

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2007-06 - Request No. 934
Issued March 26, 2007

Facts:

The inquiring attorney represented a client before an administrative law judge (ALJ) at the Social Security Administrative (SSA) in April 2004. The ALJ determined that the client, who was already receiving disability benefits, was entitled to additional benefits for a period of twelve months prior to the previously determined onset date.

Sometime after the hearing the client informed the inquiring attorney that he/she received a lump sum payment from SSA. The inquiring attorney believes that the client was mistakenly paid about twelve thousand dollars more than the amount to which the client was entitled. The inquiring attorney advised the client that the amount did not appear to be correct, that the client should hold the excessive funds until the correct amount could be confirmed, and that the client would have to return any overpayments. The client asserted that he/she had spent the money. The inquiring attorney does not believe the client intends to report the overpayment to SSA. The inquiring attorney took no further action on this matter pending receipt of a Notice of Award, which he/she states he/she has never received.

The inquiring attorney's fee for this representation is twenty-five percent of the client's retroactive benefits. The inquiring attorney states that when SSA makes a retroactive payment to a claimant, SSA automatically holds back twenty-five percent of the claimant's benefits for counsel fees. The inquiring attorney further states that in cases such as this client's case, these funds are not paid to the attorney until the attorney files a fee petition with the ALJ, and the ALJ approves it.

SSA recently notified the inquiring attorney that it is withholding funds for his fees in the client's matter, and urged him/her to promptly file a fee petition or else SSA would disburse the monies to the client. The amount being withheld for his/her counsel fees significantly exceeds the fee to which the inquiring attorney is entitled because it is twenty-five percent of the incorrectly calculated benefits. The inquiring attorney would like to obtain his/her fee, but does not want to run afoul of the Rules of Professional Conduct, particularly Rule 1.6.

Issue Presented

The inquiring attorney asks what the proper course of conduct is under the Rules of Professional Conduct.

Opinion

The inquiring attorney has an obligation of candor to the tribunal under Rule 3.3. If the inquiring attorney cannot convince the client to notify SSA of the error, the inquiring attorney must advise the ALJ that he believes that the client's retroactive benefit was miscalculated resulting in overpayment, and should request a confirmation or recalculation of the retroactive benefit upon which he/she can base a proper fee petition.

Reasoning

Rule 3.3 entitled "Candor Toward the Tribunal" states as follows:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In the ex parte proceeding, a lawyer shall 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.

The SSA's overpayment to the inquiring attorney's client is information related to the representation. As such, it is information ordinarily protected from disclosure by the inquiring attorney under Rule 1.6 "Confidentiality of Information." However, during the course of proceedings before a tribunal, lawyers have an obligation of candor to the tribunal which apply even if compliance requires disclosure of information protected by

Rule 1.6. See Rule 3.3(b). The duties imposed in paragraph (a) of the Rule continue to the conclusion of the proceeding. Rule 3.3(b). Insofar as the inquiring attorney must file a fee petition with the ALJ in order to receive his/her fee, the proceeding in this inquiry is not concluded. Therefore Rule 3.3, and not Rule 1.6, governs the conduct of the inquiring attorney.

One thing is clear. The inquiring attorney may not proffer to the ALJ a fee petition that the inquiring attorney believes to be false or fraudulent. See Rule 3.3(a)(1). If fees in SSA matters are based on a percentage of a claimant's retroactive benefits, a fee petition that comports with the inquiring attorney's obligations under Rule 3.3(a)(1) must be based on correctly calculated benefits.

Moreover, Rule 3.3(a)(2) requires lawyers to disclose to the tribunal a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Whether disclosure is required by Rule 3.3(a)(2) depends upon whether the inquiring attorney's silence will assist the client in conduct that is fraudulent or criminal. See R.I. Supreme Court Ethics Advisory Panel Op. 99-06 (1999). The Panel believes that if the client does not rectify the situation or does not consent to the inquiring attorney's doing so, the inquiring attorney's failure to disclose the miscalculated benefits would assist his/her client in fraudulent conduct in violation of Rule 3.3(a)(2).

Accordingly, the Panel concludes that if the inquiring attorney is unable to convince the client to notify SSA of the error, the inquiring attorney, pursuant to Rule 3.3, must advise the ALJ that he/she believes that the client's retroactive benefit was miscalculated resulting in overpayment, and should request a confirmation or recalculation of the retroactive benefit upon which he/she can base a proper fee petition.