



## Administrative Conference of the United States

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### **SSA DISABILITY BENEFITS PROGRAMS: THE DUTY OF CANDOR AND SUBMISSION OF ALL EVIDENCE**

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This report was prepared by the Office of the Chairman of the Administrative Conference of the United States. The views expressed do not necessarily reflect those of the Council, the members of the Conference, or its committees.

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## INTRODUCTION

The Social Security Administration’s (“SSA”) disability adjudication system decides millions of claims annually. As the Supreme Court noted in *Richardson v. Perales*:

the system’s structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend.<sup>1</sup>

That observation was made over 40 years ago. The *Perales* case established the validity under the due process clause of deciders (then hearing examiners, now Administrative Law Judges (“ALJs”)) engaging in a “three-hat role” of impartial decider while “act[ing] as an examiner charged with developing the facts.”<sup>2</sup> *Matthews v. Eldridge* later pointed out that, “[t]he [ALJ] hearing is nonadversary and the SSA is not represented by counsel.”<sup>3</sup> The ALJ also carries a special obligation in Social Security proceedings to develop the record fully and fairly.<sup>4</sup> Over the years, the number of claimants represented—by attorneys and by non-attorneys—has increased dramatically. In this situation, the ALJ’s role in managing and balancing the process has become ever-more complex.

One important question that has arisen is whether SSA could improve its adjudicatory process if claimants and their representatives were required to disclose—prior to adjudicatory proceedings conducted by administrative law judges—complete documentary evidence related to their disability claim (especially medical evidence in the form of medical records of treating physicians), even if potentially adverse to their claims. SSA has the authority to regulate the submission of evidence and the conduct of representatives (whether they are attorneys or non-attorneys).<sup>5</sup> Under SSA’s existing regulations, however, it is not clear whether claimants (and their representatives) must disclose adverse information and under what circumstances they do so.

With regard to adverse, documentary evidence, claimants’ representatives have contended that: (1) the existing regulations do not clearly impose an affirmative duty on claimants (or their representatives) to disclose adverse evidence in the absence of a specific request from SSA to do so, and that (2) without a clear regulatory-based disclosure obligation, some attorney-representatives may refrain from doing so to avoid facing difficult questions of legal ethics under their state bar rules. SSA proposed rules in the mid-1990s, and, again, in the mid-2000s, to address these issues, but no final rules emerged from these rulemaking efforts that impose specific obligations on claimants (or their representatives) to submit adverse evidence.<sup>6</sup>

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<sup>1</sup> 402 U.S. 389, 399 (1971).

<sup>2</sup> *Id.* at 410.

<sup>3</sup> 424 U.S. 319, 339 (1976); *see also* *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (“Social Security proceedings are inquisitorial rather than adversarial.”).

<sup>4</sup> *E.g.*, *Byes v. Astrue*, 687 F.3d 913, 915-16 (8th Cir. 2012).

<sup>5</sup> 42 U.S.C. § 406(a)(1) (2012).

<sup>6</sup> *See, e.g.*, Soc. Sec. Admin., Administrative Review Process for Adjudicating Initial Disability Claims; Final Rules, 71 Fed. Reg. 16,424, 16,437 (Mar. 31, 2006); Soc. Sec. Admin., Administrative Review Process for Adjudicating Initial Disability Claims; Notice of Proposed Rulemaking, 70 Fed. Reg. 43,590 (July 27, 2005); Soc. Sec. Admin., Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and

The issue is important because too often ALJs must decide a claimant’s entitlement to benefits—in particular, whether the claimant is disabled—without knowledge that the decision is based on an incomplete record. The job of the ALJ can be further complicated because the file remains “open” in that medical or other records can be added to it as the case progresses through the hearing process.<sup>7</sup> Recent news accounts have documented instances in which representatives, having collected the claimant’s medical records, disclose only certain documents that support a claim of benefits while withholding documents that do not.<sup>8</sup> The existing regulations do not clearly proscribe this conduct by representatives—at least so long as it falls short of evidence tampering, fraud, and other such conduct that quite directly would violate federal statutory and regulatory law. Given the way the regulations are written, representatives can observe professional rules mandating the vigorous representation of their clients without submitting all adverse evidence to the ALJ.<sup>9</sup>

SSA commissioned the Administrative Conference of the United States (“Administrative Conference” or “Conference”) to: (1) study the agency’s existing statutory and regulatory standards (including past rulemaking efforts) regarding the duty of candor and submission of all evidence by claimants (and their representatives) in the Social Security disability claims process; (2) survey relevant disclosure and professional conduct requirements from other federal agencies, as well as other legal resources (such as the Federal Rules of Civil Procedure (“FRCP” or “Federal Rules”) that may provide guidance on submission of evidence to tribunals whether or not it may be considered supportive of the disclosing party’s claim or position; and (3) suggest options for improving SSA’s adjudicatory process and potential regulatory approaches should the agency elect to undertake future rulemaking relating to the duty of candor or submission of information.

This study represents a collaborative effort between the Office of the Chairman of the Administrative Conference and the Conference’s consultant on this project, Professor Kathleen Clark. We reviewed the statutes, regulations, and other publicly-available information relating to federal agencies to learn the similarities and differences between SSA’s disability benefits programs and these agencies’ disclosure and professional conduct standards for adjudications or other administrative programs; reviewed law review articles, treatises, and other written materials addressing ethics issues that arise in the context of disclosure standards in administrative processes; and conducted legal research on a variety of related topics. This literature review and research was supplemented by interviews (both in-person and by phone)

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Disabled; Standards of Conduct for Claimant Representatives; Final Rules, 63 Fed. Reg. 41,404, 41,407 (Aug. 4, 1998); Soc. Sec. Admin., Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Standards of Conduct for Claimant Representatives; Notice of Proposed Rulemaking, 62 Fed. Reg. 352 (Jan. 3, 1997).

<sup>7</sup> See Soc. Sec. Admin., Eliminating the Decision Review Board; Reestablishing Uniform National Disability Adjudication Provisions; Final Rules, 76 Fed. Reg. 24,802 (May 3, 2011) [hereinafter Final Rule Reestablishing Uniform Nat’l Disability Adjud. Provisions].

<sup>8</sup> Damien Paletta & Dionne Searcey, *Two Lawyers Strike Gold In The U.S. Disability System*, WALL ST. J., Dec. 22, 2011, available at <http://online.wsj.com/article/SB30001424052970203518404577096632862007046.html>.

<sup>9</sup> See *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public? Hearing Before the S. Finance Comm.*, 112th Cong. (May 17, 2012) (testimony of Comm’r Astrue noting, in response to a question from Sen. Thune about the *Wall Street Journal* article, “that there’s [not] a requirement for all relevant evidence to be provided to the judge. Right now, that is not the law.”).

with attorneys, legal academics, and government officials at the Departments of Commerce, Justice, and Veterans Affairs, as well as numerous informal discussions with SSA officials.

This report lays out the options available to SSA if it wishes to expressly impose an affirmative obligation on claimants (and, derivatively, their representatives) to submit *all* documentary evidence related to their disability claims with the view that a complete record leads to better, and more fair, adjudication. The report begins in Part I with a brief description of the administrative process by which individuals seek disability benefits, identifies SSA’s existing statutory and regulatory authority for imposing affirmative disclosure obligations on claimants and representatives, and summarizes SSA’s rulemaking efforts to date to impose such disclosure obligations. Part II discusses how other federal agencies have imposed similar disclosure obligations in the administrative context, and Part III details how the federal courts have done so in civil litigation—in both contexts without violating traditional norms of professional conduct governing an attorney’s representation of his or her client. Part IV then discusses ethical and other standards of conduct for attorney and non-attorney representatives more generally in various types of adjudicative proceedings. Finally, Part V lays out the options available to SSA. In doing so, Part V gives due regard to the thoughtful comments of two professional associations representing claimants’ representatives submitted in connection with this project at the request of SSA—the National Organization of Social Security Claimants’ Representatives (“NOSSCR”) and the National Association of Disability Representatives (“NADR”). Those comments are reproduced in Appendices C and D, respectively.

## **I. ADJUDICATION OF DISABILITY BENEFITS CLAIMS: PROCESS, STATUTE & REGULATIONS**

### **A. Summary of SSA’s Adjudication Process**

The Social Security Act (“Act”) created two programs—Social Security Disability Insurance (“SSDI”) and Supplemental Security Income (“SSI”)—to provide monetary benefits to persons with disabilities who satisfy these programs’ respective requirements.<sup>10</sup> Individuals may qualify for regular payments from the federal government if, among other things, they can show that they have an impairment that is recognized by SSA as a disability.<sup>11</sup> Every year, millions of people apply for these disability benefits,<sup>12</sup> and SSA has created what may be the world’s largest adjudicative system to process these claims.<sup>13</sup>

The disability benefits adjudication process begins with the filing of an application with a SSA field office. Individuals seeking disability benefits may file (and pursue) their own claims

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<sup>10</sup> 42 U.S.C. §§ 401(b), 1381 (2012).

<sup>11</sup> 42 U.S.C. § 423(d) (2012).

<sup>12</sup> In fiscal year 2011, over 3.2 million people applied for disability benefits. SSA’s FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2011), *available at* <http://www.ssa.gov/finance/2011/Full%20FY%202011%20PAR.pdf>.

<sup>13</sup> *Securing the Future of the Disability Insurance Program: Hearing Before the H. Subcomm. on Soc. Sec.*, 112th Cong. (June 27, 2012) (statement of Michael Astrue, Comm’r, Soc. Sec. Admin.) [hereinafter Astrue June 2012 Testimony], *available at* [http://www.ssa.gov/legislation/testimony\\_062712.html](http://www.ssa.gov/legislation/testimony_062712.html); *see also* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS, xi (1978)); *see also* Appendix E: SSA Disposition Count by Representation (FY 2005-2011), A-9 (Sept. 28, 2012) (chart provided by SSA detailing annual number of dispositions from 2005 to 2011).

or they may choose to enlist the assistance of a representative, who may or may not be an attorney. Over the last several decades, the number of claimants with representatives has risen dramatically.<sup>14</sup> For example, according to a recent study by the Social Security Advisory Board (“SSAB”), the percentage of claimants represented by attorneys at ALJ hearings has nearly doubled since 1977 (from about 35% to 76%), while use of non-attorney representatives has experienced a steady increase since 2007.<sup>15</sup> In recent years, however, the percentage of represented claimants (relative to total annual dispositions) has remained fairly stable.<sup>16</sup> As of 2011, non-attorneys represented claimants in about 22% of disability cases.<sup>17</sup> If SSA makes a decision in favor of a claimant represented by an attorney or an “eligible non-attorney” representative that results in the payment of past due benefits, and a fee agreement is approved, SSA will pay the representative a fee award equal to 25 percent of the past-due benefits (less a special assessment) up to a cap set by SSA.<sup>18</sup>

Once an application is received by the SSA field office, the case is sent to a federally-funded state Disability Determination Service (“DDS”) for the initial steps in the adjudication process. In most states, a team consisting of a state disability examiner and a state agency medical or psychological consultant makes an initial determination of eligibility on behalf of SSA.<sup>19</sup> If an individual’s claim is denied—in most states—the claimant may seek reconsideration<sup>20</sup> by another DDS team, composed of a different examiner and medical or psychological consultant.<sup>21</sup>

If the claim is denied again, the individual may appeal his or her case to a SSA ALJ.<sup>22</sup> The ALJ reviews the case *de novo* and may award benefits prior to the hearing based on the record or decide the claim after an adjudicative hearing.<sup>23</sup> A claimant may appeal an adverse ALJ decision to the SSA Appeals Council, which makes a determination based on the record that had been before the ALJ (including the ALJ hearing).<sup>24</sup> A claimant whose application for benefits is finally denied by SSA may seek judicial review in a federal district court based on the full administrative record and subject to the substantial evidence review standard.<sup>25</sup>

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<sup>14</sup> SOCIAL SECURITY ADVISORY BOARD, ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 60 fig. 55. (2012), available at [http://www.ssab.gov/Publications/Disability/GPO\\_Chartbook\\_FINAL\\_06122012.pdf](http://www.ssab.gov/Publications/Disability/GPO_Chartbook_FINAL_06122012.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> See Appendix E, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> 20 C.F.R. § 404.1730 (2012); see also 20 C.F.R. § 416.1530 (2012).

<sup>19</sup> 42 U.S.C. §§ 405(b), 1383(c)(1)(A) (2012).

<sup>20</sup> Astrue June 2012 Testimony, *supra* note 13.

<sup>21</sup> *Id.*

<sup>22</sup> Astrue June 2012 Testimony, *supra* note 13; 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2012).

<sup>23</sup> Astrue June 2012 Testimony, *supra* note 13; 20 C.F.R. §§ 404.929, 416.1429 (2012).

<sup>24</sup> 20 C.F.R. §§ 404.967-404.968, 416.1467-416.1468 (2012). Note that “[t]he Act does not require administrative review of an ALJ’s decision. If the AC issues a decision, it becomes [SSA’s] final decision. If the AC decides not to review the ALJ’s decision, the ALJ’s decision becomes [SSA’s] final decision.” Astrue June 2012 Testimony, *supra* note 13.

<sup>25</sup> 42 U.S.C. §§ 205(g), 405(g), 1383(c)(3), 1631(c)(3) (2012). A claimant must exhaust all administrative remedies before appealing to the federal court. The claim is appealable in federal court only after the AC has issued a decision or has refused to review the case.

As the volume of disability claims filed annually has risen,<sup>26</sup> so too have the number of disability awards.<sup>27</sup> And given the increased role of both legal and non-legal representatives in what had been a largely ALJ-directed non-adversary process, some have raised questions whether the role of representatives has increased the number of unjustified awards.<sup>28</sup> As will be discussed below, SSA has attempted to modify its process for adjudicating disability claims to account for increases in the number and complexity of claims, as well as the rising number of represented claimants.<sup>29</sup>

## **B. Legal Standards for Submission of Evidence**

During the disability claim adjudication process, claimants generally have the burden of proving that they qualify as disabled.<sup>30</sup> Both claimants and their representatives must also avoid filing false claims or otherwise engaging in fraud.<sup>31</sup> Less clear is whether, and under what circumstances, claimants (and their representatives) have an obligation to fully disclose evidence to SSA that relates to their claim. Must claimants (and their representatives) only provide SSA with evidence that supports their disability claim? Or do they need to submit or disclose *all* evidence related to their claim, even if some such evidence may be viewed as adverse to their claim? The following parts describe the existing statutory and regulatory guidance on these issues.

### **1. Social Security Act**

The Act authorizes the imposition of a civil monetary penalty of \$5000 against anyone who makes a statement or representation for use in determining eligibility for disability benefits and:

omits . . . or otherwise withholds disclosure of . . . a fact which the person knows or should know is material to the determination of . . . benefits . . . , if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading.<sup>32</sup>

While the statute defines “material fact” broadly to include any fact that “the Commissioner of Social Security *may consider* in evaluating whether an applicant is entitled to benefits,”<sup>33</sup> it also

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<sup>26</sup> See SOCIAL SECURITY ADVISORY BOARD, *supra* note 14, at 6 figs. 1a & 1b (statistics on SSDI and SSI applications filed annually from 1975 to 2010); Appendix E, *supra* note 13 (annual case dispositions from 2005 to 2011).

<sup>27</sup> See SOCIAL SECURITY ADVISORY BOARD, *supra* note 14, at 15 fig. 10a.

<sup>28</sup> Damian Paletta & Dionne Searcey, *supra* note 8.

<sup>29</sup> See *infra* Part I.C.

<sup>30</sup> 20 C.F.R. § 404.1512(a) (2012) (“In general, you have to prove to us that you are blind or disabled.”). Independent of the claimant’s obligation to carry his or her disability claim, the ALJ also bears a duty to develop a full record upon which to base a decision. *E.g.*, *Byes v. Astrue*, 687 F.3d, at 915-16; *Thornton v. Schweiker*, 663 F.2d 1312, 1316 (5th Cir. 1981); see also *Perales*, 402 U.S. at 410 (noting ALJ duty to investigate facts and develop arguments both for and against granting benefits).

<sup>31</sup> 20 C.F.R. §§ 404.549(1)-(3), 404.471, 416.1340(1)-(3) (2012).

<sup>32</sup> 42 U.S.C. § 1320a-8(a)(1)(C) (2012).

<sup>33</sup> 42 U.S.C. § 1320a-8(a)(2) (2012) (emphasis added). Compare this broad definition of materiality with the narrower definition adopted by the PTO, *infra* note 131.

prohibits the omission or withholding of material facts only where the individual knows or should know that the omission or withholding is “misleading.”<sup>34</sup> The statute also states that:

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, . . . which are necessary or appropriate to carry out [the] provisions [of this title], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.<sup>35</sup>

The Commissioner thus has the power to issue regulations establishing procedures for the production of evidence, which forms the basis for adjudicating disability claims. Moreover, the Commissioner has the “power to [require] the production of any evidence that relates to any matter under investigation.”<sup>36</sup> If SSA were to decide to clarify that claimants and their representatives have an obligation of candor and to submit certain evidence, these provisions would seem to provide the statutory authority for such a position.

## 2. *Current Regulations*

SSA’s current regulations regarding the obligation of claimants and their representatives to disclose evidence that would be adverse to a disability claim appear to be ambiguous. The regulations specifically require a claimant and his or her representative to provide evidence that supports his or her disability claim, but are less clear regarding any obligation to provide evidence that would not support the claim.

### a. *Standards for Claimants*

SSA regulations explain to claimants that they bear the burden of demonstrating that they qualify for benefits: “You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled.”<sup>37</sup> That regulation also instructs claimants to “bring to [SSA’s] attention *everything that shows that you are blind or disabled.*”<sup>38</sup> These mandates suggest that claimants must provide evidence that supports their claim for disability, but not evidence that would undermine such a claim.

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<sup>34</sup> An earlier version of this statute did not include the provision limiting its application to those who know or should know that the omission or withholding of information is misleading. Professor Robert Rains has observed with respect to the earlier version that it “is at least arguable that a representative violates [that] provision if he or she submits favorable evidence to an ALJ but withholds other evidence that he or she deems unfavorable to the claim.” Robert E. Rains, *The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 373 (2007) [hereinafter *Myth of the State-Bar Bar*].

<sup>35</sup> 42 U.S.C. § 405(a) (2012).

<sup>36</sup> 42 U.S.C. § 405(d) (2012) states in full:

For the purpose of any hearing, investigation, or other proceeding authorized or directed under this title, or relative to any other matter within the Commissioner’s jurisdiction hereunder, the Commissioner of Social Security shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Commissioner of Social Security.

<sup>37</sup> 20 C.F.R. §§ 404.1512(c), 416.912(c) (2012).

