NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Executive Director
Barbara Silverstone

October 13, 2016

Carolyn Colvin
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking on Revisions to Rules of Conduct and Standards of Responsibility for Appointed Representatives, 81 Fed. Reg. 54520 (August 16, 2016), Docket No. SSA-2013-0044

Dear Acting Commissioner Colvin:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of more than 3,500 members from the private and public sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

NOSSCR educates attorney and non-attorney representatives through our publications, ethics trainings, and conferences. Although we share SSA's goal of allowing claimants access to skilled and ethical representatives, we have significant concerns about many of the proposals presented in this NPRM. We expect all representatives to act with integrity and be zealous advocates for their clients. Because the existing code of conduct is sufficient to meet those goals we urge SSA to withdraw this proposed rule and not issue a final rule on this topic. Although there have been

a few recent, high-profile cases of fraud in which representatives allegedly played a role, inappropriate representative behavior is rare and the current code of conduct can address them when they arise. Rather than taking a targeted approach and disciplining the attorneys in those rare instances, we believe the proposed rules would reduce access to representation, place representatives in ethical quandaries, and increase SSA's already enormous backlogs and wait times.

Qualification for Non-Attorney Representatives (proposed 20 C.F.R. §§ 404.1705(b)(4); 416.1505(b)(4))

Claimants may have a non-attorney representative offered to them by an insurer, hospital, state government, or other source, or they may choose to be assisted by a friend or family member who is not a professional representative. In any of these situations, and many others, claimants may not be aware of the background of their appointed representative. The final rule should clarify that claimants will be held harmless if they appoint representatives who they later learn, or who SSA later tells them, were not qualified. The proposed rule imposes a lifetime ban on certain individuals serving as non-attorney representatives, and appears to ignore expungement, sealing, or overturning of convictions. It would be appropriate for the rules for non-attorney representatives to resemble those that apply to attorney representatives who seek admission to state bars and who practice before SSA.

Affirmative Duties of Representatives (proposed 20 C.F.R. §§ 404.1740(b); 416.1540(b))

Scheduling Hearings (proposed 404.1740 (b)(3)(iii); 416.1540(b)(3)(iii))

We support SSA's attempts to find an efficient solution to scheduling hearings. Our members find that there are fewer conflicts and scheduling problems when hearing offices call representatives to schedule hearings. We encourage SSA to implement a procedure where calls or emails can be used to schedule all hearings with appointed representatives.

The proposed regulation, as written, is vague. If SSA moves ahead with requiring representatives to provide available dates and times, the final rule should clarify that any list of available times is only required to be accurate as of when it is submitted, with the understanding that if a hearing is scheduled at one location, it may make it impossible for the representative to appear at a different location at a similar time. Many representatives schedule hearings in multiple locations and attorneys also appear in other forums including state and federal court. A requirement that representatives provide their availability for a short period of time in the near future is more reasonable than expecting them to know their schedules far in advance and hold their schedules open for long periods of time. Administrative Law Judges also schedule hearings for different lengths of time. A representative might be available for a hearing at a certain time if it is expected to last 30 minutes, but not if it is scheduled for 90 minutes. The final rule should specify when representatives would have to submit their availability and how they can update their availability as it changes.

SSA should consider consolidating its hearing scheduling functions so that specially trained agency staff can work with representatives to schedule multiple hearings across multiple sites.

This would have the added benefit of allowing field office staff additional time to perform their other workloads. It would also improve efficiency if SSA recognized firms as representatives, because some firms schedule representatives to handle multiple cases scheduled on the same day at the same hearing office.

Withdrawal of representation (proposed 404.1740(b)(iv); 416.1540(b)(iv))

We have significant concerns about the proposed affirmative duty to only withdraw from representation "at a time and in a manner that does not disrupt [claim] processing", and in particular not to withdraw once a hearing has been scheduled unless the representative can show extraordinary circumstances, as determined by SSA.

The proposed rule is vague about what the appropriate time and manner for a withdrawal would be in order for it to not disrupt claim processing. The standard "adequate time to find new representation" is not defined[1,] and overlooks the fact that withdrawal may at times be appropriate even when a claimant is not able to find a different representative. The proposed rule also does not define when a hearing "is scheduled." This could mean the date an SSA employee discusses hearing times with a representative, or when the hearing notice is dated, mailed, or received by a claimant or representative. Finally, "extraordinary circumstances" is a vague and subjective standard. Although we oppose the proposal, if SSA does move forward with this provision, we strongly recommend that the final rule include examples of extraordinary circumstances, as well as a statement that the examples are merely a selection from a much wider universe of circumstances where withdrawal should be permitted.

