ADVISORY ETHICS OPINION 95-08

SYNOPSIS:

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: (1) there is reasonable justification for rejecting the opinion and accepting another; and (2) that no direct request for production of such materials has been made by the Administrative Law Judge.

FACTS:

This request involves a question arising under the provisions of the Social Security Act, as amended, pertaining to "fraudulent acts" and "similar fault" and requires an evaluation of what, if any, disclosure obligations those regulations impose on an attorney representing a client in disability benefit hearings. Fraudulent acts are defined in 42 USC §1383a(a) as:

> Knowingly and willfully making or causing to be made any false statement or representation of a material fact on any application for benefit (2) knowingly and willfully making or causing to be made any false statements or representation of a material fact for use in determining rights to any such benefit, concealing or failing to disclose such event with an intent fraudulently to secure the benefit.

Committing a fraudulent act is a crime and carries felony penalties.

The Social Security law uses the term "similar fault," and the law was recently amended to add a definition of that term as follows:

> Similar fault is involved with respect to a determination if -- (A) an incorrect or incomplete statement that is material to the determination is knowingly made; or (B) information that is material to the determination is knowingly concealed.

There is no criminal sanction for "similar fault" conduct. The sole remedy for "similar fault" conduct is a redetermination of benefit eligibility and the possibility of requiring retroactive repayment to the secretary.

Requesting attorney asks whether the "similar fault" provisions impose a disclosure obligation on an attorney representing a client in a disability hearing to disclose "harmful medical opinion" evidence. Requesting attorneys distinguishes this type of evidence from what is termed "harmful medical fact" evidence. The attorney concedes that knowingly making a false statement about a harmful medical fact, e.g. blood pressure figures or whether a bone is broken etc., or concealing an event disclosed as part of a medical report, e.g. claimant having chopped wood where the claimant alleges an inability to do so etc., would be fraud prohibited by statute and would constitute a crime.

The attorney asks whether an attorney who learns of "harmful medical opinion" evidence (as opposed to "harmful medical fact" evidence is obliged to disclose such evidence to the secretary and whether such disclosure is consistent with the attorney's duty of loyalty to the client.

ANALYSIS:

The central question is whether disclosure of "harmful medical opinion" evidence is required by statute. As discussed below, we believe the statute does create disclosure obligations, but we do not believe that disclosure of harmful medical opinion evidence necessarily falls within the ambit of information that must be disclosed.[1] There is nothing in the excerpts of the Social Security statute provided to us by requesting attorney and nothing in the attorney's request letter to suggest that the recent amendments to the Social Security Act were intended to change the traditional role of an attorney advocate in regard to preparing for and presenting a client's case. Specifically, in regard to medical opinion evidence, it is accepted and, indeed, required practice for competent attorneys to seek out opinion evidence favorable to their client's cause. It is likewise competent and ethical advocacy for an attorney to review opinions rendered by consultants, including medical consultants, and if the opinions do not support the client's position, to reject them and seek out other opinions that do. Competence, experience, training and bias all may influence an opinion reached by a consulting physician, and deficiencies in any of these areas would

[1] It is not our role to interpret the statute. There may be existing interpretations which deem harmful medical opinion evidence to be "material information". Whatever interpretation prevails in the District of Vermont will clearly need to be applied by requesting attorney.

justify rejecting an opinion. 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.

If, on the other hand, an attorney believes that there is no good faith basis for rejecting medical opinion evidence which is contrary to his client's position (the most obvious example being where the attorney has been unable to obtain medical opinion evidence supportive of his client's position) then its non-disclosure would constitute similar fault under the statute. Similar fault is not a crime but does, if detected, trigger administrative sanctions. By making sanctionable the failure to disclose information material to a benefit determination and by providing a remedy of retroactive loss of benefits for such conduct, the statute clearly imposes a duty to disclose material information, even though non-disclosure carries no criminal penalties. If information is material to a determination of benefits, the knowing concealment of the information would be a fraud on the tribunal charged with making the benefit determination. Applying for disability benefits is different from general civil litigation in that the claimant is seeking a statutory benefit and is, therefore, subject to statutorily imposed disclosure obligations which do not attend civil litigants generally. An attorney will need to decide in a particular case whether failure to disclose the rejected opinion would constitute assisting the client in conduct the lawyer knows to be illegal or fraudulent in violation of DR 7-102(A)(7)[2] or would constitute conduct "involving dishonesty, fraud, deceit, or misrepresentation" in violation of DR 1-102(A)(4)[3]. If it would, the attorney may not participate in the non-disclosure and must withdraw if the client will not permit disclosure. The attorney would not be permitted to make disclosure without the client's consent since the information would be protected as privileged either as a secret or confidence of the client. DR 4-101(C)(3)[4] permits an attorney to reveal a client's intention to commit a crime and information necessary to prevent the commission of the crime, but if the non-disclosure constitutes "similar fault" only and not a "fraudulent act" then the concealment would not be a crime and disclosure by the attorney under DDR 4-101(C)(3) would not be supported.

CONCLUSION:

Rejected harmful medical opinion evidence would not appear to be per se material to a benefit determination, and, therefore, an attorney is not automatically required to disclose or call upon the client to disclose benefit hearings. Nonetheless, both the "fraudulent acts" section of the Social Security law and the "similar fault" provisions of the Social Security law impose disclosure obligations on litigants involved in disability claims. Willful concealment of material information where there is duty to disclose constitutes fraudulent and deceitful conduct prohibited by the code and an attorney must refrain from it and may not counsel his client in pursuing such conduct. Whether harmful medical evidence is material in any given case is a determination that the attorney must make on a case by case basis.

[2] DR 7-102(A)(7) provides: "A lawyer shall not counsel or assist [the] client in conduct that the lawyer knows to be illegal or fraudulent."
[3] DR 1-102(A)(4) provides: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
[4] DR 4-101(C)(3) provides: "A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime."