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The Advocate's Conflicting Obligations Vis-à-Vis Adverse Medical Evidence in Social Security Proceedings

*Robert E. Rains**

I. THE PROBLEM

The conscientious attorney representing claimants for disability benefits before the Social Security Administration (SSA)¹ is constantly beset by ethical problems unique to that clientele in situations for which there is conflicting guidance under either the Code of Professional Responsibility or the Rules of Professional Conduct. Additionally, the nature of the clientele—people who are, or believe they are, either mentally or physically disabled—creates a set of problems of its own. Frequently the attorney must deal with a client who believes that she is disabled by physical impairments, but the attorney quickly concludes that the primary impairments are mental. This type of client is often the most resistant to well-meaning legal advice. Often the attorney must try to assist a client who suffers from diminished or impaired intellect to make intelligent decisions regarding complex litigation strategy.

The adjudicatory system within the Social Security Administration could best be described as convoluted.² The underlying law has been aptly described by the United States Supreme Court as “Byzantine”³ and “almost unintelligible.”⁴

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1. The statutory authority for such administrative proceedings to determine disability is found at 42 U.S.C. § 405(b).

2. See generally 20 C.F.R. §§ 404.900-404.996, 416.1400-416.1494 (1994).

3. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

4. *Id.* (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976), cert. denied, 430 U.S. 984 (1977)).

For example, the ancillary law on obtaining adequate legal fees, either from the client or from the government, is itself hideously complex, involving different rules depending upon the specific program involved, constantly changing procedures, state and federal agencies, and sometimes federal courts.⁵ Complicating the regulatory and statutory framework for obtaining fees is an overlay of recent Supreme Court decisions which are difficult to analyze, if not positively contradictory to each other.⁶

Perhaps the most intractable problem facing the practitioner, however, is that of dealing with medical records or reports which appear to undercut the client's claim of disability. While the conflict that exists among competing duties of zealous or diligent representation⁷, client confidentiality⁸, and candor towards the tribunal⁹ is obvious, an appropriate resolution has been elusive. The problem has been further exacerbated by disputes regarding the ability of individual administrative law judges, or the Offices of Hearings and Appeals, to promulgate their own rules and regulations of procedure,¹⁰ and by the increasing concern of attorneys working in this area about competition from non-attorney representatives who may not be bound by the Code or the Rules.¹¹ Additionally, there is a lack of uniformity among the few state and local bars which have addressed this issue in

5. The primary statutory bases in Title II actions are 42 U.S.C. § 406 (1988) and 28 U.S.C. § 2412 (1989). The law governing Title XVI cases is murky and incomplete. See *Bowen v. Galbreath*, 485 U.S. 74 (1988).

6. See, e.g., *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Sullivan v. Finkelstein*, 496 U.S. 617 (1990); *Sullivan v. Hudson*, 490 U.S. 877 (1989). For a good exegesis of the first three cases in this line, see Gill Deford, *Melkonyan v. Sullivan: What Hath the Supreme Court Wrought?*, 25 CLEARINGHOUSE REV. 663 (1991). See also *Holt v. Shalala*, 35 F.3d 376 (9th Cir. 1994).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983).

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101.

9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, 7-106.

10. See Memorandum from Jose A. Anglada, Acting United States Administrative Law Judge, Dep't of Health and Human Services Office of Hearings and Appeals, to Harry C. Taylor, II, Chief Administrative Law Judge, Charleston, West Virginia, Hearing Office (Apr. 14, 1992) (on file with author) [hereinafter U.S. ALJ Memorandum].

11. See James Podgers, *Crumbling Fortress*, A.B.A. J., Dec. 1993, at 50.

some fashion¹² and a complete lack of judicial precedent in the social security context. Compounding the confusion, Congress has enacted in the Social Security Independence and Program Improvements Act of 1994, effective October 1, 1994, a provision to combat fraudulent claims, which contains language susceptible to interpretation as shedding either heat or light on the subject.¹³

The scope of this problem is enormous. Again, in the words of the Supreme Court, "The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend."¹⁴ By 1983, the Social Security Administration's administrative law judges (ALJs) were hearing over 320,000 cases per year.¹⁵ In April 1994, SSA projected 522,000 requests for hearings for the 1994 calendar year.¹⁶

In this article I will first attempt to delineate the specific nature of the dilemma faced by the social security practitioner against the unique background of social security law and practice. Second, I will endeavor to identify the pertinent provisions of the Code of Professional Responsibility and the Rules of Professional Conduct as well as the ambiguities within both the Code and the Rules in the social security context. Third, I will attempt to relate and analyze the few formal and informal opinions from various state and local bars on the subject. Fourth, I will examine arguably related court decisions from other areas of the law, such as patent law. Fifth, I will posit some tentative answers to the issues involved under the Model Rules. Sixth, I will address the new amendment to the Social Security Act regarding fraudulent claims and its potential impact. Next, I will suggest that, pending clarification from the courts or the bar or the Social Security Administration, the zealous practitioner will best serve her clientele by full disclosure of relevant "medical facts." Finally, I

12. See discussion *infra* part IV.

13. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 206, 108 Stat. 1464, 1509-16 (1994).

14. Richardson v. Perales, 402 U.S. 389, 399 (1971).

15. Heckler v. Day, 467 U.S. 104, 106 (1984) (citing U.S. DEPT OF HEALTH AND HUM. SERVS., OFF. OF HEARINGS AND APPEALS, KEY WORKLOAD INDICATORS 1, 16 (May 1983)).

16. Social Security Administration, Process Reengineering Program; Disability Reengineering Project Proposal, 59 Fed. Reg. 18,188 (1994) [hereinafter SSA Project Proposal].

will suggest the urgent necessity for creation of a regulatory framework, either by the Social Security Administration or by the state bars, or both, to deal with these problems.

II. A BRIEF INTRODUCTION TO SOCIAL SECURITY LAW AND PRACTICE

Congress has created two major federal income maintenance programs administered by the Social Security Administration: Social Security Disability Insurance Benefits (SSDIB) under Title II of the Social Security Act¹⁷ and Supplemental Security Income (SSI) Benefits under Title XVI of the Social Security Act.¹⁸ Although the financial criteria for benefits under these programs are different, the basic definition of disability is essentially the same. As statutorily defined, "disability" means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."¹⁹

In other words, unlike, for example, the Veterans Disability Benefits System, social security is an all-or-nothing system. For social security purposes, either a person is completely disabled, and thus meets the medical eligibility criteria, or is not disabled. By comparison, veterans seeking benefits from the Department of Veterans Affairs may be found disabled to a greater or lesser degree under very specific rules setting forth percentages of disability.²⁰

The all-or-nothing nature of the social security system vastly magnifies the potential adverse consequences to the claimant of even a single medical document suggesting malingering, exaggeration, non-compliance with medical care, or simply a dispute over medical findings. There is no way for the adjudicator or court to "split the difference." By contrast, in

17. 42 U.S.C. §§ 401-433 (1988).

18. 42 U.S.C. §§ 1381-1399 (1988). For more detail regarding these programs, see Richard P. Weishaupt & Robert E. Rains, *Sullivan v. Zebley: New Disability Standards for Indigent Children to Obtain Government Benefits*, 35 ST. LOUIS U. L.J. 539, 540-46 (1991).

19. 42 U.S.C. § 423(d)(1)(A) (1988). This section is applicable to SSI claims through 42 U.S.C. § 1382c(a)(3) (1988). For a modified definition for disability based on blindness, see 42 U.S.C. §§ 416(i)(1), 423(d)(1)(B) (1988).

20. See, e.g., 38 U.S.C. §§ 1114, 1131, 1134 (Supp. III 1991).

V.A. cases (or, by way of another example, workers' compensation cases)²¹ the adjudicator faced with contradictory medical information may well determine that the claimant is forty or sixty percent disabled, but not one hundred percent; the claimant will then receive some benefits.²² That option is not available within the social security system, and thus one adverse piece of medical information may lead to a total denial of benefits in the social security system whereas it would not in other legal contexts.

The claimant seeking disability benefits is confronted with a four-step administrative procedure, theoretically designed for the careful and rigorous assessment of her medical condition, but in reality notorious for its intrinsic delays.²³ Briefly, the original application, although made at the local Social Security District Office, is actually examined by a state agency (or Bureau of Disability Determination or DDS) acting under contract to the Social Security Administration.²⁴ It is noteworthy that the applicant, as part of the application process, is required to execute medical release forms.²⁵ If the applicant is denied a favorable decision at this initial determination stage, the applicant may apply for "reconsideration."²⁶ Again, while this reconsideration request is made at the local Social Security District Office, the reconsideration is also determined by the state agency rather than the Social Security Administration.²⁷ It is quite common for claimants to go through the initial determination and reconsideration levels pro se without benefit of legal counsel.²⁸

If the applicant receives an unfavorable decision at the reconsideration level, she has sixty days in which to request a hearing before an administrative law judge of the Social

21. See, e.g., PA. STAT. ANN. tit. 77, §§ 512, 513 (1991).

22. See *supra* notes 20-21.

23. For more detail regarding this administrative procedure, see Robert E. Rains, *A Specialized Court for Social Security?* 15 FLA. L. REV. 1, 4-5 (1987). For the Supreme Court's response to the delays, see *Heckler v. Day*, 467 U.S. 104, 110-11 (1984).

24. See SSA Project Proposal, *supra* note 16, at 18,188, 18,190, 18,191 (for a flowchart of the process); see also 20 C.F.R. §§ 404.601-.641, 404.900-.906, 416.301-.335, 416.1001-.1018, 416.1401-.1405 (1994).