<sup>38</sup> 20 C.F.R. § 404.1512(a) (2012) (emphasis added); *see also* 20 C.F.R. § 416.912(a) (2012).

On the other hand, that same regulation includes language suggesting a duty to disclose not just information that helps show that the claimant *is* disabled, but also any information that helps SSA assess *whether* the claimant is disabled. Claimants must provide “medical and other evidence that [SSA] can use to reach conclusions about your medical impairment(s) and, if material to the determination of *whether you are disabled*, its effect on your ability to work.”<sup>39</sup> This provision could be read to support a requirement that claimants disclose information adverse to their claim of disability. NOSSCR has pointed to this provision as support for its contention that a “claimant is already required to disclose material facts in his or her claim for benefits.”<sup>40</sup> However, we do not understand NOSSCR’s view of the existing regulatory reference to “material” factual evidence to encompass medical records or other information that may be considered adverse to the claimant’s disability claims.

Claimants are also required to provide “evidence, *without redaction*, showing how your impairment(s) affects your functioning during the time you say that you are disabled, and any other information that [SSA] need[s] to decide your claim.”<sup>41</sup> SSA adopted this “without redaction” requirement in 2006 in lieu of a more robust disclosure requirement it had proposed the previous year.<sup>42</sup> The regulation does not define “without redaction,” and one commentator has characterized this lack of definition as “troubling.”<sup>43</sup> On the one hand, the phrase could be interpreted narrowly to mean that if a claimant provides a particular document, he or she must provide the entire document without any redactions.<sup>44</sup> Or, on the other hand, it could be interpreted broadly to include all records related to a claimant’s impairment. For example, would a claimant be free to pick and choose among the documents in his or her hospitalization records, or would he or she be required to disclose hospitalization records in their entirety?<sup>45</sup>

#### *b. Standards for Representatives*

Representatives who see their role as one of pure advocacy—assisting clients to obtain benefits within the bounds of the law—can point to several regulations that support their view. Representatives are required “to obtain the information and evidence that *the claimant wants to submit in support* of his or her claim and forward the same to” SSA.<sup>46</sup> This provision seems to envision that a representative’s role is to help a claimant obtain benefits rather than to help SSA determine whether a claimant is eligible for benefits. The regulation also requires

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<sup>39</sup> *Id.*

<sup>40</sup> Letter from Nancy G. Shor, Exec. Dir. Nat’l Org. of Soc. Sec. Claimants’ Reps., to Amber Williams, Admin. Conf. of the U.S. 2 (Sept. 14, 2012) (citing 20 C.F.R. §§ 404.1512(a), 416.912(a)) (copy attached as Appendix C: Letter from Nat’l Org. of Soc. Sec. Claimants’ Reps., A-3 (Sept. 14, 2012) [hereinafter NOSSCR 2012 Letter].

<sup>41</sup> 20 C.F.R. §§ 404.1512(c), 416.912(c) (2012) (emphasis added).

<sup>42</sup> See discussion *infra* Part I.C.2.

<sup>43</sup> *Myth of the State-Bar Bar*, *supra* note 34, at 382, n.113. Professor Rains suggests that it is “common for attorneys not to submit—and for ALJs not to want—everything in a claimant’s medical record” due to the volume of the record or the irrelevancy of certain materials. *Id.*

<sup>44</sup> *Id.* (“Unquestionably, an attorney who submits altered evidence is subject to disciplinary proceedings as well as possible criminal proceedings.”)

<sup>45</sup> *Id.* (“When a claimant has been hospitalized, for instance, it is common for his or her representative to obtain and submit only some of the records, such as admission and discharge summaries and operation records, and withhold other lengthy documents such as nursing notes.”)

<sup>46</sup> 20 C.F.R. §§ 404.1740(b)(1), 416.1540(b)(1) (2012) (emphasis added).

representatives to “assist the claimant in bringing to [SSA’s] attention everything that *shows that the claimant is disabled or blind*.”<sup>47</sup> This language could be interpreted to provide a one-way ratchet, permitting representatives to assist the claimant in coming forward with information that helps his or her claim, rather than providing all the information that would aid SSA in assessing eligibility. Finally, the regulations require a representative to “assist the claimant in providing, upon [SSA’s] request, evidence” that is relevant to his or her claim.<sup>48</sup> This provision suggests that while the representative must help a claimant comply with SSA’s requests for evidence, he or she does not otherwise have an affirmative obligation to disclose evidence to SSA.

Therefore, while it is clear that representatives may not make false or misleading statements or presentations,<sup>49</sup> it is less clear whether they have an obligation to submit all evidence, including adverse evidence, to SSA. The regulations require representatives to “be forthright in their dealings with” SSA,<sup>50</sup> but the term “forthright” is not defined. Whether this obligation simply requires truthfulness or whether it contemplates a more active role in developing a full record is an open question for some. The regulations do not explicitly address whether representatives have an obligation to disclose to SSA evidence that may potentially be contrary to a client’s disability claim.

The regulations do further instruct representatives to “[c]onduct his or her dealings in a manner that furthers the efficient, fair and orderly conduct of the administrative decisionmaking process.”<sup>51</sup> Indeed, the regulation requires representatives to “comport themselves with due regard for the *nonadversarial* nature of the proceedings by complying with [SSA] rules and standards, which are intended to ensure orderly and fair presentation of evidence and argument.”<sup>52</sup> But it is not clear what (if any) legal significance SSA believes stems from “the nonadversarial nature of the proceedings.” In some sense, nonadversarial and ex parte proceedings have common roots and at least one state bar has issued an opinion stating that representatives should conduct themselves as if the proceedings before SSA are ex parte.<sup>53</sup> This is an important connection since ex parte proceedings impose legal ethics standards that require a claimant’s attorney to provide all information that would be material to a claim—both favorable and unfavorable.<sup>54</sup> In addition, the Supreme Court of the United States has characterized SSA proceedings as “inquisitorial,”<sup>55</sup> which emphasizes the judge-directed nature of the SSA

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<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> 20 C.F.R. §§ 404.1740(b)(2), 416.1540(b)(2) (2012) (emphasis added).

<sup>49</sup> Representatives must not:

Knowingly make or present, or participate in the making or presentation of, false or misleading oral or written statements, assertions or representations about a material fact or law concerning a matter within our jurisdiction.

20 C.F.R. §§ 404.1740(c)(3), 416.1540(c)(3) (2012).

<sup>50</sup> 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2) (2012).

<sup>51</sup> 20 C.F.R. §§ 404.1740(b)(3), 416.1540(b)(3) (2012).

<sup>52</sup> 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2) (2012) (emphasis added).

<sup>53</sup> Ala. State Bar Ass’n Disciplinary Comm’n, Op. 1993-06 (1993), *available at* <http://www.alabar.org/ogc/fopDisplay.cfm?oneId=79> (“It is the opinion of the Disciplinary Commission that Rule 3.3(d) of the Rules of Professional Conduct of the Alabama State Bar applies to lawyers participating in hearings before a Social Security Administrative Law Judge adjudicating social security disability, retirement, and survivor claims.”)

<sup>54</sup> *See* discussion *infra* Part IV.A.2.a.; *see also* MODEL RULES PROF’L CONDUCT 3.3(d) (1982); Henderson v. Shinseki, 131 S. Ct. 1197 (2011); *infra* note 138 (describing Department of Veterans Affairs (“VA”) proceedings as ex parte and equating them with SAA proceedings).

<sup>55</sup> *Sims*, 530 U.S. at 111; *see also* 20 CFR § 404.900(b) (2012).

disability process. As the *Perales* case emphasized, in his or her three-hat role, the ALJ represents the government's interests, while acting as the fact-finder and "develop[ing] arguments both for and against granting benefits."<sup>56</sup> However these proceedings are characterized (as nonadversarial, ex parte, or inquisitorial), the duty of representatives can be heightened but it still needs to be adequately clarified.

### **C. SSA's Recent Rulemaking Initiatives Relating to Representative Conduct & Evidence Submission Standards**

This part describes SSA's past attempts to clarify and communicate its expectations of the duties of claimants and the role of their representatives.

#### **1. Regulatory Efforts in the 1990s: Conduct Requirements for Representatives**

##### *a. The 1997 Notice of Proposed Rulemaking*

On January 3, 1997, SSA issued a notice of a proposed rulemaking ("NPRM"), which imposed obligations on representatives to produce evidence.<sup>57</sup> No regulations of this nature had been proposed before, and while SSA acknowledged that most claimant representatives acted in an exemplary manner, SSA's experience with representatives who engaged in misconduct provided the impetus for these proposed rules.<sup>58</sup> With these proposed regulations, SSA intended to "establish standards of conduct and responsibility for persons serving as representatives and further define [SSA's] expectations regarding [representative] obligations to those they represent and to [SSA]."<sup>59</sup>

The agency had spent several years prior to 1997 compiling feedback from claimants and eliciting opinions from the representative community to help craft its proposed rule.<sup>60</sup> Common claimant complaints included the manner and timing in which representatives submitted evidence, or failed to submit evidence altogether.<sup>61</sup> SSA sent a draft rule in 1995 to 33 representative organizations. The agency received 92 responses.<sup>62</sup>

The 1995 draft language requested that a representative "[e]xercise diligence in developing the record on behalf of his or her client by obtaining and submitting, as soon as possible, all information and evidence intended for inclusion in the record."<sup>63</sup> It also requested that representatives "[p]romptly comply, at every stage of the administrative review process, with [SSA's] requests for information and evidence"<sup>64</sup> and provide evidence relating to the "matters at issue."<sup>65</sup>

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<sup>56</sup> *Sims*, 530 U.S. at 111; *see also Perales*, 402 U.S. at 400-01, 410.

<sup>57</sup> 62 Fed. Reg., *supra* note 6.

<sup>58</sup> *Id.* at 353.

<sup>59</sup> *Id.* at 352.

<sup>60</sup> SSA gathered 600 complaints made by claimants from 1988 to 1997 regarding representative malfeasance and beginning in 1995, elicited feedback from 33 organizations that comprised the representative community. *Id.* at 353.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 354.

<sup>64</sup> *Id.* at 355.

<sup>65</sup> *Id.* at 354.

The representative community's most prominent concern with the 1995 draft involved an apparent dichotomy between the traditional role of an attorney in providing zealous advocacy and protecting confidential client information, and the draft language's proposed rules of conduct. Some responses stated that such a rule was unnecessarily redundant, since attorneys were already governed by their state bar's code of conduct.<sup>66</sup> Furthermore, many felt that this rule "might place them in violation of their own [s]tate bar rules."<sup>67</sup>

In the comments accompanying its 1997 NPRM, SSA attempted to assuage the first concern by asserting the need for a uniform system of conduct. Not only do bar ethics rules vary from state to state, but they also do not apply to non-attorney representatives.<sup>68</sup> Moreover, if misconduct does occur, disciplinary actions before state bars against attorney representatives may require the production of confidential, personal information. However, federal statutes, such as the Social Security Act and the Privacy Act, may prohibit the disclosure of such information, therefore precluding state bars from conducting disciplining proceedings.<sup>69</sup>

To address the representative community's concern about confidentiality, when SSA formerly issued its 1997 proposed rule, it revised the 1995 draft rule's language. Instead of disclosing information, a representative was required to notify SSA when a claimant does not consent to disclosure.<sup>70</sup> SSA, however, strongly affirmed that representatives must not "deliberate[ly or] purposeful[ly] withhold [. . .] information or evidence"; such conduct would not only violate state bar rules, but also federal law.<sup>71</sup> SSA further affirmed that the proposed rulemaking "require[d] the representative to comply with [SSA's] requests made under statutory authority for full and accurate disclosure of material facts to the same extent that the claimant [was] required to do so."<sup>72</sup> Whether the representative failed to comply would be determined on a totality of the circumstances, case-by-case basis.<sup>73</sup>

One of the other main critiques of the draft rule had to do with its perceived vagueness and ambiguity. Some thought terms such as "diligence" and "matters at issue"<sup>74</sup> vague, while others thought the substance of the entire rule vague.<sup>75</sup> SSA responded to both prongs of the vagueness concern by modifying the language in the proposed rule and by assuring the community that while its regulations could not define with specificity every example of possible misconduct, SSA intended to address allegations of wrongdoing on a case-by-case basis, taking into account the circumstances and factors that led to the allegation.<sup>76</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 355.

<sup>68</sup> *Id.* at 354.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 355.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 353-54.

<sup>75</sup> *Id.* at 354

<sup>76</sup> *Id.* at 353-354.

Yet another concern involved the draft rule's assignment of duties to develop the record. Some believed that the language imposed a broad standard that put an unfair burden upon representatives when the responsibility for developing the record resided with the agency.<sup>77</sup> In the proposed rule, SSA continued to insist that the claimant, and therefore the claimant's representative, "take a more active role in establishing entitlement or eligibility" for disability benefits.<sup>78</sup> SSA wanted to ensure that "the claimant's evidence was available for inclusion in the record when the claim was ready for adjudication."<sup>79</sup>

In its NPRM, the agency included explanations preceding the 1997 proposed rules. The agency explained that these proposed rules introduced affirmative duties by which a representative must submit evidence to SSA. The representative would be required not only to furnish medical, vocational, and other relevant information, but also to provide such information "even if it is ostensibly unfavorable to the claimant, or provide notification by the representative that the claimant does not consent to its release."<sup>80</sup> The new obligations would apply to representatives whose claimants sought disability benefits under either SSDI or SSI, title II or title XVI, respectively. The language was identical in each context:

A representative shall:

- (1) Promptly obtain all information and evidence which the claimant wants to submit in support of the claim and forward the same for consideration as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown;
- (2) Comply with [SSA's] requests for information or evidence at any stage of the administrative review process as soon as practicable, but no later than the due date designated by the Agency, except for good cause shown. This includes an obligation to:
  - (i) Provide, upon request, identification of all known medical sources, updated information regarding medical treatment, new or corrected information regarding work activity, other specifically identified information pertaining to the claimed right or benefit or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material; and
  - (ii) Provide, upon request, all evidence and documentation pertaining to specifically identified issues which the representative or the claimant either has within his or her possession or may readily obtain, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material.<sup>81</sup>

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<sup>77</sup> *Id.* at 354.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 357.

<sup>81</sup> *Id.* at 359, 360.

*b. Public Comments on the 1997 Proposed Rule*

Although the representative community expressed many of the same concerns in response to the 1997 proposed rulemaking as it had when responding to the 1995 draft,<sup>82</sup> the concerns crystallized around two areas: vagueness and an attorney's traditional role. In particular, the American Bar Association ("ABA"), NOSSCR, and other representative organizations believed that the proposed rules were too broad and ambiguous and would conflict with state bar rules.<sup>83</sup>

First, some groups feared that the standards would put an improper burden on representatives, requiring them to develop the record and therefore potentially subject them to unreasonable requests from SSA.<sup>84</sup> The proposed rules allowed SSA to require a representative to produce any documents, at any time, with no "limit [as to] the scope, the relevance or the frequency of the requests."<sup>85</sup> Further, the groups highlighted the fact that SSA would not pay the costs for obtaining medical reports requested by a representative.<sup>86</sup> Therefore, the cost of requiring the representative to acquire medical documents could cause a claimant to choose not to be represented by counsel.<sup>87</sup>

Second, representative organizations harbored deep unease about the apparent dichotomy between an attorney's role as advocate and the duties to disclose information to SSA. Representative groups were concerned that communicating a claimant's declination to disclose information would cause SSA to draw adverse inferences about the nondisclosure.<sup>88</sup> In essence, the attorney's communication would "red flag" the claimant's nondisclosure and cause the agency to come to its own negative conclusions about why the report was withheld.<sup>89</sup> In addition, the community expressed concern that communicating a claimant's nondisclosure would put attorneys in violation of state bar rules of client confidentiality and subject them to sanction from those state bars.<sup>90</sup> NOSSCR specifically asserted that state bars' codes of conduct and professional responsibility overrode any other ethical responsibility imposed upon attorneys.<sup>91</sup>

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<sup>82</sup> 63 Fed. Reg., *supra* note 6, at 41,407.

<sup>83</sup> *Id.*; Letter from Robert Evans, Dir., Am. Bar. Ass'n, Gov't Aff. Off., to Shirley Chater, Comm'r, Soc. Sec. Admin. (Feb. 28, 1997) (on file with SSA) [hereinafter ABA 1997 Letter], Letter from Nancy Shor, Exec. Dir., Nat'l Org. of Soc. Sec. Claimants' Reps., to John Callahan, Acting Comm'r, Soc. Sec. Admin. (Mar. 3, 1997) (on file with SSA) [hereinafter NOSSCR 1997 Letter], Letter from Louis Finkelberg, Chair, Los Angeles Cnty. Bar Ass'n, Soc. Sec. Sec. to Shirley Chater, Comm'r, Soc. Sec. Admin. (Feb. 26, 1997) (on file with SSA) [hereinafter Los Angeles County Bar Association 1997 Letter].

<sup>84</sup> 63 Fed. Reg., *supra* note 82, at 41,411.

<sup>85</sup> *Id.* at 41,412; *see also* ABA 1997 Letter, *supra* note 83.

<sup>86</sup> Some state bar rules prohibited attorneys from advancing costs to claimants, compelling them to pass those costs to their clients. Los Angeles County Bar Association 1997 Letter, *supra* note 83; NOSSCR 1997 Letter, *supra* note 83.

<sup>87</sup> Los Angeles County Bar Association 1997 Letter, *supra* note 83.

<sup>88</sup> 63 Fed. Reg., *supra* note 82, at 41,413, NOSSCR 1997 Letter, *supra* note 83.

<sup>89</sup> ABA 1997 Letter, *supra* note 83; Los Angeles County Bar Association 1997 Letter, *supra* note 83; NOSSCR 1997 Letter, *supra* note 83.

<sup>90</sup> 63 Fed. Reg., *supra* note 82, at 41,413.

<sup>91</sup> NOSSCR 1997 Letter, *supra* note 83.

