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# PROFESSIONAL RESPONSIBILITY AND SOCIAL SECURITY REPRESENTATION: THE MYTH OF THE STATE-BAR BAR TO COMPLIANCE WITH FEDERAL RULES ON PRODUCTION OF ADVERSE EVIDENCE

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## INTRODUCTION

The Social Security administrative law system is probably the largest adjudicatory system in the world.[1] Each year, Social Security administrative law judges (ALJs) decide hundreds of thousands of claims, the vast majority of which concern whether an individual applicant meets the disability standards for receiving benefits under one of two related programs: Social Security Disability Insurance and Supplemental Security Income.[2]

The nature of Social Security hearings is sui generis. Claimants may but need not be represented by counsel,[3] although most claimants are.[4] The Social Security ALJ who considers the claim is an attorney,[5] but there is no separate government attorney whose job is to advocate that the claimant does not meet the relevant standards.[6] The Supreme Court has referred to Social Security hearings as nonadversarial,[7] although that characterization may often be more aspirational than accurate.

The unique nature of these hearings gives rise to a multitude of complex ethical issues concerning the conduct of representatives and ALJs.[8] The most contentious issue is whether and to what extent claimants' representatives are obligated to produce medical evidence obtained in the course of developing a case that appears to be adverse to their clients' claims. Various state and local bar organizations have issued opinions of varying degrees of formality on this issue with conflicting results.[9]

In recent years, Congress has addressed the requirement that claimants and their representatives not withhold material facts

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1 *See* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS, at xi (1978)).

2 *See generally* Soc. Sec. Admin., Benefits for People with Disabilities, http://www.ssa.gov/disability (last visited Nov. 18, 2006) (providing general information on these two largest of the several federal programs that assist people with disabilities).

3 *See* Sims v. Apfel, 530 U.S. 103, 118 (2000) (Breyer, J., dissenting) ("[A] Social Security claimant is permitted his own counsel or other representative *if he wishes* . . . ." (emphasis added)).

4 *See infra* notes 57–58 and accompanying text.

5 *See* Soc. Sec. Admin., Legal Careers, http://www.ssa.gov/careers/legalcareers2.htm (last visited Nov. 18, 2006) ("[ALJ a]pplicants must have practiced as an attorney for at least 7 years.").

6 *See, e.g.*, *Sims*, 530 U.S. at 111 ("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 . . . ." (citation omitted)).

7 *Id.* at 110–11 ("Social Security proceedings are inquisitorial rather than adversarial.").

8 *See, e.g.*, Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Claimants?*, 90 CORNELL L. REV. 769 (2005) (examining the prevalence of general hias among ALJs and the inadequate hearing procedures for Social Security claims).

9 *See infra* Part III.

through three separate pieces of legislation: the Social Security Independence and Program Improvements Act of 1994,[10] the Foster Care Independence Act of 1999,[11] and, most recently, the Social Security Protection Act of 2004.[12] Additionally, the Social Security Administration (SSA) has addressed the issue through proposed and final regulations, as well as a formal ruling.[13] Once the relevant provisions of the Social Security Protection Act of 2004 take effect, hoth claimants and their representatives will have a duty to disclose material facts in Social Security proceedings when failure to do so would be misleading.[14]

Nevertheless, even with this much-needed clarity, difficult issues will remain. Will the law still permit a representative to withhold adverse evidence that he or she deems to be purely a matter of opinion rather than of fact? Will a representative be required to obtain, at the representative's or claimant's expense, preexisting information that will almost certainly be harmful to the claim? Will a representative who has decided to withdraw from a case have an obligation to file or withhold an adverse medical report before withdrawing? What obligation will a representative have if he or she obtains information after a victory for his or her client that strongly suggests that the case lacked merit?

These issues are further complicated by claims that the Social Security Protection Act of 2004 will conflict with state bar ethics rules. Indeed, many representatives assert that their obligations under state bar ethics rules will prevent them from complying with any federal mandate to produce adverse evidence.[15] This position, however, misapprehends the majority of state and local bar opinions and is at odds with the Model Rules of Professional Conduct and basic constitutional notions of supremacy.

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10 Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (codified as amended in scattered sections of 26 & 42 U.S.C.).

11 Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified as amended in scattered sections of 42 U.S.C.).

12 Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493 (codified as amended in scattered sections of 26 & 42 U.S.C.).

13 *See, e.g.*, 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2) (2006); Social Security Ruling 00–2p: Policy Interpretation Ruling Titles II and XVI: Evaluation of Claims Involving the Issue of "Similar Fault" in the Providing of Evidence, 65 Fed. Reg. 10,140, 10,140 (Feb. 25, 2000); Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Standards of Conduct for Claimant Representatives, 63 Fed. Reg. 41,404 (Aug. 4, 1998) (to be codified at 20 C.F.R. pts. 404, 416).

14 *See* Social Security Protection Act of 2004 § 201 (imposing a civil monetary penalty for withholding material facts).

15 *See, e.g., Commissioner of Social Security's Proposed Improvements to the Disability Determination Process: Hearing Before the Subcomm. on Human Resources & Subcomm. on Social Security of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Thomas D. Sutton, President, National Organization of Social Security Claimants' Representatives), *reprinted in* SOC. SECURITY F. (Nat'l Org. of Soc. Sec. Claimants' Representatives, Englewood Cliffs, N.J.), Sept. 2005, at 8–9.

Part I provides an overview of the Social Security administrative hearings process and the role of adverse evidence and describes how the process results in complex ethical issues for claimants' representatives. Part II provides a brief history of the shifting evidentiary responsibilities of Social Security representatives under federal statutes and regulations. Part III explores the debate among attorneys and bar associations regarding whether state bar ethics rules prohibit disclosure of adverse evidence in Social Security proceedings. Finally, the Article concludes that the Model Rules of Professional Conduct, which most states have adopted at least in part, and the Supremacy Clause prevent any such conflict between the states and the federal government. Accordingly, attorneys will have a duty to disclose adverse evidence as required by the Social Security Protection Act of 2004 once the relevant provisions take effect.

## I
## THE NATURE OF SOCIAL SECURITY HEARINGS AND THE ISSUE OF ADVERSE EVIDENCE

Every year, hundreds of thousands of claimants apply to SSA for Social Security Disability Insurance benefits under Title II of the Social Security Act,[16] for Supplemental Security Income under Title XVI of the Act,[17] or for both, which is known as a "concurrent claim."[18] Although SSA handles many types of claims that may involve an array of nondisability issues, including claims for retirement and survivors' benefits,[19] determining whether claimants meet the disability standards takes up the vast bulk of administrative time and resources.

A disability benefits claim is subject to a series of determinations that are not uniform nationwide. First, a claimant receives an initial determination on his or her disability benefits claim.[20] A state agency in the claimant's state of residence contracts with SSA to make this determination.[21] Normally, if a claim is rejected on an initial determination, the claimant may seek "reconsideration," a second administrative determination,[22] that the state agency also performs.[23] In recent years, however, SSA has experimented with eliminating the reconsid-

16 42 U.S.C. §§ 401–434 (2000).

17 *Id.* §§ 1381–1383f.

18 *See, e.g.*, Mazza v. Sec'y of Dep't of Health and Human Servs., 903 F.2d 953, 954 (3d Cir. 1990).

19 42 U.S.C. § 402 (2000).

20 *See* 20 C.F.R. §§ 404.901–404.905, 416.1400–416.1406 (2006).

21 *See id.* §§ 404.1610–404.1618, 416.903, 416.1010–416.1013.

22 *Id.* §§ 404.907, 416.1407. When, and if, the Commissioner's Disability Service Improvement (DSI) process goes into effect, the reconsideration step will be replaced with a review by a "Federal reviewing official." 20 C.F.R. §§ 405.201–405.230 (2006).

23 *See id.* §§ 404.917, 416.1415.

eration step. Instead, SSA has designated a few states, such as Pennsylvania, as "prototype" states,[24] in which claimants appeal an adverse initial determination directly to what otherwise would be the third level of administrative determination, a hearing before a Social Security ALJ.[25]

At the ALJ hearing, a claimant has the opportunity to appear before a legally trained decision maker, give testimony, present witnesses under oath, and cross-examine expert witnesses who may be called by the ALJ.[26] All testimony is recorded throughout the hearing.[27] Following the ALJ hearing, a claimant whose claim has been fully or partially denied may seek review from the Appeals Council,[28] or the Appeals Council may choose to review an ALJ decision on its own motion.[29] Typically, if the Appeals Council denies the claim, it simply adopts the ALJ decision as the final decision of the Commissioner of Social Security.[30]

The sheer number of ALJ decisions is staggering. According to SSA statistics, Social Security ALJs disposed of 561,461 claims in 2004 and 599,875 claims in 2005.[31] SSA's 2006 goal was to conduct 580,000 ALJ hearings.[32]

Although claimants may seek administrative review by the Appeals Council, the only formal hearing occurs at the ALJ stage.[33] Because there is no further hearing within the adjudicatory system (absent a remand),[34] the record created at the ALJ hearing is critical. Moreover, should the claimant appeal SSA's final administrative de-

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24 Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47,218, 47,218–19 (Aug. 30, 1999).