Situations necessitating withdrawal can occur shortly before hearings. Clients can disclose information that makes representation impossible or become impossible to contact even after diligent efforts. Evidence may be received that significantly affects the claim—for example, SSA regularly adds earnings records and other exhibits to claimant files weeks after a hearing is scheduled.

Claimants may also fire their representatives while being unwilling to inform SSA of their decision to do so. Such claimants may then be placed in a position where their representative is not given leave to withdraw, and they would be represented when they do not wish to be represented (or to be represented by someone not of their choosing when they would prefer a different representative). This violates claimants' rights and could cause extremely challenging issues with regards to representatives' fees.

Given that SSA does not recognize firms as representatives, and circumstances within a law firm can change over the course of the years a claim may be pending before a hearing, claimants are often represented by different employees of the same firm. We are concerned that the proposed rule will place claimants, and firms, in a difficult position if a claimant's representative leaves a firm shortly before a hearing.

[1] For example, the time to find another representative can vary based on a claimant's intellectual ability, the availability of representatives in the area in which they live, the strength of their claim, or their hospitalization or incarceration, among numerous other factors.

Requiring representatives to disclose the circumstances of their withdrawals may cause them to act in opposition to ethical rules about zealous advocacy and client confidentiality. For attorney representatives, these rules include those issued by bar associations; in addition, some claimants' representatives are social workers or belong to other professions with their own ethical codes. This places representatives at a risk of malpractice claims and can harm their reputations among clients and potential clients. Representatives may also be placed in situations where withdrawal is not permitted, but continuing the representation places the representative in violation of other affirmative duties—for example, if the representative wishes to withdraw because the claimant will not speak to him, the representative would be at risk of violating the affirmative duties to be prepared at the hearing and to fully inform his client about all issues in the case.

The proposed rule will limit representatives' ability to review claimants' files and decide whether and how to represent them. SSA is generally hesitant or unwilling to provide a claimant's file to an individual who has not submitted a 1696 (appointment of representative) form, even if that person submits a 3288 (consent for release of information) form. SSA does not allow electronic records access to anyone except an authorized representative. Reviewing a claimant's file is a very important step in determining whether an individual has a viable claim and obtaining additional (but not duplicative) medical records. This proposed rule should not be implemented, but if it is, SSA must establish a protocol, to be implemented before the final rule, by which prospective representatives can obtain claimant files with the claimant's permission.

The proposed rule will be counterproductive to SSA's backlog reduction efforts. Currently, if a representative learns that a claimant does not plan to attend the hearing but the claimant refuses to formally withdraw the claim, the representative can withdraw (after the hearing is scheduled but sufficiently—usually at least a week—before a hearing). Then, when nobody attends the hearing, the case can be dismissed, unless a fully favorable decision on the record is possible.[2] If the proposed rule becomes final, representatives will have less ability to withdraw. Many will attend scheduled hearings in case their clients decide to attend, but few claimants will ultimately attend such hearings. "Dismissal is never appropriate"[3] in cases where a representative appears and a claimant does not. A full hearing must be held and a full decision written and issued. This is time-consuming for the agency, and while we believe the HALLEX provision is a critical protection for claimants under many circumstances and must be maintained, its interaction with the proposed rule will require ALJs to hold hearings and issue decisions in situations where they are not necessary.

Disclosures regarding medical and vocational opinions (proposed 404.1740(b)(5); 416.1540(b)(5))

We also have significant concerns about requiring representatives to disclose in writing whether the medical or vocational opinion is drafted, prepared, or issued by an employee of the representative, an individual contracting with the representative for services, or an individual to whom the representative referred the claimant for suggested treatment. Prior versions of SSA's "Best Practices for Claimant's Representatives" encouraged representatives to obtain opinions

2 https://www.ssa.gov/OP_Home/hallex/I-02/I-2-4-25.html
3 https://www.ssa.gov/OP_Home/hallex/I-02/I-2-4-25.html

and statements from medical sources;[4] the skepticism the proposed rule indicates about medical source statements is a significant departure.