*c. The 1998 Final Rule*

When SSA issued its final regulations in 1998, it chose to withdraw the proposed disclosure requirements.<sup>92</sup> In doing so, SSA still reaffirmed its intent to introduce a more active role for the claimant in establishing his or her right to benefits.<sup>93</sup> The agency explained that the proposed rules had not been intended to shift the responsibility to develop the record from the agency to the claimant or the claimant's representative.<sup>94</sup> Rather, the proposed rules were intended to reflect the reality of current practices and the expectations of the agency.<sup>95</sup> The final rules that SSA adopted in 1998 did obligate the representative to assist the claimant's submission of evidence.<sup>96</sup> However, the controversial requirements to submit evidence, upon request, of "the claimant's medical treatment, vocational factors or other specifically identified matters," as well as "all evidence . . . which the representative or claimant already has or may readily obtain," and to communicate when a claimant refused to consent to disclosure, were deleted.<sup>97</sup> The final rule's language therefore "more closely track[ed] the existing regulatory requirements that explain a claimant's duties and responsibilities with regard to submitting evidence and providing information."<sup>98</sup>

**2. Regulatory Initiatives in the 2000s: Requirements for Submission of Evidence**

*a. The 2005 Notice of Proposed Rulemaking*

SSA did not attempt to revisit this issue again until it issued a NPRM on July 27, 2005.<sup>99</sup> This time, instead of introducing obligations under the "rules of conduct and standards of responsibility for representatives" section, which applied to representatives, SSA proposed changes to the "evidence" section, which applied to claimants and only derivatively to claimant representatives. SSA proposed that, when the claimant requests a hearing, the claimant (and the claimant's representative), submit all the evidence available to him or her.<sup>100</sup> This submission would include both evidence that supports the claim and evidence that "might undermine or appear contrary" to the claim.<sup>101</sup> That requirement also applied to evidence that the claimant obtained after filing the claim, up until twenty days before the hearing; SSA "generally [would] not consider" evidence submitted outside of that timeframe.<sup>102</sup> The proposed rule stated: "(c) You must provide evidence showing how your impairment(s) affect(s) your functioning during the time you say that you are disabled, and any other information that [SSA] need[s] to decide

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<sup>92</sup> 63 Fed. Reg., *supra* note 82, at 41,406.

<sup>93</sup> *Id.* at 41,412.

<sup>94</sup> *Id.* at 41411-12.

<sup>95</sup> *Id.* at 41,411.

<sup>96</sup> *Id.* at 41,406.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see Appendix B: Comparison of Text of SSA Rulemaking Initiatives Re: Representative Conduct & Submission of Evidence (1995-2006), A-2 (chart comparing text of SSA's rulemaking initiatives, from 1995 through 2006, relating to standards for representative conduct and submission of evidence).

<sup>99</sup> 70 Fed. Reg., *supra* note 6.

<sup>100</sup> *Id.* at 43,602.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

your claim, including evidence that you consider to be unfavorable to your claim.”<sup>103</sup>

*b. Public Comments on the 2005 Proposed Rule*

The feedback SSA received in 2005 echoed the concerns SSA had received nearly a decade earlier: complaints about ambiguity and inconsistency with attorneys’ ethical and professional obligations. NOSSCR, in particular, found the proposed rules to be ambiguous.<sup>104</sup> NOSSCR questioned whether “evidence” referred to that evidence already “obtained or *all* evidence that exists, regardless of the cost, time, or effort to obtain it.”<sup>105</sup> NOSSCR also took issue with the word “consider” in the context of a claimant providing evidence “that you consider to be unfavorable to your claim” and asserted that such a word was too subjective.<sup>106</sup> NOSSCR expressed concern regarding the burden this requirement placed on the claimant and questioned whether the claimant’s noncompliance could be cause for penalty, especially in the case of noncompliant claimants who have “mental and cognitive impairments.”<sup>107</sup>

Again, the representative community also took issue with the asserted inconsistency between the SSA’s proposed regulations and an attorney’s ethical obligations. The ABA noted that the proposed rule’s breadth could not only be interpreted to require representatives to disclose irrelevant facts, but also confidential matters that the claimant did not wish revealed.<sup>108</sup> Several representative organizations commented that a representative has a SSA-imposed duty to establish a claimant’s claim, but the submission of all evidence would require the representative to simultaneously undermine that claim.<sup>109</sup> The attorney would be caught between the regulation’s disclosure obligations and a “sworn duty to obey the professional rules of the jurisdiction in which the attorney is licensed to practice.”<sup>110</sup> Such a violation of a state bar’s ethics rules could subject attorneys to discipline.<sup>111</sup> The Houston Bar Association foresaw the possibility that a claimant would not be candid with his or her attorney for fear that the attorney would disclose that information to SSA.<sup>112</sup>

*c. The 2006 Final Rule*

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<sup>103</sup> *Id.* at 43,607, 43,621.

<sup>104</sup> Letter from Nancy Shor, Exec. Dir., Nat’l Org. of Soc. Sec. Claimants’ Reps., to Jo Anne Barnhart, Comm’r, Soc. Sec. Admin. 13 (Oct. 25, 2005) (on file with SSA) [hereinafter NOSSCR 2005 Letter].

<sup>105</sup> NOSSCR 2005 Letter, *supra* note 104, at 13 (emphasis in original).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Letter from Michael Green, Pres., Am. Bar. Ass’n, to Jo Anne Barnhart, Comm’r, Soc. Sec. Admin. 4 (Sept. 27, 2005) (on file with SSA) [hereinafter ABA 2005 Letter]; The Houston Bar Association shared a similar concern. Letter from Paul Burkhalter, Chair, Houston Bar Ass’n, to Jo Anne Barnhart, Comm’r, Soc. Sec. Admin. 5 (Oct. 24, 2005) (on file with SSA) [hereinafter Houston Bar 2005 Letter].

<sup>109</sup> ABA 2005 Letter, *supra* note 108, at 5; NOSSCR 2005 Letter, *supra* note 104, at 14; Comments from Jim Shaw, Pres., Nat’l Ass’n of Disability Reps., on Comm’r of Soc. Sec.’s. Proposed Improvements to the Disability Determination Process 4 (Oct. 25, 2005).

<sup>110</sup> ABA 2005 Letter, *supra* note 108, at 5.

<sup>111</sup> ABA 2005 Letter, *supra* note 108, at 5, Houston Bar 2005 Letter, *supra* note 108, at 6, NOSSCR 2005 Letter, *supra* note 104, at 14.

<sup>112</sup> Houston Bar 2005 Letter, *supra* note 108, at 5-6.

In the end, SSA chose to adopt an amended version of its proposed rule. SSA “remove[d] language requiring claimants to submit evidence adverse to their claims.”<sup>113</sup> SSA acknowledged that such a requirement was too confusing.<sup>114</sup> Instead, the agency modified the rule to require that claimants submit evidence, such as medical documents, without redaction.<sup>115</sup> The new 2006 requirement read: “(c) You must provide evidence, without redaction, showing how your impairment(s) affects your functioning during the time you say that you are disabled, and any other information that we need to decide your claim.”<sup>116</sup>

Since 2006, SSA has not proposed any further revisions to either its regulation’s “rules of conduct and standards of responsibility for representatives” or “evidence” sections. As Part II demonstrates, other federal agencies have been successful in mandating candor from the parties that come before them so as to ensure the receipt of an adequate factual record.<sup>117</sup>

## II. PERSPECTIVES ON INFORMATION DISCLOSURE: STANDARDS IN OTHER AGENCIES

SSA’s regulations refer to the disability adjudication process as “nonadversarial.”<sup>118</sup> Indeed, when a claimant pursues his or her claim for disability benefits, there is no third party appearing before (or on behalf of) the agency to oppose such claim. While some have asserted that the SSA system is *sui generis*,<sup>119</sup> there exist other administrative systems with relatively similar structures—that is, a claimant or applicant comes before a federal agency seeking the award of a benefit/claim, no other party has a right to appear in opposition, and an agency official evaluates whether the requested benefit/claim should be awarded. A key issue for this

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<sup>113</sup> 71 Fed. Reg., *supra* note 6, at 16,437.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 71 Fed. Reg., *supra* note 6, at 16,444, 16,459; *see also* Appendix B, *supra* note 98 (chart comparing proposed and final versions of these provisions).

<sup>117</sup> As part of the Disability Service Improvement (DSI) initiative—promulgated in part through the rulemakings described in this Part—the agency continued to roll out changes implementing the DSI process, as well as to monitor the impact of these new DSI measures on the handling of initial disability claims and the administrative review process. For example, in 2006 SSA instituted a pilot DSI program in its Boston Region. *See* 71 Fed. Reg., *supra* note 6 (codified in scattered sections of 20 C.F.R. pts. 404, 405, 416 & 422). This pilot DSI program included rules requiring closure of the official record once an ALJ issued his or her decision, except upon a showing of good cause. *Id.* at 16,428, 16,453-54. In December 2009, SSA proposed elimination of the Boston Region’s pilot DSI program in favor of bringing the region back in line with the rules used to adjudicate disability claims in the rest of the country, including rules relating to ALJ hearings and closure of the record. *See* Soc. Sec. Admin., Reestablishing Uniform National Disability Adjudication Provisions; Notice of Proposed Rulemaking, 74 Fed. Reg. 63,688, 63,688-89 (Dec. 4, 2009). SSA partially finalized the elimination of the pilot DSI program in the Boston Region when, in May 2011, it issued a final rule replacing the Decision Review Board (DRB) step with Appeals Council review. *See* Final Rule Reestablishing Uniform Nat’l Disability Adjud. Provisions, *supra* note 7, at 24,802-03. With respect to closure of the record, however, SSA not only retained in this final rule the DSI’s closing-of-the-record provision in the Boston Region, but also noted that plans to extend these specific rules nationally were still alive. *Id.*

<sup>118</sup> 20 C.F.R. § 405.1(c)(1) (2012); *see also* *Sims*, 530 U.S. at 110-11 (characterizing Social Security proceedings as inquisitorial rather than adversarial”); *Perales*, 402 U.S. at 403 (“We bear in mind that [SSA] operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary.”).

<sup>119</sup> Robert E. Rains, *The Advocate’s Conflicting Obligations Vis-à-Vis Adverse Medical Evidence in Social Security Proceedings*, 1995 BYU L. REV. 99, 113 [hereinafter *Advocate’s Conflicting Obligations*] (“[I]n many ways social security hearings are truly *sui generis*.”).

kind of administrative system is whether the agency decisionmaker has sufficient information to evaluate the application.

This part explores the nature of several other federal agencies' information disclosure standards that are used in conjunction with their respective adjudicatory processes or other types of agency proceedings. The first examples are federal agencies whose processes are similar to SSA's nonadversarial system, namely the patent application process under the Patent and Trademark Office ("PTO") and the adjudication process for veterans' service-related disability benefits under the Department of Veterans Affairs ("VA"). Both of these agencies have imposed disclosure obligations on applicants and their representatives and have created their own regimes for the registration and regulation of representatives. This part also discusses two other agencies, the Securities and Exchange Commission ("SEC") and the Internal Revenue Service ("IRS"), which impose certain information disclosure requirements in a variety of contexts—on attorney representatives, non-attorney representatives, and claimants—in both regulatory and nonadversarial settings. Lastly, this part concludes with a brief discussion of the requirement under the False Claims Act ("FCA") that certain whistleblowers provide all material information to the United States Department of Justice ("Justice Department" or "Department of Justice") during the pendency of its investigation, participation, or prosecution of a *qui tam* action.

## A. Adjudicative Processes

### 1. Patent and Trademark Office

The PTO permits an inventor either to apply for a patent himself or herself or to seek the assistance of a representative (who need not be an attorney).<sup>120</sup> The PTO requires all representatives to register with the agency,<sup>121</sup> to prove their competency and fitness,<sup>122</sup> and to abide by the agency's own ethics/conduct standards for such practitioners.<sup>123</sup> Since attorneys are also subject to regulation by the state bar of any jurisdiction in which they are licensed, questions may arise concerning how to resolve any conflict between state bar-based ethics standards and the PTO's conduct requirements for representatives. PTO regulations preempt state bar rules only when "necessary for the [PTO] to accomplish its federal objectives."<sup>124</sup> One preemption issue that has arisen is whether PTO standards of candor preempt state bar rules on client confidentiality.<sup>125</sup>

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<sup>120</sup> 37 C.F.R. § 1.31 (2012) states:

An applicant for patent may file and prosecute the applicant's own case, or the applicant may give power of attorney so as to be represented by one or more patent practitioners or joint inventors, except that a juristic entity (*e.g.*, organizational assignee) must be represented by a patent practitioner even if the juristic entity is the applicant.

<sup>121</sup> 37 C.F.R. §§ 11.5-11.8 (2012).

<sup>122</sup> 37 C.F.R. § 11.7 (2012).

<sup>123</sup> 37 C.F.R. §§ 10.20, 10.21, 10.30, 10.46, 10.56, 10.61, 10.76, 10.83, 10.100, 10.110 (2012).

<sup>124</sup> 37 C.F.R. § 10.1 (2012).

<sup>125</sup> See Simone A. Rose & Debra R. Jessup, *Whose Rules Rule? Resolving Ethical Conflicts During the Simultaneous Representation of Clients in Patent Prosecution*, 12 FED. CIR. B.J. 571 (2003); Todd M. Becker, *Attorney-Client Privilege Versus the PTO's Duty of Candor: Resolving the Clash in Simultaneous Patent Representations*, 71 WASH. L. REV. 1035 (1996).

In the process of applying for a patent, a patent-seeker submits an application to the PTO showing that his or her invention qualifies for a patent and provides the PTO with certain required information.<sup>126</sup> A patent examiner then decides whether to grant the patent.<sup>127</sup> The decision is based solely on the written record.<sup>128</sup> Within this procedural context, the PTO has asserted that the public interest requires the submission of “all information material to patentability.”<sup>129</sup> The PTO imposes a “duty of candor and good faith” on “[e]ach individual associated with the filing and prosecution of a patent application . . . , which includes a duty to disclose to the [PTO] all information known to that individual to be material to patentability.”<sup>130</sup> Thus, in the context of the patent claims process, the duty of candor applies not just to the inventor seeking a patent, but also to his or her non-attorney or attorney representative.<sup>131</sup>

The PTO has, by regulation, defined the scope of this duty of candor. Inventors and their representatives have an affirmative obligation to disclose any information that is “material to patentability,” which is defined as information that is not cumulative of information already in the record or application and that: “(1) . . . establishes, by itself or in combination with other information, a prima facie case of unpatentability of a claim; or (2) . . . refutes, or is inconsistent with, a position the applicant takes in: (i) opposing an argument of unpatentability relied on by the [PTO], or (ii) asserting an argument of patentability.”<sup>132</sup>

The PTO has thus established a duty of candor on inventors and their representatives to submit material information relating to patent applications, regardless of whether such information may be considered favorable or unfavorable to the application. In the case of attorneys, when this disclosure requirement conflicts with state bar rules, the latter must give

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<sup>126</sup> 35 U.S.C. § 112 (2012); *see also* 37 C.F.R. §§ 1.51, 1.71, 1.77 (2012).

<sup>127</sup> 35 U.S.C. § 131 (2012); *see also* 37 C.F.R. § 1.104 (2012).

<sup>128</sup> 37 C.F.R. § 1.2 (2012).

<sup>129</sup> 37 C.F.R. § 1.56(a) (2012) (“A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability.”).

<sup>130</sup> 37 C.F.R. § 1.56(a) (2012).

<sup>131</sup> 37 C.F.R. § 1.56(c) (2012).

<sup>132</sup> 37 C.F.R. § 1.56(b) (2012). In May 2011, the Federal Circuit issued an *en banc* opinion holding this definition of materiality, insofar as applicable to the affirmative defense of inequitable conduct in a *patent infringement* action (as opposed to the affirmative duty to disclose material information related to a *patent claim*), overbroad. Note that, for present purposes, the affirmative duty to disclose material information related to a patent claim is the more relevant type of proceeding. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) (*en banc*). While *Therasense* thus did not affect the validity of the PTO’s current standard for materiality relating disclosure obligations in patent claims, the PTO nonetheless subsequently issued a NPRM proposing to narrow the definition of materiality relating to both the duty to disclose (patent claims) and inequitable conduct (patent infringement actions) in order to present a unitary standard that is simpler for the patent bar. Patent and Trademark Office, Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications; Notice of Proposed Rulemaking, 76 Fed. Reg. 43,631, 43,634 (Jul. 21, 2011). The proposed rule would revise the definition of information as being “material to patentability. . . if”:

- (1) The [PTO] would not allow a claim if it were aware of the information, applying a preponderance of the evidence standard and giving the claim its broadest reasonable construction;
- or
- (2) The patent owner engages in affirmative egregious misconduct before the [PTO] as to the information.

*Id.* (describing proposed rule as embodying a “but-for-plus” materiality test). The PTO has not yet issued a final rule.

way.<sup>133</sup> In situations where the PTO’s candor and information disclosure mandate conflicts with an attorney’s state bar obligations, such as the duty to preserve a client’s secrets and confidences, the candor obligation prevails.<sup>134</sup>

## 2. Department of Veterans Affairs

The disability benefits program run by the VA provides an interesting counterpoint to SSA’s disability program.<sup>135</sup> Veterans who prove service-related disabilities may be awarded disability compensation.<sup>136</sup> The amount of VA benefits awarded depends on the degree of disability.<sup>137</sup> In order for a veteran to qualify for these benefits, he or she may be seen by a physician on the VA staff who, among other things, may evaluate whether the veteran’s disability is connected to previous service. When applicants go to a physician employed by the agency, the agency retains a level of control over the disability evaluation process.<sup>138</sup>

Adjudication of veteran’s disability benefits—as with SSA’s disability benefit programs—is grounded in a nonadversarial model. The VA’s adjudicatory “process is designed to function throughout with a high degree of informality and solicitude for the claimant.”<sup>139</sup> A veteran initially applies for disability benefits at a VA regional office.<sup>140</sup> The VA’s process for evaluating the application at the initial and appeal levels are “ex parte and nonadversarial.”<sup>141</sup> As

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<sup>133</sup> See 37 C.F.R. § 10.1 (2012); see also 37 C.F.R. § 10.23(c)(10) (2012) (a practitioner may not “[k]nowingly violat[e] or caus[e] to be violated the requirements of § 1.56,” which imposes an affirmative duty to disclose information material to patentability); *Sperry v. Florida*, 373 U.S. 379 (1963) (holding that, where federal law authorizes federal agent to act before federal tribunal, federal law preempts conflicting state bar licensing requirements); *Surrick v. Killion*, 449 F.3d 520, 27-28 (3d Cir. 2006) (federal court rules preempt conflicting state rules governing practice of law when state law obstructs federal goals). *But see Schindler v. Finnerty*, 74 F. Supp. 2d 253, 261 (E.D.N.Y. 1999) (finding that the state had broad authority to “regulate the conduct of patent attorneys provided the [s]tate does not frustrate the necessary scope of practice before the PTO”).

<sup>134</sup> 37 C.F.R. § 10.57(c)(2) (2012) (“[a] practitioner may reveal [c]onfidences or secrets when permitted under Disciplinary Rules or law or court order”); see also David Hricik, *Aerial Boundaries: The Duty of Candor as a Limitation on the Duty of Patent Practitioners to Advocate for Maximum Patent Coverage*, 44 S. TEX. L. REV. 205, 259 (2002) (opining that candor helps to vindicate the federal interest in accurate patent examinations and the need for a uniform set of rules for PTO practitioners).