25. Form SSA-827; see also 20 C.F.R. §§ 404.1512-.1516, 416.912-.916 (1994).

26. 20 C.F.R. §§ 404.907-.922, 416.1406-.1422 (1994).

27. *Id.*; see also SSA Project Proposal, *supra* note 16, at 18,192.

28. See SSA Project Proposal, *supra* note 16, at 18,189.

Security Administration.²⁹ This third administrative level is, in reality, the first time that the claim will be heard by an entity of the Social Security Administration.³⁰ For many claimants, it is a critical part of the adjudicatory process and one in which claimants increasingly are represented by counsel.³¹ Not surprisingly, it is at this level that the claimant's representative will most frequently be confronted by the ethical dilemma of identification or possession of contradictory, if not outright adverse, medical evidence.

The final administrative determination level is the Social Security Appeals Council.³² If the claimant is denied benefits at the ALJ level, she has sixty days to seek review of the ALJ's decision by the Appeals Council.³³ Additionally, the Appeals Council may reopen a favorable ALJ decision on its own motion.³⁴ Unless the Appeals Council remands the case for further administrative proceedings, the Appeals Council decision constitutes the final decision of the Secretary of the United States Department of Health and Human Services (HHS) with regard to the individual's claim for benefits.³⁵ Should that determination be adverse, the claimant then has sixty days in which to seek judicial review by filing a complaint in federal district court against the Secretary.³⁶

29. 20 C.F.R. §§ 404.933, 416.1433 (1994).

30. *Id.* §§ 404.944 to .953, 416.1444 to .1453.

31. *See* SSA Project Proposal, *supra* note 16, at 18,195.

32. 20 C.F.R. §§ 404.967, 416.1467 (1994).

33. *Id.* §§ 404.968, 416.1468.

34. *Id.* §§ 404.969, 416.1469.

35. *Id.* §§ 404.981, 416.1481. Frequently, the action of the Appeals Council takes the format of adopting the decision of the Administrative Law Judge as the final decision of the Secretary. *See, e.g.,* *Ventura v. Shalala*, 862 F. Supp. 1226, 1228 (D. Del. 1994).

On Aug. 15, 1994, President Clinton signed the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994), which made the Social Security Administration an independent agency as of March 31, 1995. Throughout this article, I have referred to the "Secretary" of the United States Department of Health and Human Services as the titular head of the Social Security Administration and as the defendant in federal court. Under the provisions of this Act, the Commissioner of the Social Security Administration is now the titular head of the Social Security Administration and the proper defendant in federal court. I have retained all references to the Secretary because, until this time, it has been the Secretary who has been ultimately responsible and who has been named as defendant.

36. 20 C.F.R. §§ 404.981, 416.1481; *see also* 42 U.S.C. §§ 405(g), 1383(c)(3) (1988).

The nature of the available judicial review magnifies, once again, the potential adverse consequences to the claimant of admission into evidence of a potentially adverse medical report. The Social Security Act does not allow the courts to conduct a *de novo* review of the record. Rather, judicial review is limited to determining whether the final decision of the Secretary is supported by substantial evidence.³⁷ Substantial evidence has been described as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁸ Thus, even though a reviewing court concludes that the weight or preponderance of the evidence indicates that the claimant is disabled, the court theoretically should deny benefits if there is substantial evidence contradicting that conclusion.³⁹ It is quite possible that one adverse medical report could constitute such substantial evidence and prove fatal to the claim.⁴⁰ Even if the reviewing court reverses the denial of benefits, the claimant will have been forced to wait a very considerable period of time for critically needed income.⁴¹

III. PERTINENT PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND RULES OF PROFESSIONAL CONDUCT

At the time of this writing, a majority of states have adopted some version of the ABA's Model Rules of Professional Conduct.⁴² Twelve states, however, continue to adhere to some

37. 42 U.S.C. § 405(g) (1988).

38. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

39. *See id.*; 42 U.S.C. § 405(g). "However, substantial evidence is less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Cunning v. Harris*, 505 F. Supp. 16, 17 (W.D. Okla. 1980).

40. "Substantial' evidence is more than a scintilla but less than a preponderance of the evidence. It must do more than create a suspicion of the existence of the fact to be established, but '*no substantial evidence*' can be found only when there is a '*conspicuous absence of credible choices*' or '*no contrary medical evidence.*'" *Shannon v. Califano*, 485 F. Supp. 939, 940 (N.D. Tex. 1980) (emphasis added) (citations omitted). Not all courts take such a rigid position. *See Brewster v. Heckler*, 786 F.2d 581, 584 (3d Cir. 1986).

41. For an idea of a disabled person's dire need for federal benefits, see *Mathews v. Eldridge*, 424 U.S. 319, 350 (1976) (Brennan, J., dissenting), and *Schweiker v. Chilicky*, 487 U.S. 412, 430-31 (1988) (Brennan, J., dissenting).

42. *See* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 231-32 (John S. Dzienkowski ed., 1993).

form of the Model Code of Professional Responsibility.⁴³ Both the Rules and the Code have provisions which relate in some way to assiduous representation, client confidentiality and the scope of an advocate's duty to identify and produce adverse evidence.

Under the Model Code, Canon 7 provides that "A lawyer should represent a client zealously within the bounds of the law."⁴⁴ The Model Rules require "diligence" rather than zealousness *per se*. Rule 1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client."⁴⁵ The ABA comment states, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁴⁶

Both the Code and the Rules dictate the preservation of the confidentiality of information obtained from or about clients. Canon 4 of the ABA Model Code states, "A lawyer should preserve the confidences and secrets of a client."⁴⁷ The prohibition on revealing "secrets" is particularly important in this context. DR 4-101(A) states that a "'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁴⁸ Typically an adverse medical report would fall within this definition of "secret."

The Model Rules of Professional Conduct contain a similar, but not identical, provision. Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation"⁴⁹

Neither the dictate of confidentiality, however, nor that of diligence/zealousness is absolute. Under DR 4-101(C)(2), "A lawyer may reveal . . . [c]onfidences or secrets when permitted

43. *Id.* See also AMERICAN BAR ASS'N & THE BUREAU OF NAT'L AFF., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:301 (1991) [hereinafter MANUAL ON PROFESSIONAL CONDUCT].

44. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1993)

46. *Id.*

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4.

48. *Id.* DR 4-101.

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a).

under Disciplinary Rules or required by law or court order.”⁵⁰ Ethical Consideration 7-27 mandates that, “Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.”⁵¹ Likewise, DR 7-102(A)(3) mandates, “In his representation of a client, a lawyer shall not: . . . (3) [c]onceal or knowingly fail to disclose that which he is required by law to reveal.”⁵² Nor may a lawyer “[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.”⁵³

Under the Model Rules, there are several provisions limiting zealousness and confidentiality. Rule 8.4(c) declares that it is professional misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁴ Likewise, Rule 1.2(d) prohibits assisting or counseling a client to engage in conduct that the lawyer knows is criminal or fraudulent.⁵⁵ Rule 4.1(b) mandates that a lawyer shall not knowingly “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.”⁵⁶

The provision of the Model Rules most pertinent to the social security advocate’s dilemma is Rule 3.3, “Candor Toward the Tribunal.”⁵⁷ The “Legal Background” to Rule 3.3 clearly anticipates that a tribunal can be either a judicial or an administrative proceeding:

Rule 3.3 imposes a duty of candor on a lawyer appearing before a tribunal in a court of law or adjudicative proceeding. While the term “tribunal” is not defined in the [t]erminology section of the Rules, or in Rule 3.3 or its Comment, the context in which the term is used in the Rules makes it clear that “tribunal” refers to a trial-type proceeding in which witnesses are questioned, evidence is presented, the parties and their counsel participate fully, and the decision is rendered by a fact finder.⁵⁸

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101.

51. *Id.* EC 7-27.

52. *Id.* DR 7-102.

53. *Id.*

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c).

55. *Id.* Rule 1.2(d).

56. *Id.* Rule 4.1(b).

57. *Id.* Rule 3.3.

58. ANN. MODEL RULES OF PROFESSIONAL CONDUCT 334 (Jeanne P. Gray ed.,

Against this legal background, it is difficult to argue that an ALJ proceeding is not a proceeding before a tribunal.

Rule 3.3(a)(2) states that a “[l]awyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”⁵⁹ In an *ex parte* proceeding the standard is even higher. Rule 3.3(d) mandates, “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, *whether or not the facts are adverse*.”⁶⁰ Unfortunately, the term “*ex parte* proceeding” is not defined either in this section or in the terminology section of the Model Rules.⁶¹ The official Comment to the Model Rules provides the following explanation of “*ex parte* proceedings:”

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.⁶²

The key question then is whether a social security hearing is an *ex parte* proceeding within the meaning of the Model Rules. To address this question, it is necessary to take a more detailed look at Social Security Administrative Law Judge hearings.

The United States Supreme Court has addressed the nature of social security hearings in detail only once, in *Richardson v. Perales*.⁶³ In some ways, the case is as significant for what it did not hold as for what it did hold. The

2d ed. 1992) [hereinafter MODEL RULES].

59. *Id.* at 329.

60. *Id.* (emphasis added).

61. *Id.* at 11.

62. *Id.* at 332.

63. 402 U.S. 389, 399 (1971).