25 *See* 20 C.F.R. §§ 404.929–404.930, 416.1429–416.1430 (2006).

26 *See generally id.* §§ 404.929–404.961, 416.1429–416.1461 (including the various procedural provisions governing an ALJ hearing).

27 *Id.* § 404.951.

28 *See id.* §§ 404.967, 416.1467. The Commissioner's DSI process will replace the Appeals Council with a Decision Review Board. *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,437–38 (Mar. 31, 2006) (to be codified at 20 C.F.R. pt. 405). Claimants will not generally have a right to appeal an ALJ's denial of benefits to the Decision Review Board. *See id.* at 16,438.

29 20 C.F.R. § 404.969 (2006).

30 *See, e.g.*, McCrea v. Comm'r of Soc. Sec., 370 F.3d 357, 359 (3d Cir. 2004) ("After McCrea's request for review by the Appeals Council was denied, the decision of the ALJ became the final ruling of the Commissioner.").

31 OFFICE OF POLICY & OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2005 tbl.2.F9 (2006). SSA may have disposed of some of these claims without a hearing, as when an ALJ issues a favorable decision on the written record or dismisses a hearing request as having been untimely filed. *See* 20 C.F.R. §§ 404.948, 416.1448 (2006).

32 OFFICE OF CHIEF STRATEGIC OFFICER & OFFICE OF STRATEGIC MGMT., SOC. SEC. ADMIN., PERFORMANCE PLAN FOR FISCAL YEAR 2006 AND REVISED FINAL PERFORMANCE PLAN FOR FISCAL YEAR 2005 5 (2005), http://www.ssa.gov/performance/2006/FY2006PerfPlan.pdf.

33 20 C.F.R. §§ 404.967–404.982, 416.1466–416.1482 (2006).

34 20 C.F.R. § 416.1477 (2006).

nial to federal court, the Commissioner is required to file with the court the complete administrative record, including the hearing transcript, in order to facilitate judicial review.[35]

For a number of reasons, the ALJ hearing is often the most important stage of the adjudicatory process. First, although most successful claimants prevail at the initial determination level, ALJ decisions still account for over twenty-two percent of allowances nationally.[36] Second, in the event that an ALJ denies a claim and the claimant appeals, the record created at the ALJ hearing is subject to administrative and, possibly, judicial review.[37]

Despite the massive scope of the Social Security ALJ hearing system and its impact on hundreds of thousands of Americans annually,[38] the Supreme Court has addressed the nature of these hearings in detail only once, almost four decades ago, in *Richardson v. Perales*.[39] *Perales* primarily involved a claim that written medical reports admitted at a hearing did not constitute "substantial evidence" for purposes of judicial review of a benefits denial where the reports were contradicted by the live testimony of the claimant's treating physician and the claimant himself.[40] In rejecting this argument, the Court made a number of pronouncements that remain highly pertinent today. After a review of the statutory and regulatory framework, the Court concluded:

> [I]t is apparent that (a) the Congress granted the [Commissioner] the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the [ALJ's] discretion.[41]

The Court rejected two other claims raised by Perales. Perales attacked the ALJ's use of a medical adviser[42] at the hearing because

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35 *See* 42 U.S.C. § 405(g) (2000).

36 *See Disability Determinations and Appeals Fiscal Year 2004*, SOC. SECURITY F. No. (Nat'l Org. of Soc. Sec. Claimants' Representatives, Englewood Cliffs, N.J.), Apr. 2005, at 23.

37 *See supra* notes 33, 35 and accompanying text.

38 *See supra* note 32.

39 402 U.S. 389 (1971).

40 *See id.* at 399.

41 *Id.* at 400. At the time of *Perales*, "hearing examiners," not ALJs, conducted disability hearings at the direction of the Secretary of the (now defunct) Department of Health, Education, and Welfare. Now the Commissioner of the Social Security Administration has the responsibility for overseeing disability hearings. *See id.* at 389; Soc. Sec. Admin., SSA History, http://www.ssa.gov/history/orghist.html (last visited Nov. 18, 2006) (noting that the Department of Health, Education, and Welfare operated from 1953 to 1980). I have substituted the current titles in the above quotation and throughout this Article.

42 The term "medical expert" has replaced "medical adviser." *See* OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-2-5-32 (2005), http://www.ssa.gov/OP_Home/hallex/.

the adviser had never examined Perales and instead relied on the opinions of prior consultative examiners who were not present at the hearing to be cross-examined.[43] The Court, however, found "nothing 'reprehensible' in the practice."[44] Perales also challenged the constitutionality of the ALJ being an employee of the agency whose responsibility it is to gather evidence and, allegedly, "to make the Government's case as strong as possible."[45] Perales asserted that both the Administrative Procedure Act (APA) and due process required an "independent" ALJ.[46] Without deciding whether the APA applies to Social Security claims, the Court rejected Perales's "advocate-judge-multiple-hat suggestion."[47] According to the Court, SSA "operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary."[48] Although the Court did not rule on this particular issue, it did express concern that given the "vast workings of the social security administrative system,"[49] unnecessary procedural requirements could prove particularly burdensome.[50] The paramount issue, the Court concluded, is "the procedure's integrity and fundamental fairness," which it found to be undisturbed in this instance.[51] The same is true today: Any discussion of SSA's hearings procedures should be guided by the twin concerns of the procedures' integrity and fundamental fairness.

ALJs conduct Social Security hearings de novo.[52] Nevertheless, unlike the procedure in a typical civil trial, ALJs receive a great deal of information prior to hearings, including state agency files from the initial determination and reconsideration stages that are forwarded to the Office of Disability Adjudication and Review (ODAR), formerly the Office of Hearings and Appeals.[53] ALJs review the evidence prior to the hearing and have the explicit authority to grant a favorable

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43 *See Perales*, 402 U.S. at 395–96.

44 *Id.* at 408 (quoting the claimant).

45 *Id.* at 408–09 (quoting the claimant).

46 *Id.* at 409.

47 *Id.* at 410.

48 *Id.* at 403.

49 *Id.* at 403 n.2.

50 *See id.* at 406. Amusingly, the Court was concerned about the potential impact of its decision on SSA's "over 20,000 disability claim hearings annually," *id.*, a number almost thirty times less than today's docket. *See supra* note 32 and accompanying text.

51 *See Perales*, 402 U.S. at 410.

52 *See* 20 C.F.R. §§ 404.929, 416.1429 (2006); *see also* Soc. Sec. Admin., Information About Social Security's Office of Disability Adjudication and Review, http://www.ssa.gov/oha/about_odar.html (last visited Nov. 18, 2006) (describing the work of ALJs as conducting "impartial 'de novo' hearings and mak[ing] decisions on appealed determinations involving retirement, survivors, disability, and supplemental security income").

53 *See, e.g.*, *OHA Is No More: Meet ODAR*, SOC. SECURITY F. (Nat'l Org. of Soc. Sec. Claimants' Representatives, Englewood Cliffs, N.J.), Apr. 2006, at 1 (reporting SSA Commissioner Barnhart's April 3, 2006, announcement of the establishment of the Office of Disability Adjudication and Review (ODAR)); Soc. Sec. Admin., *supra* note 52.

decision to the claimant on the written record without holding an oral hearing.[54] Claimants, therefore, are expected to submit medical reports and other relevant evidence to ALJs in advance of hearings.[55] Indeed, in March 2006, the Commissioner issued rules to require that all evidence must be submitted at least five days prior to a hearing, with limited exceptions.[56]

Typically, a claimant engages an attorney prior to the ALJ hearing. In 2004, attorneys represented claimants at 72.6% of all ALJ hearings.[57] Additionally, nonattorney representatives were present at 13.8% of all ALJ hearings in 2004.[58] Perhaps the most critical part of a representative's job is identifying missing medical evidence and updating medical records to submit to the ALJ.[59] In addition to procuring and submitting his or her client's preexisting medical records, a representative often seeks the opinion of health care providers as to the nature and severity of the client's impairments. Accordingly, SSA has created two forms—one for physical impairments and one for mental impairments—so that providers can give Medical Source Statements of limitations.[60] It is common for an ALJ prior to a hearing to direct counsel to obtain Medical Source Statements from the claimant's medical care providers.

In many instances, an attorney will learn of other legal proceedings in which the client's medical condition was, or is, at issue. These secondary proceedings may include personal injury actions, medical malpractice claims, disability discrimination proceedings, long-term disability claims under the Employee Retirement Income Security Act (ERISA),[61] and, perhaps most commonly, workers' compensation

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54 *See* 20 C.F.R. §§ 404.948, 416.1448 (2006).

55 *See id.* §§ 404.935, 416.1435.