<sup>135</sup> See 38 C.F.R. § 3.4 (2012). In fiscal year 2010, the VA received more than one million disability compensation claims. GOVERNMENT ACCOUNTABILITY OFFICE, VETERANS DISABILITY BENEFITS: CLEARER INFORMATION FOR VETERANS AND ADDITIONAL PERFORMANCE MEASURES COULD IMPROVE APPEAL PROCESS 3–4 (2011) [hereinafter GAO VA DISABILITY REPORT].

<sup>136</sup> 38 U.S.C. §§ 1110, 1131 (2012).

<sup>137</sup> 38 U.S.C. §§ 1114, 1134 (2012). By contrast, of course, SSA’s disability process employees a statutorily-based all-or-nothing approach to disability. 42 U.S.C. § 423; see also *Advocate’s Conflicting Obligations*, *supra* note 119, at 102 (noting that 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”).

<sup>138</sup> By contrast, SSA generally relies on doctors who have no affiliation with SSA to evaluate the disability of SSA claimants. 20 C.F.R. §§ 404.1513, 404.1517 (2012). Because the VA has greater access to veterans’ medical records (through usually providing medical care itself), SSA is in a different position than the VA when requesting medical information.

<sup>139</sup> *Henderson* 131 S. Ct. at 1200-01. Indeed, in *Henderson*, the Justice Department argued—and the Supreme Court did not dispute—that “the Social Security and veterans-benefit review mechanisms share significant common attributes.” *Id.* at 1204.

<sup>140</sup> GAO VA DISABILITY REPORT, *supra* note 135, at 3.

<sup>141</sup> *Id.* at 8; see also 38 C.F.R. §§ 3.103(a), 20.700(c) (2010).

with SSA, the VA also has an affirmative obligation to assist veterans to develop a complete record to substantiate their claims.<sup>142</sup> If a veteran's claim is initially denied, the veteran may submit a notice of disagreement with the regional office to initiate an appeal before the Board of Veterans' Appeals ("BVA").<sup>143</sup> If a BVA Appeal is unsuccessful, the veteran may, in turn, seek review of the BVA decision in the Court of Appeals for Veterans Claims.<sup>144</sup>

Veterans may apply for disability benefits themselves, or have someone else (an attorney, a non-attorney claims agent, or a veterans service organization representative) assist them in the adjudication process.<sup>145</sup> Only individuals or entities accredited by the VA are permitted to assist veterans in the disability claim process.<sup>146</sup> Representatives are required to "be truthful in their dealings with claimants and VA"<sup>147</sup> and must not "[e]ngage in conduct involving fraud, deceit, misrepresentation, or dishonesty."<sup>148</sup> The VA can cancel the accreditation of any representative who fails to maintain accreditation requirements or who violates the VA's standards of conduct.<sup>149</sup>

When a veteran applies for benefits, the VA requires the disclosure of information that supports his or her claim.<sup>150</sup> If the VA learns that benefits were awarded on the basis of fraud, it can reduce or discontinue those benefits.<sup>151</sup> The VA defines fraud to include:

an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for [VA] benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.<sup>152</sup>

In addition, veterans who are receiving pension benefits "because of nonservice-connected disability or age"<sup>153</sup> have an affirmative obligation to notify the VA of changes in circumstances that may affect their continuing entitlement to these benefits.<sup>154</sup> A veteran's disclosure could result in adverse monetary consequences (*i.e.*, disability benefits being reduced or revoked).

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<sup>142</sup> *Henderson*, 131 S. Ct. at 1200-01; 38 U.S.C. § 5103(a) (2010).

<sup>143</sup> 38 U.S.C. § 7105 (2012).

<sup>144</sup> 38 U.S.C. § 7252 (2012). For a useful chart summarizing the VA's disability benefits appeals process, see GAO VA DISABILITY REPORT, *supra* note 135, at 6. (copy of GAO chart reproduced in Appendix H: GAO Chart Depicting VA Disability Claim Appeal Process, A-14).

<sup>145</sup> 38 U.S.C. §§ 5901-04 (2012).

<sup>146</sup> 38 U.S.C. § 5901 (2012); 38 C.F.R. § 14.629 (2012). By contrast, SSA does not accredit representatives who assist claimants. *See, e.g.*, 20 C.F.R. § 404.1705 (setting out requirements for attorney and non-attorney representatives absent any accreditation standards).

<sup>147</sup> 38 C.F.R. § 14.632(a)(2) (2012).

<sup>148</sup> 38 C.F.R. § 14.632(c)(3) (2012).

<sup>149</sup> 38 C.F.R. §§ 14.633(b), 14.633(c)(1) (2012).

<sup>150</sup> *See* 38 C.F.R. §§ 3.151, 3.201-16 (2012) (specifying claims forms to be filled out and requiring the submission of information, including, among other items, evidence related to any disability claim previously submitted to SSA, service records and nature of discharge, existence and age of dependents, marital status, and social security number).

<sup>151</sup> *Roberts v. Shinseki*, 23 Vet. App. 416, 428-29 (Vet. App. 2010).

<sup>152</sup> 38 C.F.R. § 3.1(aa)(2) (2012).

<sup>153</sup> 38 C.F.R. § 3.3(a)(3) (2012).

<sup>154</sup> 38 C.F.R. § 3.277 (2012) (applicants for, and recipients of, need-based pensions must disclose changes in any factor affecting entitlement to benefits, including: income, net worth, and marital status); 38 C.F.R. § 3.660 (2012)

## B. Other Types of Agency Programs

### 1. Securities and Exchange Commission

Like the PTO and the VA, the SEC has also adopted specific regulations governing the conduct of attorneys who practice before the agency.<sup>155</sup> These regulations go beyond simply imposing basic good-conduct obligations on counsel in agency proceedings, and instead require the disclosure of a client's material violations or fraudulent conduct internally to the client's chief legal officer, the chief executive officer, and, in certain circumstances, to an audit committee of the board of directors.<sup>156</sup> The regulations also indicate that an attorney may use internal reports that have previously been created pursuant to his or her disclosure to the client's officers "in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this [regulation] is in issue."<sup>157</sup> The attorney may even disclose the client's material violations or fraudulent conduct to the Commission, "to the extent the attorney believes reasonably necessary"<sup>158</sup> to accomplish one of these goals. Although the SEC has not set up its own registration system for those attorneys, it has asserted its authority to discipline attorneys who violate those regulations.<sup>159</sup>

After enactment of the Sarbanes-Oxley Act of 2002,<sup>160</sup> which, in turn, followed in the wake of the massive corporate fraud at Enron and WorldCom,<sup>161</sup> the SEC promulgated a set of detailed ethics standards for the attorneys who practice before it.<sup>162</sup> One particularly controversial regulation related to counsel's ability to reveal confidential information to the Commission—without the client's consent—when reasonably necessary to prevent a material violation of securities laws or fraudulent act or to redress the consequences of a material violation.<sup>163</sup> While many states' ethics rules permit (but do not require) attorneys to disclose

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(requiring certain benefit recipients to notify the VA "of any material change or expected change" in income or other circumstances that would affect benefits entitlement or benefit award being paid); *see Zyglewicz v. Nicholson*, 2005 U.S. App. Vet. Claims LEXIS 289 (Vet. App. 2005) (affirming BVA decision to deny a waiver of debt created by an overpayment of benefits because the veteran knowingly and in bad faith failed to disclose other income); *see also Jackson v. West*, 1999 U.S. App. Vet. Claims LEXIS 1319 (Vet. App. 1999) (affirming BVA decision to deny waiver of recovery of overpayment of benefits because veteran-recipient knowingly failed to report income).

<sup>155</sup> 17 C.F.R. §§ 205.1-205.7 (2012).

<sup>156</sup> 17 C.F.R. § 205.3(b) (2012).

<sup>157</sup> 17 C.F.R. § 205.3(d)(1) (2012).

<sup>158</sup> 17 C.F.R. § 205.3(d)(2) (2012).

<sup>159</sup> 17 C.F.R. § 205.6 (2012). Even before enactment of the Sarbanes-Oxley Act, the SEC had asserted its authority to discipline attorneys who violated its conduct regulations. *See Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (affirming SEC's then-existing regulatory authority for disciplining professionals appearing before agency).

<sup>160</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>161</sup> Linda Chatman Thomsen & Donna Norman, *Sarbanes-Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. L. 393, 394 (2008) ("The story behind [Sarbanes-Oxley] begins with the fraud at Enron Corporation."); *id.* at 395 (noting increased public pressure for Congress to pass legislation after news broke of the "multi-billion dollar accounting fraud" at WorldCom).

<sup>162</sup> 15 U.S.C. § 7245 (2012) (requiring the SEC to issue rules specifying minimum standards of professional conduct for attorneys "appearing and practicing before the Commission"); 17 C.F.R. §§ 205.1-205.7 (2012) (SEC professional conduct regulations implementing Sarbanes-Oxley Act).

<sup>163</sup> 17 C.F.R. § 205.3(d)(2) (2012); *see also* 17 C.F.R. § 205.2 (h)(i) (2012) (defining "material violation"). In addition, SEC regulations permit an attorney to use otherwise confidential information "in connection with any

client fraud under specified circumstances, others do not. The SEC's permission-to-disclose rule is thus broader than legal ethics standards applicable in many states or found in the ABA's Model Rules of Professional Conduct.<sup>164</sup>

The SEC's adoption of this regulation permitting the disclosure of a client's material violations or fraud occurred against the backdrop of long-standing bar opposition to attorneys disclosing client fraud.<sup>165</sup> At the time that the SEC was considering this regulation, the ABA's Model Rules of Professional Conduct did not contain confidentiality exceptions for client fraud (although many states did have such exceptions),<sup>166</sup> and the ABA had a decades-long history of rejecting such exceptions.<sup>167</sup> The SEC noted that attorneys in most states were already permitted to disclose this kind of information and that any "generalized concerns about impacting the attorney-client relationship must yield to the public interest" under certain circumstances involving client commission of a material violation or fraud.<sup>168</sup> The SEC's authority in this area continues to be contentious, especially because it involves confidential client information.<sup>169</sup>

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investigation, proceeding, or litigation in which the attorney's [own] compliance with . . . [the conduct rules] is in issue." 17 C.F.R. § 205.3(d)(1) (2012). This provision is similar to a "self-defense" exception found in Rule 1.6(b)(5) of the Model Rules of Professional Conduct.

<sup>164</sup> Lisa H. Nicholson, *A Hobson's Choice For Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 136-37 (2002) (citing THOMAS D. MORGAN & RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-44 (2002)) (noting that, as of the time the SEC's permission-to-disclose regulation was promulgated, the ABA's Model Rules only permitted disclosure of client confidence's to prevent death or substantial bodily injury, and nine states still follow this approach); see also Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296, 6,310 n.92 (Feb. 6, 2003) ("The ABA's Model Rule 1.6, which prohibits disclosure of confidential client information even to prevent a criminal fraud, is a minority rule.").

<sup>165</sup> See Susan P. Koniak, *When The Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1254-56 (2003) (describing ABA resistance to the SEC's efforts to discipline attorneys for their involvement in client fraud during the 1970s); Nicholson, *supra* note 164, at 139-45 (noting "almost twenty years and three failed attempts" to expand confidentiality exceptions in the Model Rules); Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 77-93 (2010) (describing battles between the SEC and bar organizations over the proper role of attorneys to "disrupt[] the misconduct of their client representatives").

<sup>166</sup> See Nicholson, *supra* note 164. The ABA House of Delegates did not adopt these fraud-related exceptions (Model Rule 1.6(b)(2) and (b)(3)) until August 2003, six months after the SEC adopted its regulation for attorneys. *Id.* at 133.

<sup>167</sup> When the ABA was overhauling its legal ethics standards in the late 1970s and early 1980s, it delegated the task of drafting revised standards to the Kutak Commission. The Kutak Commission proposed a confidentiality exception that would have allowed attorneys to disclose information "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used," but the ABA House of Delegates rejected that exception. The ABA rejected proposed confidentiality exceptions for client fraud in the early 1980s and again in 1991. See ABA MODEL RULES OF PROF'L CONDUCT (PRE-2002) HISTORY available at <http://www.law.cornell.edu/ethics/aba/2001/history.htm>. The ABA eventually adopted fraud-related exceptions to confidentiality, but those exceptions are narrower than the SEC's regulations. See Appendix F: Excerpts of American Bar Ass'n. Model Rules of Professional Conduct (2002) A-10 (providing excerpts of Rule 1.6(b)(2)-(3) of the Model Rules).

<sup>168</sup> Securities and Exchange Comm'n., Implementation of Standards of Professional Conduct for Attorneys; Final Rules, 68 Fed. Reg. 6296, 6311 (Feb. 6, 2003); see also Peter C. Kostant, *When Zeal Boils Over: Disclosure and the Duty of Candor of Legal Counsel in Regulatory Proceedings and the Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487, 490 (1993) (noting that "[l]awyers in a regulatory context must not interfere with the rights of the government agency, under applicable regulations, to full, prompt and accurate disclosure").

<sup>169</sup> See Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 77-93 (2010).

The SEC has also promulgated regulations that allow it to discipline the representatives who thwart the agency's conduct regulations; the Court of Appeals for the Second Circuit has affirmed the SEC's authority to "protect the integrity of its own processes."<sup>170</sup> Like the SEC, SSA can also issue regulations requiring disclosure of non-privileged claimant information and even discipline representatives who violate its regulations. SSA has the authority to impose this type of regulation even if it were to conflict with state bar rules.<sup>171</sup>

## 2. *Internal Revenue Service*

Another example of a conflict between federally-mandated disclosure and attorney confidentiality standards arose in the 1980s and 1990s when the IRS demanded that attorneys comply with a law requiring the disclosure of cash transactions over \$10,000.<sup>172</sup> A federal money laundering statute requires such reporting by "[a]ny person . . . who is engaged in a trade or business."<sup>173</sup> The statute does not target attorneys, but neither does it exempt them from its reach. Many attorneys resisted this disclosure requirement, asserting that ethical constraints prevented them from making such disclosure; other parts of the organized bar supported those attorneys.<sup>174</sup> Despite such opposition from bar authorities, federal courts rejected arguments that state bar confidentiality rules prevailed over this federal disclosure provision.<sup>175</sup>

## 3. *False Claims Act*

Another setting in which the federal government requires candor from a private party arises under the FCA.<sup>176</sup> Under the FCA, a potential whistleblower with information about fraud or false monetary claims made against the United States may file a lawsuit under seal.<sup>177</sup> The United States has the option of intervening in the lawsuit. Intervention is typically in the whistleblower's interest because the likelihood of success in a FCA-based action rises dramatically with governmental intervention.<sup>178</sup> (The whistleblower receives a statutorily prescribed "share of any proceeds from the action—generally ranging from 15 to 25 percent if the Government intervenes" and "from 25 to 30 percent if it does not."<sup>179</sup>) The FCA requires the

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<sup>170</sup> See *Touche Ross*, 609 F.2d at 581.

<sup>171</sup> See *infra* Part V. Properly drafted, however, conflicts between a rule by SSA mandating affirmative disclosure of claimant information and state bar rules would likely be modest and resolveable. *Id.*

<sup>172</sup> See Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055 (2012); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

<sup>173</sup> 26 U.S.C. § 6050I(a) (2012).

<sup>174</sup> Aviel, *supra* note 172, at 1075 (noting "ethics opinions issued by the ABA, various state bar organizations, and the ethics advisory committee of the National Association of Criminal Defense Lawyers[] 'stating or strongly suggesting' that ethical obligations prevented the lawyers from complying with the demands of the IRS").

<sup>175</sup> *Id.* at n.94 (citing *United States v. Sindel*, 53 F.3d 874, 876-77 (8th Cir. 1995)).

<sup>176</sup> 31 U.S.C. §§ 3729-3733 (2012).

<sup>177</sup> 31 U.S.C. § 3730(d) (2012).

<sup>178</sup> 31 U.S.C. § 3730 (2012); see David Kwok, *Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act* (2012), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=david\\_kwok](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=david_kwok) (noting a "startling poor success rate in non-intervened cases," with 95% success rate in cases where the government intervenes (i.e., resulting in a settlement or judgment in favor of the government), and 6% success rate in cases where the government does not intervene). In the latter type of case, however, the relator obtains a higher percentage of the proceeds.

<sup>179</sup> *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 769-70 (citing 31 U.S.C. §§ 3730(d)(1)-(2) (2012)).

relator (plaintiff) to disclose to the Department of Justice “substantially all material evidence and information” in his or her possession.<sup>180</sup> This is intended to ensure that the Justice Department has access to information that may dissuade it from intervening, as well as information that may persuade it to intervene. This requirement amounts to an affirmative duty of candor when dealing with a federal agency.

### III. CIVIL LITIGATION IN FEDERAL COURT: DISCOVERY & DISCLOSURE REQUIREMENTS

As has been addressed, and unlike civil litigation in the federal court system, the process for adjudicating Social Security disability benefits is nonadversarial.<sup>181</sup> Nonetheless, there are distinct parallels between the mandatory disclosure obligations that have been imposed by the Federal Rules over the past twenty years and SSA’s own efforts during the same time period to promulgate revised regulations specifying that representatives and claimants have an affirmative obligation to submit complete information—even if such information might be viewed as “unfavorable” to a disability claim. Review of the history underlying the FRCP’s mandatory disclosure obligations, as well as the text of such rules, may thus provide some insights to SSA as it considers regulatory modifications to ensure disability claims are adjudicated based on a complete record of the claimant’s relevant medical and work history.

By the late 1970s, significant increases in the volume and complexity of federal civil litigation led to a rising chorus for civil discovery reform.<sup>182</sup> Critics claimed that civil discovery, while originally conceived as a set of self-regulating pretrial disclosure tools among the parties, was increasingly marred by sharp tactics that frustrated its usefulness, increased litigation costs, delayed the resolution of cases, and caused the courts to expend undue amounts of time engaged in case management.<sup>183</sup> Though it would take more than a decade for these civil discovery reform efforts to bear fruit, in 1993 the Federal Rules were revised to impose—for the first time—mandatory disclosure obligations on civil litigants.

#### A. 1993 Amendments: Imposition of Mandatory Disclosure

The 1993 Amendments to the Federal Rules embodied a comprehensive set of revisions governing all stages of civil litigation, from service of a complaint to entry of judgment.<sup>184</sup> The

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<sup>180</sup> 31 U.S.C. § 3730(b)(2) (2012).

<sup>181</sup> See discussion *supra* Part I.A.

