provide a hypothetical, which is consistent with actual practice.

John is a representative.<sup>59</sup> He has a client, Joan, who has filed a Social Security disability claim. Joan has been denied at the Initial Level and the Reconsideration Level. Based on the current evidence in Joan's file, which includes all of the records from her medical treatment, John characterizes Joan's claim as weak. He anticipates that without further development, Joan will lose her claim at the Hearing Level.

John decides to obtain opinion evidence from the five doctors who have treated Joan during the period of her alleged disability. John sends requests for written reports and the completion of questionnaires to all of these doctors. Four of these doctors respond, including the doctor who treats Joan most often and the doctor who specializes in the area of Joan's allegedly disabling impairment. Each of these four doctors responds by affirmatively indicating, in no uncertain terms, that it is his or her medical opinion that Joan is not disabled.

John declines to submit any of the reports from the four doctors to SSA and instead calls Joan and explains the problem. He explains to Joan what is needed to establish her disability under SSA's rules and sends her a blank questionnaire to bring to her fifth doctor, the one who declined John's initial request. He stresses the importance of receiving a favorable response on this questionnaire to Joan and that it would likely make the difference between her winning and losing her claim. Joan brings the questionnaire to her fifth doctor, who then completes it favorably—possibly after some prodding from Joan—by checking a few boxes and signing his name.<sup>60</sup> John then submits the favorable report to

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59. As discussed in Part III, he may or may not be an attorney. *See infra* text accompanying notes 115-22.

60. SSA publishes a form, on which a medical source checks off boxes to indicate a claimant's limitations due to medical impairments. *See* OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., OMB NO. 0960-0662,

SSA. Thereafter, SSA grants Joan's claim by relying on the report, never being aware of the existence of the more detailed unfavorable reports from all of Joan's other doctors. The following graphic illustrates the portion of the SSA form addressing a claimant's ability to sit, stand, and walk.

**MEDICAL SOURCE STATEMENT OF ABILITY TO DO WORK-RELATED ACTIVITIES (PHYSICAL)**

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**II. SITTING/STANDING/WALKING**

Please check how many hours the individual can (if less than one hour, how many minutes):

At One Time without Interruption

	<u>Minutes</u>	<u>Hours</u>							
A. Sit	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	
B. Stand	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	
C. Walk	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	

Total in an 8 hour work day

	<u>Minutes</u>	<u>Hours</u>							
A. Sit	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	
B. Stand	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	
C. Walk	_____ <input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5	<input type="checkbox"/> 6	<input type="checkbox"/> 7	<input type="checkbox"/> 8	

Figure 1

The questions then become: Is what John did acceptable practice? Does it violate the law or a code of ethics? In terms of practice, the reality is that nearly all representatives do not submit adverse medical and opinion evidence.<sup>61</sup> The data is limited on how widespread the practice is, in no small part likely due to SSA's lack of investigating representatives.<sup>62</sup> However, this practice has been a concern of many ALJs who consider it commonplace and have brought the issue to the attention of Congress.<sup>63</sup> Further, the practice has been, at least, perceived by SSA to be so widespread as to warrant the passage of the 2015 Revisions. Additionally, of note, at least one firm has institutionalized the process of withholding

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MEDICAL SOURCE STATEMENT OF ABILITY TO DO WORK-RELATED ACTIVITIES (PHYSICAL) (2006).

61. See *2013 Oversight Hearing*, *supra* note 3, at 3.

62. See *infra* Part III.B.2.

63. See, e.g., *2013 Oversight Hearing*, *supra* note 3; *infra* notes 84, 87.

adverse evidence on a large scale. That firm has developed a policy in which all incoming evidence is reviewed and marked with a red, yellow, or green sticker.<sup>64</sup> Medical evidence marked with a red sticker includes “a doctor’s opinion that a person can still work, walk long distances[,] or lift heavy things” and is “not handed over to [SSA].”<sup>65</sup> The fact that this firm is also the firm that was paid the highest amount in fees by SSA<sup>66</sup> should give pause to anyone considering how the ability to take advantage of the past submission policy encouraged profiteering.

Although determining what the practice has been is a relatively simple matter, determining whether the practice was actually allowed before the 2015 Revisions and what will come of it following the revisions is more difficult.

### B. *The Law*

Since SSA was separated from the Department of Health and Human Services in 1994,<sup>67</sup> it has been illegal for a disability claimant or his representative to make false or misleading statements to, or omit material facts from SSA during the disability determination process.<sup>68</sup> Section 1129 of the Social Security Independence and Program Improvements Act of 1994 imposed civil penalties<sup>69</sup> against:

[a]ny person (including an organization, agency, or other entity) who . . . makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to [disability benefits] . . . that the person knows or should

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64. See Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL ST. J. (Dec. 22, 2011), <http://www.wsj.com/articles/SB10001424052970203518404577096632862007046>.

65. *Id.*

66. See *infra* Part III.B.3.

67. Social Security Independence and Program Improvements Act of 1994, Pub. L. No.103-296, § 101, 108 Stat. 1464, 1465 (1994).

68. For a complete historical account of the law governing the submission of adverse evidence to SSA, see Rains, *supra* note 2, at 366-82.

69. The penalties imposed by the 1994 Act were further increased in 1999 by Section 207 of the Foster Care Independence Act of 1999. See Rains, *supra* note 2, at 375.

know is *false or misleading*[, or] *makes such a statement . . . with knowing disregard for the truth*, or *omits from a statement . . . a fact which the person knows or should know is material* shall be subject to . . . a civil money penalty . . . .

For purposes of this section, *a material fact is one which the [Secretary] may consider in evaluating whether an applicant is entitled to benefits under [title] II . . . or eligible for benefits or payments under [title] XVI . . . .*<sup>70</sup>

The law concerning the submission of adverse evidence was changed with the passage of the Social Security Protection Act of 2004 (“2004 Act”), by extending false or misleading statements and omissions of material facts to include those caused by failures to disclose.<sup>71</sup> Section 201(a)(1)(C) of the 2004 Act subjects to penalty any person who:

omits from a statement or representation for such use, *or otherwise withholds disclosure of*, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .<sup>72</sup>

This law, as enacted by Congress, would seem to make clear that a representative is required to submit all evidence that bears on the issue of a claimant’s disability, not just favorable evidence, and that failure to do so is cause for sanction. However, the regulations promulgated by SSA at the time muddied the waters. Section 404.1512 of the regulations promulgated under the 2004 Act addressed general evidence requirements.<sup>73</sup> The first subsection of this regulation—prior to the 2015 Revisions discussed below—stated:

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70. 42 U.S.C. § 1320a-8 (2012) (emphasis added).

71. Pub. L. No. 108-203, § 201, 118 Stat. 493, 507 (2004) (codified as amended at 42 U.S.C. § 1320a-8 (2012)).

72. *Id.* (emphasis added).

73. *See* 20 C.F.R. § 404.1512 (2014).