56 20 C.F.R. § 405.331 (2006) (stating the rationale for the new procedures as helping to "ensure that adjudicators receive evidence in a timely manner resulting in a more efficient determination process while protecting the rights of the claimant"). For now, this provision applies only in Social Security Region I, which consists of the New England states. *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,448–49 (Mar. 31, 2006).

57 *See* Soc. Sec. Admin., Profile of Participant Involvement at Hearings Held for Fiscal Year 2004, at 1 (Nov. 5, 2004) (on file with author). For a more detailed analysis of representation figures by type of claim, see SOC. SEC. ADVISORY BD., DISABILITY DECISION MAKING: DATA AND MATERIALS 78 (2006), http://www.ssab.gov/documents/chartbook.pdf.

58 *See* Soc. Sec. Admin., *supra* note 57, at 1. In 2004, both an attorney and a nonattorney representative were present at 3.5% of all ALJ hearings. *See id.*

59 *Cf. Case Law Developments*, 2 MENTAL & PHYSICAL DISABILITY L. REP. 16, 28 (2005) (noting the ALJ's heightened duty to develop the record in the absence of a nonattorney representative).

60 Office of Hearings & Appeals, Soc. Sec. Admin., Form HA-1151-U4, Medical Source Statement of Ability to Do Work-Related Activities (Physical) (on file with author); Office of Hearings & Appeals, Soc. Sec. Admin., Form HA-1152-U3, Medical Source Statement of Ability to Do Work-Related Activities (Mental) (on file with author).

61 29 U.S.C. §§ 1001–1461 (2000).

claims. Because these secondary proceedings are adversarial, they often include medical reports that minimize the seriousness of the claimant's medical conditions. In the context of ERISA claims, the Supreme Court has acknowledged this problem: "Nor do we question the Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an incentive to make a finding of not disabled in order to save their employers money and to preserve their own consulting arrangements."[62]

Occasionally, an attorney representing a Social Security claimant also represents the claimant in one or more secondary legal matters, and, as a result, already has in his or her possession negative medical reports from an adverse source. But the attorney who becomes aware of an ancillary legal proceeding that he or she is not handling will also normally be able to obtain such reports, either with or without paying for them.

In an effort to build the case for disability, the zealous advocate is likely to communicate with one or more past or present health care providers to request a report that documents his or her client's condition(s), provides medical findings, and lists the type and severity of any exertional or nonexertional impairments.[63] Furthermore, the request may ask the provider to express an opinion as to whether the claimant has a condition that meets or equals one of the enumerated impairments found in SSA's Listing of Impairments.[64] If the ALJ finds that a claimant who is not working meets a listed impairment or has its equivalent, the claimant must be found to be disabled.[65] Often the attorney's request will be accompanied by a residual functional capacities form for the treatment provider to fill out and return with the report. Not surprisingly, the more treatment providers the attorney asks for reports, the more likely it is that one or more of the responses will contain matter that is less than helpful or outright harmful to the claim.

These scenarios give rise to a host of ethical issues. Chief among them is whether an attorney who possesses, or has the ability to obtain, reports or records that include material deleterious to the claim (a) must submit that material to the ALJ, (b) may submit that material to the ALJ, or (c) is precluded from submitting that material to the

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62 Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832 (2003).

63 *See* 20 C.F.R. § 404.1569a (2006) (defining what constitutes both "exertional" and "non-exertional" impairments in Social Security claims).

64 *See, e.g.*, Soc. Sec. Admin., Listing of Impairments - Adult Listings (Part A), http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm (last visited Nov. 18, 2006) (detailing the categories of adult disabilities that qualify for Social Security benefits).

65 *See* 20 C.F.R. §§ 404, subpt. P, app. 1, 416.925 (2006); *see also* Bowen v. Yuckert, 482 U.S. 137, 141 (1987) ("If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled.").

ALJ.[66] SSA and Congress have addressed this issue repeatedly over the last decade but have failed to create consistency within the law.

## II
## THE FEDERAL STATUTORY AND REGULATORY FRAMEWORK REGARDING EVIDENTIARY RESPONSIBILITIES IN SOCIAL SECURITY PROCEEDINGS: A HISTORICAL PROGRESSION

### A. The Social Security Independence and Program Improvements Act of 1994

In the 1994 statute separating SSA from the Department of Health and Human Services, Congress provided that civil monetary penalties would apply for making false and misleading representations during Social Security proceedings:

> *Any 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 or the amount of—
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> (A) monthly insurance benefits under title II, or
>
> (B) benefits or payments under title XVI,
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> *that the person knows or should know is false or misleading or knows or should know omits a material fact or makes such a statement with knowing disregard for the truth* shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than $5,000 for each such statement or representation. Such person also shall be subject to an assessment, in lieu of damages sustained by the United States because of such statement or representation, of not more than twice the amount of benefits or payments paid as a result of such a statement or representation. In addition, the Secretary may make a determination in the same proceeding to exclude, as provided in section 1128, such a person who is a medical provider or physician from participation in the programs under title XVIII and to direct the appropriate State agency to exclude the person from participation in any State health care program permanently or for such period as the Secretary determines.

66 *See, e.g.*, Mason Hogan, *Current Ethical Issues in Social Security Disability Practice*, *in* 2 ASS'N TRIAL LAW. AM. ANN. CONVENTION REFERENCE MATERIALS 2775, 2775 (2000) ("There has always been a tension in Social Security Disability practice between the advocate's duty of candor to the tribunal and his or her duty to represent his or her client zealously. Specifically, this conflict has arisen when the advocate is in possession of evidence which would be harmful to the client's claim.").

> (2) 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.*[67]

It is at least arguable that a representative violates this provision if he or she submits favorable evidence to an ALJ but withholds other evidence that he or she deems unfavorable to the claim.

### B. Social Security Administration Rules of Conduct for Representatives

In 1998, SSA promulgated "[r]ules of conduct and standards of responsibility for representatives" that apply to "[a]ll attorneys or other persons acting on behalf of a party seeking a statutory right or benefit."[68] Unfortunately, the rules are a model of ambiguity with regard to any duty to disclose adverse evidence.

Advocates who insist that there is no such duty point to the following language in the rules spelling out a representative's affirmative duties:

> *A representative shall,* in conformity with the regulations setting forth our existing duties and responsibilities and those of claimants . . . :
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> (1) *Act 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 . . . .*[69]

Surely, these advocates argue, this language makes clear that the duty to produce evidence encompasses only evidence that *supports* the claim of disability. This argument is buttressed by the fact that the Notice of Proposed Rulemaking (NPRM) that led to the promulgation of the rules contained language that would have imposed broad affirmative obligations on representatives.[70] The proposed affirmative duties would have mandated, inter alia, that a representative:

> (i) Provide, upon request, identification of all known medical sources, updated information regarding medical treatment, new or corrected information regarding work activity, other specifically identified information pertaining to the claimed right or benefit, or

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67 Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, 1510 (codified with some differences in language at 42 U.S.C. § 1320a-8 (2000)) (emphasis added).

68 20 C.F.R. §§ 404.1740(a)(1), 416.1540(a)(1) (2006).

69 *Id.* §§ 404.1740(b), 416.1540(b) (2006) (emphasis added).

70 *See* Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Standards of Conduct for Claimant Representatives, 62 Fed. Reg. 352, 359 (proposed Jan. 3, 1997).

> notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material; and
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> (ii) Provide, upon request, all evidence and documentation pertaining to specifically identified issues which the representative or the claimant either has within his or her possession or may readily obtain, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material . . . .[71]

SSA dropped these provisions when it adopted its final version of the rules. Its explanation for doing so, however, was nebulous:

> Based on the public comments we received, we deleted proposed §§ 404.1740(b)(2)(i) and 416.1540(b)(2)(i), which would have required that the representative provide, upon request, information regarding the claimant's medical treatment, vocational factors or other specifically identified matters, or provide notification that the claimant does not consent to release the information. We also deleted proposed §§ 404.1740(b)(2)(ii) and 416.1540(b)(2)(ii), which would have required that the representative provide, upon request, all evidence and documentation pertaining to specifically identified issues which the representative or claimant already has or may readily obtain. We deleted these proposed requirements to more closely track the existing regulatory requirements that explain a claimant's duties and responsibilities with regard to submitting evidence and providing information.[72]

On the other hand, the rules as promulgated do contain some language that suggests a duty of full disclosure: "All representatives shall be forthright in their dealings with us and with the claimant and shall comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards, which are intended to ensure orderly and fair presentation of evidence and argument."[73] Arguably, a representative who fails to disclose adverse evidence is not being "forthright." Moreover, the rules impose the further obligation to do the following:

> Assist the claimant in complying, as soon as practicable, with our requests for information or evidence at any stage of the administrative decisionmaking process in his or her claim. In disability and blindness claims, this includes the obligation . . . to assist the claimant in providing, upon our request, evidence about:
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> . . . .