<sup>182</sup> See, e.g., William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989) (making the case for reforming Rule 26 to adopt a duty-to-disclose regime); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1348 (1978) (same).

<sup>183</sup> See, e.g., Paul Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really In Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998); (describing 1938 Federal Rules as effecting shift to pretrial regime of “attorney-managed discovery”) [hereinafter *Here We Go Again*], Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel A Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 483-84 (1995) (“The authors of the FRCP designed discovery to make information gathering a self-executing process.”) [hereinafter *Gladiators Be Gone*].

<sup>184</sup> See COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS PURSUANT TO 28 U.S.C. 2072, H.R. DOC. NO. 74, at 108, 103d

most controversial aspect of these Amendments was a new requirement, set forth in Rule 26(a), which imposed a mandatory obligation on parties to disclose—early in the litigation (and without awaiting a formal discovery request)—four specified types of information:

- **Potential Witnesses** (“the name, if known, the address and telephone number of each individual likely to have discoverable information . . . [and] identifying the subjects of the information”);
- **Relevant Documents** (“a copy of, or a description by category and location of, all documents . . . in the possession, custody, or control of the party that are relevant to disputed facts”);
- **Damages Calculations** (“a computation of any category of damages claimed by the disclosing party,” including “making available for inspection and copying . . . the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based”); and
- **Insurance Agreements** (“any insurance agreement under which any person carrying on an insurance business may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment”).<sup>185</sup>

In mandating this new initial mandatory disclosure regime, the drafters of Rule 26 also took care to emphasize that such obligations extended to *all* responsive, non-privileged information even if potentially adverse to a party’s claims or defenses. For example, with respect to the mandated disclosure of the identities of potential witnesses, the Advisory Committee stated:

All persons with such information should be disclosed, *whether or not their testimony will be supportive of the position of the disclosing party*. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses, or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties.<sup>186</sup>

The 1993 Amendments to Rule 26 also laid out an “administrative” framework for these new disclosure obligations. *First*, with respect to timing, parties were obligated to make their disclosures at the outset of the litigation—specifically, within ten days of the parties’ initial scheduling or discovery conference.<sup>187</sup> *Second*, a party’s mandatory disclosure obligations did

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Cong., 1st Sess. (1993), reprinted in Supreme Court of the United States, *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 511 (1993) [hereinafter *1993 Amendments to the Federal Rules*].

<sup>185</sup> Fed. R. Civ. P. 26(a)(1)(A)-(D) (1993). The full text of Rule 26(a)(1), as amended in 1993, is set forth in Appendix G: Excerpts of Fed. R. of Civ. Pro., Rule 26 (1993), A-12.

<sup>186</sup> FED. R. CIV. P. 26(a)(1)(A) advisory committee’s note (1993) (emphasis added). The Advisory Committee made a similar admonition with respect to disclosure of responsive documents. See *id.* 26(a)(1)(B) advisory committee’s note (“As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to a party, *whether or not supportive of its contentions in the case.*”) (emphasis added).

<sup>187</sup> See FED. R. CIV. P. 26(a)(1)(D), 26(f) (1993). A party could not shirk his or her disclosure obligation by claiming that the case was still in its formative stages (and, as a result, evidentiary development still incomplete). As Rule 26(a)(1)(D) cautioned: “A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case.” *Id.*

not cease with this initial disclosure; rather, Rule 26(e) imposed an ongoing duty to supplement or correct a prior disclosure “if a party learn[ed] that in some material respect the information disclosed [was] incomplete or incorrect.”<sup>188</sup> *Third*, the 1993 Amendments to Rule 26 took steps to ensure accountability by requiring signatures on all mandatory disclosures by a counsel of record (or party, if unrepresented), with such signature “constitut[ing] a certification that to the best of the signer’s knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.”<sup>189</sup> Rule 26(g) added “teeth” to this certification by permitting, at the court’s discretion, imposition of “appropriate sanction” for violation of disclosure requirements against “the person who made the certification, the party on whose behalf the disclosure is made, or both.”<sup>190</sup>

During the rule-drafting process overseen by the Advisory Committee of the Judicial Conference of the United States (Advisory Committee),<sup>191</sup> the foregoing duty-to-disclose regime faced near uniform opposition from all segments of the legal profession (*e.g.*, practitioners, bar associations, federal judges, public interest groups, academics, and the Department of Justice) and other interested entities, such as insurers and large businesses. Critics of the proposed changes to Rule 26(a) charged that mandatory disclosures would exacerbate the problems of cost and delay in civil discovery, lead to disputes over incomplete disclosures, and, most importantly, conflict with the ethical duties of an attorney to his or her client.<sup>192</sup> The strongest—and most frequently voiced—objection to the proposed disclosures was that such disclosures would undermine the adversary system by creating an untenable conflict between an attorney’s obligation to “represent a client zealously,”<sup>193</sup> and the obligation under the new rule to disclose relevant information even if damaging to his or her client.<sup>194</sup> Some also voiced concern that imposing a mandatory duty-to-disclose regime on a national basis was premature because local discovery reform experiments mandated by the Civil Justice Reform Act of 1990 (“CJRA”)<sup>195</sup> were not yet complete.<sup>196</sup>

Justice Scalia (joined by Justices Souter and Thomas) refused to endorse the new amendments upon their submission by the Judicial Conference of the United States (“Judicial

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<sup>188</sup> FED. R. CIV. P. 26(e)(1) (1993).

<sup>189</sup> FED. R. CIV. P. 26(g) (1993).

<sup>190</sup> *Id.*

<sup>191</sup> Federal court rules result from an elaborate and carefully designed rulemaking process. In brief, the Judicial Conference drafts, reviews, and promulgates proposed rules through the work of several committees and a public notice-and-comment period. The Judicial Conference, upon endorsement of the rulemaking package (*e.g.*, proposed rules, Advisory Committee notes, and report), sends the proposal to the Supreme Court. The Supreme Court deliberates on the proposed rules, and, if it approves them, submits the rules to Congress. Congress then has seven months (or longer) to amend or reject the proposed rules before they can take effect. *See* 28 U.S.C. § 2074(a); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA L. REV. 1, 21-28 (1992) (recounting rulemaking process for the 1993 Amendments); *see generally* WINIFRED BROWN, FEDERAL RULE MAKING: PROBLEMS AND POSSIBILITIES 5-34 (1981).

<sup>192</sup> Bell, *supra* note 191, at 28-41 (summarizing commenters’ opposition to mandatory disclosure requirements in proposed Rule 26(a)).

<sup>193</sup> MODEL CODE OF PROF’L RESPONSIBILITY CANON 7 (1983).

<sup>194</sup> *Id.*; *see also* *Gladiators be Gone*, *supra* note 183, at 503-04.

<sup>195</sup> *See* Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098; *see also* 28 U.S.C. §§ 471, 473(a)(2)(C).

<sup>196</sup> *1993 Amendments to the Federal Rules*, *supra* note 184, at 511.

Conference”) to the Supreme Court for approval.<sup>197</sup> Justice Scalia’s strong dissent echoes the criticisms leveled at Rule 26(a)’s disclosure mandate by other commenters:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed are not clear but require the exercise of considerable judgment—the new Rule [26(a)] would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.<sup>198</sup>

Ultimately, however, these criticisms did not prevail. The 1993 amendments—including Rule 26(a)’s mandatory disclosure provisions—were approved by the Supreme Court (over Justice Scalia’s dissent) and became law by virtue of congressional inaction. However, the 1993 Amendments acknowledged concerns that national implementation at that time might be premature by explicitly permitting local federal districts (as well as attorneys, by stipulation) to “opt out” of the mandatory disclosure rules in favor of local variations.<sup>199</sup>

Empirical and other evidence suggest that, despite its contentious origins, Rule 26(a)’s duty-to-disclose scheme has improved the civil discovery process, and has done so without creating insurmountable ethical issues. With respect to empirical analyses, in 1997 the Judicial Conference commissioned studies by the Federal Judicial Center (“FJC”),<sup>200</sup> the research arm of the federal courts, and the RAND Institute for Civil Justice (“RAND”)<sup>201</sup> to evaluate the effect of Rule 26(a)’s mandatory disclosure rules and other similar local pilot discovery management programs. These comprehensive studies yielded complementary data on the efficacy of early discovery disclosures. The RAND study, for which data collection preceded the effective date of the 1993 Amendments, assessed local pilot case management programs started in response to the CJRA, including early mandatory disclosures.<sup>202</sup> Among other things, RAND reported that the vast majority of attorneys viewed mandatory disclosure programs favorably and believed they improved fairness.<sup>203</sup> RAND also observed that attorneys reported greater disclosure with mandatory early disclosure programs, as compared to voluntary programs or districts with no disclosure policy.<sup>204</sup>

Following up on the RAND report, the FJC subsequently undertook a comprehensive statistical analysis of Rule 26(a)(1) to tell the full “empirical” story of the effects of its

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<sup>197</sup> *Id.* at 510.

<sup>198</sup> *Id.* at 510.

<sup>199</sup> FED. R. CIV. P. 26(a)(1) (1993) (establishing default rule that initial mandatory disclosure obligations apply in each district “[e]xcept to the extent otherwise stipulated or directed by order or local rule”).

<sup>200</sup> THOMAS E. WILLGING ET AL., AN EMPIRICAL STUDY OF DISCOVERY AND DISCLOSURE PRACTICE UNDER THE 1993 FEDERAL RULE AMENDMENT (1998), *reprinted in* 39 B.C. L. Rev. 525 (1998) [hereinafter FJC STUDY].

<sup>201</sup> JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998) [hereinafter RAND REPORT], *available at* [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2009/MR941.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/MR941.pdf).

<sup>202</sup> *Id.* at 16-17.

<sup>203</sup> *Id.* at 54 tbl. 3-2, 120-24.

<sup>204</sup> *Id.* at 48.

mandatory disclosure provisions.<sup>205</sup> The FJC’s study included a national survey of attorneys in 1000 closed civil cases selected from various federal districts across the country that, based on the nature of the complaint, were likely to have included discovery.<sup>206</sup> Statistical analyses of the survey responses led the FJC to several conclusions of interest. First, despite Rule 26(a)(1)’s opt-out provision, use of mandatory disclosures was nonetheless widespread, with over one-half of attorneys (58%) whose cases involved discovery having exchanged such disclosures in their cases.<sup>207</sup> Second, the surveyed attorneys’ views of the efficacy of mandatory disclosures were generally favorable. Of respondents who reported an effect, they generally viewed these disclosures as having the salutary benefits of, on the one hand, decreasing litigation costs and the time from filing to disposition while, at the same time, increasing both procedural fairness and fairness of case outcomes.<sup>208</sup> Lastly, a plurality of respondents (41%) favored replacing the opt-out system with a uniform national rule requiring mandatory disclosures in every federal district.<sup>209</sup>

There are also several reasons to believe that concerns about the 1993 Amendment’s duty-to-disclose scheme were overstated. The text of amended Rule 26(a)(1), as well as the Advisory Committee’s accompanying notes, made explicit that the new disclosure rules were not intended to compromise existing privilege or work product doctrines.<sup>210</sup> As one commentator observed shortly after the 1993 Amendments took effect: “Amended Rule 26 and the Advisory Committee’s Notes do not seem to have eliminated, eviscerated, or otherwise enfeebled the assertion of privileges and immunities in the discovery process.”<sup>211</sup> As important, the attorney-client privilege is likely not implicated by most disclosures under Rule 26(a)(1) because the privilege extends only to communications, not underlying *factual* information.<sup>212</sup> Most (if not all) of the information disclosed under this provision—including, the names of potential witnesses, lists of relevant documents, and copies of insurance agreements—is likely to be solely factual and, thus, exempt from privilege claims.

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<sup>205</sup> See FJC STUDY, *supra* note 200.

<sup>206</sup> *Id.* at 528.

<sup>207</sup> *Id.* at 534, 554 tbl. 2 & 559. Although attorneys’ evaluations of Rule 26(a)(1)’s disclosure mandate were generally positive, slightly more than one-third of surveyed attorneys (37%) who had participated in a case with disclosures identified one or more implementation problems, the most frequent of which was a disclosure by their opponent that was too brief or incomplete. *Id.*

<sup>208</sup> *Id.* at 534-35, 562-64. The FJC study did, however, reveal one particular subset of cases in which respondents deemed mandatory disclosures to be ineffective—cases with high monetary stakes (*i.e.*, claims valued at over \$500,000), high complexity, or contentious relationships. *Id.* at 563-64.

<sup>209</sup> *Id.* at 535, 564-65.

<sup>210</sup> See FED. R. CIV. P. 26(a)(1)(C), 26(b)(1) (1993); see also FED. R. CIV. P. 26(b) advisory committee’s note (1993); *Gladiators Be Gone*, *supra* note 183, at 509-10 (“Lawyers who insist that automatic disclosures are unethical . . . misconstrue the lawyer’s role in the adversary process as well as their ethical obligations under the rules of professional responsibility.”); Charles W. Sorenson, *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 766 (1995) (“On its face, amended Rule 26(a) does not impinge upon the [attorney-client] privilege even for initial [mandatory] disclosures . . . and the Advisory Committee Notes accompanying the December 1993 amendments acknowledge that a party may object to the production of documents during Rule 26(a) disclosure on the basis of ‘privilege or work-product protection.’”).

<sup>211</sup> Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 32 (1994).

<sup>212</sup> *Upjohn v. United States*, 449 U.S. 383, 395-96 (1981); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5484 (2012); see also Sorenson, *supra* note 210, at 766-67; Mullenix, *supra* note 211, at 41.

Yet, even in the broader, non-evidentiary sense, Rule 26(a)'s mandatory disclosure obligations did not cause serious dissonance with attorneys' norms of professional responsibility. The attorney's duties of confidentiality and zealous representation are not without boundaries. The Model Rules of Professional Conduct<sup>213</sup> subject these duties to limitations that require (or permit) attorneys to disclose client information when mandated by law or court order—which, presumably, encompasses “the other law” of mandatory disclosures under Rule 26(a)(1).<sup>214</sup> Thus, it cannot be seriously argued that Rule 26(a)'s duty-to-disclose scheme poses a threat to attorneys' ethical obligations. Indeed, our research has revealed no cases in which an attorney has been subject to sanction by his or her state bar for complying with Rule 26(a)'s mandatory disclosure provisions.

## **B. 2000 Amendments: Refinements to Mandatory Disclosure**

In 1997, the Judicial Conference initiated the committee process to explore the need for additional revisions to Rule 26. The Advisory Committee drew on the results of the RAND and FJC studies, as well as public hearings and concluded, among other things, that Rule 26(a)(1)'s mandatory disclosures had been well-received, but that the existing “opt out” provision had resulted in the “balkanization” of discovery rules among the ninety-four judicial districts.<sup>215</sup> More generally, the Advisory Committee also continued to hear criticisms that the broad scope of discovery led to abusive tactics and increased costs. Ultimately, in 2000, the Advisory Committee's reform proposal led to amendments to the Federal Rules—which, while described as “modest,”<sup>216</sup> revised Rule 26 in several respects.<sup>217</sup>

The 2000 Amendments made two revisions to Rule 26 of particular relevance to this report. First, to bring uniformity to disclosure rules across all federal jurisdictions, the amendments removed the authority of local districts to alter or opt out of the nationally-applicable disclosure provisions in Rule 26(a)(1).<sup>218</sup> Also, the 2000 amendments narrowed the scope of information parties must divulge in their mandatory disclosures.<sup>219</sup> Whereas disclosure obligations previously (under the 1993 Amendments) extended under Rule 26(a)(1) to discoverable (non-privileged) information “relevant to disputed facts alleged with particularity in the pleadings,”<sup>220</sup> the 2000 Amendments narrowed the scope of such mandatory disclosures to

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<sup>213</sup> MODEL RULES OF PROF'L CONDUCT pmbl, para. 9 (setting forth an attorney's obligation to zealously pursue client's legitimate interests “within the bounds of the law”) & Rule 1.6(b)(6) 1982) (permitting an attorney to reveal a client's information when reasonably necessary “to comply with other law or a court order”).

<sup>214</sup> See Mullenix, *supra* note 211, at 40-41 (rejecting arguments that Rule 26(a) disclosures conflict with ethical canons and stating: “The lawyer's broader duty of confidentiality . . . is itself subject to waivers and exceptions that permit or require lawyers to disclose client information when authorized or mandated by law, including the duty of candor towards tribunals.”); Sorenson, *supra* note 210, at 779-92 (“[T]he short answer to the arguments by the critics of disclosure regarding the purported violation of ethical duties to the client is simply that attorneys' zealotry has always been ethically subject to legal limitations and obligations, including obligations to reveal to an opposing party adverse information.”); *Gladiators Be Gone*, *supra* note 183, at 509-10 (opining that mandatory disclosures are consistent with ethical obligations under Canon 7 of the Model Code of Professional Responsibility); see also discussion *supra* at Part IV.A.2.-3.

<sup>215</sup> See Niemeyer, *supra* note 183, at 519, 521-23.

<sup>216</sup> Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 1 FED. CTS. L. REV. 289, 290-91, 299 (2006).

<sup>217</sup> *Amendments to the Federal Rules of Civil Procedure*, 192 F.R.D. 340 (2000) [hereinafter *2000 Amendments*].

<sup>218</sup> See FED. R. CIV. P. 26(a)(1), 26(b)(1) (2000); FED. R. CIV. P. 26 advisory committee's note (2000).

<sup>219</sup> E.g., *AG-Innovations, Inc. v. United States*, 82 Fed. Cl. 69, 77 (2008).

<sup>220</sup> See FED. R. CIV. P. 26(a)(1)(A)-(B) (1993).

discoverable matters that the disclosing party may use “to support its claims or defenses.”<sup>221</sup> Parties may only seek broader “relevant to the subject matter” discovery by court order upon a showing of good cause. In effect, this change created a multi-tiered approach to discovery by: (1) narrowing the scope of initial, mandatory disclosures (as well as other subsequently-propounded discovery requests such as interrogatories or document requests) and (2) getting courts more actively involved in broader discovery requests.<sup>222</sup>

Two themes emerge from the 2000 Amendments to Rule 26 that may be relevant to SSA’s duty of candor efforts. First, widespread use of pilot disclosure measures in a program of national scope (such as the federal court system)—while useful to assess alternate approaches—may nonetheless come at the cost of confusion among practitioners and some measure of inefficiency. For example, attorneys surveyed in the FJC study ranked adoption of a national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes.<sup>223</sup> Second, perceptions about the scope of mandatory disclosures can play a role in acceptance of such disclosures by the bar. Whether this new phraseology in amended Rule 26(a)(1) does, in fact, narrow the scope of disclosed evidence is a matter of scholarly debate.<sup>224</sup> Indeed, even the framers of the 2000 Amendments admit that the line between the former subject-matter discovery standard and the new claim-or-defense standard is a fine one.<sup>225</sup> Yet, what does seem clear is that *perceptions* about the scope of required disclosures (rather than ethical considerations)—by some bar organizations, practitioners, and judges still reluctant to

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<sup>221</sup> FED. R. CIV. P. 26(a)(1)(A)-(B) (2000); FED. R. CIV. P. 26 advisory committee’s note (2000).