In general, you have to prove to us that you are blind or disabled. Therefore, *you must bring to our attention everything that shows that you are blind or disabled.* This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are disabled, its effect on your ability to work on a sustained basis . . . .<sup>74</sup>

Additionally, Section 404.1740 of the regulations addresses “[r]ules of conduct and standards of responsibility for representatives.”<sup>75</sup> Section 404.1740(b)(1)—before the 2015 Revisions—listed a representative’s affirmative duties as including the obligation to:

[a]ct with reasonable promptness to obtain the information and *evidence that the claimant wants to submit in support of his or her claim*, and forward the same to us for consideration as soon as practicable. In disability and blindness claims, this includes the obligations to assist the claimant in bringing to our attention *everything that shows that the claimant is disabled* or blind, and to assist the claimant in furnishing medical evidence that the claimant intends to personally provide and other evidence that we can use to reach conclusions about the claimant’s medical impairment(s) and, if material to the determination of whether the claimant is blind or disabled, its effect upon the claimant’s ability to work on a sustained basis, pursuant to § 404.1512(a).<sup>76</sup>

The language of these regulations was relied upon by representatives to argue that they were only obligated to submit evidence that a claimant *wants* submitted—obviously excluding adverse evidence—and evidence that shows that a claimant is disabled—not evidence that tends to show that a claimant is not disabled.<sup>77</sup> This interpretation was somewhat hedged by language in that same regulation, which directs: “[a]ll representatives must be forthright in their dealings with us and with the claimant and must comport themselves with due regard for the non-adversarial nature of the proceedings by complying with our rules and standards,

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74. *Id.* (emphasis added).

75. 20 C.F.R. § 404.1740.

76. 20 C.F.R. § 404.1740(b)(1) (emphasis added).

77. *See Rains, supra* note 2, at 373.

which are intended to ensure orderly and fair presentation of evidence and argument.”<sup>78</sup>

This portion of the regulation at least suggested a rule against concealing adverse evidence. However, this portion of the regulation had not been enough to overcome representatives’ interpretation of Sections 404.1512(a) and 404.1740(b)(1). Further, an examination of SSA’s past policy would suggest that even SSA agreed with these representatives’ interpretation of the regulations.

### C. *The Policy*

Prior to the 2015 Revisions, SSA’s policy on the submission of evidence had been, at best, nebulous. Deputy Commissioner Sklar stated in his 2013 testimony before Congress that “[r]ight now there is some ambiguity in” whether claimants’ representatives must submit adverse evidence.<sup>79</sup> He characterized the policy as a “tricky issue.”<sup>80</sup>

Based on a review of the law, the issue had been seen by some commentators as merely an enforcement problem; the law clearly mandated submission of adverse evidence, but SSA did not enforce the mandate.<sup>81</sup> ALJ Swank addressed the issue and concluded that “there is almost no likelihood [SSA] will . . . enforce the *requirement* that all evidence be submitted . . . . As the *requirement* to submit adverse evidence is never enforced, there is no need for claimants’ representatives to comply with the *requirement*.”<sup>82</sup> However, framing the issue as a lack of enforcement of a clear mandate

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78. 20 C.F.R. § 404.1740(a)(2).

79. *2013 Oversight Hearing*, *supra* note 3, at 134 (statement of Glenn E. Sklar, Deputy Comm’r, Office of Disability Adjudication and Review). Deputy Commissioner Sklar’s statement was given in response to the question from Congressman Tim Walberg of Michigan, in which he asked: “are claimants and claimants’ representatives required by law to provide complete and accurate evidence, medical, financial[,] or other, that bears on the case, whether or not the information is adverse, unfavorable to their claim?” *Id.*

80. *Id.*

81. See Swank, *Money for Nothing*, *supra* note 12, at 170-74.

82. *Id.* at 174 (emphasis added).

ignored the complexity of the law, including the regulations promulgated by SSA and SSA's actual stated policy.<sup>83</sup>

The practice of withholding adverse evidence at least appeared to be endorsed by SSA. General Counsel for SSA has been cited by at least one firm as advising representatives that the regulations only require claimants to prove their disabilities, not their abilities, and representatives may limit their submission of evidence accordingly.<sup>84</sup> It was also indicated that General Counsel advised that, if faced with a request for evidence adverse to their clients' claims, representatives should decline the requests on the grounds that the requested evidence does not support the claim of disability.<sup>85</sup> This is also how SSA's policy was understood by ALJs. For example, ALJ Thomas W. Snook testified before Congress, complaining that he "[could] not direct [claimants' representatives] to submit all relevant evidence, not just evidence favorable to the claimant."<sup>86</sup> He indicated that under SSA's policy, "[u]nlike other judicial systems, . . . a [representative] only ha[d] to submit evidence favorable to a claimant."<sup>87</sup> Similarly, ALJ Larry J. Butler questioned: "[w]hy does SSA apparently continue to inform attorneys and non-attorney representatives that withholding material evidence that may be adverse to the claimant (that is, suggest the claimant is not disabled) is permissible?"<sup>88</sup>

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83. For SSA's stated policy, see *2013 Oversight Hearing*, *supra* note 3, at 134 (statement of Glenn E. Sklar, Deputy Comm'r, Office of Disability Adjudication and Review).

84. *Id.* at 50 (statement of ALJ Larry J. Butler) (referring to a firm presentation citing Sarah Humphreys of SSA's Office of General Counsel giving this advice before the 2004 Fifth Circuit Organization of Social Security Claimants Representatives conference).

85. *Id.*

86. *Id.* at 104.

87. *Id.* at 101.

88. *Id.* at 49. ALJ Butler further contended that "SSA is *absolutely incorrect*. An attorney cannot conceal material evidence indicating that a claimant is not disabled and permit an ALJ—based on an incomplete and misleading record—to erroneously award \$300,000 of taxpayer funds to an individual who is not disabled." *Id.* (emphasis added).

SSA's apparent policy allowing the withholding of adverse evidence was also consistent with its interpretation of its own regulations, as evidenced by its past efforts to amend those regulations. In 2005, then-acting Commissioner Jo Anne B. Barnhart attempted to amend the regulations to eliminate the withholding practice.<sup>89</sup> As stated in the July 27, 2005 Notice of Proposed Rulemaking:

We propose to require that you submit all evidence available to you when you request your hearing. This rule will require you to submit all available evidence that supports the allegations that form the basis of your claim, as well as all available evidence that might undermine or appear contrary to your allegations.<sup>90</sup>

It was proposed that the language of Section 404.1512(c) should be changed.<sup>91</sup> The relevant portion of the regulation originally stated: "You must provide evidence, without redaction, showing how your impairment(s) affects your functioning during the time you say that you are disabled, and any other information that we need to decide your claim."<sup>92</sup> The amended language would have stated: "You must provide evidence showing how your impairment(s) affect(s) your functioning during the time you say that you are disabled, and any other information that we need to decide your claim, *including evidence that you consider to be unfavorable to your claim.*"<sup>93</sup>

Not surprisingly, the 2005 proposed amendment met strong opposition from representatives and other practitioners.<sup>94</sup> At a hearing before the House Ways and Means Subcommittee on Social Security and Human Resources concerning the proposed amendment, then-president of the National Organization of Social Security Claimants' Representatives ("NOSSCR") Thomas D. Sutton

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89. See Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590, 43,606 (proposed July 27, 2005).

90. *Id.* at 43,602.

91. See *id.* at 43,606-07.

92. 20 C.F.R. § 404.1512(c) (2014).

93. Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. at 43,607 (emphasis added).

94. See Rains, *supra* note 2, at 380.

testified that “[f]or attorney representatives, [his organization had] serious concerns that th[e] requirement [to submit unfavorable evidence] may conflict with state bar ethics rules which limit the submission of evidence that could be considered adverse to a client.”<sup>95</sup> This concern was mirrored in the comments to Commissioner Barnhart from then-president of the American Bar Association (“ABA”), Michael S. Greco, who concluded that the proposed amendment to the regulation would, in fact, create ethical conflicts for attorney representatives.<sup>96</sup> He further intimated that complicity with the amended regulations would expose attorney representatives to disciplinary action under their respective state bars.<sup>97</sup>

The opposition from these interest groups and concern about creating ethics conflicts likely contributed to the proposed amendment eventually being rejected.<sup>98</sup> However, the arguments put forth by these interest groups rely on a misunderstanding of the law. As Robert E. Rains explained extensively in his Cornell Law Review article addressing the subject, the bar imposed by state bars on potential federal rules on the production of adverse evidence promulgated by SSA is a myth.<sup>99</sup> When a conflict exists between a federal rule mandating disclosure of evidence that may be confidential or otherwise protected under a state ethics rule, the federal law takes precedence over the ethics rule, in accordance with the Supremacy Clause.<sup>100</sup> Professor Rains explained that such an approach would be no different in the context of SSA rulemaking.<sup>101</sup> Further, in his article, he closely examined official opinions given by various state bars on the issue of an attorney representative submitting adverse evidence in a

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95. *Id.* (citing *Comm’r of Soc. Sec.’s Proposed Improvements to the Disability Determination Process: Hearing Before the Subcomm. on Human Res. & Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 109th Cong. (2005)).