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71 *Id.*

72 Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Standards of Conduct for Claimant Representatives, 63 Fed. Reg. 41,404, 41,406 (Aug. 4, 1998).

73 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2) (2006).

(vi) Any other factors showing how the claimant's impairment(s) affects his or her ability to work . . . .[74]

This duty to assist compliance suggests that a representative must satisfy an ALJ's request to produce all evidence in the case, irrespective of whether that evidence supports or weakens the claim. Finally, and more generally, the rules state that a representative shall not "[k]nowingly make or present, or participate in the making or presentation of, false or misleading oral or written statements, assertions or representations about a material fact or law concerning a matter within our jurisdiction . . . ."[75] This, of course, raises the question whether withholding adverse evidence would violate this prohibition. Consider, for example, the not unusual situation in which a physician sends a representative both a written report and a residual functional capacities form, and the language in one of these documents supports the disability claim more than the language in the other. If the representative submits only the more supportive of the two documents to the ALJ, has he or she violated this prohibition?

### C. The Foster Care Independence Act of 1999

Five years after creating the independent SSA,[76] Congress revisited the integrity of Social Security proceedings. Section 207 of the Foster Care Independence Act of 1999 added another section to the Social Security Act imposing additional penalties for false and misleading statements:

> (a) IN GENERAL.—*Any person 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 or the amount of—
>
> (1) monthly insurance benefits under title II; or
>
> (2) benefits or payments under title XVI,
>
> *that the person knows or should know is false or misleading or knows or should know omits a material fact* or who makes such a statement with knowing disregard for the truth shall be subject to, in addition to any other penalties that may be prescribed by law, a penalty described in subsection (b) to be imposed by the Commissioner of Social Security.
>
> (b) PENALTY.— The penalty described in this subsection is—
>
> (1) nonpayment of benefits under title II that would otherwise be payable to the person; and
>
> (2) ineligibility for cash benefits under title XVI,
>
> for each month that begins during the applicable period described in subsection (c).

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74 *Id.* §§ 404.1740(b)(2), 416.1540(b)(2) (2006).

75 *Id.* §§ 404.1740(c)(3), 416.1540(c)(3) (2006).

76 *See supra* Part II.B.

> (c) DURATION OF PENALTY.—The duration of the applicable period, with respect to a determination by the Commissioner under subsection (a) that a person has engaged in conduct described in subsection (a), shall be—
>
> (1) six consecutive months, in the case of the first such determination with respect to the person;
>
> (2) twelve consecutive months, in the case of the second such determination with respect to the person; and
>
> (3) twenty-four consecutive months, in the case of the third or subsequent such determination with respect to the person.[77]

Thus, by adding periods of ineligibility for benefits to which the claimant would otherwise be entitled, this provision significantly increased the penalties contained in the Social Security Independence and Program Improvements Act of 1994.

### D. Social Security Ruling 00-2p: Fraud and Similar Fault

The Social Security Act declares:

> The Commissioner of Social Security shall immediately redetermine the entitlement of individuals to monthly insurance benefits . . . if there is reason to believe that fraud or similar fault was involved in the application of the individual for such benefits. . . . When redetermining the entitlement, or making an initial determination of entitlement, of an individual . . . the Commissioner . . . shall disregard any evidence if there is reason to believe that fraud or similar fault was involved in the providing of such evidence.[78]

The statute then goes on to define similar fault as follows:

> [S]imilar fault is involved with respect to a determination if—
>
> (i) an incorrect or incomplete statement that is material to the determination is knowingly made; or
>
> (ii) information that is material to the determination is knowingly concealed.[79]

Issued by SSA in February 2000, Social Security Ruling (SSR) 00-2p seeks to clarify this concept of "similar fault."[80] The ruling speci-

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77 Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 1129A, 113 Stat. 1822, 1837–38 (1999) (codified with some differences in language at 42 U.S.C.A. § 1320a–8(a)(1) (West 2006)) (emphasis added).

78 42 U.S.C. § 405(u)(1) (2000).

79 42 U.S.C. § 1383(e)(7)(B) (2000).

80 *See* Social Security Ruling 00–2p: Policy Interpretation Ruling Titles II and XVI: Evaluation of Claims Involving the Issue of "Similar Fault" in the Providing of Evidence, 65 Fed. Reg. 10,140, 10,140 (Feb. 25, 2000). Social Security rulings do not have the authority of regulations duly promulgated under the Administrative Procedure Act. *See* Heckler v. Edwards, 465 U.S. 870, 873 n.3 (1984) ("Once published, a ruling is binding on all components of the Social Security Administration in accordance with [20 C.F.R. pt. 422]. Rulings do not have the force and effect of the law or regulations but are to be relied upon as precedents in determining other cases where the facts are basically the same. A ruling may

fies that a finding of similar fault "can be made only if there is reason to believe, based on a preponderance of the evidence, that the person committing the fault knew that the evidence provided was false *or incomplete.* A 'similar fault' finding cannot be based on speculation or suspicion."[81] Moreover, "a finding of 'fraud' made as part of a criminal prosecution" is *not* a requirement of finding "similar fault."[82]

E. The Social Security Protection Act of 2004

Congress revisited these issues yet again in the Social Security Protection Act (SSPA) of 2004.[83] Section 201 of the SSPA amends the civil penalties provisions enacted in the Foster Care Independence Act of 1999, which penalized a declarant for making a statement or representation of a material fact that he or she knew or should have known omitted a material fact.[84] The SSPA adds that a declarant will face a civil monetary penalty if he or she:

> (C) 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* . . . ."[85]

The Ways and Means Committee report accompanying the bill that became the SSPA explains in pertinent part:

> Currently the SSA cannot impose civil monetary penalties and assessments on a person who should have come forward to notify the SSA of changed circumstances that affect eligibility or benefit amount, but did not. To be subject to civil monetary penalties and assessments under the current law, an individual must have made a statement that omitted a material fact or was false or misleading. Examples of the types of individuals intended to be covered under this amendment to Section 1129 and 1129A *include (but are not limited to):* (1) an individual who has a joint bank account with a benefi-

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be superseded, modified, or revoked by later legislation, regulations, court decisions or rulings.").

81 Social Security Ruling 00–2p: Policy Interpretation Ruling Titles II and XVI: Evaluation of Claims Involving the Issue of "Similar Fault" in the Providing of Evidence, 65 Fed. Reg. at 10,141 (emphasis added).

82 *Id.*

83 Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493–541 (2004) (codified at 42 U.S.C.A. § 1320a–8(a)(1) (West 2006)).

84 *See* Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 1129A, 113 Stat. 1822, 1837–38 (1999) (codified with some differences in language at 42 U.S.C.A. § 1320a–8(a)(1) (West 2006)).

85 Social Security Protection Act of 2004 § 201 (emphasis added).

> ciary in which the SSA direct deposited the beneficiary's Social Security checks; upon the death of the beneficiary, this individual fails to advise the SSA of the beneficiary's death, instead spending the proceeds from the deceased beneficiary's Social Security checks; and (2) an individual who is receiving benefits under one SSN while working under another SSN.[86]

A classic example of fraudulent failure to report a change in circumstances is the failure of a benefits recipient to report a return to work. Congress was concerned, however, that SSA would mistakenly accuse benefits recipients of fraudulently failing to report a change in circumstances.[87] SSA has too frequently failed to record recipients' reports of changed circumstances—especially those made to SSA's toll-free phone number—or to include the new information in recipients' files.[88] To combat this problem, Congress tied the effective date of § 201 of the SSPA to SSA's implementation of § 202 of the SSPA,[89] which requires SSA to issue a receipt each time a disabled beneficiary reports a change in status.[90] Congress mandated that this receipt system be created no later than one year after March 2, 2004, the SSPA's date of enactment.[91] SSA did not, however, issue proposed rules implementing § 202 until October 18, 2005,[92] and did not finalize those rules until November 17, 2006, effective December 18, 2006.[93]

SSA published two sets of proposed rules implementing § 201 of the SSPA. SSA's Office of Inspector General (OIG) authored the first set, which was published as proposed in the Federal Register on March 23, 2005,[94] and in final form on May 17, 2006.[95] The final regulations track the statutory language of § 201 and authorize the OIG to impose a penalty or assessment on any person who the OIG determines to have:

> Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the

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86 H.R. REP. No. 108-46, at 33 (2003).

87 *See supra* text accompanying note 77.

88 See H.R. REP. No. 108-46, at 34.

89 Social Security Protection Act of 2004 § 201(d).

90 *Id.*

91 42 U.S.C.A. § 902 (West 2006).

92 *See* Rules for the Issuance of Work Report Receipts, 70 Fed. Reg. 60,463, 60,463–68 (proposed Oct. 18, 2005) (to be codified at 20 C.F.R. pts. 404, 416).

93 *See* Rules for the Issuance of Work Report Receipts, 71 Fed. Reg. 66,860 (Nov. 17, 2006) (to be codified at 20 C.F.R. pts. 404, 416).