<sup>222</sup> *E.g.*, In re Cooper & Tire Rubber Co., 568 F.3d 1180, 1188-89 (10th Cir. 2009) (discussing impact of amended Rule 26 on discovery process); Sanyo Laser Products, Inc. v. Arista Records, Inc., 214 F.R.D. 496, 498-500 (S.D. Ind. 2003) (same); Thomas D. Rowe, Jr., *A Square Peg In A Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 17-18 (2002) (“To put it in the terms colloquially used by litigators . . . the amended rule’s second tier [of court-mediated discovery] aims to provide ‘adult supervision’ to contain possible squabbles when any party seeks and may engage in broader subject-matter discovery.”); *see generally* FEDERAL PRACTICE AND PROCEDURE § 2008 (discussing effect of 2000 amendments on scope of discovery and collecting cases).

<sup>223</sup> FJC STUDY, *supra* note 200, at 541-43, 582-87; *see also* DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Federal Judicial Center, March 30, 1998), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/\\$File/FRCP2698.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/$File/FRCP2698.pdf); JUDICIAL CONFERENCE, FINAL REPORT TO CONGRESS, ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY: ASSESSMENT OF PRINCIPLES, GUIDELINES AND TECHNIQUES, 175 F.R.D. 62 (1990) *available at* <http://host4.uscourts.gov/library/cjra/cjrafin.pdf>. In the run-up to the 2000 Amendments, individuals testifying at the public hearings on the proposed amendments also emphasized the need for national uniformity. *See* Niemeyer, *supra* note 183, at 522-23 (summarizing comments at public hearings); FED. R. CIV. P. 26 advisory committee’s note (2000).

<sup>224</sup> *See, e.g.*, Marcus, *supra* note 216, at 293-94, 299 (concluding that definitional revisions in 2000 Amendments “should not have a dramatic effect on the scope of discovery”); Rowe, *supra* note 222, at 18-22, 24-27 (expressing doubts that new claim-or-defense default discoverability standard will, in practice, limit discovery based on liberal discovery traditions and review of early caselaw applying amended Rule 26); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875, 883-87 (2001); Elizabeth G. Thornburg, *Giving the “Haves” A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 249-54 (1999) (expressing the view that the revised scope of discovery is “apt to result in the disclosure of less information both initially [through mandatory disclosures] and after formal discovery”).

<sup>225</sup> *See* FED. R. CIV. P. 26(b)(1) advisory committee’s note (2000) (“The dividing line between information relevant to the claims and defenses and information relevant only to the subject matter of the action cannot be defined with precision.”).

fully embrace a duty-to-disclose scheme—was as much the likely driver underlying these 2000 Amendments as other factors.<sup>226</sup> This suggests that SSA may be able to reduce potential opposition to any rulemaking it may undertake in the future relating to submission of evidence by thoughtfully tailoring and explaining its proposed regulation as it has done in the past.

Lastly, it bears noting that the federal judiciary has recently initiated a discretionary pilot program—developed by a Judicial Conference Advisory Committee—to use case-specific initial discovery protocols for employment litigation involving adverse actions.<sup>227</sup> These pilot discovery protocols, which are being employed at present by individual district court judges (or districts) on a voluntary basis, were developed as a form of case-type-specific “pattern discovery” given that such employment actions are “regularly litigated and [present] recurring issues.”<sup>228</sup> For judges (or districts) adopting them, these pilot protocols will supplant Rule 26(a)(1)’s mandatory disclosures in favor of a case-specific suite of pattern discovery that consist of: (1) detailed mandatory initial disclosures that are specifically tailored to issues commonly raised in employment discrimination cases alleging adverse personnel actions; (2) a standing order for their implementation by individual judges participating in the pilot program; and (3) a model protective order that attorneys and judges can use as the basis for such orders, if needed.<sup>229</sup> The FJC will evaluate this pilot program over time to determine its impact and efficacy in these types of employment actions.<sup>230</sup> If the pilot model proves successful, the FJC indicates that it may be used as the basis for development of other case-specific pattern discovery protocols.<sup>231</sup> While this pilot program is still in its infancy, it nonetheless may still serve as another useful civil discovery model for SSA as it considers whether—or how—to frame any new rules addressing the disclosure obligations of claimants and representatives.

#### IV. ETHICS STANDARDS THAT REQUIRE DISCLOSURE OF INFORMATION

Despite the experience under FRCP 26(a), concerns have been raised that an affirmative disclosure obligation would (in the case of attorney representatives) put attorneys in conflict with state rules of professional conduct—in particular, rules governing the disclosure of a client’s confidential information.<sup>232</sup> This part addresses the ethical obligations of attorneys with an eye toward the options set forth in Part V. It also briefly addresses the regulation of a non-attorney representatives’ conduct.

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<sup>226</sup> See Rowe, *supra* note 222, at 15-16 (“The scope redefinition can be understood as fitting with several of the goals animating the 2000 package of amendments,” which included: constraining improper or overly expansive discovery; prompting judicial supervision in cases with problematic discovery issues; and, confirming judicial discretion to tailor discovery to the needs of particular cases); Thornburg, *supra* note 224, at 236, 243-46 (opining that the “same pressures that caused controversy to flow around the 1993 [disclosure] proposal . . . have led the Advisory Committee to once again take up the issue of disclosure and its relationship to formal discovery”).

<sup>227</sup> FEDERAL JUDICIAL CENTER, PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (Nov. 2011) [hereinafter FJC PILOT EMPL. LIT. PROJECT], available at [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf).

<sup>228</sup> *Id.* at 1.

<sup>229</sup> *Id.* at 2.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> NOSSCR 2012 Letter, *supra* note 40.

## **A. Ethics Considerations for Attorney Representatives**

### ***1. Sources of Governing Law***

The law governing an attorney's conduct comes from diverse sources, including statutes that apply to attorneys and non-attorneys alike,<sup>233</sup> common law standards based on the fiduciary nature of attorney-client relationships, the rules adopted by tribunals in which the attorney litigates, rules adopted by agencies before whom the attorney practices, and professional rules adopted by the state supreme court where the attorney is licensed. Two sources are of particular importance here: state rules of professional conduct and the rules of the tribunal before which an attorney practices.

Forty-nine of the fifty state supreme courts have adopted professional rules that are based on the ABA Model Rules of Professional Conduct.<sup>234</sup> The Model Rules do not have the force of law in and of themselves. They become law only if a state (whether through its supreme court or otherwise) adopts them as binding law. While there is significant variation from state to state regarding an attorney's general disclosure of confidential information and related matters, the principles discussed below are common to every state's rules of professional conduct.

Attorneys are also bound by the rules of the tribunal before which they practice. As the ABA's Model Rules provide, "a lawyer shall not . . . knowingly disobey an obligation under the rules of the tribunal except for an open refusal based on an assertion that no valid obligation exists."<sup>235</sup> The ABA rules specifically contemplate, in fact, that a tribunal's rules may sometimes conflict with other rules of professional conduct to which an attorney is subject. In the case of such conflict, the ABA Model Rules state, the rules of the tribunal control.<sup>236</sup>

There is an important, related principle at work when the tribunal's rules have the force of federal law (as would any SSA procedural regulation). When, pursuant to its statutory authority, a federal agency promulgates rules governing the attorneys who practice before them, those rules, by operation of the Constitution's Supremacy Clause, preempt any conflicting state ethics rules. But SSA need not resort to its preemptive authority to impose a duty of disclosure.

### ***2. The Confidentiality Mandate & Its Exceptions***

Attorneys are generally required to keep client-related information confidential unless an exception to their confidentiality duty permits or requires disclosure.<sup>237</sup> The ABA's Model Rules

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<sup>233</sup> *E.g.*, *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324, 1332 (2010) (noting that Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 applies to attorneys and rejecting law firm's argument that the federal statute "impermissibly trenches on an area of traditional state regulation"); *Goldfarb v. Va. St. Bar*, 421 U.S. 773 (1975) (Sherman Act applies to attorneys and prohibits bar's minimum fee schedule).

<sup>234</sup> California has followed a different model, with some rules adopted by its supreme court and other standards enacted by the legislature in the state's Professional and Business Code. CA RULES OF PROF'L CONDUCT.

<sup>235</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2012).

<sup>236</sup> *Id.* at R. 8.5 (2012).

<sup>237</sup> *Id.* R. 1.6(a) (2012). The precise scope of the duty of confidentiality (i.e., what information is included in the confidentiality obligation) varies depending on the state where the attorney is licensed. Some states have adopted the rather broad approach found in Model Rule 1.6 (i.e., information relating to the representation of a client), while others have adopted a narrower approach (i.e., information covered by the attorney-client privilege and other

delineate eleven exceptions to this requirement.<sup>238</sup> Three of these exceptions are relevant in the context of this report: those allowing an attorney to (1) disclose information in ex parte proceedings,<sup>239</sup> (2) “prevent, mitigate or rectify a client crime or fraud” where the attorney’s services had been used in the crime or fraud,<sup>240</sup> and (3) “comply with other law.”<sup>241</sup> The last one is particularly important and to a large extent underlies the options in Part V.

*a. Candor in Ex Parte Proceedings*

SSA disability adjudications do not technically fit within the traditional understanding of an ex parte proceeding: since the government is not represented, the proceedings are not out of the presence of any party. Yet the Supreme Court has characterized a similar sort of proceeding administered by the VA as ex parte,<sup>242</sup> and also equated VA and SSA disability proceedings in other respects. As a result, it is relevant to the issue addressed in this report to consider the rules of professional conduct governing an attorney’s obligation in ex parte proceedings. These proceedings most commonly arise in situations where one party to a dispute seeks a temporary restraining order (“TRO”) and there is not sufficient time to bring the other party before the court.

Nearly every state’s rules of professional conduct requires, in one form or another, an attorney in an ex parte proceeding to “inform the tribunal of all material facts known to the attorney that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”<sup>243</sup> This candor obligation is appropriate because an ex parte proceeding represents a departure from the adversary process. Tribunals normally rely on the adversary process—and the incentive of each party to present favorable information—to ensure that the tribunal is informed of all relevant information. But where there is a departure from the adversary process, the ordinary rules of confidentiality are relaxed. The judge cannot rely on the party opposing the TRO to come forward with information adverse to the TRO. Thus, professional rules obligate the attorney for the party seeking the TRO to help the judge achieve a just result because of the lack of an adversary process.

This established rule on ex parte proceedings carries over to SSA administrative proceedings that determine a claimant’s eligibility for disability benefits. On the one hand, at the ALJ stage, the claimant (and the representative, if he or she has one) stands before an ALJ without the government there to argue against the claimant’s eligibility.<sup>244</sup> This aspect of the process suggests the proceeding is ex parte. On the other hand, unlike a trial judge who hears a

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information the disclosure of which would be harmful to the client). *Compare, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 4-1.6(a) (broad approach) *with, e.g.*, D.C. RULES OF PROF’L CONDUCT R. 1.6 (narrower approach).

<sup>238</sup> Model Rule 1.6(a) contains two exceptions: where “the client gives informed consent” and where “disclosure is impliedly authorized in order to carry out the representation.” Model Rule 1.6(b) lists seven additional exceptions, and other exceptions are found in Model Rule 3.3 and in Model Rule 3.8(d) for prosecutors.

<sup>239</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 (2012).

<sup>240</sup> *Id.* R. 1.6(b)(3), (b)(2) (2012).

<sup>241</sup> *Id.* R. 1.6(b)(6) (2012).

<sup>242</sup> *Henderson*, 131 S. Ct. at 1200-01.

<sup>243</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2012).

<sup>244</sup> Frank Bloch, Jeffrey Lubbers, & Paul Verkuil, *Introducing Nonadversarial Government Representatives to Improve the Record for Decision in Social Security Disability Adjudications: A Report to the Social Security Advisory Board*, 92 CORNELL L. REV. 235, 240-43 (2007).

request for a TRO and has a single obligation—to adjudicate that request—the ALJ hearing a disability claim has an obligation not just to adjudicate the claim, but also to consider the interests of the government. Hence, as noted above, ALJ proceedings do not technically fit within the traditional definition of an *ex parte* proceeding. At the same time, the Supreme Court has characterized benefits proceedings before the VA as *ex parte*,<sup>245</sup> and those proceedings, as the Supreme Court also noted, differ little, if at all, from SSA proceedings as far as the *ex parte* question is concerned. Since the ALJ, in “representing” the government, while balancing his or her role as a neutral decider, does not have access to discovery or other information in the claimant’s hands, it could well be that *ex parte* constraints on claimant’s counsel are appropriate. In this way, the terms *nonadversarial* and *ex parte* tend to merge, as the Court suggested in *Henderson*.

*b. Perpetuation of a Fraud*

A second relevant exception arises when a client has used an attorney’s services in perpetrating a fraud. Attorneys must not knowingly assist a client in a fraud or engage in “conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>246</sup> These prohibitions are obvious and encompass the starkest type of attorney misconduct. Other professional rules provide guidance to attorneys regarding a less stark, but likely, more common scenario: where the attorney has not *knowingly* assisted a client in a fraud, but comes to believe that he or she has done so inadvertently.

When an attorney discovers that a client has used his or her services to perpetrate a fraud, the attorney’s lack of knowledge at the time of providing the original services does not relieve that attorney of the responsibility to take action once the attorney becomes aware of the client’s fraudulent conduct.<sup>247</sup> If failure to disclose a material fact would constitute assistance in that fraud, then the attorney has an affirmative obligation to disclose that information.<sup>248</sup> If an attorney learns that a client has testified falsely before a tribunal, the attorney has an obligation to take remedial measures, which may include disclosure of the falsehood to the tribunal.<sup>249</sup>

*c. Disclosure of Information Pursuant to “Other Law” or Court Order*

The third and most important exception permits attorneys to disclose otherwise confidential information if, as Model Rule 1.6(b)(6) provides, “other law” or a “court order”

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<sup>245</sup> *Henderson*, 131 S. Ct. at 1200-01.

<sup>246</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2012); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2012).

<sup>247</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 (2012).

<sup>248</sup> This obligation can be derived by reading Model Rules 4.1 and 1.6(b)(3) together. Rule 4.1 requires an attorney “to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” MODEL RULES OF PROF’L CONDUCT R. 4.1 (2012). Rule 1.6 allows attorneys to reveal otherwise confidential information “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(3) (2012).

<sup>249</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2012).

requires such disclosure.<sup>250</sup> While there may well be contexts in which it is not clear whether the “other” disclosure law actually supersedes an attorney’s duties of confidentiality and representation of a client’s interests,<sup>251</sup> there is no serious question an attorney may—and perhaps even must—comply with a tribunal’s validly promulgated regulation requiring the disclosure of *adverse factual information that does not invade a privilege*. A regulatory obligation of the sort contemplated here would be no different, as far as legal ethics rules are concerned, from the obligation to comply with a discovery request or an order calling for the production of adverse information,<sup>252</sup> or a self-executing disclosure requirement of the sort imposed by the Federal Rules,<sup>253</sup> at least so long as the regulation described the information to be disclosed with a reasonable degree of particularity.<sup>254</sup> The options set forth in Part V are drafted accordingly.<sup>255</sup>

The situation is no different in the context of administrative adjudications. As noted in Part II, federal administrative agencies sometimes impose affirmative disclosure obligations on clients—and, derivatively, their attorneys. The *Restatement (Third) of the Law Governing Lawyers* recognizes, without reservation, the legitimacy of such agency requirements (in both adjudicative and non-adjudicative proceedings), at least if they are confined to the disclosure of facts:<sup>256</sup> “Agency rules sometimes require that a lawyer . . . make affirmative disclosures of fact. . . . [A] lawyer providing representation subject to such laws must comply with them.”<sup>257</sup> It notes, in particular, that “with respect to contentions of fact, . . . a lawyer may be required to disclose to the . . . tribunal”<sup>258</sup> even “certain information unfavorable to the client.”<sup>259</sup> At the same time, the *Restatement* makes clear that only when agency regulations clearly impose a disclosure obligation should attorneys so construe them. “Ambiguous regulations that are claimed to impose such a requirement should be construed in favor of the traditional lawyer roles.”<sup>260</sup> The options laid out in Part V are drafted to avoid any such ambiguity.

### **3. Relationship Between Professional Rules & Federal Agency Standards for Attorneys that Practice Before Them**

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<sup>250</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2012); see Aviel, *supra* note 172, at 1059 n.18 (noting that forty-one jurisdictions included this provision).

<sup>251</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6, Cmt.12 (2012) (“Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”); see also Aviel, *supra* note 172.

<sup>252</sup> See, e.g., FED. R. CIV. P. 26, 33 & 34.

<sup>253</sup> See discussion *supra*, Part III (discussing FED. R. CIV. P. 26(a)(1)).

<sup>254</sup> See, e.g., Mullenix, *supra* note 211, at 39 (rejecting argument that 1993 Amendments to Rule 26(a)(1) would bring attorneys into conflict with professional duties; emphasizing that, because this mandatory disclosure requirement was limited to non-privileged and non-immunized factual material, it did not encompass any material that an attorney was not already required to disclose in response to a discovery request or court order under long-standing federal-court discovery rules); Sorenson, *supra* note 210, at 781 (“[T]he short answer to the argument . . . [that the 1993 amendment would conflict with a lawyer’s ethical duties is that those duties have] always been subject to legal limitations and obligations, including obligations to reveal to an opposing party adverse information.”).

<sup>255</sup> See, e.g., FED. R. CIV. P. 26, 33 (2012).

<sup>256</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 104(2) Cmt. d (2000).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

If SSA were to impose an affirmative disclosure mandate on claimants, how would an attorney's compliance with such a mandate interact with a state rule of professional conduct that, for argument's sake, forbade compliance with the mandate? When SSA has proposed candor obligations in the past, some argued that it would be improper for a federal agency to impose standards inconsistent with bar rules.<sup>261</sup> While attorneys often argue that bar rules are supreme and cannot be countermanded by federal agencies, if a federal agency has the authority to regulate attorneys practicing before it—as SSA unquestionably does<sup>262</sup>—the Constitution's Supremacy Clause enables that agency to impose on state-licensed attorneys conduct standards that further federal interests, even if such conduct standards are inconsistent with state law.<sup>263</sup> The only limitation on SSA's authority to do so would arise if the disclosure obligation invaded a constitutional right to counsel, such as that guaranteed to defendants in criminal trials.<sup>264</sup> None of the many comments SSA has received in opposition to proposed duties of candor in the past has ever sought to ground their position in a constitutional right to counsel.<sup>265</sup>

## B. Ethics Considerations for Non-Attorney Representatives

The Social Security Act gives the Commissioner the authority to establish rules for regulating non-attorney representation.<sup>266</sup> In fact, five thousand non-attorney representatives are currently practicing before SSA.<sup>267</sup> As has been noted:

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<sup>261</sup> See Houston Bar 2005 Letter, *supra* note 108, at 6 (on file with SSA) (noting the conflict between the proposed regulation and “our own state bar rules”).

