**National Organization of**

**Social Security Claimants' Representatives**

**(NOSSCR)**

**560 Sylvan Avenue • Englewood Cliffs, NJ 07632**

**Telephone: (201) 567-4228 • Fax:** **(201) 567-1542 • email: nosscr@worldnet.att.net**

***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.[[1]](#footnote-1) This duty extends to the representative under SSA’s “Rules of conduct and standards of responsibility for representatives.”[[2]](#footnote-2) 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.

SSA’s current Rules of Conduct establish a procedure for handling alleged violations.[[3]](#footnote-3) 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.[[4]](#footnote-4) 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.” [[5]](#footnote-5) This proposed change was rejected when the final rule was published.[[6]](#footnote-6) 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.[[7]](#footnote-7)

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 “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.[[8]](#footnote-8)  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….”[[9]](#footnote-9)

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.

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

1. 20 C.F.R. §§ 404.1512(a) and 416.912(a). [↑](#footnote-ref-1)
2. 20 C.F.R. §§ 404.1740(b)(1) and 416.1540(b)(1). [↑](#footnote-ref-2)
3. 20 C.F.R. §§ 404.1740 and 416.1540. [↑](#footnote-ref-3)
4. 20 C.F.R. §§ 404.1512(a) and 416.912(a). [↑](#footnote-ref-4)
5. 70 Fed. Reg. 43590 (July 27, 2005). [↑](#footnote-ref-5)
6. 71 Fed. Reg. 16424 (Mar. 31, 2006). [↑](#footnote-ref-6)
7. 70 Fed. Reg. 43602. [↑](#footnote-ref-7)
8. 63 Fed. Reg. 41404 (Aug. 4, 1998). [↑](#footnote-ref-8)
9. 63 Fed. Reg. 41413. [↑](#footnote-ref-9)