Court declined to determine how or whether social security hearings fit within the Federal Administrative Procedures Act: "We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA."⁶⁴ The Court opined that "the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary."⁶⁵ This language has given rise to the oft-quoted doctrine that social security hearings are "nonadversarial" in nature.⁶⁶

In *Perales*, the claimant challenged the fairness of the hearing procedures, *inter alia*, on due process grounds:

He says that the hearing examiner has the responsibility for gathering the evidence and "to make the Government's case as strong as possible"; that naturally he leans toward a decision in favor of the evidence he has gathered; that justice must satisfy the appearance of justice, citing *Offutt v. United States*, 348 U.S. 11, 14 (1954), and *In re Murchison*, 349 U.S. 133, 136 (1955); and that an "independent hearing examiner such as in the" Longshoremens' and Harbor Workers' Compensation Act should be provided.⁶⁷

The Court rejected this assertion:

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.⁶⁸

But, while the Court has upheld the role of the Social Security ALJ, unquestionably the ALJ's position in a social security hearing is significantly different from that of a trial judge in a temporary restraining order (TRO) proceeding. The ALJ is an employee of the federal entity from whom the claimant is

64. *Id.* at 409.

65. *Id.* at 403.

66. *See, e.g., Sullivan v. Hudson*, 490 U.S. 877, 891 (1989).

67. *Perales*, 402 U.S. at 408-09. Social Security Administration hearings are now presided over by administrative law judges, not hearing examiners. *See Hudson*, 490 U.S. at 879.

68. *Perales*, 402 U.S. at 410.

seeking a monetary award.⁶⁹ The ALJ's employer will be the defendant in federal court should the claimant be denied benefits administratively and file a complaint for judicial review.⁷⁰ Not only is the ALJ technically an employee of this potentially interested inchoate party, but HHS's employer-employee relationship with the ALJs is an unusual one in a judicial context.⁷¹

For example, if one were to sue an executive entity of the Commonwealth of Pennsylvania in the appropriate state court (usually the Commonwealth Court of Pennsylvania), one would understand that the presiding judiciary would be employees of the Commonwealth, albeit of an entirely independent branch of state government with a set salary and fixed term of office. In contrast, the ALJ is not only employed by the same department as SSA, but—despite protestations of independence—is somewhat controlled by purportedly higher authority within that department. This effort at control is nowhere clearer than in the context of acquiescence/nonacquiescence in decisions of the circuit courts of appeal. There is a long and unfortunate history of SSA taking the position that it is not bound by precedential decisions of the circuit courts, sometimes even within the circuit that issued the decision, and regardless of whether the Secretary had sought a writ of certiorari from the Supreme Court to review the case. SSA now publishes "Acquiescence Rulings" indicating which circuit court decisions it will abide by and within which circuit(s)—if not nationally—it will abide by a ruling.⁷² Recently, the Office of Hearings and Appeals (OHA) Associate Commissioner sent a memorandum to all ALJs directing them that they may not rely upon, or use as authority, a circuit court decision that would be favorable to a claimant if SSA has not "acquiesced" in that decision, even if the claimant's case is being heard within

69. There have been repeated attempts to create an independent ALJ corps. On Nov. 19, 1993, the Senate passed S. 486, which would place all ALJ's in a unified corps. See *Senate Passes Measure Creating Independent ALJ Corps*, SOC. SECURITY F., Nov.-Dec. 1993, at 1, 4.

70. 42 U.S.C. § 405(g) (1988). See also *Recent Congressional Attention on Independent Agency, SSA's Backlog of Disability Reviews, and Quality of Notices*, SOC. SECURITY F., Mar. 1994, at 1, 7.

71. See Rains, *supra* note 23, at 12-13. At times that relationship has been stormy. During the era of "Bellmon Reviews" in the early 1980s, the Association of Administrative Law Judges sued the Secretary of Health and Human Services and high SSA officials alleging illegal interference with their independence.

72. *Id.* at 8-10; see also 20 C.F.R. §§ 404.985, 416.1485 (1994).

that circuit!⁷³ One would hardly expect a court administrator to purport to instruct trial court judges which appellate decisions they are allowed to utilize, much less expect that any trial judge would feel bound by such an instruction. This would be all the more remarkable in a lawsuit in which the court administrator was a party in interest.

The ALJ is different from the trial judge hearing a TRO in another important respect. A TRO is typically presented with little advance warning to a neutral judge who has little, if any, ability to discover underlying information.⁷⁴ By comparison, the current national average is for the ALJ hearing process to take 265 days.⁷⁵ Even if one assumed a two-month delay from the date of the hearing until the issuance of the decision, the case would be before the OHA for some 200 days before the ALJ hearing. After the case is assigned to an individual ALJ, the ALJ receives a significant record already compiled by the state agency.⁷⁶ She is hardly the *tabula rasa* we expect of a trial judge hearing a TRO. Moreover, the ALJ has an independent duty to develop the case,⁷⁷ and extraordinary discovery tools for doing so. The claimant is supposed to submit evidence in advance of the hearing, if possible.⁷⁸ The ALJ can require a claimant to submit to one or more "consultative [medical] evaluations" from her own doctor or one under contract to the state agency.⁷⁹ The ALJ can, and often does, contact claimants' counsel prior to a hearing and request or demand additional medical records which she perceives to be

73. *No Application of Circuit Caselaw Without an Acquiescence Ruling*, SOC. SECURITY F., Mar. 1994, at 12-13. This raises an interesting question: could an ALJ, who theoretically is guaranteed quasi-judicial independence, be disciplined in some fashion by the SSA for citing and using a circuit court opinion in a decision to make a ruling favorable to a claimant?

74. See FED. R. CIV. P. 65(b); *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir. 1987).

75. See SSA Project Proposal, *supra* note 16, at 18,195.

76. 20 C.F.R. §§ 404.1512(d), 416.912(d) (1994).

77. "The ALJ's duties are heightened when a claimant is *pro se*, but exist even when a claimant is represented by counsel." *Fishburn v. Sullivan*, 802 F. Supp. 1018, 1025-26 (S.D.N.Y. 1992) (quoting *Walker v. Heckler*, 588 F. Supp. 819, 824 (S.D.N.Y. 1984)). "The fact that a claimant is represented by counsel does not absolve the ALJ from his abiding responsibility to develop fully the facts of the claimant's case in a nonadversarial fashion consistent with the broadly remedial purposes of the Social Security Act." *Id.* at 1026 (quoting *Masella v. Heckler*, 592 F. Supp. 621, 624 (W.D.N.Y. 1984)).

78. 20 C.F.R. §§ 404.935, 416.1435 (1994).

79. *Id.* §§ 404.1517, 416.917.

lacking.⁸⁰ The ALJ may also direct the attendance and testimony of expert witnesses—vocational experts and, less frequently, medical experts—at hearings.⁸¹ The ALJ may issue subpoenas on her own initiative to other witnesses to appear and testify.⁸² If the ALJ is dissatisfied with the completeness of the record at the close of the hearing, she may use any or all of these discovery tools after the hearing and convene a subsequent hearing or hearings as she deems fit.⁸³

Given the duty of the ALJ to develop the record fully, and the means available for doing so, it is debatable whether there is an unrepresented interested party at an ALJ hearing as there is in the classic *ex parte* proceeding. (It is true that the Social Security Administration does not have counsel present at the hearing to present a case against the claimant. An experiment with such a government representative program in the 1980s was abandoned in the face of much criticism.)⁸⁴ While undoubtedly the Social Security Administration is an inchoate party, in the many ways set forth above, the ALJ, and the OHA staff, actively ensure the fullness of the record. ALJs have the ability, indeed the duty, to avoid the intrinsic danger of an *ex parte* hearing, that critical information favorable to the absent party will be kept from the tribunal. Presumably this danger is the key concern behind Model Rule 3.3(d).

Finally, yet another critical distinction exists between a social security hearing and an application for a TRO. In the typical TRO proceeding there is great pressure on the court to issue an immediate decision to avert immediate irreparable harm (or to deny the request).⁸⁵ By comparison, although claimants are entitled to a prompt decision and are often in dire need of the benefits they are seeking, no time limit is imposed on the ALJ for issuing a decision even after the long-

80. Presumably this authority is based upon 20 C.F.R. §§ 404.1512(c), 404.1710, 416.912(c), 416.1510 (1994).

81. See *Richardson v. Perales*, 402 U.S. 389, 395-96 (1971).

82. 20 C.F.R. §§ 404.950(d), 416.1450(d) (1994).

83. *Id.* §§ 404.944, 416.1444. In recent years, however, some ALJs have complained that an SSA managerial decision to take away their authority over OHA support staff has prevented them from adequately developing cases. See Christine M. Moore, *SSA Disability Adjudication in Crisis!*, JUDGES' J., Summer 1994, at 2, 40-42.

84. *Unconstitutional: Government Representative Program Enjoined*, SOC. SECURITY F., July 1986, at 1-5; *Government Representative Project Discontinued*, SOC. SECURITY F., Apr. 1987, at 1, 1.

85. See *supra* note 74 and accompanying text.

awaited hearing.⁸⁶ There is little, if any, danger of the ALJ being rushed into a hurried decision based on an incomplete record, as social security's own statistics demonstrate.⁸⁷

In short, in many ways social security hearings are truly *sui generis*.

IV. STATE AND LOCAL BAR INTERPRETATIONS

As noted, the bars in a few states have grappled with the quandary of the advocate's duty in this context. The resulting opinions vary in degree of formality, depth of analysis, and ultimate conclusion.