96. *Id.* at 380-81.

97. *See id.*

98. *See id.* at 381-82; *see also* 20 C.F.R. § 404.1512(c) (2014).

99. *See* Rains, *supra* note 2, at 390.

100. *Id.* at 392.

101. *See id.* at 394.

Social Security disability claim, and he showed that “none of the opinions suggest[ ] that an attorney may violate federal law because of a state bar ethics rule.”<sup>102</sup> Professor Rains ultimately concluded his article by contending that “any ambiguity in SSA’s regulations cannot negate the clear rule issued by Congress” in the 2004 Act.<sup>103</sup>

SSA’s policy regarding the submission of adverse evidence historically was a “tricky” one fraught with “ambiguity.”<sup>104</sup> However, the uncertainty of SSA’s unclear policy was dispelled with the 2015 Revisions, which now clearly state SSA’s policy mandating the submission of adverse evidence.

#### D. *The 2015 Revisions*

On March 20, 2015, SSA issued a final rule on the submission of evidence in disability claims, effective April 20, 2015.<sup>105</sup> The purposes of the revisions are to end the representatives’ practice of withholding adverse evidence and to clearly articulate SSA’s policy and rule against it.<sup>106</sup> As stated in the Notice of Proposed Rulemaking:

There has been recent public and media interest in what our regulations require regarding the submission of evidence in disability claims, particularly regarding the duty to submit unfavorable evidence. There have been allegations that when some representatives submit evidence to us, they deliberately withhold evidence they deem unfavorable to the claimant. We also know, based on our program experience, that we do not always receive complete evidence. This public and media interest has drawn congressional attention. In particular, members of Congress have asked about the relationship between the Social Security Protection

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102. *Id.* at 390.

103. *Id.* at 394.

104. *See supra* notes 79-80 and accompanying text.

105. *See* Submission of Evidence in Disability Claims, 80 Fed. Reg. 14,828, 14,828 (Mar. 20, 2015).

106. *See* Submission of Evidence in Disability Claims, 79 Fed. Reg. 9663, 9665 (proposed Feb. 20, 2014) (“We propose to revise §[ ] 404.1512(a) . . . to require you to inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. This would include evidence that may be either favorable or unfavorable to your claim.”) (internal citations omitted).

Act of 2004 (SSPA) and the duty to submit potentially unfavorable evidence in disability claims. The SSPA authorized us to penalize a person who withholds a fact, which the person knows or should know is material to the determination of any initial or continuing right to benefits. In light of congressional interest and our program experience, we have again reviewed our regulations that govern the submission of evidence.<sup>107</sup>

The 2015 Revisions notably changed Sections 404.1512 (Evidence) and 404.1740 (Rules of Conduct and Professional Standards of Responsibility for Representatives).<sup>108</sup> Section 404.1512 has been revised, in relevant part, as follows:

(a) *General.* In general, you have to prove to us that you are blind or disabled. **You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled.** This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process, including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge hearing decision. We will consider only impairment(s) you say you have or about which we receive evidence.

(b) *What we mean by "evidence."* Evidence is anything you or anyone else submits to us or that we obtain that relates to your claim.

(1) Evidence includes, but is not limited to:

[. . .]

(ii) Other *evidence from medical sources*, such as medical history, *opinions*, and statements about treatment you have received . . . .<sup>109</sup>

Additionally, Section 404.1740 has been revised, in relevant part, as follows:

(b) *Affirmative duties.* A representative must, in conformity with the regulations setting forth our existing duties and responsibilities

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107. *Id.* at 9664 (citations omitted).

108. The relevant language of these two sections prior to the 2015 Revisions is reproduced above in Part II.B.

109. Submission of Evidence in Disability Claims, 80 Fed. Reg. at 14,836 (emphasis added).

and those of claimants (see § 404.1512 in disability and blindness claims):

(1) Act with reasonable promptness to help *obtain the information or evidence that the claimant **must submit** under our regulations*, and forward the information or evidence to us for consideration as soon as practicable.<sup>110</sup>

The language of the changes in the 2015 Revisions makes explicit SSA's new rule and policy firmly against the practice of withholding adverse evidence. But simply changing the regulations does not fully resolve the issue. Now that the 2015 Revisions have been made and SSA has articulated a new rule and a new policy, the question becomes: what happens next? The new rule will likely face opposition and potential legal challenges. In promulgating the revisions, SSA received comments opposing the changes "from members of the public, advocacy groups, legal organizations, members of the disability advocacy community, and several national groups of Social Security claimants' representatives."<sup>111</sup> The opposition from these groups is not wholly without merit. As discussed in Part II.C, some believe that a rule requiring attorneys to submit adverse evidence, against the interests of their clients, would directly violate their ethical duties.<sup>112</sup> Although the ABA did not provide public comment in opposition to the 2015 revisions, the sentiment expressed in then-president Greco's opposition to the 2005 proposed amendment remains applicable. Mr. Greco described the ABA's position as follows:

[The] requirement [to submit adverse evidence in a Social Security disability claim] has the potential for causing significant conflicts for lawyers torn between following an agency rule and complying with their professional responsibilities towards their clients. Moreover, enforcement of these provisions would place the Social Security Administration in the position of attempting to override a lawyer's sworn duty to obey the professional rules of the jurisdiction in which the lawyer is licensed to practice.

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110. *Id.* at 14,837 (emphasis added).

111. *Id.* at 14,829.

112. *See supra* notes 94-97 and accompanying text.

No matter what the tribunal, lawyers have the ethical obligation to advocate zealously on their clients' behalf and to advise them on possible courses of action and the potential consequences of those actions. They are prohibited by ABA Model Rule 1.6 from disclosing privileged and confidential client information, except with consent from the client and under some very limited circumstances. Indeed, to reveal client confidences would expose them to disciplinary action.<sup>113</sup>

As discussed, a conflict between state ethical rules and a rule from SSA mandating submission of adverse evidence does not invalidate the SSA rule. Instead, as Professor Rains explained, through an application of the supremacy doctrine, the SSA rule should trump the state ethical rules.<sup>114</sup> However, an ultimate finding that the supremacy doctrine does allow for the rule made by the 2015 Revisions would likely only be borne out through litigation on the subject. As discussed, the Social Security disability practice is a billion-dollar industry with some firms earning tens of millions of dollars each year, and these firms have a great financial interest and means to strongly oppose the rule through extensive litigation. It is possible that the 2015 Revisions may not have resolved the issues on the submission of adverse evidence but are instead the beginning of the process.

In addition to continued opposition and possible litigation, the new rule brought about by the 2015 Revisions may face an even greater obstacle from SSA itself. Creating the new rule is only the first half of solving the problem—the second half is enforcing the rule. As discussed in Part III.B.2, SSA's monitoring and regulation of representative misconduct is significantly limited, and even near nonexistent.