94 Civil Monetary Penalties, Assessments and Recommended Exclusions, 70 Fed. Reg. 14,603, 14,603–07 (proposed Mar. 23, 2005) (to be codified at 20 C.F.R. pts. 404, 416).

95 Civil Monetary Penalties, Assessments and Recommended Exclusions, 71 Fed. Reg. 28,574, 28,574–81 (May 17, 2006) (to be codified at 20 C.F.R. pt. 498).

> person knew or should have known was material for such use and that such omission or withholding was false or misleading.[96]

Although the above regulation is final, it will not become effective until SSA implements the centralized computer file required by § 202 of the SSPA.[97]

SSA published a second set of proposed rules implementing § 201 of the SSPA in October 2005.[98] The language of these proposed rules, like the first set, tracks the statutory language of § 201:

> We propose to amend §§ 404.459 and 416.1340 of our regulations by revising the heading and paragraphs (a) and (e) of each section to reflect that, as a result of section 201 of the SSPA, an individual will be subject to the penalty if he or she withholds information that is material for use in determining any right to or the amount of monthly benefits . . . if the person knows, or should know, that the withholding of the information is misleading.[99]

### F. The Commissioner's July 2005 Administrative Redesign Proposals

On July 27, 2005, following lengthy consideration, SSA Commissioner Jo Anne Barnhart formally proposed extensive changes to the administrative system for adjudicating Social Security claims.[100] Among the proposed changes was an obligation to submit all evidence:

> 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.[101]

Significantly, Commissioner Barnhart's proposed rule encompassed "*all* evidence available," not just evidence concerning "material facts."[102] Under SSA's regulations, the term "evidence" is very

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96 20 C.F.R. § 498.102(a)(3) (2006).

97 Civil Monetary Penalties, Assessments and Recommended Exclusions, 71 Fed. Reg. 28,574, 28,575 (May 17, 2006).

98 Representative Payment Policies and Administrative Procedure for Imposing Penalties for False or Misleading Statements or Withholding of Information, 70 Fed. Reg. 60,251, 60,251–56 (proposed Oct. 17, 2005) (to be codified at 20 C.F.R. pts. 404, 408 & 416).

99 *Id.* at 60,252.

100 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590, 43,590–624 (proposed July 27, 2005) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

101 *Id.* at 43,602.

102 *Id.*

broad.[103] It includes medical opinions, statements the claimant or others made about the claimant's impairments, and "information" from medical and nonmedical sources.[104] Due in part to its use of the word "evidence," the proposed rule was highly controversial.[105]

On September 27, 2005, the House Ways and Means Subcommittees on Social Security and Human Resources held a hearing on Commissioner Barnhart's July 27, 2005, NPRM.[106] Panelists challenged numerous aspects of the Commissioner's proposed regulations, including, predictably, the requirement that claimants produce adverse evidence.[107] On behalf of the National Organization of Social Security Claimants' Representatives, its then-president, Thomas D. Sutton, testified:

> The NPRM requires the claimant to submit all evidence "available to you." This includes "evidence that you consider to be unfavorable to your claim." The preface clarifies that this includes adverse evidence, i.e., evidence that "might undermine" or "appear contrary" to the claimant's allegations.
>
> . . . .
>
> For attorney representatives, we have serious concerns that this requirement may conflict with state bar ethics rules which limit the submission of evidence that could be considered adverse to a client. This proposed requirement seems to misunderstand the general duties and obligations of attorneys. In every state, attorney representatives are currently bound by state bar rules that forbid an attorney from engaging in professional conduct involving disbonesty, fraud, deceit, or willful misrepresentation. An attorney who violates this rule is subject to disciplinary proceedings and possible sanction by the state bar. Existing bar rules in every state also require an attorney to zealously advocate on behalf of a client. An attorney who violates this rule is also subject to sanction by the state bar.[108]

In written comments to Commissioner Barnhart, then-American Bar Association (ABA) President Michael S. Greco echoed Sutton's concerns:

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103 *See* 20 C.F.R. §§ 404.1512(b), 416.912(b) (2006) ("Evidence is anything you or anyone else submits to us or that we obtain that relates to your claim.").

104 *See id.*

105 *See infra* text accompanying notes 108–09.

106 *See Commissioner of Social Security's Proposed Improvements to the Disability Determination Process: Hearing Before the Subcomm. on Human Resources & Subcomm. on Social Security of the H. Comm. on Ways and Means*, 109th Cong. (2005), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=442&comm=4.

107 *See, e.g., id.* (statement of Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities).

108 *Id.* (statement of Thomas D. Sutton, President, National Organization of Social Security Claimants' Representatives), *reprinted in* SOC. SECURITY F. No. (Nat'l Org. of Soc. Sec. Claimants' Representatives, Englewood Cliffs, N.J.), Sept. 2005, at 8–9.

> [T]he current proposals are directed to claimants and appear designed to circumvent the issue of ethical conflicts for lawyers. However, because lawyers step into the shoes of their clients, the proposed rules would continue to present the same ethical dilemmas for duly licensed lawyers and the legal assistants who work under their supervision. Proposed § 405.331 states: "You must submit with your request for hearing any evidence that you have available to you." Proposed § 404.1512(c) and § 416.912(c) would require a claimant to submit ". . . evidence that you consider to be unfavorable to your claim . . . ." The preface makes clear that claimants would be required to submit all available evidence that supports the claim, as well as all available evidence that might undermine or appear contrary to the claim. 70 Fed. Reg. 43602. Like the proposals of 1995 and 1997, this requirement 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.
>
> 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.[109]

### G. The Commissioner's Disability Service Improvement Process, March 2006

In March 2006, the Commissioner promulgated final regulations based on the July 2005 NPRM, called the Disability Service Improvement (DSI) process, which began to take effect August 1, 2006.[110] Pertinently, the Commissioner modified the proposed language regarding the duty to submit adverse evidence to read as follows: "You must provide evidence, without redaction, showing how your impair-

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109 Letter from Michael S. Greco, President, ABA, to the Honorable Jo Anne Barnhart, Comm'r, Soc. Sec. Admin. (Sept. 27, 2005) (on file with author).

110 Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,424–62 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422). While the new regulations will affect the overall disability determination process, the ALJ hearing will remain an important step for many claimants. *See id.* at 16,428, 16,436–37 (describing the continuing role of the ALJ under the new DSI process). Moreover, DSI will initially take effect only in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. *Id.* at 16,440–41.

ment(s) affects your functioning during the time you say that you are disabled, and any other information that we need to decide your claim."[111]

The explanation for this change in language provides little information:

> The proposed rule provided that claimants must submit all available evidence that supports the claim, even evidence that might undermine or appear contrary to the allegations. The final rule states that claimants must provide evidence, without redaction, showing how their impairments affect functioning during the time they say they are disabled.[112]

The final rule does not define "redaction."[113] Nor does the final rule indicate how it will affect the implementation of § 201 of the SSPA.[114]

## III
## STATE BAR RULES AND OPINIONS

### A. American Bar Association Model Rules of Professional Conduct

Many attorneys assert that state bar ethics rules forbid them from submitting evidence adverse to their clients' disability claims.[115] As most states have adopted some version of the ABA's Model Rules of Professional Conduct (Model Rules),[116] these attorneys usually point to the confidentiality provisions in their state's version of Model Rule 1.6.[117] Model Rule 1.6 provides:

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111 *Id.* at 16,444, 16,459.

112 *Id.* at 16,428.

113 *See id.* at 16,444, 16,459. The failure to define "redaction" is troubling. Unquestionably, an attorney who submits altered evidence is subject to disciplinary proceedings as well as possible criminal proceedings. *See, e.g., In re* Watkins, 656 So. 2d 984, 984–87 (La. 1995) (suspending from legal practice for two years an attorney who had, among other bad acts, submitted false evidence to SSA). On the other hand, it is common for attorneys not to submit—and for ALJs not to want—everything in a claimant's medical record. Often, the medical record will include matters that are irrelevant to the claim, such as treatment for temporary conditions that are not part of the asserted basis for disability, insurance information, and release forms. When a claimant has been hospitalized, for instance, it is common for his or her representative to obtain and submit only some of the records, such as admission and discharge summaries and operation records, and withhold other lengthy documents such as nursing notes.

114 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,424–62.

115 *See, e.g., supra* text accompanying notes 108–09.

116 *See* E. Norman Veasey, *Introduction* to MODEL RULES OF PROF'L CONDUCT (2006), *available at* http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html (noting that as of August 2002, forty-two states and the District of Columbia had adopted some form of the Model Rules).

117 *See, e.g., supra* text accompanying notes 108–09.

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (6) to comply with other law or a court order.[118]

This last exception to nondisclosure, wherein an attorney reasonably believes disclosure is necessary "to comply with other law or a court order," was added to the Model Rules in 2002 as part of a comprehensive revision of the ethics rules.[119] Of course, the fact that the ABA has changed a Model Rule does not mean that specific states will adopt the revision.

