Comments of the
Association of Administrative Law Judges
International Federation of Professional And Technical Engineers,
AFL-CIO (Judicial Council 1)

Regarding
Social Security Administration
Notice of Proposed Rulemaking

"Revisions to Rules of Conduct and Standards
Of Responsibility for Appointed Representatives"

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The Association of Administrative Law Judges ("AALJ"), IFPTE, AFL-CIO (Judicial Council 1) submits the following comments in response to the Social Security Administration's Notice of Proposed Rule Making for **"Revisions to Rules of Conduct and Standards of Responsibility for Appointed Representatives".**

AALJ/IFPTE is the exclusive bargaining representative for approximately 1,600 federal non-supervisory administrative law judges ("ALJs") who serve with the Social Security Administration ("SSA").

On August 16, 2016, SSA announced a proposal:

> (1) "to revise our rules of conduct and standards of responsibility for representatives" and
>
> (2) "to update and clarify procedures we use when we bring charges against a representative for violating our rules of conduct and standards of responsibility for representatives." 81 FR 54520.

SSA's announced purpose was: (1) "to better protect the integrity of our administrative process" and (2) [to] "further clarify representatives' currently existing responsibilities in their conduct with us." 81 FR 54520. "We seek to ensure that our rules of conduct and standards of responsibility are clearer as a whole and directly address a broader range of inappropriate conduct." 81 FR 54520.

Specifically, SSA observed that "To provide the best possible service to the public," representatives must "conduct business before us ethically, and conscientiously assist their

non-attorney representative, to file a joint appearance (Form 1696) with the agency and would also require the client to agree in writing to such joint representation.

This change, if adopted, would further the agency's interest in ensuring ethical, knowledgeable, skilled, and well-prepared representation of clients by non-attorney representatives with a presumption that such representatives will have, or have access to by the fact of their working under the direction of a qualified attorney representative, such knowledge of the applicable provisions of the Act, regulations, rulings and court precedent that they can effectively, efficiently and in compliance with Agency policy and rules of hearing procedure present their client's case.

Left unchanged, the adjudicatory scheme as pertaining to representation, will be two-tiered, separate and unequal. ***True advocacy will be skewed in favor of claimants who retain licensed attorneys****. The agency goal of having a full and fair record of evidence in each and every case before a decision is made will not be realized as fully in cases where a* ***non-attorney*** *appears because such* ***individuals may lack the skill sets or analytical tools*** *to comprehend or make inferences from documentation in the client's file at the time a request for hearing is filed that may bear on the question of what additional evidence may reasonably be expected to exist and the means for obtaining and submitting such existing evidence.*

This problem is compounded currently by the fact that the agency has not adopted a set of formal rules of hearing procedure. Were such rules adopted and if the rules included delegation of power to judges to issue mandatory prehearing orders and to exercise sanction power, the agency would cut the Gordian Knot it has tied for itself by its history of ineffective rule-making (including to a significant degree the current proposals as they apply to non-attorneys).

At the close of FY 2016, 1,122,014 cases remained pending before ODAR. 477,706 of those cases have been pending over 365 days. During FY 16, SSA processed a total of 644,953 fee agreements. Of those 100,243 (or 15.5%) were fee agreements tendered by non-attorney representatives. If this percentage is representative generally of the proportion of the cases pending before the agency at the hearing level where the representative is a non-attorney, that means that 174,391 pending cases have non-attorney representatives.

Does SSA believe that it truly lacks the power to un-do this Gordian Knot? Does it truly believe that a separate and unequal system of client representation is commensurate with program integrity, ethical conduct and properly managing limited agency resources?

Other comments concerning the NPRM.

Currently (and unchanged under the NPRM) § 404.1710, Authority of a representative, provides

> **§ 404.1710. Authority of a representative.**
>
> (a) *What a representative may do.* Your representative may, on your behalf—
> (1) Obtain information about your claim to the same extent that you are able to do;
> (2) Submit evidence;
> (3) Make statements about facts and law; and
> (4) Make any request or give any notice about the proceedings before us.
>
> (b) *What a representative may not do.* A representative may not sign an application on behalf of a claimant for rights or benefits under title II of the Act unless authorized to do so under § 404.612.

The wording of § 404.1710(a) is deficient and misleading insofar as it purports to define a representative's authority as being wholly permissive ("may"). This section should be revised and harmonized with the balance of the other Rules of Conduct to signal not only what a representative "may" do but also what a representative "shall" do.

Conclusion

Thank you for the opportunity for commenting on your proposal. We look forward to working with SSA in meeting and overcoming the current challenges as well as those that lie ahead.

Dated: October 16, 2016

Respectfully submitted, on behalf of the
AALJ National Executive Board by

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