While implementation and enforcement of the new regulations outlined in the 2015 Revisions will likely face some hurdles, the revisions represent a significant change in policy. The scope of the revisions goes far beyond the 2005 proposed amendment that failed to become a final rule. The

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113. Rains, *supra* note 2, at 381 (quoting Letter from Michael S. Greco, Pres., ABA, to Hon. Jo Anne Barnhart, Comm'r, Soc. Sec. Admin. (Sept. 27, 2005) (on file with Robert E. Rains)).

114. *See id.* at 392-94.

fact that the 2015 Revisions have succeeded where the 2005 proposed amendment failed likely speaks to a change in the attitudes of the general population and lawmakers in the last ten years. There is now greater concern that the disability programs be operated in a way that fulfills their purpose but which is not inappropriately inclusive and exploitable. Hopefully, the 2015 Revisions represent a turning point in SSA policymaking and are the start of greater change.

### III. POLICY REGARDING NON-ATTORNEY REPRESENTATION BEFORE SSA

It is a well-settled doctrine that the “unauthorized practice of law,” that is, the practice of law by people other than attorneys, is illegal.<sup>115</sup> It has been argued that restricting the practice of law to attorneys is to protect the public against “harmful incompetence and unscrupulous conduct.”<sup>116</sup> Despite this general rule, the practice of law by non-attorneys has long been allowed before SSA.<sup>117</sup> Many of these non-attorneys have been the friends or relatives of claimants, or have been members of a non-profit organization or government agency.<sup>118</sup>

Although they were allowed to practice before SSA, these non-attorneys were not treated as equal to the attorneys in the same practice.<sup>119</sup> Importantly, attorneys were paid fees for their representation directly from SSA, consistent with the fee withholding discussed in Part I.A, while non-

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115. See Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 224-25 (2012) [hereinafter Swank, *Unauthorized Practice of Law*].

116. *Id.* at 228 (quoting Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999)).

117. See Swank, *Unauthorized Practice of Law*, *supra* note 115, at 234.

118. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-5, SSA DISABILITY REPRESENTATIVES: FEE PAYMENT CHANGES SHOW PROMISE, BUT ELIGIBILITY CRITERIA AND REPRESENTATIVE OVERPAYMENTS REQUIRE FURTHER MONITORING 13-14, 17 (2007) [hereinafter 2007 GAO REPORT] (indicating that “[a]bout half” of all ineligible nonattorneys “are claimants’ relatives and friends[,]” and half of the remaining amount “work for non[-]profit organizations or government agencies”).

119. See Swank, *Unauthorized Practice of Law*, *supra* note 115, at 239-40.

attorneys were not.<sup>120</sup> However, more recently, congressional legislation has elevated eligible non-attorney representatives (“NARs”) to the same level as attorneys by extending to them fee withholding.<sup>121</sup> It is my contention that these eligible NARs have contributed to the current financial distress and institutional failures of SSA. They are on the whole less qualified to practice than attorneys, are essentially unregulated, and have contributed to the proliferation of profiteering entities in Social Security disability practice. These characteristics of eligible NARs are addressed below, following a brief history of non-attorney representation before SSA and the laws that created eligible NARs.

*A. A Brief History of Non-Attorney Representation before the Social Security Administration and the Laws that Created Eligible NARs*

The practice of law by non-attorneys before federal administrative agencies like SSA has been allowed since the enactment of the Administrative Procedure Act (“APA”) in 1946.<sup>122</sup> The APA allowed each federal agency to determine who may represent others before it—allowing each agency to allow non-attorneys to practice before it, if the agency so chose.<sup>123</sup> Soon after the passage of the APA, conflicts arose between non-attorneys practicing before federal administrative agencies and state bar associations.<sup>124</sup> Bar associations petitioned state courts to hold non-attorneys in contempt for the unauthorized practice of law and to enjoin them from practicing law in the state.<sup>125</sup> The apparent inconsistency between the APA allowing non-attorney practice and the state bars’ position that such practice was illegal unauthorized practice of law was finally resolved by

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120. *See id.*

121. *See infra* Part III.A.

122. *See Swank, Unauthorized Practice of Law, supra* note 115, at 235.

123. *Id.*

124. *See Sperry v. Florida*, 373 U.S. 379 (1963).

125. *See id.*; Swank, *Unauthorized Practice of Law, supra* note 115, at 236.

the Supreme Court in *Sperry v. Florida*.<sup>126</sup> There, Chief Justice Warren framed the issue as falling under the Supremacy Clause.<sup>127</sup> In the eyes of the Court, there was no doubt that the APA allowed non-attorneys to practice irrespective of state bar licensing requirements:

The statute thus expressly permits the Commissioner to authorize practice before the [administrative agency] by non-lawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, [states] may not deny to those failing to meet [their] own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give “the State’s licensing board a virtual power of review over the federal determination” that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. “No State law can hinder or obstruct the free use of a license granted under an act of Congress.”<sup>128</sup>

Since the Court’s decision, non-attorney practice before SSA has been commonplace.<sup>129</sup> However, the nature of their representation has changed significantly in recent years. This change occurred with the passage of the 2004 Act.<sup>130</sup> Section 303 of the 2004 Act established a five-year demonstration project for extending fee withholding to NARs who met certain requirements.<sup>131</sup> This project made these NARs (“eligible NARs”) indistinguishable from attorneys in practice before SSA; they essentially were afforded all of the

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126. 373 U.S. 379; Swank, *Unauthorized Practice of Law*, *supra* note 115, at 235.

127. *See Sperry*, 373 U.S. at 385.

128. *Id.* (internal citations omitted).

129. For the period from 1977 through 2010, there was nonattorney participation, on average, at 15.7% of all Social Security disability hearings. *See* SSAB DATA, *supra* note 29, at 60 fig. 55 (“Cases with Representation at ALJ Hearings—Fiscal Years 1977-2010.”).

130. *See* Pub. L. No. 108-203, 118 Stat. 493 (2004) (codified as amended at 42 U.S.C. § 1305 (2012)).

131. *Id.* § 303 (“Nationwide Demonstration Project Providing for Extension of Fee Withholding Procedures to Non-attorney Representatives.”).

rights and all of the benefits, including the very desirable direct payment of fees from SSA.<sup>132</sup>

SSA began implementing the application procedures for qualifying as an eligible NAR in 2005,<sup>133</sup> and soon NARs were becoming certified as eligible and being paid fees directly from SSA. Over the next few years, the project gained momentum and was generally considered by Congress to be a success.<sup>134</sup> Because the initial demonstration project was only authorized for a five-year period, Congress passed the Social Security Disability Applicants' Access to Professional Representation Act of 2010 ("2010 Act") to "provide for permanent extension of [fee withholding procedures] . . . to qualified non-attorney representatives."<sup>135</sup> Since the passage of the 2010 Act, more and more NARs are becoming certified by SSA, often supplanting attorneys in the process.

B. *The Issues with Eligible NARs and the Effects of Their Existence*

This Comment focuses on three areas in which the eligible NAR program has had either a demonstrable or potential negative impact on the Social Security disability system: (1) eligible NARs are less qualified to practice than attorneys; (2) they are essentially unregulated; and (3) they have contributed to the proliferation of profiteering entities in the field. These three factors have created a class of representatives—growing in size—that have been in a position to exploit the current situation of SSA.

1. *Eligible NARs May Not Be as "Qualified" as Congress Intended.* The current legislation providing direct payment for eligible NARs elevates those representatives to the same level as attorneys, making the two indistinguishable in practice before SSA. Because of this fact and the fact that non-attorney representation is the exception not the rule, the question as to whether eligible NARs are qualified must be

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132. *Id.*

133. *See* Demonstration Project for Direct Payment to Non-Attorney Representatives, 70 Fed. Reg. 2447, 2447-50 (proposed Jan. 13, 2005).