The proposed rule is vague: it does not define terms such as "prepared" and therefore leaves unclear whether disclosure would be required if, for example, a representative discussed the sequential evaluation process or the content of listings with the writer of a medical or vocational opinion, or provided links to SSA's own resources. It is not obvious whether developing and providing a questionnaire for a medical or vocational source to complete would require disclosure.

The phrase "individual to whom the representative referred the claimant for suggested treatment" is also vague. Representatives may encourage their clients to call mental health hotlines, suggest they seek a particular type of medical treatment (physical therapy, psychiatric treatment, etc.) but not refer them to any one provider, or encourage their clients to discuss certain symptoms or diagnostic procedures with their current treating providers. They might inform their clients about free or low-cost medical services without ever interacting with those providers, and later request evidence or medical source statements. It is not apparent from the proposed rule whether any of these circumstances would constitute a referral that requires disclosure.

The proposed rule could also discourage representatives from referring clients for medical care or from requesting medical and vocational opinions. This is counterproductive for the claimant and for SSA. Encouraging claimants to seek medical treatment and helping them arrange it is an important function of representatives. Obtaining medical source statements and other evidence can help SSA achieve accurate decisions. If a client is in crisis, as individuals with serious health conditions, limited incomes, and lengthy waits for SSA adjudication often are, representatives should have no reason to hesitate before suggesting that their clients seek appropriate care.

SSA has recently proposed a rule that would require all written statements to be submitted five business days before a hearing, without any good cause exemptions.[5] If SSA proceeds with both rules, it would be impossible for representatives to comply with them in situations where they obtain medical or vocational opinions less than five business days before the hearing. The final rules must be clarified to accommodate such situations or at least one of the rules should not be finalized.

If the proposed rule is implemented, we strongly urge the final rule to make clear that opinions are entitled to the <u>exact same weight</u> regardless of whether representatives requested them, referred a client for treatment (or suggested they return to a provider the client has already seen), requested that a treating doctor be the one to perform a consultative examination[6] discussed SSA law and policy with a provider, or other circumstances. This clarification would be in keeping

4 https://web.archive.org/web/20151012093148/http://www.ssa.gov/appeals/best_practices.html shows the document as it appeared in 2015; the relevant section states "When Possible, obtain a medical source statement from a treating source which identifies the limitations imposed by the claimant's impairments. Submit with supporting evidence or direct attention to supporting evidence already in the file. Treating source statements can greatly assist an ALJ in assessing Step 3 of the sequential evaluation and the claimant's residual functional capacity."
5 81 Fed. Reg. 45079
6 SSA's preference is for treating providers to perform consultative examinations when possible, though SSA and state agencies rarely invite treating providers to do so.

with case law, including, for example: *Punzio v. Astrue,* 630 F.3d 704 (7th Cir. 2011); *Franz v. Colvin*, 91 F.Supp.3d 1200 (D. Or. 2015); *Gutierrez v. Colvin*, 67 F.Supp.3d 1198 (D.Colo. 2015); *Ryan v. Astrue*, 5 F.Supp.3d 493 (S.D.N.Y. 2014); and *Dickey v. Colvin*, 74 F.Supp.3d 1118 (N.D.Ca. 2014).

Disclosure of discovery of fraud (proposed 404.1740(b)(6); 416.1540(b)(6))

This rule, like proposed rule 404.1740(b)(iv) and 416.1540(b)(iv), may place representatives in ethical quandaries and at risk of malpractice to the extent that it conflicts with professional ethics regarding client confidentiality.

If the proposed rule is finalized, a "knowing" standard should be added to the proposed affirmative responsibility to inform the agency if a claimant used the representative's services to commit fraud against SSA. In the extraordinarily rare situations in which a claimant both commits fraud and hires a representative, the representative might be unaware of the fraud—both while it occurs and after it has been perpetrated. Representatives should not be held responsible for such circumstances. Furthermore, any final rule should clarify that a request to withdraw from a case should never be considered as an indication that a claimant is committing fraud or that a representative is aware of fraud in a case.

Disclosure of disbarment, suspension, and disqualification (proposed 404.1740(b)(7-9);416.1540(b)(7-9))

The proposed rule does not specify what actions SSA will take against attorney and non-attorney representatives who disclose such situations. It is not clear whether they are an automatic bar to representation (and if there are any avenues to contest or repeal such bars), or whether SSA will address each situation individually. The final rule should clarify these topics.