A. Alabama

In a brief opinion published in July 1993, the General Counsel of the Alabama State Bar Disciplinary Commission unequivocally held 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."⁸⁸ In reaching this conclusion, the General Counsel relied upon Professors Hazard and Hodes' handbook, *The Modern Rules of Professional Conduct*, and its general discussion of *ex parte* proceedings (which does not address social security proceedings), as well as one patent case.⁸⁹

B. Missouri

In 1989, a private practitioner in Missouri requested an opinion from the Missouri Bar Ethics Committee as to whether he was under a duty to disclose to a Social Security ALJ depositions in his possession which were taken in civil litigation prior to the filing of his client's disability claim. The attorney stated that in his opinion, "some would be helpful in her social security case, some would not matter one way or another, and

86. Heckler v. Day, 467 U.S. 104, 106, 116-17 (1984).

87. See SSA Project Proposal, *supra* note 16, at 18,195; text accompanying note 75.

88. Robert W. Norris, *Opinions of the General Counsel*, 54 ALA. LAW. 252, 252 (1993).

89. *Id.* at 252-53 (citing Pfizer and Co. v. Federal Trade Commission, 401 F.2d 574, 579 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969)).

a few would be harmful."⁹⁰ The General Chairman of the Missouri Bar Administration Advisory Committee 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.⁹¹

No further explanation, rationale or authority was provided in the opinion.

C. New York County

In 1993, the Committee on Professional Ethics of the New York County Lawyers Association was presented with the question of whether a lawyer representing claimants seeking social security benefits "is obliged to produce all relevant medical information about the claimant in this process, including information obtained from the clients which may be detrimental to the clients' claims, if no request is made for the information."⁹²

The committee addressed this issue under New York State's Code of Professional Responsibility which is in fact a hybrid of the Model Code and the Model Rules.⁹³ In a well-reasoned opinion, the committee made a number of points. It began by noting the potential conflict between a lawyer's duty under Canon 4 to preserve client confidences and secrets and the lawyer's duty under Canon 7 to represent a client zealously within the bounds of the law. "Whether these interests collide in the circumstances presented depends on whether the disclosure of medical information is necessary to avoid the lawyer's presentation of a false claim for disability benefits."⁹⁴

The committee's opinion disclaimed any reliance upon the Social Security Act and SSA regulations. The opinion addressed

90. Letter from Dewey L. Crepeau, Partner, Crepeau & Roberts, to Harold Barrick, Missouri Bar Ethics Committee 1 (April 7, 1989) (on file with author).

91. Letter from Harold W. Barrick, General Chairman, Missouri Bar Administration, to Dewey L. Crepeau, Partner, Crepeau & Roberts 1 (April 19, 1989) (on file with author).

92. Comm. on Prof. Ethics of the N.Y. County Lawyers' Ass'n, *New York County Lawyers' Ethics Opinion*, N.Y.L.J., Sept. 9, 1993, at 2.

93. MANUAL ON PROFESSIONAL CONDUCT, *supra* note 43, at 01:38-01:40.

94. *New York County Lawyers' Ethics Opinion*, *supra* note 92, at 2.

solely the lawyer's obligation under New York State's Code. The opinion noted, however, that "a lawyer must comply with the letter and the spirit of any statutes and regulations governing disclosure in proceedings for social security benefits."⁹⁵

Having made that disclaimer, the committee opined,

If no law independently mandates disclosure, then nothing in the Code 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. A lawyer's obligation is to present whatever evidence exists which, in the lawyer's professional judgment, best advances the client's interests in the proceeding. That the lawyer may have been given access by the client to other evidence that does not support the client's position does not alter this obligation. To the contrary, if such other evidence is provided by, or upon instructions from, the client, the lawyer may have a duty not to disclose such evidence.⁹⁶

The opinion went on, however, to add several important caveats. First, the opinion noted:

A lawyer need not volunteer relevant evidence harmful to a client's interests, but neither may a lawyer knowingly make a false statement of fact, use perjured testimony or false evidence, or assist a client in fraudulent conduct. DR 7-102(A)(4), (5) & (7). If a lawyer is able to advance a good faith claim for benefits despite knowledge of contrary medical reports, and if none of the evidence or statements made in support of that claim is known to be false in light of such knowledge, then nothing in the Code precludes assertion of the claim. If, however, the lawyer's knowledge of the adverse medical information constitutes knowledge that the claim itself is false, then the lawyer is not free to advance the claim and must withdraw from the representation.⁹⁷

Also, the opinion addressed situations where a doctor has issued two opinions with regard to a client which could appear to be contradictory. In the first situation, the doctor's opinion used language which has a technical meaning within the social security regulations, the attorney went back to the doctor and asked whether the doctor had intended that technical meaning,

95. *Id.*

96. *Id.*

97. *Id.*

and the doctor issued a second opinion which was intended to clarify and revise the first. Based upon these facts and circumstances, the lawyer would have no reason to believe that the doctor's intention in issuing the second opinion was anything other than to correct an unintentional error in the first report. In that case it would be appropriate for the lawyer to submit only the second opinion.⁹⁸

The committee compared that situation to another scenario where a second report from a medical treating source conflicts with a first report and clearly is intended to rescind that prior report. In that scenario, the committee opined:

the lawyer could not reasonably rely on the first report as a basis for proceeding with the claim. In that circumstance, the lawyer would not be free to offer only the first opinion as evidence, for to do so would be to present evidence that the lawyer knows to be untrue.⁹⁹

Finally the opinion noted, "There are also circumstances when the lawyer either must produce both medical opinions or may produce neither opinion, even if the opinions are not contradictory. Truth cannot be measured in a vacuum."¹⁰⁰

The committee concluded that "[s]ubject to the qualifications set forth above, a lawyer representing a claimant in a social security disability hearing is not obligated to produce all relevant medical information if no request is made for such information and such information does not constitute knowledge that the claim is false."¹⁰¹

D. Virginia

In 1992, a Social Security Administrative Law Judge lodged a complaint with the Virginia State Bar asserting that a private attorney was in direct violation of Virginia DR 7-105(A), in refusing to comply with an order which the ALJ had issued directing the attorney to "submit any and all documentation in his possession pertaining to [a] claimant's alleged physical and mental impairments . . . so that a determination can be made as to whether said documentation is material to the case."¹⁰² The attorney had previously written to this ALJ

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. The Court's Order of April 9, 1992, directing claimant's counsel to submit

stating the position of his firm that it would comply with any request for “[a]ny specific medical record generated in the normal course of health care delivery . . . [and] [a]ny report from a doctor addressing topics you specify.”¹⁰³ The attorney went on to state, “Except as noted above, we will not state whether or not we have supplied all medical evidence and we will not supply medical evidence which undermines a claimant’s claim.”¹⁰⁴ In support of this position, the attorney relied upon social security regulations and sub-regulatory material. The regulation states, “If you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case.”¹⁰⁵ A sub-regulatory document, HALLEX § I-2-524, mandates that “[a] claimant’s failure or refusal to submit existing evidence that an ALJ needs and request [sic] is not a basis for denying the claim or dismissing the RH.”¹⁰⁶ Rather, the ALJ must make a decision based on the evidence available in the case.¹⁰⁷ The attorney also expressed the concern that the judge’s order would place a claimant represented by counsel at a comparative disadvantage to a pro se claimant.¹⁰⁸ This is because an aggressive and conscientious attorney will usually obtain more documents than the typical pro se claimant. Some of those documents could come back to haunt the claimant. Finally, the attorney pointed out the ALJ’s authority to subpoena specific records and to obtain consultative examinations.¹⁰⁹

In a thoughtful letter opinion, the Assistant Bar Counsel of the Virginia State Bar informed the ALJ that the attorney’s actions did not constitute misconduct under Virginia Disciplinary Rule 7-105 and that the state bar would take no further action in the matter.¹¹⁰ It is noteworthy, however, that the Virginia State Bar opinion does not purport to decide the ulti-

evidence (on file with author).

103. Letter from Charles H. Cuthbert, Jr., Partner, Cuthbert Law Offices, P.C., to an Administrative Law Judge, Social Security Administration 1 (Mar. 26, 1992) (on file with author).

104. *Id.*

105. *Id.* at 2 (citing 20 C.F.R. § 404.1516 (1994)) (emphasis omitted).

106. “RH” refers to a Request for a Hearing.

107. SSA HALLEX § I-2-524 (citing 21 C.F.R. §§ 404.1516, 416.916).

108. Letter from Charles H. Cuthbert, Jr., *supra* note 103, at 1.

109. *Id.* at 3.

110. Letter from Richard C. Vorhis, Assistant Bar Counsel, Virginia State Bar, to an Administrative Law Judge, Social Security Administration (Aug. 18, 1992) (on file with author).

mate issue of the attorney's obligation to produce the documents. The opinion cited Virginia Disciplinary Rule 7-105(A), which states, "a lawyer shall not disregard or advise his client to disregard . . . a ruling of a tribunal made in the course for [sic] proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."¹¹¹ The Bar Counsel noted that the relevant question therefore is whether the attorney was taking appropriate steps in good faith to test the validity of such a ruling.¹¹²

The Bar Counsel then noted the attorney's dilemma. Under Canon 4 the attorney is required to preserve the client's confidences and secrets.