134. *See infra* Part III.C. Though, as discussed in Part III.B.1, it is unclear by what standards the project was considered a success.

135. Pub. L. No. 111-142, 124 Stat. 38, 38 (2010).

framed in terms of whether they are as qualified as attorneys practicing in the same field, not whether they are more qualified than laypersons.

Under the 2004 Act, NARs are only eligible for direct payment of fees if they meet certain requirements. Therefore, any discussion of qualifications must start with a discussion of these requirements. The 2004 Act contains five requirements that must be met: (1) “[t]he representative has been awarded a bachelor’s degree . . . [;]” (2) “[t]he representative has passed an examination, written and administered by the Commissioner, which tests knowledge of the relevant provisions of the Social Security Act . . . [;]” (3) the representative must be insured; (4) the representative must pass a background check; and (5) the representative must participate in continuing education as the Commissioner may prescribe.<sup>136</sup>

The standard initially promulgated under the 2004 Act also required an experience component—an applicant was required to represent at least five claimants before SSA in the 24-month period prior to applying.<sup>137</sup> To be considered to have represented a claimant, an applicant must have been the appointed representative at the time a decision was issued or appeared at a hearing before an ALJ.<sup>138</sup> Notably, however, the experience requirement was eliminated from the current scheme implemented under the 2010 Act.

SSA’s abandonment of the experience requirement is contrary to the recommendation provided by the United States Government Accountability Office (“GAO”). Section 304 of the 2004 Act required a “GAO Study Regarding the Fee Payment Process for Claimant Representatives” to be

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136. § 303, 118 Stat. at 521-22.

137. See SOC. SEC. ADMIN., OMB No. 0960-0699, NON-ATTORNEY REPRESENTATIVE DEMONSTRATION PROJECT, 1-2 (2006).

138. *Id.* at 2 (“Representing a claimant before SSA can count toward satisfaction of the representational requirement only if the applicant was serving as the claimant’s appointed representative at the time at which SSA decided the case at any administrative level (i.e. the initial, reconsideration, ALJ hearing, or Appeals Council level) or, if the case has not been decided while the applicant was the appointed representative, the applicant appeared as the claimant’s appointed representative at a hearing before an ALJ . . .”).

performed.<sup>139</sup> Section 304(a)(2)(D) stated in pertinent part that the study should assess the potential results of creating eligible NARs with respect to program administration “and assess whether the rules and procedures employed by the Commissioner of Social Security to evaluate the qualifications and performance of claimant representatives should be revised prior to making such procedures permanent.”<sup>140</sup> The GAO complied with this requirement and issued a report to congressional committees in 2007. The September 2007 report, *SSA Disability Representatives: Fee Payment Changes Show Promise, but Eligibility Criteria and Representative Overpayments Require Further Monitoring*,<sup>141</sup> identified a number of issues, but the most significant was the experience requirement. The GAO found that “the [m]inimum [e]xperience [r]equirement [m]ay [b]e [i]nsufficient,”<sup>142</sup> writing in part:

We found that judges . . . in addition to advocacy groups we spoke with, questioned the adequacy of the experience standard, which calls for nonattorneys to have represented at least five claimants before SSA over a 2-year period. Most of the judges we interviewed and more than half of the eligible nonattorneys considered this to be *insufficient experience*. Judges, and also advocacy groups we spoke with, said that the standard *would not ensure that eligible nonattorneys are well qualified in disability representation*.<sup>143</sup>

The GAO further noted that “according to an association of representatives, fee withholding is attracting more inexperienced non-attorneys to the field of disability representation.”<sup>144</sup> The report ultimately concluded with the concern that, in light of the availability of fee withholding drawing more non-attorneys into the field, the then-existing “experience standard set by SSA may not be sufficiently

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139. § 304, 118 Stat. at 523-24.

140. *Id.* § 304(a)(2)(D).

141. 2007 GAO REPORT, *supra* note 118.

142. *Id.* at 26.

143. *Id.* at 4 (emphasis added).

144. *Id.* at Highlights.

rigorous to ensure that representatives are well qualified.”<sup>145</sup> Inexplicably, after the 2010 Act came into effect, SSA eliminated the experience standard as a requirement in becoming an eligible NAR. This elimination was made while, just as the GAO report predicted, the number of eligible NARs entering the field, attracted by direct payment, had exploded.<sup>146</sup> These eligible NARs are, at best, questionably qualified based on the findings of the GAO.

Considering that now an individual with an undergraduate degree in any field—it is irrelevant whether it is in philosophy or electrical engineering—can be eligible for direct payment without any relevant experience, the only one of the requirements that really establishes whether an individual is competent to practice before SSA is the written examination. Therefore, the qualification of these eligible NARs is predicated on the quality of the examination they must pass. Congress has left the nature and the format of the examination to the discretion of the Commissioner of Social Security, who has since contracted with CPS HR Consulting to administer it.<sup>147</sup>

In its current form, the eligible NAR examination is three hours long, open-book—applicants are provided with a copy of the Code of Federal Regulations for Parts 400 to 499 (“Code”)—and contains between forty and fifty multiple-choice questions.<sup>148</sup> The questions test information contained in the provided Code and cover four areas: disability, vocational, appeals, and ethics.<sup>149</sup> To pass, applicants need to

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145. *Id.* at 35 (“To the extent that the availability of fee withholding draws more nonattorneys into the field of disability representation for the first time, it is possible that in the future some less qualified nonattorneys could satisfy the criteria.”).

146. *See infra* Part III.C.

147. *Direct Payment to Non-Attorney Representatives: General Information*, CPS HR CONSULTING: SOC. SEC. ADMIN., <https://secure.cpsshr.us/ssa/About.asp> (last visited Mar. 5, 2015).

148. *Direct Payment to Non-Attorney Representatives: Examination*, CPS HR CONSULTING: SOC. SEC. ADMIN., <https://secure.cpsshr.us/ssa/Examination.asp> (last visited Mar. 5, 2015) [hereinafter *Non-Attorney Representatives: Examination*].

149. *Direct Payment to Non-Attorney Representatives: Sample Examination Questions*, CPS HR CONSULTING: SOC. SEC. ADMIN., <https://secure.cpsshr.us/ssa/>

answer at least 70% of the questions correctly.<sup>150</sup> I contend that such an examination alone is inadequate to establish an applicant's competency and qualification to be a NAR, based on both the format of the examination and its grading structure.

In terms of the examination format, it is too generous to applicants. Three hours to answer up to fifty simple multiple-choice questions—for which the reference book is provided—is not sufficient to establish competency, especially in light of the fact that an applicant will still pass if he answers nearly one-third of the questions incorrectly.<sup>151</sup> As a point of illustration, the following is an example of a representative examination question:

Which statement best describes the term “severe” impairment?  
[Answer choice C is the correct answer].

- a. A combination of unrelated non-severe impairments with no impact on basic work activity may be considered a severe impairment because having multiple non-severe impairments can be much worse than having just one.
- b. A medically determinable impairment or a combination of impairments which prevents the ability to perform substantial gainful activity is considered “severe.”
- c. An impairment or combination of impairments is only severe if the impairment significantly impacts at least one basic work activity.**
- d. An impairment or combination of impairments is considered severe only if the impairment impacts several basic work activities.<sup>152</sup>

The answer to this question may not be plainly obvious, but finding its answer is not difficult using the copy of the Code provided to the applicants. The copy of the Code

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PracticeExam.asp (last visited Mar. 5, 2015) [hereinafter *Non-Attorney Representatives: Sample Questions*].