Prohibited Actions by Representatives (proposed 20 C.F.R. §§ 404.1740(c)(3); 416.1540(c)(3))

Representatives should not be sanctioned based on submitting evidence they "should have reason to believe" is false or misleading. The current rule's "knowingly" standard should be applied. Representatives may not have the same information, training, or experience as investigatory or law enforcement agencies do. It could be possible in hindsight or with more information to realize that something is inaccurate, but not be aware of that fact at the time. Given that SSA requires submission of all evidence, whether helpful to a claim or not, SSA should not create rules that cause representatives to hesitate when submitting evidence supplied to them by the claimant or someone else.

A final rule, if issued, should clarify the term "misleading" as it appears in 404.1740(c)(3) and (7)(ii)(B). For example, submitting evidence or documents that contains a claimant's former address should not be considered misleading, especially if the claimant has not informed the representative of the address change or the address was accurate at the time the evidence was generated. Most claims include evidence that indicates disability, as well as evidence that could lead a decision-maker to deny benefits. Evidence that is from its stated source and is not altered in a manner designed to change how it is perceived, should not be considered misleading.

Written statements that advocate for a particular finding, using evidence as well as SSA law, regulations, and subregulatory guidance, should not be considered misleading. Submitting such written statements is an important part of a representative's job in many cases. Successfully advocating for a claimant involves highlighting information that is important to the claim and making assertions and explanations about why seemingly harmful information should not preclude the claimant's desired outcome. This work is the very purpose of obtaining a representative and should not be curtailed or described as misleading.

Proposed § 404.1740(c)(ii)(C) would forbid a representative from communicating with an agency employee or adjudicator outside the normal course of business or prescribed procedures in an attempt to influence the processing or outcome of a case. The final rule should indicate that if SSA staff request that a claimant or representative contact them in a specific manner (for example, by faxing a document rather than using Electronic Records Express, or by calling at a specific time when the hearing office is less busy) that such contact is by definition within the normal course of business or prescribed procedures. Furthermore, SSA's unprecedented workloads and budgetary shortfalls at times cause the agency to lose materials, delay decisions or processing, route documents improperly, or make other errors. At such times, representatives may contact supervisory SSA staff, members of Congress and their staffs, or organizations including NOSSCR[7] for assistance in problem-solving. Any final rule should indicate that inquiries to SSA and state agency staff about the status of a case, requests for the case to be processed (including but not limited to requests for critical case flags), and Congressional inquiries about the case are not sanctionable. In addition, any final rule should clarify that claimants who wish to speak to the media about their claims, and representatives who speak to the media about cases with their client's permission, cannot be sanctioned for such activity. Such a clarification would help confirm the First Amendment rights of claimants and representatives.

Notice of Charges (proposed 20 C.F.R. §§ 404.1750; 416.1550)

With any code of conduct, there will be representatives who are accused of wrongdoing and ultimately absolved. It is important to ensure that representatives have adequate opportunity to defend themselves from accusations of misconduct, and to allow representatives to serve their clients without unnecessary constraints.

The proposed 14 days is not enough time to respond to charges. Representatives take notices of charges extremely seriously and often hire counsel to defend them. Obtaining legal representation and working with an attorney to formulate a response to the notice can take time. A proper response often requires the representative to obtain documentation from clients, bank records, or other records and materials. In addition, allowing 14 days from the date of the notice provides less than 14 days to respond, given mailing time and potential delays between the letter being dated and being mailed. Thirty days is appropriate and should be maintained.

The NPRM states that "quicker processing of these cases is also of particular interest to the person against whom we bring charges because it results in a more timely resolution of the

7 In such circumstances, NOSSCR might provide a representative with suggestions of how to communicate with SSA or ask an SSA staff member to contact the representative about a challenging case. NOSSCR does not solicit or share personally identifiable information about claimants in such situations.

matter." The current 30-day policy does not prohibit a representative from answering charges in less than 30 days. If representatives are able to answer a notice of charges faster so they can obtain a quicker response from SSA, the current rule allows them to do so.