Another specific exception to confidentiality appears in Model Rule 3.3 that provides: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."[120] In light of this instruction, there has been significant debate regarding whether a Social Security ALJ hearing constitutes an ex parte proceeding, since there is no opposing counsel present to represent SSA and argue against a finding of disability.[121]

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118 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006).

119 *See* AM. BAR. ASS'N, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROF'L CONDUCT 17 (2003) (indicating revisions to Model Rule 1.6).

120 MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2006).

121 *See, e.g.*, Sims v. Apfel, 530 U.S. 103, 111 (2000) ("The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council.").

Finally, the Model Rules contain a choice of law provision in Model Rule 8.5(b) that reiterates the primacy of the rules of the forum:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.[122]

### B. Application of State Ethics Rules

A number of state bars (and, in one instance, a county bar) have issued opinions applying their bar rules to the question of whether an attorney has a duty to produce adverse evidence in a Social Security proceeding.

As a preliminary matter, there is no real dispute that an attoruey who comes into possession of evidence indicating that a client is committing fraud has a duty to take corrective action,[123] as the comments of Mr. Sutton[124] and Mr. Greco[125] indicate. For example, an attorney may learn that his or her client made misrepresentations in an affidavit to SSA, or falsely testified that he was not working during a certain period when, in fact, he was.

The Illinois State Bar Association's Advisory Opinion on Professional Conduct No. 99-04 addressed the duties of an attorney who learns that a client has failed to disclose assets, resources, or income—information that affects financial eligibility—in the client's application for Supplemental Security Income.[126] The opinion concluded

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122 MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2006).

123 *Id.* R. 3.3(b).

124 *See supra* text accompanying note 108.

125 *See supra* text accompanying note 109.

126 Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. on Prof'l Conduct 99-04 (1999), [2001 Transfer Binder] 5 Nat'l Rep. on Legal Ethics & Prof. Resp. (University Publications of America) IL:OPINIONS:22. The Maryland State Bar Association Committee on Ethics has issued a similar opinion concerning a lawyer who came into possession of evidence establishing that his client, a child receiving Social Security survivor's benefits, was not in fact the child of the deceased wage earner. Md. State Bar Ass'n Comm. on Ethics, Op. 95-44 (1995) (on file with author) (stating that if the "acceptance [of benefits]

that the attorney must disclose the hidden financial information to the tribunal (here, SSA) to "prevent assisting the client in perpetrating a fraudulent act upon the tribunal."[127] The attorney should first seek to persuade the client to rectify the situation, but if the client refuses, the attorney must disclose the fraud.[128] Moreover, withdrawal by the attorney "does not obviate or supplant the duty of disclosure. . . . The very act of withdrawal without disclosure might or could be construed as conduct involving dishonesty, fraud, deceit or misrepresentation and which is prejudicial to the administration of justice."[129] The Maryland State Bar Association Committee on Ethics has issued a similar opinion relating to a situation in which the lawyer has come into possession of evidence that a child receiving Social Security survivors' benefits is not, in fact, the child of the deceased wage earner.[130]

Most cases involving adverse evidence are, however, not straightforward fraud cases. Rather, they usually involve medical reports combining "facts" and "opinions" (often a difficult distinction to make) that suggest that a client is less impaired than he or she claims. Not surprisingly, if a representative asks more than one medical provider to assess a client's residual functional capacity to perform various tasks, the representative is likely to receive answers that conflict. And, as the Supreme Court has noted, if one or more of these medical sources is employed by, or under contract to, an entity with a financial interest adverse to the client, the probability of disagreement is significantly heightened.[131]

If Social Security proceedings are ex parte within the meaning of Model Rule 3.3(d), then a representative clearly must produce all adverse "material facts" in any jurisdiction that has adopted that rule.[132] However, two state bar opinions from states that have adopted Model Rule 3.3(d) have addressed this question and have arrived at opposite conclusions.

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would indeed constitute a criminal or fraudulent act, Rule 3.3(a)(2) affirmatively requires [the lawyer] to disclose such facts to the tribunal").

127 Ill. State Bar Ass'n Comm. on Prof'l Conduct, *supra* note 126, at IL:OPINIONS:28.

128 *Id.*

129 *Id.* at IL:OPINIONS:28–29.

130 *See* Md. State Bar Ass'n Comm. on Ethics, Op. 95-44, *supra* note 126.

131 *See* Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832 (2003) (acknowledging concerns "that physicians repeatedly retained by benefits plans may have an incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements"); *see also* Sridar V. Vasudevan & David L. Drury, *The Independent Medical Examination: Purpose and Process*, WIS. MED. J., Mar.–Apr. 1999 at 10, 10 ("Since the insurer selects the physician to accomplish the [Independent Medical Exam] and pays the physician a respectable amount for the service, there is indeed potential bias favoring the carrier.").

132 MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2006); *see supra* text accompanying note 121.

In July 1993, the Alabama State Bar advised:

> It is the opinion of the Disciplinary Commission that Rule 3.3(d) of the Rules of Professional Conduct of the Alabama State Bar applies to lawyers participating in hearings before a Social Security Administrative Law Judge adjudicating Social Security disability, retirement and survivor claims. The term "tribunal" as used in this rule includes both courts and administrative proceedings.[133]

In January 1999, the North Carolina State Bar concluded that a Social Security disability hearing is not ex parte within the meaning of Model Rule 3.3(d), and therefore lawyers have no duty to produce adverse evidence.[134] The North Carolina State Bar reasoned:

> [A] Social Security disability hearing should be distinguished from an *ex parte* proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.[135]

Interestingly, the original North Carolina Proposed Formal Ethics Opinion on the subject, dated January 15, 1998, reached the opposite conclusion.[136] The proposed opinion concluded that a representative in possession of a letter opinion indicating that a treating physician believes the claimant is not disabled would be required under Model Rule 3.3(d) to submit the evidence to the ALJ because, the proposed opinion stated, the ALJ hearing is an ex parte proceeding.[137] In October 1998, without explanation, a revised proposed opinion replaced the original.[138] The Ethics Committee made no effort in either the revised proposed opinion or the final opinion to explain this change.[139] Likewise, no effort was made to address the Alabama opinion mandating production.[140]

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133 Ala. State Bar Ass'n Disciplinary Comm'n, Op. RO-93-06 (1993), *in* Robert W. Norris, *Opinions of the General Counsel*, ALA. LAW., July 1993, at 252, 252, *available at* http://www.alabar.org/ogc/fopDisplay.cfm?oneId=79.

134 N.C. State Bar, 98 Formal Ethics Op. 1 (1999), *reprinted in* THE NORTH CAROLINA STATE BAR LAWYER'S HANDBOOK 229 (2000).

135 *Id.* (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 678–79 (1986)).

136 *See* N.C. State Bar, Proposed 98 Formal Ethics Op. 1 (1998) (on file with author).

137 *See id.*

138 *See* N.C. State Bar, Revised Proposed 98 Formal Ethics Op. 1 (1998) (on file with author).

139 *See* N.C. State Bar, *supra* note 134; N.C. State Bar, *supra* note 138.

140 *See* N.C. State Bar, *supra* note 134; N.C. State Bar, *supra* note 138.

Those who argue that confidentiality rules prohibit attorneys from producing adverse evidence will find little support in the final North Carolina State Bar opinion, however. Although the opinion does not require disclosure, the bar urges the production of adverse evidence, stating that "it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight."[141]

In 1995, the Vermont Bar Association issued an opinion addressing whether an attorney representing a client with a Social Security disability benefits claim has a duty under Vermont's version of the Code of Professional Responsibility (the predecessor to the Model Rules of Professional Conduct) to submit medical opinion evidence that is inconsistent with his or her client's claim.[142] Although the opinion discusses the Social Security Act's provisions on fraud and similar fault at length, it contains a confusing disclaimer that "[i]t is not our role to interpret the statute."[143] The opinion continues:

> It is . . . competent and ethical advocacy for an attorney to review opinions rendered by consultants, including medical consultants, and if the opinions do not support the client's position, to reject them and seek out other opinions that do . . . . Where there is a difference among medical opinions it is an attorney's duty on behalf of a client . . . to reject some opinions while accepting others.[144]

The Vermont opinion adds a number of qualifications, however. For instance, the opinion applies only if "no direct request for production of such materials has been made by the Administrative Law Judge."[145] Moreover, the opinion strongly suggests that an attorney may have an obligation to disclose "harmful medical fact" evidence.[146] Additionally, an attorney must disclose the medical opinion evidence if he or she has no good faith basis for rejecting it.[147] Finally, if the medical opinion evidence contains "information [that] is material to a determination of benefits, the knowing concealment of the information would be a fraud on the tribunal charged with making the benefit

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141 N.C. State Bar, *supra* note 134.