<sup>262</sup> See discussion *supra* Part I.B.

<sup>263</sup> See *Sperry*, 373 U.S., at 385 (where a federal agency permits non-attorneys to represent inventors seeking patents, a state may not interfere with such non-attorneys engaging in this practice before the federal agency).

<sup>264</sup> See Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 721 (2011) (noting that “the Fifth and Sixth Amendments as currently interpreted will allow a great many applications of disclosure statutes to attorneys”) (footnote omitted).

<sup>265</sup> Indeed, the Supreme Court's decision in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) arguably forecloses such argument. In *Walters*, plaintiffs raised constitutional challenges to the statutory provision limiting to \$10 the fee that could be paid to attorneys or other persons who represent veterans seeking service-related disability benefits. *Id.* at 308. The Court concluded that neither the First nor Fifth Amendments raised a constitutional bar to this fee-limiting provision in light of the informal, nonadversarial nature of the VA's adjudication process. *Id.* at 320-34. In so holding, the Court noted the similarities between VA and SSA disability benefit programs: “We think the benefits at stake in VA proceedings, which are not granted on the basis of need, are more akin to the Social Security benefits involved in *Matthews* [*v. Eldridge*] than they are to the welfare payments upon which recipients in *Goldberg* [*v. Kelly*] depended for their daily subsistence.” *Id.* at 240-41.

<sup>266</sup> 42 U.S.C. § 406(a)(1) (2012) states:

The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

<sup>267</sup> Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. L.J. 223, 224 (2012) (citing to Drew A. Swank, *The Social Security Administration's Condoning of and Colluding with Attorney Misconduct*, 63 ADMIN. L. REV. (forthcoming 2012) (manuscript at 9 n.66, on file with Drew Swank)).

Non-attorneys represent claimants ranging from eleven to fourteen percent of the more than 700,000 cases heard by [SSA] each year. This equates to a minimum of 77,000 to 98,000 cases per year. As [SSA] is the largest adjudicatory system in the world, more non-attorney representatives likely appear before it than in any other forum.<sup>268</sup>

Therefore, any consideration of the obligations of representatives, ethical or otherwise, would be incomplete without an analysis of its impact on non-attorney representatives.

The key issue relating to non-attorney representatives who appear before an agency is the unauthorized practice of law. This issue has been a topic of debate and disagreement, primarily because there exists no commonly agreed upon or authoritative definition of what constitutes the “unauthorized practice of law.”<sup>269</sup> Moreover, a person who does engage in the unauthorized “practice of law risk[s] exposure to civil and criminal penalties.”<sup>270</sup> However, whatever the exact definition of the “unauthorized practice of law,” the Supreme Court has long ago held that a federal agency may preempt state bar rules prohibiting non-attorneys from practicing law.<sup>271</sup> A federal agency may thus permit non-attorneys to practice law before it as “an exception to the unauthorized practice of law doctrine.”<sup>272</sup>

This ability to permit what might otherwise be the unauthorized practice of law is important in order to vest non-attorney representatives with authority to appear before an agency like SSA, the VA, or the PTO. But more is required than this authority. The regulations governing a non-attorney’s practice need to be fairly robust in order to have legitimacy. Except for an agency’s own rules, non-attorneys’ conduct is largely unregulated.<sup>273</sup> Non-attorney representatives are in need of agency oversight precisely because there are no outside rules of conduct—like state bar rules—that otherwise apply to them. Non-attorneys “usually do not carry malpractice insurance,” and “no risk of bar sanctions exist,” thus limiting the “recourses against non-attorneys.”<sup>274</sup>

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<sup>268</sup> *Id.* at 234-35.

<sup>269</sup> See Swank, *supra* note 267, at 231-32; see also Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2266-67 (1999) (“Courts have defined the practice of law to include representing parties in contested cases, negotiating the settlement of claims, drafting documents, giving legal advice, and representing oneself to be licensed to practice law.”) The main concern driving the doctrine is that such practice harms the public and undermines the adjudicative system. See *id.* at 2267-68 (noting that a “litigant might fail to take action, to reveal facts, or to make arguments due to ineffective assistance by an individual without sufficient training. A pattern of court decision making based on inadequately developed facts and uninformed legal arguments could undermine the integrity of the legal system”). But see Swank, *supra* note 267, at 231 (noting that “the arguments for the unauthorized practice of law doctrine are conjectural and subject to debate.”); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 701, 224 (1996) (“Groups such as accountants, real estate brokers, and insurance agents cannot help but provide law-related services, and no evidence suggests that these practitioners’ work has been less satisfactory than lawyers’.”).

<sup>270</sup> Swank, *supra* note 267, at 227; see also Hurder, *supra* note 269, at 2242.

<sup>271</sup> *Sperry*, 373 U.S.

<sup>272</sup> Swank, *supra* note 267, at 238; see also 5 U.S.C. § 555(b) (APA provision permitting parties to appear before agencies “in person or by or with counsel or other duly qualified representative”).

<sup>273</sup> This is unlike attorneys, whose conduct is regulated by their respective state bar associations.

<sup>274</sup> Swank, *supra* note 267, at 229.

Moreover, in the non-attorney representative context, agencies like SSA do not have to address the potential conflict that may exist between state bar rules and its regulations. However, there are other facets of this kind of representation that an agency should address. When drafting regulations, an agency should make them clear and accessible to both legally trained and non-legally trained individuals.<sup>275</sup> An agency should ensure that the regulations are “well-tailored . . . to the government’s own interests in the operation of its [adjudicative] system.”<sup>276</sup> An agency should also develop a system of registration and a mechanism to hold non-attorney representatives more accountable.<sup>277</sup> Potentially useful examples include those of “the [PTO], the Interstate Commerce Commission, and the Department of Labor, [which all] require their non-attorney representatives to qualify to practice.”<sup>278</sup> An agency may also look to the examples of the “Federal Trade Commission, Department of Labor, and International Trade Commission, . . . [which] allow their [ALJs] . . . to sanction representatives who appear before them.”<sup>279</sup>

Finally, SSA may gain guidance from the Administrative Conference’s prior work in the area of non-attorney assistance and representation. The Administrative Conference issued a Recommendation in 1986 that focused on maximizing and improving this kind of representation.<sup>280</sup> Among other things, the Conference recommended that “[a]gencies . . . declare unambiguously their intention to authorize assistance and representation by nonlawyers meeting agency criteria”<sup>281</sup> and “review their rules of practice that deal with attorney conduct . . . to ensure that similar rules are made applicable to nonlawyers as appropriate, and . . . establish effective agency procedures for enforcing those rules of practice.”<sup>282</sup>

## **V. SSA REGULATORY OPTIONS TO ENHANCE DISCLOSURE OF ALL EVIDENCE RELATING TO DISABILITY CLAIMS**

### **A. Guiding Principles**

This part first identifies the fundamental principles that should guide any effort to impose, by regulation, an affirmative disclosure obligation on claimants (and, derivatively, their representatives) so as to ensure that disability claims are adjudicated based on a record SSA deems adequate. This part then lays out in general terms the principal options—consistent with

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<sup>275</sup> Rhode, *supra* note 269, at 714 (noting that “[s]implifying procedures, standardizing forms . . . are . . . steps in the right direction”).

<sup>276</sup> Hurder, *supra* note 269, at 2265.

<sup>277</sup> There is no SSA competency requirement for non-attorney representatives. Although the Social Security Act, 42 U.S.C. § 406(a)(1), contemplates competency requirements, the regulations only impose a requirement to be “capable of giving valuable help.” Swank, *supra* note 267, at 239. There is “no examination, no qualifying test, nothing at all exists to qualify [non-attorney representatives] for the job in the first place.” *Id.* at 240. Also, while there exist ethics regulations, ALJs may take no action themselves to rectify the situation, but are required to report the misconduct to the Office of Disability Adjudication and Review (“ODAR”). *Id.* at 240-42.

<sup>278</sup> Swank, *supra* note 267, at 247.

<sup>279</sup> *Id.* at 248.

<sup>280</sup> ACUS Recommendation 86-1, Nonlawyer Assistance and Representation, 51 Fed. Reg. 25,641 (July 16, 1968), available at <http://www.acus.gov/acus-recommendations/nonlawyer-assistance-and-representation/>.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

these guidelines—that SSA may wish to consider in drafting any such regulation. The particular content of any such regulation is beyond the scope of this report.

The following guiding principles underlie our proposed options, which follow below in the Part V.B.

**First**, any proposed regulation should place disclosure obligations directly on claimants rather than on their representatives (if any), just as discovery and other evidence-production obligations in federal courts are placed on civil litigants, not their counsel. A representative’s obligations should be derivative of his or her client’s obligations (with one exception, as noted in Part V.B below). To enforce this disclosure obligation, SSA could further provide that failure to abide by such disclosure obligation may serve as the basis for revocation of benefits (claimants)<sup>283</sup> or suspension/disqualification from appearing in agency proceedings (representatives)<sup>284</sup> when such failure amounted to withholding material information, as set forth in SSA’s existing regulations governing the conduct of claimants and representatives.

**Second**, as recommended by NOSCCR and NADR in their recently-submitted comments to the Administrative Conference,<sup>285</sup> any proposed disclosure obligations should apply both to attorney and non-attorney representatives. Such disclosure obligations should be drafted in plain language so that they are easily comprehensible to claimants, representatives, and members of the public.

**Third**, any disclosure obligations should be drafted so that they do not intrude on any established legal privileges, including the attorney-client privilege or (assuming it is applicable in this context) the work-product doctrine. The obligations should not, among other things, require a claimant (or his or her representative) to disclose his or her subjective opinions regarding the evidence, as past proposed regulations arguably did.

**Fourth**, while SSA may override state rules of professional conduct, there is no reason for SSA to do so: with one exception, the options laid out below are entirely consistent with state rules of professional conduct, including those (to quote NOSCCR) requiring “the attorney’s duties of confidentiality to the client and not to act in a way that is adverse to the client’s interest.”<sup>286</sup> The exception is the option to impose on claimants’ representatives the limited obligation to disclose to SSA if his/her services were used to perpetuate a fraud. Many states’ rules of professional conduct, in accord with the ABA Model Rules of Professional Conduct, already impose such an obligation. But some states’ rules do not.

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<sup>283</sup> See 20 C.F.R. §§ 404.459 (2012) (specifying penalties for claimant withholding of material evidence).

<sup>284</sup> See 20 C.F.R. §§ 404.1740, 404.1745, 416.1540 & 416.1545 (2012) (detailing penalties and suspension/disbarment process for representatives who engage in prohibited conduct, including false or misleading assertions about a material fact or law).

<sup>285</sup> See NOSCCR 2012 Letter, *supra* note 40 (“There is no basis to make a distinction in the obligations of attorneys who represent claimants and non-attorneys who represent claimants. Both types of representatives have identical responsibilities to their clients and to the Social Security Administration.”). *Id.* Letter from Trisha Cardillo, Pres., Nat’l Ass’n. of Disability Reps. to Amber Williams, Admin. Conf. of the U.S. (Sept. 14, 2012) (“NADR feels strongly that there should be ONE standard, ONE set of rules for all representatives—attorney or non-attorney”) (emphasis in original) (copy attached as Appendix D: Letter from National Association of Disability Reps., A-7 (Sept. 14, 2012)).

<sup>286</sup> NOSCCR 2012 Letter, *supra* note 40.

*Fifth*, any disclosure obligations should be written so as to minimize the extent to which a claimant (and/or his or her representative) must make subjective judgments as to the legal relevance of particular evidence. It is preferable, for instance, to identify a particular category of documents that a claimant must identify or produce with some reasonable degree of certainty—much as the discovery protocols in federal court do—rather than simply asking for the identification or production of, say, “material” or “relevant” evidence.

## **B. Options**

There are a number of options (and of course several variants on each) for imposing affirmative disclosure obligations that will ensure an adequate record. One approach would be to require a claimant to produce, at some point before the ALJ renders a decision,<sup>287</sup> all documents—whether favorable or unfavorable—bearing on the claimant’s entitlement to benefits, not simply documents that support the claimant’s position. Such a regulation might require, for instance, the claimant to produce all medical records from healthcare providers from whom the claimant sought treatment or consultation for physical or mental impairment(s) that concern or relate to the claim of disability. The claimant could be put on notice that the obligation extends to unfavorable evidence, and key terms, like “medical records,” could be defined with a reasonable degree of specificity. (Any number of other relevant records—whether bearing on work history or otherwise—could of course be included within the disclosure obligation.)

The federal civil litigation system includes several models on which such a disclosure obligation could be based. A recent example is the model initial discovery protocols for use in employment discrimination cases prepared by a group of federal judges and practicing attorneys under the auspices of the Judicial Conference’s Advisory Committee on Civil Rules. Those protocols, which judges participating in a pilot program can impose by court order, require the identification and production of specific evidence by the parties. The protocols require a plaintiff to produce, among other documents, “[a]ll communications concerning the factual allegations or claim at issue in this lawsuit and any “diary, journal, and calendar entries maintained by the plaintiffs concerning the factual allegations or claims at issue in this lawsuit.”<sup>288</sup> (The mandatory disclosure obligations of Rule 26(a)(1) of the Federal Rules, discussed in Part III, are similar.) This model does not permit a party to disclose selectively only information that supports his or her claim; it requires the disclosure of unfavorable information as well. A disclosure requirement drafted along these lines would not, in the case of a claimant represented by an attorney, put the attorney in conflict with his or her professional obligations. The civil litigation system regularly calls upon parties (and, derivatively, their attorneys) to turn over evidence adverse to their position in the case.

Claimants’ advocates might raise two arguably legitimate objections to the sort of disclosure obligation described in the preceding two paragraphs: first, they might contend that

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<sup>287</sup> The timing of disclosure is, of course, closely related to the broader issue of whether (and, if so, when) the record before the ALJ should be closed. See Final Rule Reestablishing Uniform Nat’l Disability Adjud. Provisions *supra* note 7. SSA may wish to revisit this latter timing issue in the context of any future rulemaking it may undertake to revise rules governing claimant disclosure obligations as addressed in this report.

<sup>288</sup> See FJC PILOT EMBL. LIT. PROJECT, *supra* note 227.

such an obligation would require them to turn over documents that are not within their “possession, custody, or control” (to use the phrase used in the discovery provisions of the Federal Rules),<sup>289</sup> much as they objected to the requirement proposed by SSA in 2005 that a claimant turn over all evidence “available to you;”<sup>290</sup> and second, they might object that, even if particular documents called for were available to claimants, the cost of obtaining them would be significant or even prohibitive.

One alternative that would address both concerns would be to require a claimant to produce all documents within a specific category (again, for example, medical records) in the claimant’s (or his or her representative’s) “possession, custody, or control” (again, to use the standard of the Federal Rules); or, if a narrower, more claimant-friendly standard is preferred, all documents within the actual custody of the claimant or his or her representative.

Another possibility (which could be combined with the preceding one) would be to require the claimant (in the case of medical records) to identify the name and contact information of any healthcare provider (*e.g.*, doctor, hospital, clinic) from which he or she sought treatment or consulted regarding the impairment(s) on which his or her claimed entitlement to disability benefits depends. (Here again the regulation could make explicit what is already implicit in such a requirement—namely, that the claimant identify both healthcare providers whose records are likely to support a claim of disability and those whose records are likely to undercut a claim of disability.) The ALJ could then subpoena the record rather than requiring the claimant to obtain it. Once again the self-executing disclosure provisions of the Federal Rules offer a model. Rule 26(a)(1)(A)(ii) requires the disclosure only of “a description by category and location . . . of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.”<sup>291</sup> It does not actually require the production of the documents. If the other party wants the documents its opponent has identified, it generally must then propound a discovery request.

Whatever approach is taken, key terms appearing in the disclosure regulation should be defined with reasonable specificity. An example alluded to above can be found in the protocols adopted by the Advisory Committee of Civil Rules for use in employment discrimination. They identify such terms as “concerning,” “document,” and “identify” (the last term in the context of referring to the identification of both persons and documents).

While any disclosure obligation should probably be directed at claimants (with the result that both claimants and their representatives are bound by them), SSA may wish to consider imposing one particular (and very limited) affirmative obligation on attorney and non-attorney representatives: specifically, SSA may wish to require that representatives who learn that their services were used in fraud must disclose that information to SSA. Attorney representatives who are licensed in states that have adopted relevant ABA Model Rules (such as Model Rule 1.6) already have this obligation. (Not every state has done so.) If the attorney learns that a client used his services to perpetrate a fraud and failure to disclose would constitute assistance in that

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<sup>289</sup> FED. R. CIV. P. 34(a)(1).

<sup>290</sup> NOSSCR 2012 Letter, *supra* note 40 (citing 70 Fed. Reg., *supra* note 6).

<sup>291</sup> FED. R. CIV. P. 26(a)(1)(A)(ii) (2012).

fraud, then the attorney must disclose that fact.<sup>292</sup> By incorporating this Model Rules standard in SSA regulations for representatives, SSA will be able to ensure that all representatives—attorneys as well as non-attorneys, and attorneys licensed in states that follow relevant provisions in the Model Rules as well as attorneys licensed in other states—are subject to this requirement.<sup>293</sup> There is a strong federal interest in ensuring that claimants who deserve benefits receive them and that claimants who do not deserve benefits do not receive them.

As this report shows, the ALJ adjudication phase of the SSA disability decision process has been changed over the years from a more inquisitorial, single-decider model to one that now often involves representation on the claimant’s side. But Supreme Court decisions from *Perales* to *Henderson* have continued to characterize the decision process as nonadversarial, despite increased representative involvement. This structure permits the agency to require duty of disclosure obligations. Other federal agencies have already taken steps—which appear to be accepted practice—that SSA might adopt in this setting. Moreover, even in a pure adversary context, the FRCP Rule 26(a) experience shows that duties of candor are not inconsistent with attorney obligations and their bar ethics rules are no barrier.