Venue of Hearing and Appeals Council Review (proposed 20 C.F.R. §§ 404.1765 and 404.1780; 416.1565 and 404.1580)

There is no reason to remove representatives' ability to choose the manner of their hearing or of their oral argument for Appeals Council review of hearing officer's decision. SSA should not have sole discretion both over the manner of the hearing and whether a representative has "good cause" to object to it. Representatives should always be allowed to have hearings; a decision on the record should only be allowed if the representative agrees to it. This is because representatives' livelihoods are at stake in these hearings—that is an important property right and due process is necessary before removing it.

If a final rule is issued, it should clarify in 404.1765(c) whether the written notice must be mailed 14 calendar or business days before a hearing.

Proposed 404.1765(d)(1) would allow the hearing officer to change the time and place for a hearing either on his or her own initiative, or at the request of a party to the hearing. If a final rule is issued, it should place restrictions on the hearing officer's ability to do this: hearings should not be scheduled outside of normal business hours, at unusual locations or a public space, or with little notice unless all parties are given notice and have the opportunity to object.

Similarly, in proposed 404.1765(g)(3), the hearing officer would be allowed to make the hearing open to any person the hearing officer considers necessary or proper. Representatives should be able to object to the opening of the hearing to specific people, and the final rule should also clarify that "necessary and proper" means that the individual has a role to play in the hearing (for example, translators, witnesses, parties, their representatives, etc.). Hearing officers should not be allowed to make hearings public for the purposes of setting examples for other representatives or embarrassing a hearing participant.

Review of Hearing Officer's Decision (proposed 20 C.F.R. §§ 404.1775; 416.1575)

Just as 14 days is insufficient time for a representative to respond to charges, it is insufficient time for requesting review of a hearing officer's decision. The current 30 days is appropriate, allowing representatives to obtain and work with counsel should they desire. Allowing just 14 days from when the decision is mailed provides well less than 14 days to formulate and submit a response. Should any change to the time for requesting review be present in a final rule, that rule should clarify whether it refers to business or calendar days.

Evidence Permitted on Review (Proposed 20 C.F.R. §§ 404.1785; 416.1585)

The Appeals Council should admit all additional evidence into the record, while allowing the opposing party the opportunity to comment on it, and then determine whether it changes the decision. In addition, any final rule should include a good cause exemption that allows

representatives who did not file answers because of unusual or compelling circumstances to submit additional evidence to the Appeals Council.

Appeals Council decision (Proposed 20 C.F.R. §§ 404.1790(f); 416.1590(f))

With regards to the publication of decisions in proposed 404.1790(f), representatives who are found to have not committed any violations should always be granted redaction of their name and any other identifying information before the decision is published. To do otherwise would harm the reputation of individuals who committed no wrong. Any final rule should say "we will remove or redact personally identifiable information" rather than "we may remove or redact information" from a decision prior to publication.

Reinstatement after Suspension or Disqualification (Proposed 20 C.F.R. §§ 404.1799; 416.1599)

The preamble to the NPRM states that the reason for this proposed rule is that some people who repeatedly request reinstatement have not attempted to comply with the requirements. The proposed rule placing a 3 year ban on a suspended or disqualified representative's ability to again request reinstatement places a harsh and indiscriminate penalty on those representatives who have made serious and thorough attempts at remedying their situations. The final rule should strike a better balance between administrative efficiency and representatives' livelihoods.

General Comments

The "Background" section of this Notice of Proposed Rulemaking says that the proposed changes are designed "to save limited administrative resources, process claims more efficiently, and to protect the integrity of [SSA] programs." We support program integrity, but SSA's budgetary problems should not limit an accused representative's ability to respond to charges.

We note that in several sections of the proposed rule, the word "shall" is changed to "will." If a final rule is issued, it should explain the rationale for and meaning of each change.

As a final note, many aspects of the proposed rule, such as the requirements regarding supervision of employees, assistants, partners, contractors, or other people assisting representatives, show awareness of the fact that many representatives are not solo practitioners: they work in law firms, nonprofit organizations, and other venues. We support the proper supervision of employees, and agree with SSA's comment that in law firms, partners are already responsible for associates' work. Proposed §§404.1740(b)(10) and (c)(14) would extend the obligations and responsibilities of supervisors. However, SSA has never recognized firms as representatives. This is a fundamental inconsistency in SSA policy. NOSSCR has long advocated for SSA to recognize firms as representatives. Such recognition would benefit claimants and representatives, and it would also increase efficiency for SSA across a variety of agency workloads.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

Barbara Silverstone
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