150. *Non-Attorney Representatives: Examination*, *supra* note 148.

151. *See id.*

152. *Non-Attorney Representatives: Sample Questions*, *supra* note 149 (emphasis added).

provided includes an index at the beginning.<sup>153</sup> Under the bolded section “Determining Disability and Blindness” (Subpart P), is a subheading, “Evaluation of Disability.”<sup>154</sup> This subheading has five regulations listed, including Section 404.1521: “What we mean by an impairment(s) that is not severe.”<sup>155</sup> If one were to turn to that section of the Code, he would find the following directly under the bolded heading: “*Non-severe impairment(s)*. An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.”<sup>156</sup>

It is not my position that a layperson with no familiarity with Social Security disability could take the examination and pass solely on the basis that it is multiple choice and open-book, though it may be possible, in light of the fact that the person would be allowed to answer nearly one-third of the questions incorrectly. It is, however, my position that an individual of average intelligence could spend a period of a week or two going through the Code, especially learning the index, and would have a reasonable chance of passing the examination. That such an individual, who prior to those two weeks had no familiarity with SSA or its procedures, is deemed more than just competent to practice before SSA but is certified to be of the same competence as an attorney also so practicing is alarming. It bears noting that with the rescission of the experience requirement, this hypothetical applicant may have, and likely has, never been inside a court room, never appeared before an ALJ, never seen medical records, and never so much as met a disabled potential client.

In terms of the grading, the examination is not comprehensive. As discussed above, the questions fall into four evenly distributed categories: disability, vocational, appeals, and ethics. In grading the examination, an applicant must achieve a score of 70% or better; however, there is no minimum score that must be achieved in each separate category. Therefore, because each category represents 25% of

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153. See 20 C.F.R. Ch. III, pts. 400-99 (2013).

154. *Id.*

155. *Id.*

156. 20 C.F.R. § 404.1521(a).

the examination and an applicant may answer up to 30% of the examination incorrectly, an applicant will be certified by SSA even if he answers all of the questions in a particular section incorrectly—as well as some in other sections. For example, SSA will still deem an applicant who answers 0% of the ethics questions correctly to be competent.

It is my contention that the examination procedures for NAR certification are plainly inadequate in establishing an applicant's competency. The inadequacy of the examination is especially troublesome in light of the fact that this requirement is the only requirement that establishes an applicant's qualifications as an eligible NAR. My contention is not based solely on the logical conclusion that some applicants subject to inadequate certification procedures will invariably be unqualified; it is, in fact, supported by available empirical evidence, which shows that NARs are less qualified than attorneys and more likely to engage in misconduct.

In September of 2007, the Office of the Inspector General (“OIG”) for SSA issued a report addressing data about claimants' representatives' misconduct.<sup>157</sup> The report explained that SSA maintains a list of representatives who have been sanctioned, defined as either disqualified or suspended from practice before SSA.<sup>158</sup> The list includes all representatives who had been sanctioned since 1980.<sup>159</sup> As the below figure from the OIG report shows, NARs are more likely to be sanctioned than attorneys.

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157. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-07-17057, CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION (2007) [hereinafter 2007 OIG REPORT], available at [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057\\_0.pdf](http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057_0.pdf).

158. *Id.* at 4.

159. See Drew A. Swank, *The Social Security Administration's Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 507, 519-20 (2012) [hereinafter Swank, *Condoning and Colluding*] (referring to the 2011 list, on file with author).

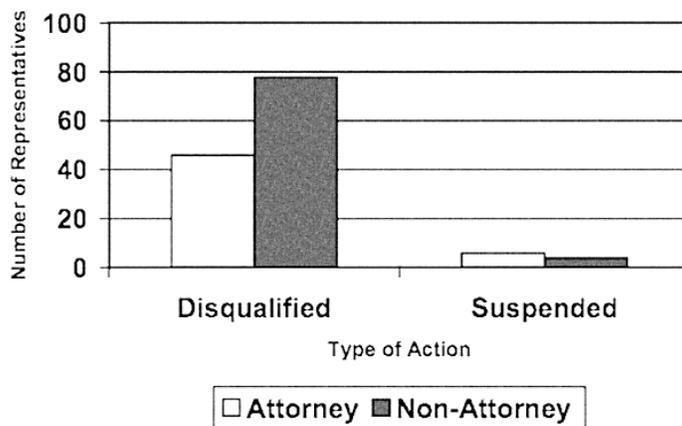


Figure 2: Sanctioned Representatives at SSA (as of May 2007)

The figure would make it seem at first glance that NARs are almost twice as likely to be sanctioned when compared to attorneys. However, the reality is far worse. The OIG report explained that in 2006, there were 31,000 claimant representatives, of which approximately 26,000 were attorneys and 5000 were NARs.<sup>160</sup> Therefore, considering there was more than five times the number of attorneys compared to NARs,<sup>161</sup> the data actually indicates that NARs are approximately *nine times* more likely to be sanctioned than attorneys.

Therefore, knowing that NARs are generally less qualified than attorneys and are more likely to engage in misconduct, the question must be asked: how does SSA deal with this misconduct? The answer, as addressed below, is that it essentially doesn't.

*2. Eligible NARs Operate in Limbo Free from Regulation of Misconduct.* The practice of law by attorneys has often been considered a self-regulating profession. Yet the reality

160. 2007 OIG REPORT, *supra* note 157, at 1 n.3.

161. The historic data maintained by the Social Security Advisory Board regarding representative attendance at ALJ hearings also supports a general ratio of between 5:1 and 4:1 for attorneys to NARs since 1980. See SSAB DATA, *supra* note 29, at 60 fig.55 ("Cases with Representation at ALJ Hearings—Fiscal Years 1977-2010.").

is that the practice is regulated in many ways, most notably by state bars. However, eligible NARs practicing before SSA are not subject to the same regulatory scheme, which has developed over decades to police attorney misconduct. Rather than giving my explanation of the dangers of creating eligible NARs that exist outside of the usual regulatory framework, I provide, in part, the testimony regarding this issue that Congress heard before passing the 2004 Act. On February 27, 2003, Richard P. Morris, then-president of NOSSCR, testified before Congress regarding the legislation that would become the 2004 Act:

The actions of attorneys also are more heavily regulated and face greater scrutiny than the actions of unaffiliated non-attorney representatives. States have enacted institutional controls to govern the conduct of professionals such as attorneys. The only controls that exist for non-attorney representatives are two short pages of regulations entitled “Rules of Conduct and Standards of Responsibility for Representatives.” By contrast, attorneys and paralegals they supervise must comply with both these Social Security Administration standards and state bar codes of conduct, which are much more stringent and impose much more severe punishments for violations. While the Social Security Administration standards for non-attorney representatives do provide a starting point, the standards are general and, to date, enforcement has been limited. In contrast, state institutional controls provide many protections for disability claimants who are represented by attorneys and those paralegals they supervise.

Because unaffiliated non-attorney representatives do not fall under the purview of such institutional controls, claimants do not have many protections from unscrupulous non-attorney representatives. In order to practice law, attorneys must swear to abide by the ethical code of the state in which they practice. Failure to abide by such codes will result in fines, censure, or even disbarment. In contrast, non-attorney representatives are not under any similar ethical standards promulgated by a licensing body. . . .