The dilemma is particularly harsh in that if [the attorney] should reveal the secrets of his client, he would likely be facing a misconduct proceeding on the violation of the rules regarding confidences and secrets. Furthermore, he would be placed in the situation of not being able to validly contest the ruling since once the information is disclosed, the effect cannot be retracted even on appeal, and therefore would be likely considered moot.¹¹³

The opinion concluded:

Since there is no final order in any of the proceedings effected [sic] that [the attorney] could legally pursue on appeal, [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 your ruling.¹¹⁴

Under the circumstances, the Virginia Bar Counsel found that "whether or not [the attorney] is legally correct in his reading of the applicable laws concerning these proceedings, his actions do not constitute misconduct in regard to Disciplinary Rule 7-105."¹¹⁵

111. *Id.* at 2 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A)).

112. *Id.*

113. *Id.* at 2.

114. *Id.*

115. *Id.* at 3.

E. West Virginia

A variation of the same issues arose in West Virginia in 1991, which ultimately involved higher officials within the Social Security Administration. The acting Hearing Office Chief Administrative Law Judge of the Charleston OHA had proposed a standard "Pre-Hearing Order" to be issued to representatives upon receipt of a request for hearing and prior to assignment of the case to an individual ALJ.¹¹⁶ Claimants' representatives took exception to paragraph 3 of the proposed Pre-Hearing Order which would have required the representative to submit the following:

All relevant medical evidence as set forth in 20 C.F.R. 404.1513/416.913, including medical work-related assessments and updated clinical records from treating physicians, when the same can reasonably be produced. If a representative knows that available evidence exists which is material to the issue of disability, the representative shall submit such evidence to the Administrative Law Judge who adjudicates the case, unless the representative identifies good cause for not submitting the specific evidence and timely petitions the Administrative Law Judge in writing.¹¹⁷

Several members of the Charleston Bar who represent social security claimants signed a letter to the Charleston Acting Chief ALJ in November 1991 setting forth their objections to this proposed language.¹¹⁸ The attorneys forcefully articulated the position that they "have an obligation to present evidence which is in the best interests of our client and which proves the existence of an impairment and his (her) resulting disability. We are not charged with the duty, obligation or responsibility to disprove disability."¹¹⁹

They then proposed that the West Virginia State Bar adopt a resolution in opposition to a lawyer having a duty to submit adverse evidence in a social security proceeding.¹²⁰ Following

116. [Proposed] Pre-Hearing Order issued by Charleston, West Virginia, Office of Hearings and Appeals, Social Security Administration (on file with the author).

117. *Id.* at 2.

118. Letter from Frederick G. Barkus, et al., Partner, Bickley, Jacobs & Barkus, to Charlie Paul Andrus, Acting Chief Administrative Law Judge, Charleston, West Virginia, Office of Hearings and Appeals (Nov. 7, 1991) (on file with author).

119. *Id.* at 2.

120. *Id.*

a number of meetings, the Acting Chief Administrative Law Judge for the United States issued a memorandum to the incoming Charleston Hearing Office Chief Administrative Law Judge, addressing various issues raised in the controversy.¹²¹ This memorandum expressed a number of concerns with regard to the formality of the proposed Pre-Hearing Order, delays in scheduling hearings that it would cause, and the proposed requirement of submitting evidence in advance of hearings.¹²²

Addressing the issue of an attorney's duty to produce adverse evidence and the proposed West Virginia State Bar Resolution, the Acting Chief ALJ for the United States stated his opposition to the principle that an attorney does not have a duty to submit such evidence. He cited a number of reasons. First, the U.S. Acting Chief noted that "the ALJ as fact finder is not asking the attorney to divulge any information that the Judge is not already entitled to."¹²³ He added, "I note that it has been a long-standing maxim of evidence law that the refusal or failure to bring before the tribunal a document whose contents are material or relevant to the issues of the case permits the tribunal to infer that the tenor of the document is unfavorable to the party's cause."¹²⁴ Furthermore, "[a] representative's refusal to submit material medical evidence to an ALJ also cannot be reconciled with Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct."¹²⁵ The memorandum opined that "[t]he Social Security disability hearing is analogous to an *ex parte* proceeding, in that the hearing is nonadversarial in nature, i.e., the Agency is not represented."¹²⁶

Importantly, however, the U.S. Acting Chief Judge was careful to add, "my beliefs are based on an initial review and analysis of pertinent law and policy."¹²⁷ He noted that he had also discovered "at least one agency policy statement (which is somewhat dated) which suggests a contrary conclusion."¹²⁸ He

121. U.S. ALJ Memorandum, *supra* note 10.

122. *Id.*

123. *Id.* at 3.

124. *Id.*

125. *Id.* (citing rule 3.3(d) relating to *ex parte* proceedings and adverse facts).

126. *Id.* at 3-4.

127. *Id.* at 4. Presumably, this is a reference to HALLEX § I-2-524, cited by the Virginia attorney in his response to the ALJ. See *supra* notes 103-109 and accompanying text.

128. *Id.*

stated that he was going "to request the Associate Commissioner to request an opinion of the Office of General Counsel on the issue."¹²⁹

Notwithstanding the U.S. Acting Chief Judge's reservations, the West Virginia State Bar Board of Governors finally approved a resolution in April 1992 formally opposing that portion of paragraph 3 of the proposed hearing order,

which purports to require claimant's [sic] 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.¹³⁰

V. COURT DECISIONS ON EX PARTE PROCEEDINGS AND ADVERSE EVIDENCE

There appears to be a complete lack of judicial precedent on the key issue addressed in this article, the duty of an attorney in a social security proceeding to produce evidence which is adverse to his client's claim of disability. Thus far, this has been a classic example of a legal question capable of repetition yet evading review. None of the various state opinions on the subject cite any judicial authority within the social security area. The *Annotated Model Rules of Professional Conduct* of the Center of Professional Responsibility of the ABA, in its explanation of paragraph (d) of Rule 3.3, cites a number of cases on ex parte proceedings and adverse evidence, none of which arise in the social security field.¹³¹ Similarly, *The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct*, in its discussion of the duty of disclosure in ex parte proceedings makes no reference to social security proceedings or cases at all.¹³² There is no authority which indicates that Rule 3.3.(d) was intended to apply to a social security administrative proceeding, or that the drafters of the Model Rules even contem-

129. *Id.*

130. Resolution of the West Virginia State Bar (Apr. 23, 1992) (on file with author).

131. MODEL RULES, *supra* note 58, at 347.

132. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 579-80, 619 (2d ed. Supp. 1992).

plated the application of Rule 3.3(d) to social security proceedings.¹³³ Obviously, this does not answer the question as to whether Rule 3.3(d) logically should be applied to social security proceedings.

The various cases cited by the authorities and commentators in support of Rule 3.3(d) fall into several categories. There are several cases involving motions for default judgment where critical information was kept from the court, situations involving nonmeritorious claims to a court, situations where there has been concealment in discovery, and others involving concealment of matters relating to fee arrangements with clients. The most frequently cited are patent cases. All of these cases arguably have some bearing on social security practice, but all likewise are markedly distinct from social security practice. *The Annotated Model Rules* cites the following cases in its Legal Background for Rule 3.3(d).

In *Addison v. Brown*,¹³⁴ an attorney filed a writ to prohibit a trial on behalf of criminal defendants alleging a violation of Florida's speedy trial rule. The writ was filed late on a Friday afternoon, and the trial was supposed to commence the following Monday. Despite the inconvenience, the court ordered a stay and therefore the trial was postponed. Subsequently, the court found out that the petition for the writ omitted critical information which counsel knew or should have known: the petitioners had obtained three or more continuances and "had specifically waived speedy trial under the rule."¹³⁵ The District Court of Appeals opined, "While an attorney always carries a duty and obligation of candor with the court . . . this is especially important when the relief requested is urgently sought and the time insufficient to allow the opposition to present a response."¹³⁶ Under the circumstances, the District Court of Appeals imposed sanctions against the attorney which were upheld on appeal per curiam by the Florida Supreme Court. Clearly, the exigencies of the situation, involving a last minute writ to prohibit a criminal trial, are far more akin to a

133. A recent student note detailing the legislative history of Model Rule 3.3(d) reaches the same conclusion *sub silentio*; there is no reference to social security practice or caselaw in the deliberative processes leading to promulgation of the Rule. Jill M. Dennis, Note, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL ETHICS 157 (1994).

134. 413 So. 2d 1240 (Fla. Dist. Ct. App. 1982).

135. *Id.* at 1241.

136. *Id.* (citations omitted).

typical TRO proceeding than to practice before a Social Security ALJ.

*In re Rensch*¹³⁷ also arose in a criminal context. A criminal defendant had retained private counsel on a limited basis and also sought the services of the public defender's office. This caused the trial judge concern about the defendant's status as an indigent and whether the defendant's assets would be available to satisfy a county lien for court appointed attorney's fees before they would be available to pay private attorney fees. The judge questioned the private attorney as to what his consideration had been thus far in representation, to which the attorney replied, "Not a penny."¹³⁸ While this might have been literally true, in that no cash had changed hands, what the attorney had failed to disclose was that he had had the criminal defendant deed to him a lot valued at \$4,000-\$5,000 and also give a promissory note for \$5,000 with the defendant's parents co-signing the note as sureties.¹³⁹ The state supreme court found that the attorney was guilty of a serious breach of professional ethics, and that he had willfully violated Canon 1 and Disciplinary Rule 1-102(A)(4) and (5) by his misrepresentation of his fee arrangement to the court.¹⁴⁰ There can be little argument that the attorney in this case had used an overly literal English usage to commit "dishonesty, fraud, deceit or misrepresentation."¹⁴¹ Moreover, in this situation, the critical information was largely within the control of the interested parties, and the court had little independent mechanism for ascertaining the falseness of the attorney's statements. This is unlike an ALJ with broad discovery powers.