142 *See* Vt. Bar Ass'n Prof'l Responsibility Comm., Advisory Ethics Op. 95-08 (1995), *available at* http://www.vtbar.org/ezstatic/data/vtbar/attorney_judicial_resources/advisory_ethics_opinions/1995/95-08.pdf. Vermont subsequently replaced its Code of Professional Responsibility with a version of the Model Rules. *See* VERMONT RULES OF PROF'L CONDUCT (1999), *available at* http://www.vermontjudiciary.org/PRB1.htm.

143 Vt. Bar Ass'n Prof'l Responsibility Comm., *supra* note 142.

144 *Id.* at 1–2.

145 *Id.* at 1.

146 *Id.* ("[W]e believe the statute does create disclosure obligations, but we do not believe that disclosure of harmful medical opinion evidence *necessarily* falls within the ambit of information that must be disclosed." (emphasis added)).

147 *See id.* at 2.

determination."[148] Notably, the opinion presumes that the attorney obtained the harmful medical opinion evidence from "medical consultants."[149] The opinion does not address a situation in which one of the claimant's past or present medical service providers has rendered a harmful opinion after treating the claimant.[150] The opinion concludes with this warning:

> Willful concealment of material information where there is a duty to disclose constitutes fraudulent and deceitful conduct prohibited by the code and an attorney must refrain from it and may not counsel his client in pursuing such conduct. Whether harmful medical evidence is material in any given case is a determination that the attorney must make on a case by case basis.[151]

In a thoughtful 1993 opinion, the New York County Lawyers' Association Committee on Professional Ethics addressed "whether a lawyer is obliged to produce all relevant medical information about the claimant in [the Social Security disability] process, including information obtained from the clients which may be detrimental to the clients' claims, if no request is made for the information."[152] Like the Vermont Bar Association's advisory ethics opinion, this opinion deals with an attorney's responsibility under a state version of the Code of Professional Responsibility rather than the Model Rules.[153] The New York County opinion emphasizes even more clearly than the Vermont opinion that it is not addressing an attorney's duties under the statute or regulations governing claims for Social Security benefits.[154] Rather, the opinion states a general rule: "If no law independently mandates disclosure, then nothing in the Code [of Professional Responsibility] requires a lawyer to volunteer evidence—even evidence relevant to the matter in issue—to a tribunal or other person before whom the lawyer appears on behalf of a client."[155] The opinion, however, adds several significant qualifications to this general rule. For example, the rule does not apply "if the administrative judge or officials . . . request such information."[156] In addition, "nothing in the

148 *Id.*

149 *Id.* at 1.

150 *Id.* at 1–2.

151 *Id.* at 2.

152 N.Y. County Law. Ass'n Comm. on Prof'l Ethics, *New York County Lawyers' Ethics Opinion: Question 698*, N.Y.L.J., Sept. 9, 1993, at 2.

153 *See id.* Unlike Vermont, New York is still a Code of Professional Responsibility state and has not yet adopted the Model Rules. *See* N.Y. STATE BAR ASS'N, THE LAWYER'S CODE OF PROF'L RESPONSIBILITY (2005), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeofProfessionalResponsibility.pdf.

154 *See* N.Y. County Law. Ass'n Comm. on Prof'l Ethics, *supra* note 152, at 2.

155 *Id.*

156 *Id.*

Code precludes assertion of the claim" so long as the attorney is "able to advance a good faith claim for benefits despite knowledge of contrary medical reports."[157] For example, if a second opinion from a treating physician is intended to clarify or rescind an earlier opinion from the same physician, the attorney must disclose the second opinion.[158]

Three other state bars have spoken on an attorney's duty to disclose adverse evidence in Social Security proceedings in ways that deserve brief mention. In 1992, the Virginia State Bar received a complaint from an ALJ concerning an attorney who had refused to comply with an ALJ order to "submit any and all documentation in his possession pertaining to [the] claimant's alleged physical and mental impairments."[159] The attorney had declined to do so, relying on a previous letter to the ALJ in which he argued that such production is not required under SSA's regulations or under its Hearings, Appeals and Litigation Law Manual (HALLEX).[160] After considering the relevant provisions of the Virginia Code of Professional Responsibility,[161] the Virginia State Bar Counsel found no wrongdoing because the attorney "would appear to be proceeding in the only way that he presently can to take appropriate steps in good faith to test the validity of [the ALJ's] ruling."[162] Therefore, counsel found, the attorney had not violated Virginia Disciplinary Rule 7-105(a),[163] which states in part that "a lawyer shall not disregard or advise his client to disregard . . . a ruling of a tribunal made in the course [of a] proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."[164] The Virginia State Bar Counsel specifically declined to decide "whether or not [the lawyer] is legally correct in his reading of the applicable laws concerning these proceedings."[165]

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157 *Id.*

158 *See id.*

159 Letter from U.S. ALJ, Office of Hearings & Appeals, Soc. Sec. Admin., to Va. State Bar, Order of ALJ to Submit Evidence (May 1, 1992) (on file witb author) (withholding ALJ name for confidentiality reasons).

160 *See* Letter from Att'y to U.S. ALJ, Office of Hearings & Appeals, Soc. Sec. Admin. (Mar. 26, 1992) (on file with author) (withholding names for confidentiality reasons); *see also* Letter from Att'y to U.S. ALJ, Off. of Hearings & Appeals, Soc. Sec. Admin. (Apr. 13, 1992) (on file with author) (names withheld for confidentiality reasons) ("I respectfully decline to do so, for the reasons I stated in my letter to you dated March 26, 1992.").

161 Like Vermont, Virginia has since replaced its Code of Professional Responsibility with a version of the Model Rules. *See* VIRGINIA RULES OF PROF'L CONDUCT (2006), *available at* http://www.vsb.org/docs/2006-07_pg.pdf.

162 Letter from Assistant Bar Couns., Va. State Bar, to U.S. ALJ, Office of Hearings & Appeals, Soc. Sec. Admin. 2 (Aug. 18, 1992) (on file with author) (withbolding ALJ name for confidentiality reasons).

163 *See id.* at 3.

164 *Id.* at 2.

165 *Id.* at 3.

In 1989, the Missouri State Bar issued a brief, conclusory opinion[166] in response to an attorney who inquired whether he had an ethical obligation to provide SSA with depositions arising from other litigation involving his client.[167] The attorney believed that some of the depositions would be helpful to his client's Social Security claim, others would be neutral, and a few would be harmful.[168] The General Chairman of the Missouri Bar Administration responded:

> It is the opinion of the Advisory Committee that a lawyer has no duty to defeat his own case. While it would be an ethical violation to violate the provisions of Rule 3.3 of [sic] Rule 4, we do not believe the duty exists to present every shred of evidence known supporting every or all positions possible in litigation.[169]

Finally, in the early 1990s, the Charleston, West Virginia SSA Office of Hearings and Appeals created a proposed Pre-Hearing Order that would have required representatives to submit "[a]ll relevant medical evidence . . . including medical work-related assessments and updated clinical records from treating physicians, when the same can reasonably be produced."[170] In response, the West Virginia State Bar issued an opposing resolution:

> The West Virginia State Bar opposes that portion of paragraph 3 of the proposed pre-hearing order of the Social Security Administration, Office of Hearings and Appeals in Charleston, West Virginia, which purports to require claimant[s'] attorneys or representatives to obtain and submit evidence which may be adverse to their respective clients' interests. The State Bar is of the opinion that such a requirement is contrary to the obligation of the claimant's attorney to zealously represent his or her client and tends to denigrate the advocacy role and convert the attorney into an arm of the administration.[171]

### C. The Myth of the State-Bar Bar

In analyzing the various state bar opinions on the obligation to submit adverse evidence, what the opinions do not state is perhaps more important than what the opinions do state. Specifically, none of the opinions suggests that an attorney may violate federal law because of a state bar ethics rule. The Alabama State Bar finds that Model

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166 Letter from Harold W. Barrick, Gen. Chairman, Mo. Bar Admin., to Dewey L. Crepeau, Att'y at Law, Crepeau & Roberts, P.C. (Apr. 19, 1989) (on file with author).

167 *See* Letter from Dewey L. Crepeau, Att'y at Law, Crepeau & Roberts, P.C., to Harold Barrick, Att'y at Law, Mo. Bar Ethics Comm. (Apr. 7, 1989) (on file with author).

168 *See id.*

169 Letter from Harold W. Barrick to Dewey L. Crepeau, *supra* note 166.

170 Pre-Hearing Order, Office of Hearings & Appeals, Charleston, W. Va., Dep't of Health & Human Servs., Soc. Sec. Admin. (on file with author).

