ADVISORY ETHICS OPINION 2015-1

SUMMARY

When an attorney brings a claim for Social Security Disability Insurance (SSDI) benefits concurrently with a separate civil action, such as a Worker's Compensation claim or tort action, the attorney must nevertheless produce in the SSDI proceeding, as required by the new final federal rules on the duty to produce evidence, "all evidence known to [the claimant] that relates to whether or not [the claimant is] blind or disabled." With the exception of material protected by the attorney-client privilege and material related to a representative's [or lawyer's] analysis of the claim, this duty to produce written evidence applies to the SSDI proceeding even though in a concurrent civil claim the Federal or Vermont Rules of Civil procedure might otherwise not require production.

DISCUSSION

The requesting attorney describes states that it a common practice to simultaneously file a Social Security disability insurance claim and a civil action involving the same party and involving facts that presumably underlay the cause of the claimed disability. The request states that in the civil actions, written reports or opinions prepared by experts retained for the purpose of trial preparation would be protected from disclosure by Rule 26(b)(4)(D).

Recent changes to the Social Security administration rules applicable to SSDI expanded the obligation of the claimant to disclose all "known" evidence, even that which is adverse to the claim, whereas under prior rules the obligation was to produce evidence that established the existence and severity of the medical impairments.[1]

Therefore, the instant request is limited to the situation in which the claimant has a concurrent SSDI claim and a separate civil action. We do not engage in a detailed

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[1] The SSDI Rules Abstract of the relevant changes on production of evidence states:

Abstract

We are clarifying our regulations to require you to inform us about or submit all evidence known to you that relates to your disability claim, subject to two exceptions for certain privileged communications. This requirement includes the duty to submit all evidence that relates to your disability claim received from any source in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. We are also requiring your representative to help you obtain the information or evidence that we require you to submit under our regulations. These modifications to our regulations will better describe your duty to submit all evidence that relates to your disability claim and enable us to have more complete case records on which to make more accurate disability determinations and decisions.

analysis or interpretation of the federal law pertaining to SSDI cases, including evidentiary matters, but rely upon the requesting attorney's summary of the impact of the regulatory changes on representation of claimants and the excerpts from the Federal Register that discuss the recent rule changes provided to us.

In a prior Opinion, No. 95-08, the Committee advised:

> "When an attorney representing a client in a social security disability benefit hearing obtains medical opinion evidence which is not consistent with this client's claim, such evidence need not be disclosed, provided that: (there is reasonable justification for rejecting the opinion and accepting another; and (2) that no request for production of such materials has been made by the Administrative Law Judge."

We note that in Opinion 95-08 we were asked to distinguish between harmful medical opinion evidence and harmful medical fact evidence and concluded that where "there is a difference among medical opinions, it is an attorney's duty on behalf of a client to reject some opinions while accepting others," unless the "attorney believes that there is no good faith basis for rejecting medical opinion evidence which is contrary to his client's position," then the attorney would be obliged under the existing federal law to disclose it to the fact adjudicating body.

The requesting attorney assumes that the new rules would change the conclusion in Advisory Opinion 95-08. We need not comment on that assumption except to recognize that the newly enacted SSDI evidentiary rules create an affirmative duty on the claimant and the claimant's representatives to produce "all evidence known to you that relates to <u>whether or not</u> you are blind or disabled." (Emphasis added). Indeed, no distinction is made between medical fact and medical opinion evidence as long as the evidence relates to the disability claim. The requesting attorney has provided the relevant sections of the Federal Register, which discuss the definition of evidence and the exceptions to it which are intended to protect attorney client privilege and attorney work product.

RELEVANT RULES OF PROFESSIONAL RESPONSIBILITY

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 required by paragraph (b) or permitted by paragraph (c).

c) A lawyer <u>may reveal information</u> relating to the representation of a client, though disclosure is not required by paragraph (b), <u>when permitted under these rules or required by another provision of law</u> or by court order or when the lawyer reasonably believes that disclosure is necessary: (Emphasis added)

<u>Comments to Rule 1.6</u>

[9] Paragraph (c) permits, but does not require, disclosures not required by paragraph (b) when these rules permit it, or when another provision of law or a court order requires it. Whether another provision of law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (c) permits the lawyer to make such disclosures as are necessary to comply with the law. When a lawyer is ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure, the lawyer, absent informed consent from the client to do otherwise, should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (c) permits the lawyer to comply with the court's order. Both provisions are permissive, however, allowing a lawyer to follow the dictates of conscience in cases where disclosure is not required by paragraph (b) by suffering the consequences of nondisclosure.

Reporter's Notes to Rule 1.6(c)

Amended V.R.P.C. 1.6(c), like the original Vermont rule, lists permissive disclosures, making clear that the provision applies to information other than that for which disclosure is required under V.R.P.C. 1.6(b). The provision in the first sentence permitting disclosure when required by law or court order is carried forward from the original rule and has been added to the Model Rules as Rule 1.6(b)(6). The disclosure continues to be permissive in the amended Vermont rule so that ''A lawyer willing to take the risk of contempt or other legal penalties on behalf of a client should not also be subject to professional discipline for nondisclosure.''

CONCLUSION

It seems clear that the controlling federal law with respect both medical fact and medical opinion evidence in SSDI cases is that the claimant is required to produce them if reduced to writing, notwithstanding the possibility that such written materials could be protected as attorney work product in a contemporaneous civil action, under Rule 26(b) of the Vermont or Federal Rules of Civil Procedure.[2]

Given this conclusion, our opinion is that if an attorney produces such information in an SSDI case, after consultation with his or her client, he or she would not be in violation of the Vermont Rules of Professional Responsibility. The instant request falls squarely within

[2] "If a claimant's medical source sends his or her representative medical records or a written opinion about the claimant's medical condition, the representative cannot withhold those records or that opinion based on the work product doctrine adopted under these rules." 80 FR at 14833.

the language of VRPR 1.6(c), which permits such disclosure because it is "required by another provision of law."[3]

We caution that the application of this opinion in a particular case may well be fact driven. In this matter we have not been provided with a specific fact pattern or examples of materials prepared for a civil action that may be adverse to the merits of the SSDI claim. Thus our recommendation is that an attorney handling simultaneous cases in these two forums which have different disclosure requirements carefully analyze the impact of disclosure on the client's interests and exercise independent professional judgment as to whether the disclosure is required in each SSDI claim.

[3] While we are not aware of any specific decision in Vermont law that defines "other law" in the context of Rule 1.6(c), we note that the relevant federal rules regard the SSDI disclosure requirements to "constitute 'other law.'" See also, Reporter's Notes on Rule 1.6(c) above.