More troubling, if an unaffiliated, non-attorney representative behaves unethically the client has no direct recourse. The client cannot bring a charge against the non-attorney representative before an ethics committee because such a committee does not exist. The client is limited to complaining to the Social Security Administration, which may or may not bring a charge against the non-attorney representative. *Surprisingly, the Social Security Administration has no obligation to investigate a charge of misfeasance or malfeasance against a non-attorney representative,* unlike a state bar commission of professional conduct which is

required by law to conduct an investigation of any charge of wrongdoing. Thus, the state licensing scheme for attorneys provides clients with direct recourse if they have a complaint.<sup>162</sup>

Because eligible NARs operate outside of the complex system designed for policing attorneys, any regulation of their conduct must come from SSA. However, Mr. Morris's concerns about SSA's lack of obligation to investigate eligible NARs have proven to be true. SSA's regulation of eligible NARs is all but nonexistent. As was discussed in the Introduction, SSA lacks the funding necessary to administer some of its most essential functions. The result is a lack of resources for and a deprioritizing of monitoring and regulating representative misconduct.<sup>163</sup> While, as discussed in Part III.B.1, NARs are much more likely to be sanctioned than attorneys, the overall likelihood of them being sanctioned at all is remarkably low.<sup>164</sup> From 1980 through 2011, a total of 101 NARs were sanctioned.<sup>165</sup> This results in an average rate of 0.06% NARs being sanctioned per year.<sup>166</sup> As one commentator has noted, such a rate is drastically lower than the general rates of attorney *disbarment*—not just disciplinary action—in individual states.<sup>167</sup> Considering that disbarment by a state bar has been historically very unlikely,<sup>168</sup> the fact that an NAR is only a fraction as likely to be sanctioned highlights just how unlikely disciplinary action is. Moreover, it is worth noting that sanctioning is not always the result of internal inquiry by SSA and is sometimes precipitated by the offender representative being the subject of outside proceedings, such as conviction of a crime and

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162. *The Social Security Protection Act of 2003: Hearing on H.R. 743 Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 108th Cong. 53-54 (2003) (statement of Richard P. Morris, Pres., NOSSCR) (emphasis added).

163. See Swank, *Condoning and Colluding*, *supra* note 159, at 518-19.

164. See *id.* at 519-20.

165. *Id.*

166. With a total of 101 NARs being sanctioned in the 32 years from 1980 through 2011, an average of 3.16 NARs were sanctioned per year. Assuming an average of 5000 NARs practicing per year, based on the 2007 OIG REPORT, *supra* note 157, 3.16 NARs of the 5000 represents the rate of 0.063%.

167. See Swank, *Condoning and Colluding*, *supra* note 159, at 520.

168. *Id.*

incarceration.<sup>169</sup> Therefore, the actual rate of NARs sanctioned by SSA for misconduct in practice—as opposed to other reasons like incarceration—may in fact be much lower.

By being free from the self-governing, attorney-policing scheme and being subject only to very limited SSA sanctioning, eligible NARs operate in a sort of lawless crack in the system. However, the fact that these eligible NARs are laypersons and not attorneys does not mitigate the harm that can be done by their misconduct, both to their individual clients and to SSA itself.

3. *Eligible NARs Contribute to the Rise of Social Security Disability “Mega-firms.”* The factors that have led to the current unfortunate state of SSA (i.e., evidence submission policy, lack of oversight of representatives, and paying-down-the-backlog scheme) have also created a great opportunity for profit. In 2013, SSA paid \$1,226,129,697.74 in fees to claimants’ representatives.<sup>170</sup> This large aggregate of fee payments has led to the propagation of so-called “mega-firms.”<sup>171</sup> These mega-firms specialize in Social Security disability and have developed assembly line processes to maximize profit. Congress’s creation of eligible NARs has been essential to such firms’ proliferation.

In December of 2011, the Wall Street Journal profiled the firm that was paid the highest fees by SSA the prior year; those fees added up to \$88 million.<sup>172</sup> The fees the firm received that year were triple what it received in 2006.<sup>173</sup> This growth was, in part, attributable to the 2004 Act creating

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169. See Swank, *Money for Nothing*, *supra* note 12, at 173.

170. See *Statistics on Title II Direct Payments to Claimant Representatives*, SOC. SEC. ADMIN., <http://www.ssa.gov/representation/statistics.htm#sb=3> (last visited Mar. 6, 2015) [hereinafter *Statistics on Title II Direct Payments*]. This amount represents fee payments only on Title II claims (commonly Disability Insurance claims) but does not include amounts paid on Title XVI claims (Supplemental Security Income). Therefore, the overall fee payment amount would be higher.

171. *2013 Oversight Hearing*, *supra* note 3, at 101. The Honorable Thomas W. Snook discussed the existence of high volume, profit-driven firms specializing in Social Security disability and also made specific mention of the firm profiled in Paletta & Searcey, *supra* note 64.

172. Paletta & Searcey, *supra* note 64.

173. *Id.*

eligible NARs and to the changes that occurred as a result of the 2008 financial crisis. In response to the 2004 Act “making it easier for non[-]lawyer advocates to get paid[,]” the firm “hired lower-paid nonlawyers [eligible NARs] to handle cases, ramped up advertising and began processing far greater numbers of clients.”<sup>174</sup> The result has been a profits-driven, assembly line approach to the practice with some corners being cut and perhaps even lines being crossed.<sup>175</sup> A former manager at one of the firm’s many offices “describe[d] the operation as ‘like a warehouse’ with the goal of seeing ‘how much money they can make.’”<sup>176</sup>

The firm profiled in the Wall Street Journal article is by no means unique. The article made clear mention that other firms rely on eligible NARs and have similarly specialized high volume practices, including one in California run by an individual who was the sixth highest paid representative that year.<sup>177</sup> Further, the success of these current firms is likely to cause even more such groups to enter the field. ALJs interviewed in connection with the article were concerned about such a possibility and cautioned that the firm profiled had “creat[ed] a model that many competitors are working to mirror.”<sup>178</sup>

Why have these mega-firms transitioned to the use of eligible NARs, and how has the transition helped proliferate their existence? One commentator has put it bluntly: “[m]oney, of course, is the motivation for firms to hire non-attorney representatives over attorneys . . . . [T]he firm has a greater profit using non-attorney representatives, as the firm would pay them less, on average, than attorneys.”<sup>179</sup>

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174. *Id.*

175. The firm has institutionalized the practice of withholding unfavorable evidence with a color-coded sticker system discussed at *supra* notes 64-65 and accompanying text. It has been reprimanded by SSA for backdating documents, and, at the time of the article, was being investigated for possibly forging signatures. Paletta & Searcey, *supra* note 64.

176. Paletta & Searcey, *supra* note 64.

177. *See id.*

178. *Id.*

179. Swank, *Unauthorized Practice of Law*, *supra* note 115, at 243.

However, the answer may actually be more complicated. While the cheaper supply of labor available with the use of eligible NARs may be helpful to a mega-firm's bottom line, their use may actually be necessary for a mega-firm's existence. The firm profiled by the Wall Street Journal is a firm only in the sense that it is a business conglomerate; it is not a law firm. In 2010, after the passage of the 2010 Act, the owners of the firm sold a majority stake in the firm to a private equity company,<sup>180</sup> making it no longer a law firm.<sup>181</sup> The law prohibits a nonlawyer to own any interest in a law firm or to manage or supervise the professional activities of a lawyer.<sup>182</sup> The purpose for this prohibition is to limit a profit seeking entity, unbound by ethical obligations, from directing the actions of lawyers bound to resolve ethical conflicts arising from the pursuit of profits in favor of ethical outcomes.<sup>183</sup> Thus, a mega-firm, such as the one profiled, would not be able to exist without the existence of eligible NARs who can be controlled by profit-seeking groups like private equity companies.

It is clear that eligible NARs are contributing to the existence of mega-firms, and in some cases are necessary to their existence. In considering whether such contribution is as detrimental to the system as some of the other issues discussed above, I share Judge Snook's concern: "is this really what Congress intended, that disability law firms be owned by hedge funds?"<sup>184</sup> Should profit-seeking entities, unfettered

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180. Paletta & Searcey, *supra* note 64.