It is, of course, SSA’s decision how best to proceed with the creation of procedural regulations mandating disclosure of adverse information described herein. The two prior rulemakings have given SSA substantial background information and presumably any future rulemaking would do the same. The Office of the Chairman of the Administrative Conference of the United States believes that the Social Security Administration has significant latitude to decide how best to proceed on the question of the duty of candor and the submission of evidence.

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<sup>292</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b), 4.1 (2012).

<sup>293</sup> The Board of Immigration Appeals (“BIA”) has adopted a regulation that imposes on all immigration practitioners—both attorneys and non-attorneys—an ethics standard that is based upon, but actually stricter than, the analogous Model Rules provision.

*Compare* 8 C.F.R. § 1003.102(c) authorizing the BIA to sanction an immigration practitioner who [k]nowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures

*with* MODEL RULES OF PROF’L CONDUCT R. 3.3 (2012). The BIA regulation is similar to, but stricter than, Model Rule 3.3 because it prohibits conduct that is done “knowingly” or “with reckless disregard.” *See* Cyrus D. Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York’s Ethical Rules?*, 42ND ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE (2009).

# APPENDICES

## APPENDIX A: METHODOLOGY

This report reviewed statutes, regulations, and other publicly-available information relating to federal agencies to learn the similarities and differences between SSA's disability benefits programs and these agencies' disclosure and professional conduct standards for adjudications or other administrative programs, as well as law review articles and other written materials addressing the ethics issues that arise in that context. This research was supplemented by interviews by the consultant (both in-person and by phone) with attorneys, legal academics, and government officials at the Departments of Commerce, Justice, Veterans Affairs, and the Social Security Administration. In addition, written questions were submitted to the two leading organizations of claimants' representative (NOSSCR and NADR). (*See* Appendices C and D.)

**APPENDIX B: COMPARISON OF TEXT OF SSA RULEMAKING INITIATIVES RE:  
REPRESENTATIVE CONDUCT & SUBMISSION OF EVIDENCE (1995-2006)**

Relevant section: Rules of conduct and standards of responsibility for representatives			Relevant section: Evidence	
1995 Draft Rule	1997 NPRM	1998 Final Rule	2005 NPRM	2006 Final Rule
<p>Representatives must “[e]xercise diligence in developing the record on behalf of his or her client by obtaining and submitting, as soon as possible, all information and evidence intended for inclusion in the record.” Representatives must also “[p]romptly comply, at every stage of the administrative review process, with [SSA’s] requests for information and evidence” and provide evidence relating to the “matters at issue.”</p>	<p>A representative shall: (1) Promptly obtain [and submit] all . . . evidence which . . . support[s] . . . the claim . . . ; (2) Comply with [SSA’s] requests for . . . evidence . . . . This includes an obligation to: (i) Provide, upon request, identification of all . . . information pertaining to the claimed right or benefit or notification by the representative . . . that the claimant does not consent to the release of some or all of the material; and (ii) Provide, upon request, all evidence and documentation . . . which the representative or the claimant either has within his or her possession or may readily obtain, or notification by the representative after consultation with the claimant that the claimant does not consent to the release of some or all of the material.</p>	<p>A representative must . . . : (1) Act with reasonable promptness to obtain [and submit] . . . evidence that the claimant wants to submit in support of his or her claim . . . . (2) Assist the claimant in complying . . . with [SSA’s] requests for . . . evidence . . . about: (i) The claimant's age; (ii) The claimant's education and training; (iii) The claimant's work experience; (iv) The claimant's daily activities both before and after the date the claimant alleges that he or she became disabled; (v) The claimant's efforts to work; and (vi) Any other factors showing how the claimant's impairment(s) affects his or her ability to work.</p>	<p>You must provide evidence showing how your impairment(s) affect(s) your functioning during the time you say that you are disabled, and any other information that we need to decide your claim, including evidence that you consider to be unfavorable to your claim.</p>	<p>You must provide evidence, without redaction, showing how your impairment(s) affects your functioning during the time you say that you are disabled, and any other information that we need to decide your claim.</p>

**APPENDIX C: LETTER FROM NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS'  
REPRESENTATIVES**

**NATIONAL ORGANIZATION OF  
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES  
(NOSSCR)**

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**Executive Director  
Nancy G. Shor**

September 14, 2012

Amber G. Williams  
Administrative Conference of the United States  
1120 20th St., NW Suite 706 South  
Washington, DC 20036

Re: SSA “duty of candor” study

Dear Ms. Williams:

Thank you for the opportunity to provide comments on the ACUS study of the Social Security Administration’s regulations regarding the duty of candor and submission of evidence in disability claims. We have provided answers to the questions in your recent email.

**1. What is NOSSCR’s position on SSA’s current regulations and/or policies regarding the duties of representatives and the submission of evidence?**

Under current regulations, a claimant is required to disclose material facts in his or her claim for benefits and to prove disability.<sup>294</sup> This duty extends to the representative under SSA’s “Rules of conduct and standards of responsibility for representatives.”<sup>295</sup> We believe that the current regulations regarding the duty of claimants and representatives to submit evidence work well, especially when combined with the duty to inform SSA of all treatment received.

**2. What suggestions does NOSSCR have for improving the current regulations and/or policies regarding the duties of representatives and submission of evidence?**

We believe that the current statutory and regulatory scheme provide adequate procedures and tools for SSA to address submission of evidence issues.

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<sup>294</sup> 20 C.F.R. §§ 404.1512(a) and 416.912(a).

<sup>295</sup> 20 C.F.R. §§ 404.1740(b)(1) and 416.1540(b)(1).

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SSA's current Rules of Conduct establish a procedure for handling alleged violations.<sup>296</sup> We have long advocated for use of the procedures in Rules of Conduct if the Agency believes there has been a violation.

The claimant is already required to disclose material facts in his or her claim for benefits.<sup>297</sup> This duty extends to the representative as an affirmative duty under 20 C.F.R. §§ 404.1740(b)(1) and 416.1540(b)(1). Further, 42 U.S.C. § 1320a-8(a)(1)(A), enacted in 2004, permits imposition of a civil monetary penalty (CMP) or sanctions if:

[The individual] omits from a statement or representation ... or otherwise withholds disclosure of a fact which the person knows or should know is material to the determination of any initial or continuing right to [benefits] ..., [or] if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading ....

This statutory requirement applies to representatives, as well as claimants.

### **3. What legal or practical concerns would NOSSCR have if claimants and their representatives have an obligation to share all information/evidence in their possession and/or of which they are aware that is material to the determination of a claimant's eligibility for disability benefits?**

A requirement to provide "all" evidence may conflict with state bar ethics rules which limit the submission of evidence that could be considered adverse to a client. In every state, attorney representatives are currently bound by state bar rules that forbid an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. SSA's Rules of Conduct for all representatives impose similar prohibited actions.

SSA previously proposed adding a requirement to 20 C.F.R. §§ 404.1512(a) and 416.912(a) that the claimant submit all evidence "available to you."<sup>298</sup> This proposed change was rejected when the final rule was published.<sup>299</sup> The proposed rule required the claimant to submit all evidence "available to you," including "evidence that you consider to be unfavorable to your claim." The preface clarified that this included adverse evidence, i.e., evidence that "might undermine" or "appear contrary" to the claimant's allegations.<sup>300</sup>

In NOSSCR's comments, we raised concerns that the proposed regulation could very well set a trap for unsuspecting claimants. What is meant by "available"? Only that evidence which has been obtained or *all* evidence that exists, regardless of the cost, time, or effort to obtain it? What is meant by evidence you "consider" to be unfavorable? Is this too subjective? Who makes the decision that evidence is

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<sup>296</sup> 20 C.F.R. §§ 404.1740 and 416.1540.

<sup>297</sup> 20 C.F.R. §§ 404.1512(a) and 416.912(a).

<sup>298</sup> 70 Fed. Reg. 43590 (July 27, 2005).

<sup>299</sup> 71 Fed. Reg. 16424 (Mar. 31, 2006).

<sup>300</sup> 70 Fed. Reg. 43602.

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“available”? Would a claimant be penalized if an adjudicator decided that there was noncompliance? Does this requirement place an undue burden on claimants with mental or cognitive impairments?

We believe that a requirement to provide “all information/evidence in [the claimants’] possession and/or of which they are aware that is material to the determination” of a disability determination is equally problematic and raises the same concerns. What does it mean to be “aware”? How would a claimant know what is “material” to the disability determination?

Another concern that we raised about the previous proposed requirement to submit “all” evidence is that it could open the process to manipulation by those who have a personal grudge against the claimant or interests adverse to the claimant, e.g., former spouses, creditors, insurance companies.

In addition to the 2005 proposed rule, SSA previously rejected a proposed regulation that raised similar ethical concerns. In 1998, SSA issued the final rule on Standards of Conduct for Claimant Representatives.<sup>301</sup> The proposed rule required representatives to comply with SSA requests for information and evidence. To protect a client’s confidentiality, the representative could notify SSA that “the claimant does not consent to the release of some or all of the [requested] material.” Many commenters, including the American Bar Association and NOSSCR, objected to this provision as a “red flag” that would permit ALJs and SSA to draw adverse inferences based on this statement. In the final rule, SSA deleted this provision “[b]ecause of the confusion and ethical concerns surrounding this proposed language....”<sup>302</sup>

Our members are very concerned about situations where rules could conflict with State bar ethics rules regarding the attorney’s duties of confidentiality to the client and not to act in a way that is adverse to the client’s interest. In every state, attorney representatives are currently bound by state bar rules that forbid an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. An attorney who violates these rules is subject to disciplinary proceedings and possible sanction by the state bar. Existing bar rules in every state also require an attorney to zealously advocate on behalf of a client. An attorney who violates these rules is also subject to sanction by the state bar.

#### **4. What legal or practical concerns would NOSSCR have if there were distinctions for non-lawyer and lawyer representatives?**

There should be a single approach for all representatives. The current Rules of Conduct and the statutory process for imposing civil monetary penalties apply to all representatives and do not distinguish between attorneys and non-attorneys. We believe that this is the appropriate approach. While attorney representatives are also required to comply with State bar rules, we advocate that the Agency apply the current Rules of Conduct where appropriate.

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<sup>301</sup> 63 Fed. Reg. 41404 (Aug. 4, 1998).

<sup>302</sup> 63 Fed. Reg. 41413.

## **APPENDIX C: NOSSCR LETTER (CON'T)**

There is no basis to make a distinction in the obligations of attorneys who represent claimants and non-attorneys who represent claimants. Both types of representatives have identical responsibilities to their clients and to the Social Security Administration. The current rules and regulations appropriately apply to each.

The groups do differ in that attorneys are also subject to the rules of the bars to which they are admitted. This fact, however, does not support the concept of SSA's setting out different obligations to the two groups.

In addition, having two separate sets of administrative procedures will be onerous and confusing for claimants and is likely to make the process less efficient from the Agency's perspective.

Very truly yours,

Nancy G. Shor  
Executive Director

Ethel Zelenske  
Director of Government Affairs

## APPENDIX D: LETTER FROM NATIONAL ASSOCIATION OF DISABILITY REPRESENTATIVES

**From:** Amber Williams <AWilliams@acus.gov>  
**Subject:** NADR's Comments  
**Date:** September 14, 2012 6:43:31 PM EDT  
**To:** Kathleen Clark [email deleted]

Hi Kathleen,

I've included NADR's comments below for your review and inclusion into your report. Please let me know if you have any questions.

Kind regards,  
Amber

1. What is NADR's position on SSA's current regulations and/or policies regarding the duties of representatives and the submission of evidence?

NADR takes very seriously SSA's Rules of Conduct for representatives at 20 CFR 404.1740 et. seq, and emphasizes heightened ethics for Social Security representatives in all matters for all of our members, not just with submission of evidence. Our Accredited Disability Representative program requires adherence to a strict standard, and all of our training programs and conferences include ethics sessions. From a pragmatic standpoint, we emphasize that a representative's reputation can be forever ruined, not to mention s/he can be sanctioned, for violating any of the rules of conduct.

2. What suggestions does NADR have for improving the current regulations and/or policies regarding the duties of representatives and submission of evidence?

The current regulations regarding the duty of claimants and representatives to submit evidence work well. 20 CFR 404.1740(c)(3) prohibits a representative from knowingly making or presenting false or misleading statements. 20 CFR 404.1740(b)(1) indicates as an affirmative duty that a representative must act to submit the evidence the claimant wants to submit in support of his or her claim. The regulations and policies provide the ALJ with the information s/he needs to make the mandated findings, while protecting the claimant's right to privacy. It is the responsibility of the claimant and his or her representative to prove that the claimant's limitations meet SSA's definition of disability.

3. What legal or practical concerns would NADR have if claimants and their representatives have an obligation to share all information/evidence in their possession and/or of which they are aware that is material to the determination of a claimant's eligibility for disability benefits?

Given the non-adversarial nature of these proceedings, the key determination is whether or not

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information/evidence is, in fact, “material” to the determination. Who better to make that decision on behalf of the claimant, if not the representative? Some information is obviously material – e.g., evidence of earnings/work activity to assist the ALJ in making the step one finding. Other information may not be material at all, from the claimant’s perspective. Balancing the need for truth with protecting the claimant’s right to privacy is not an easy act, but is vital.

4. What legal or practical concerns would NADR have if there were distinctions for these obligations for non-lawyer and lawyer representatives?

For our attorney members, being required to provide "all" evidence could place the attorney in the position of having violated one of his/her bar rules. NADR feels strongly that there should be ONE standard, ONE set of rules for all representatives – attorney or non-attorney. Creating separate rules would not only be a logistics nightmare for SSA and for the representative community, but one group may logically claim a disadvantage, from both a legal and a practice standpoint. We believe that representatives should not only be zealous advocates, but officers of this system, equally invested in protecting the integrity of the program and facilitating the claim process, not hindering it.

**APPENDIX E: SSA DISPOSITION COUNT BY REPRESENTATION (FY 2005-2011)**

Annual Dispositions by Type of Representation (FY 2005-11)									
Fiscal Year	Claimants w/ Non-attorney Representative	Non-Atty Rep %	Claimants w/ Attorney Representative	Atty Rep %	Total # of Represented Claimants	Total Rep %	Total # of Unrepresented Claimants	Total Unrep %	Total Dispositions
2005	48,825	9.4%	338,639	65.2%	387,464	74.6%	131,900	25.4%	519,364
2006	52,027	9.3%	364,783	65.3%	416,810	74.6%	142,168	25.4%	558,978
2007	50,348	9.2%	361,883	66.0%	412,231	75.2%	135,721	24.8%	547,952
2008	54,328	9.4%	386,624	67.2%	440,952	76.6%	134,430	23.4%	575,382
2009	67,783	10.3%	446,994	67.6%	514,777	77.9%	146,066	22.1%	660,843
2010	75,354	10.2%	499,626	67.7%	574,980	78.0%	162,636	22.0%	737,616
2011	80,198	10.1%	534,548	67.4%	614,746	77.5%	178,817	22.5%	793,563

[Source: SSA CPMS MI and DART (DITI) Data - Prepared by ODAR, OESSI, DMIA (9/28/12)]

**APPENDIX F: EXCERPTS OF AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT (2002)**

**Rule 1.6: Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

**Rule 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

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(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is

**APPENDIX F: EXCERPTS OF ABA MODEL RULES (CONT.)**

false.

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(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

#### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

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- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

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**APPENDIX G: EXCERPTS OF FEDERAL RULE OF CIVIL PROCEDURE, RULE 26 (1993)**

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

**(a) Required Disclosures; Methods to Discover Additional Matter.**

(1) **Initial Disclosures.** Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under sub-division (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

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(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

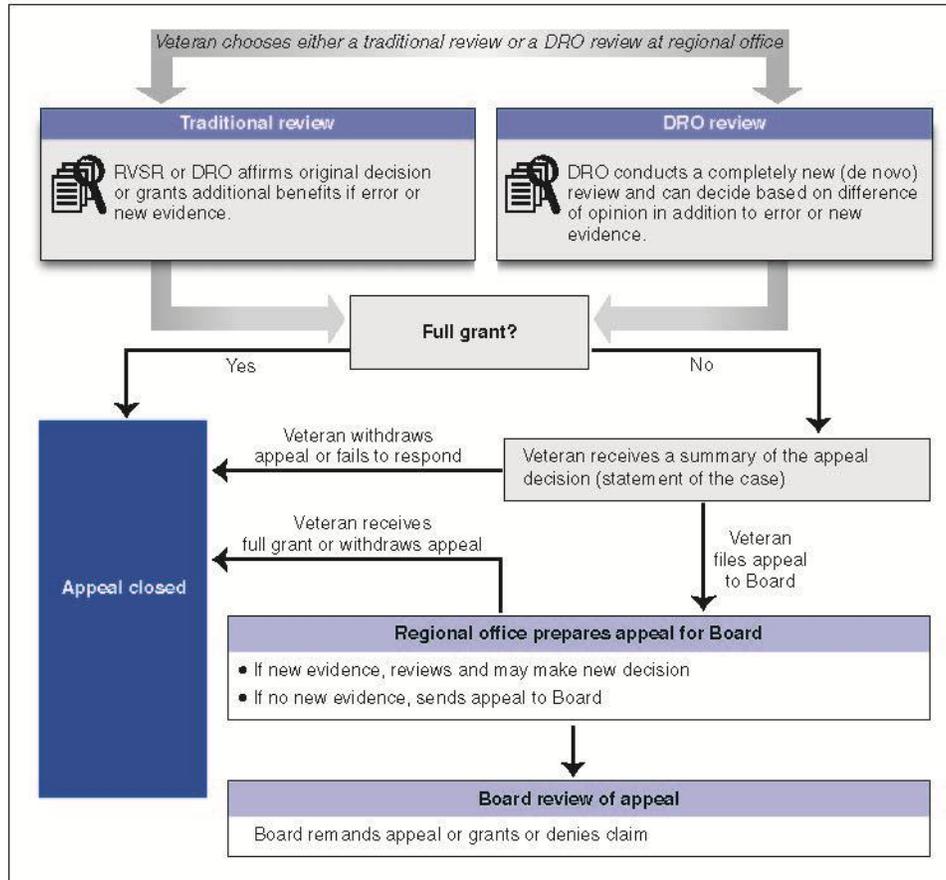
(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons

**APPENDIX G: EXCERPTS OF FRCP 26 (1993) (CONT.)**

having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

**APPENDIX H: GAO CHART DEPICTING VA DISABILITY CLAIM APPEAL PROCESS**

**Figure 1: VA Disability Claim Appeal Process**



Source: GAO analysis of VBA process.

(Source: U. S. Gov't Accountability Office, GAO-11-812, Veterans Disability Benefits: Clearer Information for Veterans and Additional Performance Measures Could Improve the Appeals Process 6 (Sept. 2011))