*In re Turner*¹⁴² involved a complex receivership matter with two corporate entities and a private attorney who acted as an independent counsel for one of those entities. During a recess in the receivership proceeding, the attorney accepted from his employing corporation a check issued to that corporation from a debtor corporation. After the recess, the trial judge

137. 333 N.W.2d 713 (S.D. 1983).

138. *Id.* at 714.

139. *Id.* at 713-14.

140. *Id.* at 716.

141. *Id.* (quoting Disciplinary Rule 1-102(A)(4)). Unquestionably, a social security attorney who similarly misstated his fee arrangements to the Social Security Administration would properly be subject to disciplinary proceedings. *In re Quaid*, 646 So.2d 343, 349 (La. 1994).

142. 416 A.2d 894 (N.J. 1980).

placed the employing corporation in receivership. The attorney subsequently deposited the check into his personal bank account even though he knew that the check was an asset of the corporation then in receivership.¹⁴³ The New Jersey Supreme Court found that the attorney had a duty to advise the Court of this asset and, until being advised of the Court's disposition of the receivership application, to hold the money in trust.¹⁴⁴ "Respondent's failure to do so constituted violations of DR 1-102, as conduct prejudicial to the administration of justice, and of DR 7-102(A)(3), by failing to disclose that which he was required to reveal."¹⁴⁵ The attorney was publicly reprimanded and ordered to reimburse costs to the court.¹⁴⁶ Again, this situation involved outright concealment of facts which the court had no effective independent means of ascertaining at the time. Furthermore, this was another situation involving an expedited process where time was of the essence.

There are several cases involving default judgments and the failure of the party seeking the default to inform the court of understandings with opposing parties. In *In re Schiff*,¹⁴⁷ the attorney was found to have engaged in numerous bad acts. Those which are most relevant to the duty to disclose involved the attorney's repeated taking of default judgments when he knew that opposing counsel had become involved in the case and there was no intention on the part of defendants to default. In some of these cases the attorney had told opposing counsel it was not necessary to appear in court because he would obtain a continuance or otherwise move the matter along, and then proceeded to take a default. In several of these instances, the attorney then failed to inform opposing counsel of the entry of the default.¹⁴⁸ The court imposed a public reprimand and two years' probation.¹⁴⁹ These matters were, in reality, only *ex parte* in the sense that, by the attorney's conduct, he made the court unaware that the matters were being contested. They were not true *ex parte* proceedings, but only appeared to be so because of the attorney's ongoing pattern of deceit.

143. *Id.* at 895.

144. *Id.*

145. *Id.*

146. *Id.* at 896.

147. 542 S.W.2d 771 (Mo. 1976) (en banc).

148. *Id.* at 771-74.

149. *Id.* at 775.

Similarly, in *Hutton v. Fisher*,¹⁵⁰ a law firm took a default judgment in a personal injury matter despite the fact that a senior attorney in the firm was aware that the defendants were represented by counsel who asserted that he had telephoned the attorney requesting additional time to answer and was assured that he might have whatever time he wanted. The case is complicated by the fact that the new associate who took the default judgment was apparently not made aware of the contact from the counsel for the defendants. There was also another unintentional error in counsel's averment in support of the default in that he asserted that no defendant was an infant although in fact one of the defendants was a minor.¹⁵¹ Without finding a violation of disciplinary rules, the Third Circuit ordered the default judgment vacated under these circumstances. Again, this proceeding was ex parte only in a technical sense as the senior attorney was aware of the intention of defendants to retain counsel to represent them in the proceeding.¹⁵²

In *Singer Company v. Greever & Walsh Wholesale Textile*,¹⁵³ the District Court set aside a default judgment where there had been a written agreement between counsel for an enlargement of time to answer, and plaintiff's counsel took the default judgment while being aware that counsel for the defendant would be out of town at the time. Again, there was no finding of a violation of disciplinary rules in the opening of the default judgment.

In *Dalminter, Inc. v. Edwards, Inc.*,¹⁵⁴ the court set aside another default judgment. In this interesting case, a corporate defendant, through its president, sent a letter to the attorney for the plaintiff in response to a summons indicating that, "Our answer to this complaint is that the Summons was served in error since our Corporation was not chartered until [several months after the incidents complained of]."¹⁵⁵ The defendant corporation took no further action. When plaintiff's counsel filed for a default judgment, he did not inform the court of this letter which had not been filed with the court. The court found

150. 359 F.2d 913 (3d Cir. 1966).

151. *Id.* at 914-15.

152. *Id.* at 915.

153. 82 F.R.D. 1 (E.D. Tenn. 1977).

154. 27 F.R.D. 491 (S.D. Tex. 1961).

155. *Id.* at 492 (quoting a letter from the attorney for the plaintiff).

that plaintiff's counsel had a duty to inform the court of the letter, particularly since a layperson might well have concluded from the summons that a response directly to the plaintiff was all that was required.¹⁵⁶ The court did not find any violation of rules of conduct.

The case of *Litton Systems v. American Telephone & Telegraph*,¹⁵⁷ involved discovery abuse in an anti-trust case. The federal district judge upheld the Magistrate's finding that plaintiff's counsel had engaged in a "pattern of intentional concealment of evidence"¹⁵⁸ related to part of the underlying litigation. The attorney, without having reviewed all of the deponent's files, had stated in connection with the taking of a deposition that there were no other relevant documents of the deponent. In fact, there were other documents in the deponent's bottom drawer.¹⁵⁹ The attorney also misstated the scope of an investigation by a new president of plaintiff's company.

The Court of Appeals upheld the imposition of sanctions of over \$10,000,000 against the plaintiff, although the sanctions were not as great as those sought by the opposing party, agreeing with the trial court's finding that plaintiff's in-house counsel was "grossly negligent."¹⁶⁰ Thus, this case involved not a mere failure to produce adverse evidence, but also an affirmative denial of the existence of such evidence.

In *People v. Lewis*,¹⁶¹ a criminal defendant raised several issues on appeal. Among those issues was his assertion that he had been denied effective assistance of counsel at trial in that his attorney had told the court that he was of the opinion that the defendant was able to cooperate in his own defense and was fit for trial and sentencing. The defendant had wanted his attorney to assert that he was not capable of standing trial. The appellate court held,

Where a defense attorney knows that his client is capable of communicating intelligently, and the client, in an apparent attempt to deceive the trier of fact, presents confused or self-contradictory testimony, it is the ethical responsibility of

156. *Id.* at 493.

157. 90 F.R.D. 410 (S.D.N.Y. 1981).

158. *Id.* at 413.

159. *Id.*

160. *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 826 (2d Cir. 1983).

161. 393 N.E.2d 1380 (Ill. App. Ct. 1979).

defense counsel to disclose to the trial court the facts as he knows them. See Illinois Code of Professional Responsibility, DR 7-102A(6) and (7); DR 7-102B(1).¹⁶²

This case seems to be more directed to a duty not to pursue a fraudulent claim than a duty to introduce adverse evidence.¹⁶³

The case of *Hennigan v. Harris County*¹⁶⁴ also involved matters of fraud. In this case, a constable brought a fraud action against an attorney. The attorney had presented a writ of execution to the constable with instructions to levy against a property owned by an individual who had been under a duty to pay the attorney fees arising out of a prior divorce action. There was a hearing held on the matter, after which the party owing the debt to the attorney paid the attorney by check in the amount of most of the debt, marked "Paid in full."¹⁶⁵ The attorney deposited that check into his bank account. He failed to inform the court of the payment, and subsequently the court entered judgment against the constable. That judgment became final, and the constable paid the attorney the full amount of the debt. Approximately a year later, the constable learned for the first time that the debt had already been paid by the other party. The constable brought an action of fraud against the attorney for concealing the fact that he had received payment from the opposing party. The court found that the action of fraud was valid. "Where there is a duty to speak, silence may be as misleading as a positive misrepresentation of existing facts."¹⁶⁶ The court entered judgment against the attorney based upon his fraud. Clearly this case involves wrongful self-dealing on the part of the attorney and actual fraud upon the court.

In *Beckman Instruments, Inc. v. Chemtronics, Inc.*,¹⁶⁷ the court invalidated a patent on two grounds, the second of which is pertinent here. When the patent holder filed its application with the Patent Office, it failed to disclose information in its

162. *Id.* at 1384.

163. This case is startlingly similar to the subsequent Supreme Court decision in *Nix v. Whiteside*, 475 U.S. 157 (1986), in which the Court found no denial of the right to assistance of counsel where the criminal defense attorney refused to cooperate with the defendant in presenting perjured testimony.

164. 593 S.W.2d 380 (Tex. Civ. App. 1979).

165. *Id.* at 382.

166. *Id.* at 384.

167. 428 F.2d 555 (5th Cir. 1970).

possession regarding a prior unpatented device which had been disclosed to the public by a published article and a public speech, which device the court found to be substantially identical to the device which was then patented. The court cited Supreme Court precedent:

Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an *uncompromising duty* to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. . . . Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies.¹⁶⁸

It is noteworthy that this case, like other Patent Office cases cited in support of a duty to propound adverse information,¹⁶⁹ relies upon the specific nature of the Patent Office and its limited resources. *Beckman* also repeated the rationale of the Supreme Court in *Pfizer & Co. v. Federal Trade Commission*:¹⁷⁰ "The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys."¹⁷¹ The *Beckman* court further elaborated:

The Patent Office does not have full research facilities of its own, and it has never been intended by Congress that it should. In examining patents, the Office relies heavily upon the prior art references that are cited to it by applicants. It is therefore evident that our patent system could not function

168. *Id.* at 565 (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 818 (1945) (emphasis added)). The Patent Office has promulgated a regulation setting forth this duty. 37 C.F.R. § 1.56 (1994); see also 37 C.F.R. § 10.85 (1994).