171 W. Va. State Bar Bd. of Governors, Resolution (Apr. 23, 1992) (on file with author).

Rule 3.3(d) requires an attorney to produce adverse evidence.[172] The North Carolina Bar reaches the opposite conclusion.[173] Even so, the North Carolina Bar never declares that the ethics rules bar an attorney from producing adverse evidence.[174] Rather, North Carolina opines that it is the "hallmark of good lawyering" for an advocate to make such a disclosure.[175] Although the Vermont Bar disclaims any attempt to interpret the Social Security Act, it never suggests that an attorney could refuse a direct request by SSA to produce adverse opinion evidence.[176] Nor does the Vermont Bar suggest that an attorney could suppress a doctor's report that combines factual and opinion evidence.[177] Similarly, the bar associations of New York County, Virginia, Missouri, and West Virginia do not address whether production of adverse evidence is required by the Social Security Act and regulations.[178]

As discussed earlier, then-President of the ABA Michael S. Greco responded to SSA's July 2005 proposed rule of full disclosure by arguing that it is inconsistent with Model Rule 1.6, which prohibits lawyers from disclosing privileged and confidential client information without client consent.[179] Indeed, then-President Greco argued that to reveal client confidences as instructed under the proposed rule would expose attorneys to disciplinary action.[180] However, Model Rule 1.6(b)(6) specifically addresses this perceived dilemma by authorizing attorneys to disclose information "to comply with other law or a court order."[181] The proposed rule would have constituted "other law" had SSA adopted it. Moreover, "for conduct in connection with a matter pending before a tribunal," Model Rule 8.5(b)(1) applies the rules of professional conduct of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.[182] An attorney in a Social Security proceeding operates under the rules of SSA,[183] and Model Rule 8.5(b) protects the attorney from the "catch-22" of conflicting rules by mandating compliance with the rules of the tribunal.

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172 *See* Ala. State Bar Ass'n Disciplinary Comm'n, *supra* note 133.

173 *See* N.C. State Bar, *supra* note 134.

174 *See id.*

175 *Id.*

176 *See* Vt. Bar Ass'n Prof'l Responsibility Comm., *supra* note 142.

177 *See id.*

178 *See supra* text accompanying notes 152–71.

179 *See supra* text accompanying note 109.

180 *See id.*

181 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2006).

182 MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (2006).

183 *See* 20 C.F.R. § 416.1540(a)(2) (2006) ("All representatives shall be forthright in their dealings with us and with the claimant and shall comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards . . . .").

Even if a state's bar rules did not contain provisions similar to Model Rules 1.6(b)(6) or 8.5(b), the notion that an attorney could be punished by his or her state bar for complying with federal law in a federal forum is antithetical to the Supremacy Clause.[184] In *Sperry v. Florida* ex rel. *Florida Bar*,[185] the Supreme Court directly applied the supremacy doctrine to practice before a federal agency:

> 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.[186]

Indeed, it is because of the Supremacy Clause that a state bar cannot prevent nonlawyers from representing claimants at Social Security hearings, even if the state bar believes that such representation constitutes the unauthorized practice of law. This is simply because federal law permits nonattorney representatives.[187] Similarly, there is no merit to the argument that an SSA rule mandating that an attorney disclose adverse evidence would subject an attorney to sanctions by his or her state bar. As the Sixth Circuit recently noted, "when a state licensing law excludes a lawyer from practice that federal rules expressly allow, the two rules *do* conflict, and the state law must give way."[188]

To enforce the supremacy doctrine, a federal court may even step in to effectively overrule a state supreme court's discipline of an attorney. For example, in 2002, the Pennsylvania Office of Disciplinary Counsel (ODC) brought a contempt action against attorney Frank Marcone for maintaining a law office in Pennsylvania despite a court-ordered suspension.[189] Marcone opened a Pennsylvania office for the sole purpose of practicing before the U.S. District Court for the Eastern District of Pennsylvania, which had reinstated him to practice

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184 *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

185 373 U.S. 379 (1963).

186 *Id.* at 385.

187 *See* 20 C.F.R. §§ 404.1705(b), 416.1505(b) (2006) (establishing criteria for nonlawyer representatives at Social Security hearings).

188 *In re* Desilets, 291 F.3d 925, 928 (6th Cir. 2002) (interpreting *Sperry*, 373 U.S. at 385).

189 *See* Office of Disciplinary Counsel v. Marcone, 855 A.2d 654, 668 (Pa. 2004), *cert. denied*, 543 U.S. 1151 (2005).

before that court.[190] The Pennsylvania Supreme Court rejected Marcone's Supremacy Clause argument:

> First, Mr. Marcone fails to offer any statute or rule that expressly preempts our state regulation of the practice of law in general or of Mr. Marcone's maintenance of a law office within our borders in particular.
>
> . . . .
>
> Finally, we find no conflict between the federal statutes and rules and our state rules. While an attorney's admission to federal court may permit him to represent clients in federal court, it is not impossible or even inconsistent in the least for Marcone to comply with our Court's authority to regulate a suspended attorney's maintenance of a law office within our borders from which he holds himself out to the public and consults with clients, even if "limited" to a federal practice.[191]

The Pennsylvania Supreme Court ultimately held Marcone in contempt of the state bar order for "maintaining a law office in the Commonwealth, by which he [held] himself out to the citizens of our Commonwealth as one competent to exercise legal judgment and as one competent in the law, and counsel[ed] clients as to their legal rights and obligations."[192] The Court decreed that Mr. Marcone "[s]hall not maintain an office for the practice of law of any kind within the Commonwealth of Pennsylvania."[193]

Another similarly situated lawyer practicing in Pennsylvania, Robert Surrick, who had been suspended from practice by the Pennsylvania Bar but was admitted to practice before the U.S. District Court for the Eastern District of Pennsylvania, sued the Chief Counsel for the Pennsylvania ODC in the Eastern District following Marcone's loss.[194] Surrick argued that the state violated the Supremacy Clause by prohibiting him from maintaining an office in Pennsylvania to practice in federal court.[195] The court agreed, holding that "to the extent that there exists a state rule prohibiting one in the position of plaintiff from opening and maintaining an office within the Commonwealth of Pennsylvania for the purpose of representing clients pursuant to his admission in good standing before the Eastern District, such state rule is preempted."[196] The court held that, notwithstanding the Supreme Court of Pennsylvania's prior order, Surrick could reopen his Penn-

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190 *See id.* at 657.

191 *Id.* at 664–65.

192 *Id.* at 668.

193 *Id.*

194 *See* Surrick v. Killion, No. 04-5668, 2005 U.S. Dist. LEXIS 6755, at *2–5 (E.D. Pa. Apr. 18, 2005), *aff'd*, 449 F.3d 520 (3d Cir. 2006).

195 *See id.* at *29.

196 *Id.* at *38.

sylvania office, subject to various conditions intended to clarify his status to the public.[197]

On appeal, the Third Circuit Court of Appeals affirmed with a strongly worded opinion.[198] Rejecting the state's restrictive interpretation of *Sperry*, the Third Circuit declared: "Sperry . . . stands for the general proposition that where federal law authorizes an agent to practice before a federal tribunal, the federal law preempts a state's licensing requirements to the extent that those requirements hinder or obstruct the goals of federal law."[199] Moreover, the court continued: "Federal law preempts not only state laws that expressly prohibit the very act the federal law allows, but those that 'stand as an obstacle to the accomplishment of the full purposes and objectives' of federal law."[200]

## CONCLUSION

Because the Supremacy Clause prohibits states from restraining an attorney's practice before a federal tribunal, it also prohibits states from restraining an attorney from acts that are compelled by that tribunal. In the unlikely and apparently unprecedented event that a state bar were to discipline an attorney for complying with Social Security law in a Social Security proceeding, the attorney would be entitled to relief in federal court under the supremacy doctrine.

The argument that SSA's July 2005 proposed rule mandating disclosure of adverse evidence would have created a direct ethical conflict for attorneys in jurisdictions with conflicting state bar rules is unfounded. Attorneys who do not wish to produce adverse evidence are better off arguing that no direct conflict exists between the federal and state rules, and thus, in the absence of a direct conflict, attorneys are bound by their state bar rules. SSA has strengthened this argument by failing, without meaningful explanation, to adopt its July 2005 proposed rule on adverse evidence.[201] SSA has continued to muddle the issue with its March 2006 retreat into ambiguous language in the DSI process.[202]

Nevertheless, any ambiguity in SSA's regulations cannot negate the clear rule issued by Congress in the SSPA.[203] At the very least, in a Social Security proceeding, an attorney cannot withhold a fact that the attorney knows, or should know, is material to a determination of

197 *See id.* at *40–41.
198 *Surrick*, 449 F.3d at 522.
199 *Id.* at 530.
200 *Id.* at 532 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).
201 *See supra* Part II.F.
202 *See supra* Part II.G.
203 *See supra* Part II.E.

whether the client is eligible for benefits if the attorney knows, or should know, that withholding such information will mislead the tribunal.[204] This federal rule applies to attorneys in every state, and attorneys must understand that state bar rules do not and cannot permit, much less mandate, noncompliance.

204 *See supra* text accompanying note 85.