181. The firm explains on its website that it is not a law firm and that its representatives are not lawyers. Under the heading on the main page, "Social Security Disability Attorney vs. Social Security Disability Advocate," the firm explains: "We are America's Most Successful Social Security Disability Advocates®. While very similar to a Social Security Disability lawyer, by definition an advocate is 'one that argues for a cause; one that pleads in another's behalf; a supporter.'" BINDER & BINDER, <http://www.binderandbinder.com> (last visited Mar. 6, 2015).

182. RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 10 (2000) ("A nonlawyer may not own any interest in a law firm, and a nonlawyer may not be empowered to or actually direct or control the professional activities of a lawyer in the firm.").

183. *See id.* § 10 cmts. b–c.

184. 2013 Oversight Hearing, *supra* note 3, at 101.

by the ethical constraints built through history that govern lawyers, be allowed to participate in the practice of law?

C. *If There are So Many Problems with Eligible NARs, Why Did Congress Pass the 2010 Act?*

Why did a Congress infamous for political gridlock and inaction overwhelmingly support the 2010 Act,<sup>185</sup> an act that did little more than make permanent the eligible NAR program put into effect by the 2004 Act? The reasons shown by the limited congressional record are twofold. First, the bill was seen as a basic reform, which would not harm benefits recipients—potential voters—to a system in need of reform. As Senator Max Baucus from Montana explained the law: “This bill unifies the attorney and nonattorney fee withholding process for both Social Security and supplemental security income. The bill is a commonsense reform to the Social Security Act and should be enacted.”<sup>186</sup> The second, and arguably more substantial, reason for passing the 2010 Act was that Congress perceived that passing the law would increase claimants’ access to representation. As Congresswoman Laura Richardson of California urged:

[t]he provisions set to be extended by H.R. 4532 will provide easy access to the qualified representation that many seniors need in order to secure their benefits. This legislation is especially important in these tough economic times . . . . Now, more than ever, we need to help the elderly access the benefits that they need to achieve financial stability . . . . I support this bill because it will make the Social Security system more fair and easy to use for the 63,000 seniors in my district and millions more across the country. In order to uphold our obligation to senior citizens we must provide them with the resources needed to take advantage of available benefits.<sup>187</sup>

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185. The bill was passed by a vote of 412 yeas to 6 nays in the House of Representatives. 156 CONG. REC. H594 (daily ed. Feb. 4, 2010). This support was not dissimilar from the support for the 2004 Act, which was passed by the House with a vote of 402 yeas to 19 nays. 150 CONG. REC. H437 (daily ed. Feb. 11, 2004).

186. 156 CONG. REC. S673 (daily ed. Feb. 22, 2010).

187. 156 CONG. REC. H2034-35 (daily ed. Feb. 25, 2010).

Despite the perception of some legislators, the reality is that access to representation was not a real issue at the time, nor is it now. In actuality, when the first act was passed in 2004, nearly all claimants for Social Security disability benefits were represented.<sup>188</sup> This fact is a logical result considering that, at that time, SSA paid out over \$700 million to claimants' representatives—all of whom eligible for such payment at the time were attorneys—that year.<sup>189</sup> This amount of money paid in a non-adversarial system, which is now a billion-dollar industry,<sup>190</sup> had apparently proven incentive enough for many attorneys.

While the supposed need for increased access to representation perceived by Congress was not a reality, the acts it has passed have created a need for access to *attorney* representation. Since the implementation of the 2004 Act, which began to take significant effect in 2006, there has been a dramatic increase in the volume of NARs, at the cost of a decrease in the volume of attorneys. As shown by the data maintained by the Social Security Advisory Board, the percentage of attorneys present at disability hearings has decreased 7.7%, while the percentage of NARs has increased by a whopping 224%.<sup>191</sup>

Year	Attorney	Non-Attorney
2006	80.9%	8.6%
2007	81.3%	8.6%
2008	78.0%	9.3%
2009	74.5%	10.6%
2010	74.6%	19.3%

Table 2

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188. In 2004, attorneys were present at 72.6% of ALJ hearings, and non-attorneys were present at 13.8%. See SSAB DATA, *supra* note 29, at 60 fig. 55 (“Cases with Representation at ALJ Hearings—Fiscal Years 1977-2010.”).

189. See *Statistics on Title II Direct Payments*, *supra* note 170.

190. See *id.*

191. See SSAB DATA, *supra* note 29, at 60 fig. 55 (“Cases with Representation at ALJ Hearings—Fiscal Years 1977-2010.”).

While this data is only current through 2010, it is likely that the volume of attorneys has continued to decline as that of NARs has increased. As discussed in Part III.B.3, the passage of the 2010 Act, making the eligible NAR program permanent, has led to the involvement of profit-seeking entities like private equity companies participating in the field; where such participation exists, the use of eligible NARs is essential.

### CONCLUSION

The Social Security disability system is a sinking ship. We need to plug as many holes as possible in order to protect those who truly need to be in the ship. Exactly 10,569,361 people have been awarded Social Security disability benefits from the start of 2008 through the end of 2014.<sup>192</sup> If only 1% of those awards were achieved as a result of the policies outlined in this Comment, that would still represent a bill of \$31,708,083,000 over the period of benefits payment.<sup>193</sup>

SSA has made a significant change to its policy on the submission of adverse evidence with the 2015 Revisions. However, this change is still new, untested, and likely subject to further opposition. SSA should continue down the path started by the revisions, but it must now take steps to ensure that the new rule it created is followed.

The eligible NAR program should be ended, or at least altered, to place eligible NARs in a position lower than attorneys. Eligible NARs were created in response to a problem that did not exist: the absence of available representatives. Now, these eligible NARs are less qualified than attorneys practicing in the field, and they are more likely to perpetrate misconduct, yet they operate outside the scope of any likely discipline. Ending the program would simply end the problems caused by this representative class. One way to address the problem would be to reduce the fee payable to these representatives. If the fee cap were reduced below \$6000 for eligible NARs but remained the same for

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192. See *Benefits Awards by Type of Beneficiary*, SOC. SEC. ADMIN., <http://www.ssa.gov/OACT/ProgData/awards.html> (last visited Mar. 31, 2015).

193. Assuming the average beneficiary receives \$300,000 over the period of benefits payment. See CONN LAW FIRM CASE STUDY, *supra* note 12, at 5.

attorneys, NARs would be a less viable labor force for profiteering entities like private equity companies that employ them. This may slow or taper the influx of these representatives into the field while still encouraging attorney practice. However, such a response may actually increase eligible NAR practice by making them a more attractive representative option for claimants who generally rely on advertising in choosing a representative<sup>194</sup> and may be enticed by the lower fee, ignorant of the actual cost of that lower fee. The only real solution to the problems of the eligible NAR class of representatives is to end the program creating the class.

Though in this Comment I have painted the situation of Social Security disability as dire and the system as dying, I believe that reformation of the two problematic policies addressed in this Comment represent a cost-effective way to start righting the ship. Therefore, I end this Comment with the same sentiment of the fund's Board of Trustees from their recent report, which outlined the system's imminent financial shortfall: "With informed discussion, creative thinking, and timely legislative action, Social Security can continue to protect future generations."<sup>195</sup>

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194. Notably, the highest paid Social Security disability firm, which also relies on eligible NARs as a labor force and is owned by a private equity company, spent "more than \$20 million on TV ads" in 2010. Paletta & Searcey, *supra* note 64.

195. 2013 BOARD OF TRUSTEES REPORT, *supra* note 4, at 5.