169. Another patents case cited in the commentaries is *Kingsland v. Dorsey*, 338 U.S. 318 (1949). See Harold L. Marquis, *An Appraisal of Attorneys' Responsibility Before Administrative Agencies*, 26 CASE W. RES. L. REV. 285, 298 (1976). In *Kingsland*, the Court upheld the disbarment of an attorney from patent practice. The *per curiam* opinion for the Court provides no details, but a strong dissent by Justice Jackson indicates that the attorney had participated in ghost-writing a trade journal article which was later presented to the Patent Office as having been written by an apparently disinterested labor leader. There was no claim that the article itself was false or misleading in any way.

170. 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

171. *Beckman*, 428 F.2d at 565 (quoting *Pfizer*, 401 F.2d at 579.).

successfully if applicants were allowed to approach the Patent Office as an arm's length adversary.¹⁷²

To the extent that the Social Security Administration and its contracting state agencies have significant personnel and the ability, indeed duty, to obtain information with regard to applicants' claims for disability, and to the extent that OHAs have staff as well as the ability to bring in vocational and medical experts, the position of the Social Security Administration appears to be markedly different from that of the Patent Office. Whether SSA's ability to investigate claims should lead to a different result in a social security case than in the patent case, should a claim ever rise to the level of court, remains at this point an open question.

VI. A TENTATIVE ANALYSIS OF THE DUTY TO PRODUCE UNDER THE MODEL RULES

Against the confusion of the various bar opinions and the silence of the courts on the subject, any conclusion on the basic issue presented, as to the duty under the Model Rules to produce adverse evidence in a social security hearing, is necessarily tentative. Application of Rule 3.3(d) in those jurisdictions which have adopted the Rules is dependent upon whether a social security hearing is an *ex parte* proceeding within the meaning of the Rules. While social security hearings have features that are similar to a classic *ex parte* proceeding, they have other features that are markedly dissimilar. Although it appears that the drafters of the Model Rules never specifically contemplated social security hearings, or were silent if they did, that does not answer the question. It is certainly not reasonable to expect that the drafters would specifically contemplate, much less name, every type of judicial and administrative proceeding in which attorneys represent clients.

I am forced to conclude that, despite the fact that social security hearings involve an enormous administrative agency with not only the duty but also the vast resources to investigate social security claims, and the fact that ALJs in many ways do represent the government's interest, nevertheless, it appears that social security cases are sufficiently akin to patent cases that the *ex parte* rule should apply to them. The hearings

172. *Id.* at 564-65.

are, in a technical sense, nonadversarial. While ALJs have a duty to develop the record, they do not take the place of government attorneys. More importantly, they *should* not take the place of government attorneys. They do not interview claimants prior to a hearing, although an interview of sorts is conducted by an SSA worker when the claimant initially applies. Those attorneys who take the position that they are not under the obligations of Rule 3.3(d) in effect invite, practically compel, the ALJ to assume an adversarial position against their client.

If Rule 3.3(d) does apply to social security proceedings, a number of questions still remain. The Rule requires a lawyer to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."¹⁷³ When is a fact known to a lawyer? Even if a fact is "known" to a lawyer, is the lawyer under a duty to investigate and obtain supporting documentation of that fact, either as her own obligation or if ordered to do so by an ALJ? Is the lawyer required to expend her client's money or her own money to investigate and obtain evidence which is potentially adverse to the client's case? Finally, what is a fact?

The terminology section of the Model Rules states that, "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."¹⁷⁴ Just when a "fact" is "known" to an attorney is a troubling epistemological problem.¹⁷⁵ Nevertheless, knowledge of a related legal proceeding involving a client's medical condition could well demonstrate knowledge of the existence of medical reports ordinarily generated in that type of proceeding.

Perhaps the most troubling area for the social security bar involves so-called "independent medical examinations" (IMEs) obtained by workers' compensation insurance carriers where the claimant for disability has previously litigated a claim for workers' compensation. It is a foregone conclusion that a contested workers' compensation case will always generate evidence adverse to the claimant.¹⁷⁶ It is not uncommon that a

173. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1993).

174. MODEL RULES, *supra* note 58, at 11.

175. For a brief, but telling, exegesis of the subject, see Justice Stevens' concurrence in *Nix v. Whiteside*, 475 U.S. 157, 190-91 (1986).

176. A similar situation would likely occur had there been a contested personal

claimant for benefits under Title II of the Social Security Act has previously asserted an on-the-job injury in a workers' compensation case. In many instances, the same attorney who is representing the claimant in the social security claim, or another attorney in the same firm, has represented the claimant in the workers' compensation claim. In other cases the social security representative will be aware of a previous workers' compensation case.

It is critical to an understanding of the depth of the bar's concern to realize that these medical examinations are only independent in the sense that the doctor is not the claimant's doctor.¹⁷⁷ The examinations are performed by physicians who are under contract to the workers' compensation insurance carriers and who understand full well the economic interests of the party who pays the bill.¹⁷⁸ If the IME is simply submitted to the Social Security ALJ, a highly adversarial report will become evidence in a nonadversarial proceeding, with the grave danger of impairing the truth-seeking function and skewing the results. If the claimant's case is before an ALJ who tends to seize upon any piece of adverse evidence to deny a claim, production of the IME will almost inevitably be fatal to the client's claim for disability benefits. As noted previously, when the claim is reviewed on the substantial evidence test, some courts will then uphold the denial of benefits even though the great weight of evidence supports the claim of disability.¹⁷⁹ Indeed, this may well happen even if the workers' compensation referee or appellate tribunal discredited the IME and awarded workers' compensation.¹⁸⁰

Rule 3.3(d) itself does not contain a duty to obtain material facts, only a duty to inform a tribunal of material facts. If the existence of a prior workers' compensation claim is a "fact," then it would appear that there is a duty to inform the ALJ of a prior workers' compensation proceeding. It does not necessar-

injury action involving the claimant.

177. See Thomas J. Vesper, *Who's Afraid of the Independent Medical Examiner?*, TRIAL, Dec. 1993, at 29.

178. Such doctors tend to be at least as adversarial as SSA's consulting physicians of whom Justice Douglas said "[t]he use by HEW of its stable of defense doctors without submitting them to cross-examination is the cutting of corners—a practice in which certainly the Government should not indulge." Richardson v. Perales, 402 U.S. 389, 414 (1971) (Douglas, J., dissenting).

179. See *supra* note 40 and accompanying text.

180. See *supra* note 40 and accompanying text.

ily follow, however, that the ALJ then has a right to compel the attorney to obtain the adverse evidence against his client. Nevertheless, many ALJs seem to believe that they have such power.¹⁸¹ Thus, the attorney becomes compelled to work against her own client, often at her own expense.

Interestingly, none of the various state court opinions on this subject have addressed the distinction between fact and opinion. Rule 3.3(d) is limited to a duty to disclose material facts, not opinions. Anyone who has ever dealt with forensic medicine will readily understand that the distinction between a medical fact and a medical opinion is an elusive one at best.¹⁸² Moreover, it is quite common for medical reports and depositions to contain a mix of fact and opinion. For example, a single medical report could contain a "fact" that a blood test indicated a non-therapeutic level of anti-convulsive medication, coupled with the doctor's opinion that the patient was not regularly taking that medication. If there is a duty to produce facts, the attorney may be effectively compelled to produce adverse opinions that are part of the same document.

VII. 1994 SOCIAL SECURITY ACT AMENDMENT ADDRESSING FRAUDULENT CLAIMS

The Social Security Independence and Program Improvements Act of 1994 contains a section entitled "Expansion of the authority of the Social Security Administration to prevent, detect, and terminate fraudulent claims for OASDI and SSI benefits,"¹⁸³ which adds a new section 1129 to the Social Security Act, effective October 1, 1994, reading, in pertinent part:

CIVIL MONETARY PENALTIES AND ASSESSMENTS FOR TITLES II AND XVI.

(a)(1) 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—

(A) monthly insurance benefits under title II, or

181. See *supra* text accompanying note 117.

182. In a society that cannot agree on who is a living human being (*Roe v. Wade*, 410 U.S. 113 (1973)) and who is effectively a dead one (*Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992)), one might reasonably wonder whether there are any medical "facts" at all.

183. The Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 206, 108 Stat. 1464, 1509-16 (1994).

(B) 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 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.¹⁸⁴

The statutory definition of "a material fact" is curiously circular:

(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.¹⁸⁵

In this subsection, "one" clearly relates back to "fact," thus maintaining the fact/opinion distinction. Query: is it a fact that an IME has expressed the opinion that someone is a malingerer? If it were, the distinction would be effectively eliminated.

While one may doubt that the authors of this amendment really considered the attorney's ethical dilemma caused by knowledge or possession of adverse evidence,¹⁸⁶ it cannot be denied that the language is remarkably similar to Rule 3.3(d) of the Model Rules. Like Rule 3.3(d), moreover, it fails to resolve the difficult issues of mixed fact and opinion evidence and the proper role (if any) of medical reports generated in a prior adversarial proceeding in adjudicating social security claims. It likewise fails to address an advocate's duty—if any—to obtain such evidence, or clearly delineate the scope of client confidentiality.

