

## ETHICS OPINION

RO-93-06

Lawyer's obligation under Rule 3.3 to disclose adverse information in administrative proceeding discussed

### QUESTION:

"I am writing you at the request of John Doe, the Acting Chief Administrative Law Judge for the XYZ Office of Hearings and Appeals. Our office is part of the Social Security Administration. We are responsible for adjudicating Social Security disability, retirement, and survivors claims appealed from adverse determinations made by lower level components of the administration. The Administrative Procedure Act, Social Security Act, the code of Federal Regulations, and formal Rulings issued by the administration provide the basic legal framework that governs how hearings are held and decisions made in our office.

We need the State Bar's input to clarify the applicability of Rule 3.3 of the Alabama Rules of Professional Conduct in social security proceedings at the hearing level. Specifically, is a hearing held by an Administrative Law Judge in any of the four OHA offices located in Alabama an 'ex parte proceeding' within the meaning of Rule 3.3(d)?

The issue is quite troubling to the Judges and Attorneys in our office. Certain well recognized Social Security attorneys have lectured at CLE Seminars and even made videotape presentations during the past few years suggesting that they have no duty to submit any evidence, medical or otherwise, potentially adverse to their client. However, since the Federal Rules of Evidence do not per se apply in the administrative proceedings we conduct and because the adjudication process we follow is non-adversarial in nature, a real potential exists for decisions being made based on an incomplete record. Therefore, a potential for abuse is created strictly by differing interpretations of various applicable legal principles. It has been my experience that some advocates view themselves as more of an officer of the court, while others, as mentioned above, adopt a more zealous approach to representation with respect to disclosure of facts adverse to their client.

I think the resolution of this issue is important. As I understand it, Rule 3.3(d) did not extend under the Alabama Rules of Professional Conduct prior to January

1. 1991. Therefore, it represents a new ethical standard of which many attorneys may not even be aware. With the huge growth of the workload within OHA, the same Rule potentially applies to legal representation in up to 9000 claims currently in the process of adjudication within the four OHA offices in Alabama (2500 in Mobile). Just as important, the above provision is part of the ABA Model Rules of Professional Conduct. As a result, many other states have also chosen to adopt the same or a similar provision. To my knowledge, no formal opinion has ever been issued by a State Bar covering the applicability of the same Model Rule language in Social Security proceedings.

All of the Judges and Attorneys in our office would greatly appreciate your consideration of this question for a formal opinion."

ANSWER:

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. The term "tribunal" as used in this Rule includes both courts and administrative proceedings. Rule 3.3 is applicable to adjudicative hearings while Rule 3.9 concerns non-adjudicative proceedings. The only difference between Rules 3.3 and 3.9 is that a lawyer representing a client before a non-adjudicative administrative proceeding or a legislature is not required to inform the legislative or administrative tribunal of all material facts known to the lawyer.

Rule 3.3 of the Rules of Professional Conduct is a "fairness rule" designed to protect the integrity of the decision-making process. Professors Hazard and Hodes

in their Handbook on The Modern Rules of Professional Conduct, Second edition, section 3.3:101, provide the following overview of the Rule:

"When the adversary system is operating smoothly, opposing counsel police each other. They can generally be relied upon to expose false and misleading representations made by the other side, and to present legal argumentation in a sharp dialectic that will help the court come to a sound decision. But opposing counsel may not always discover the truth or the law, either through lack of diligence or because the truth has been effectively concealed. Without rules assuring that lawyers will police themselves, therefore, courts would occasionally make decisions on the basis of evidence that one of the professional participants knows is false, or apply legal concepts that one of the professional participants knows has already been rejected by a higher court.

The situations treated in Rule 3.3 entail the most severe tension between duties to a client and duties to the tribunal. According to this rule, where there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself. In these situations, the conception of lawyer as 'officer of the court' achieves its maximum force."

Rule 3.3(d) expands the lawyer's duties in an ex parte proceeding requiring the lawyer to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Professors Hazard and Hodes provide this explanation of subsection (d):

"Normally, the principal duty of an advocate in any proceeding is to present the best possible case for his client. However, since opposing counsel will not be present in ex parte proceedings, and will not be available to expose deficiencies in the proofs or to

present countervailing considerations, the tribunal must be protected from making wrong decisions that it would not have made in an adversary proceeding. In subsection (d), therefore, the special duty of candor to the tribunal (and the public interest in the integrity of the process) once again outweighs the advantage to an individual client."

By deliberately using the term "tribunal", the Rule is applicable to adjudications before administrative bodies, as well as courts. In Charles Pfizer and Co., Inc. v. Federal Trade Commission, 401 F.2d 574, (6th Cir. 1968), the Court held that a patent lawyer must present adverse facts to a U.S. Patent Office Hearing Officer even if that might cause the " patent to be denied.

If the proceedings are non-adjudicative, the lawyer does not have a duty to reveal all material facts but Rule 3.9 requires that the lawyer disclose that he is appearing in a representative capacity and that he abide by the special duties of candor contained in Rule 3.3(a) ,(b), and (c), as well as Rule 3.4, Fairness to Opposing Parties and Counsel and Rule 3.5, Maintaining the Impartiality and Decorum of a Tribunal.