Further, by adding the threat of civil penalties, without clarifying the ethical obligation of attorneys facing genuine

184. *Id.* at 1510 (emphasis added).

185. *Id.*

186. The Report of the House-Senate Conference Committee on the Act is silent in this regard. *Social Security Administrative Reform Act of 1994*, [CCH Special 1] Unemployment Ins. Rep. with Soc. Security (CCH) No. 7, Pt. 3, at 144-45 (Aug. 22, 1994).

dilemmas, the new provision is especially troubling. Now the attorney is caught between risking a disciplinary complaint by her client on the one hand (as noted by the Virginia State Bar opinion letter)¹⁸⁷ and facing severe financial sanctions on the other. This is all the more unfortunate since the section never specifically addresses the attorney's dual roles as advocate and "officer of the legal system."¹⁸⁸

VIII. THE APPROPRIATE ROLE OF THE ZEALOUS PRACTITIONER

Notwithstanding all the legitimate concerns of the bar outlined above, I join those advocates who continue to believe that in the long run it is not only consistent with the Rules of Conduct, but also with the best interests of clients, to produce all relevant evidence at a social security ALJ hearing.¹⁸⁹ I assert that this position is not only prudent in terms of the attorney's good standing with the bar, but also as a litigation strategy.

I am well aware of situations in which there is a complete breakdown of goodwill between certain advocates and the ALJs before whom they appear, and this is most unfortunate. Nevertheless, in the long run I believe that the clients will be better served by full disclosure for several reasons. First, if the attorney submits the adverse evidence, she can use that opportunity to explain to the ALJ why it should not defeat her client's claim. If the ALJ learns of this evidence from other sources, it will be too late to undo the harmful effect of the evidence.¹⁹⁰ Second, it should never be forgotten that ultimately, any ALJ is engaged in the job of judging. The ALJ necessarily judges not only the client but also the attorney. The great bulk of cases will inevitably involve some judgment calls. If the ALJ does not fully trust the attorney who practices before her, if the ALJ believes that the attorney may be hiding relevant, harmful evidence, it is most unlikely that the ALJ will exercise that judgment in favor of that attorney and that attorney's client. Third, if the ALJ believes that the attorney is hiding relevant evidence, this will almost inevitably provoke the ALJ to adopt

187. See *supra* note 110 and accompanying text.

188. MODEL RULES, *supra* note 58, at 7.

189. I am joined in this view by Charles Hall, Esq., a prominent social security practitioner and author. CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 2.52 (West's Handbook Series, 1993 ed., 1993).

190. *Id.*

more of the role of government advocate against the client rather than the appropriate role of fact finder.

Based on many years of social security practice, I believe that most ALJs are more likely to render favorable decisions when they have a complete record, when they feel they are being dealt with honestly, and when they know that the attorney who is presenting the claim is a zealous advocate who will make sure that the decision is correct by appealing that case as far as necessary if the decision is not legally supportable.

Moreover, the social security regulations provide a practical way to deal with the adverse medical report generated on behalf of an adversary in another legal proceeding. The zealous advocate can and should seek to have the ALJ subpoena the doctor who made the report to the social security hearing.¹⁹¹ There is a growing body of authority that a claimant has a right to have the ALJ subpoena such a doctor to the hearing for purposes of cross-examination.¹⁹² If the ALJ refuses to issue the subpoena, or the doctor fails to comply, this would be a basis to exclude the adverse report or its use as substantial evidence.¹⁹³ Indeed, the failure of claimant's counsel to exercise "his right to subpoena the reporting physician"¹⁹⁴ was a key factor relied upon by the Supreme Court in *Richardson v. Perales*¹⁹⁵ to uphold the use of medical consultants' reports without cross-examination.

IX. THE NEED FOR RULES OF PROFESSIONAL CONDUCT FOR ADMINISTRATIVE ADVOCACY

As should by now be clear, the current state of the law on the professional responsibilities of the advocate in the realm of social security administrative proceedings is totally unsettled. As correctly noted by the Virginia State Bar Counsel, this plac-

191. 20 C.F.R. §§ 404.950(d), 416.1450(d); see also *Richardson v. Perales*, 402 U.S. 389, 402, 404-05 (1971).

192. See, e.g., *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990), cert. denied, 500 U.S. 959 (1991); *Wallace v. Bowen*, 869 F.2d 187, 192-93 (3d Cir. 1988); *Souch v. Califano*, 599 F.2d 577, 580 (4th Cir. 1979); *Goan v. Shalala*, 853 F. Supp. 218 (S.D.W. Va. 1994).

193. See, e.g., *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990). Without the inducement of a fee similar to those a doctor normally receives from the workers' compensation insurance carrier, it is doubtful that most doctors would comply with such a subpoena.

194. *Perales*, 402 U.S. at 402.

195. 402 U.S. 389 (1971).

es the attorney in a true dilemma.¹⁹⁶ If she does not comply with an ALJ's direction to produce adverse evidence, she runs the risk of both adverse action against her client and a disciplinary proceeding and possible punishment for herself. If she complies with the ALJ's request or otherwise produces adverse evidence, she runs the risk of not only losing the case and the fee, but also having the client make a complaint to the disciplinary authorities.¹⁹⁷ Moreover, as has been seen, the few bars that are now addressing this issue are taking different approaches, and individual ALJs and OHAs, apparently without rule-making authority, have taken it upon themselves to issue their own, non-uniform edicts on the subject.¹⁹⁸ The Social Security Administration has long emphasized its desire to have national standards,¹⁹⁹ and the current situation is the antithesis of such standards.

Almost twenty years ago, Professor Harold Marquis argued for the need to have a joint bar-agency committee draft a Code of Ethics covering the different types of administrative proceedings and perhaps supplemental rules tailored to the unique proceedings of the particular agencies.²⁰⁰ Clearly that need is at least as great today, and the 1994 fraud amendment to the Social Security Act may provide the necessary impetus. Indeed, SSA's September 1994 Plan for a New Disability Claim Process calls for the agency to "establish a code of professional conduct for representatives in all matters before SSA."²⁰¹

Any such set of rules should also govern the responsibilities of individuals who are not members of the bar, but who practice before those agencies on anything other than an individual volunteer basis. There is some precedent for state courts

196. See *supra* part IV.D.

197. *Id.*

198. See *supra* part IV.

199. This is the stated justification for the Secretary's policy of nonacquiescence. See Comment, *The Doctrine of Nonacquiescence*, 13 SAN FERN. V. L. REV. 9, 16 (1985).

200. Marquis, *supra* note 169, at 314.

201. SOCIAL SECURITY ADMINISTRATION, PLAN FOR A NEW DISABILITY CLAIM PROCESS 42 (SSA Pub. No. 01-005, 1994). In February 1995, the Office of Hearings and Appeals proposed a set of "Rules of Conduct and Standards of Responsibility for Representatives." While the proposal was drafted, unfortunately, without any involvement of the practicing bar, SSA has at least solicited comments on it. The proposal fails to address many of the difficult issues raised herein with any specificity. A revised draft, made available in April 1995 and on file with the author, provides somewhat more specificity, but remains deficient in a number of respects in dealing with these difficult issues.

taking the view that they can regulate the conduct of non-attorneys engaging in a quasi-legal practice.²⁰² The Patent Office has dealt with the problem by promulgating a rule by which the Code of Professional Responsibility was made applicable to registered patent agents who are not attorneys.²⁰³ In the last several years, the Social Security Administration has seen a number of non-attorneys engaged in regular practice before Social Security ALJs. Clearly, if it is unethical for a licensed attorney to fail to produce certain evidence in an ALJ hearing, it cannot be ethical for a nonlicensed professional advocate to engage in similar conduct.²⁰⁴ Indeed, the Social Security Act gives the Secretary explicit power to prescribe rules and regulations for "agents or other persons" representing claimants and to suspend or prohibit from further practice "any such person, agent, or attorney who refuses to comply."²⁰⁵

The obvious danger is that the Administration would be tempted to promulgate rules of a draconian nature intended to disadvantage claimants and their attorneys rather than honestly perform a truth-seeking function. For this reason, a joint bar-agency committee would be critical to the process. In his memo to the Charleston ALJ of April 1992, the United States Acting Chief Administrative Law Judge expressed his desire for "good relations between all Judges . . . and all members of the Bar to exist."²⁰⁶ He further opined that "we must build a consensus of opinion on this issue."²⁰⁷

It will ultimately not serve the interests of the Administration, the bar, or, most importantly, the claimants, for SSA to insist on the production of medical reports generated in adversarial proceedings, only to have advocates insist on the issuance of subpoenas which are unlikely to be honored. This will hardly enhance the administrative adjudicative process and its valid truth-seeking role. It would be more consistent with the benevolent purposes of the Social Security Act for the

202. See *Triffin v. DiSalvo*, 643 A.2d 118 (Pa. Super. Ct. 1994).

203. David J. Henry, *Ethics in United States Patent Practice*, 62 A.B.A. J. 465 (1976). See generally 37 C.F.R. § 10 (1994).

204. I wish to make it clear that I would not seek to apply any such rules to the individual who, on a one-time, uncompensated basis, represents a friend or family member in a social security hearing. It is not reasonable to believe that such individuals would even be familiar with formal rules of conduct.

205. 42 U.S.C. § 406(a) (1988).

206. U.S. ALJ Memorandum, *supra* note 10, at 4.

207. *Id.*

Administration to recognize that requiring the production of such potentially highly prejudicial adversarial reports in what is ostensibly a nonadversarial adjudicative process is not particularly useful, and is, ultimately, simply inappropriate.