RECENT DEVELOPMENT

THE SOCIAL SECURITY ADMINISTRATION'S CONDONING OF AND COLLUDING WITH ATTORNEY MISCONDUCT

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INTRODUCTION

Why would a federal agency prohibit its employees from reporting attorney misconduct to state bar associations? Why would a federal agency wish to shield attorney misconduct? How is the Social Security Administration—the federal agency in question—serving the American public if one of its employees discovers attorney misconduct but is not only prohibited from reporting that misconduct to a state bar, but may even be threatened with criminal prosecution for doing so? This Article examines the Social Security Administration's prohibition against reporting attorney misconduct, how that prohibition forces the lawyers and administrative law judges it employs potentially to violate the rules of their own state bars, and how it harms the American public. Ultimately, this Article illustrates that the legal basis for the prohibition is meritless and the prohibition needs to be vacated to not only allow Social Security Administration employees to comply with the ethical requirements of their state bars, but even more importantly, to protect the tax-paying public from unchecked attorney misconduct resulting in improperly paid Social Security disability benefits.

I. THE PROHIBITION

The *Chief Administrative Law Judge Bulletin 09-04 (CJB 09-04)* from the Social Security Administration's Office of Disability Adjudication and Review (ODAR) describes the policy in question.[1] Modifying a prior policy,[2] the new guidance dictates that any Social Security administrative law judge, hearing office manager, or staff member who suspects representative misconduct is to report it to the Hearing Office Management Team.[3] Furthermore, it instructs the employee to "not report suspected

1. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, OFFICE OF THE CHIEF ADMIN. LAW JUDGE, PROCEDURES FOR REFERRING OBSERVED OR SUSPECTED MISCONDUCT BY CLAIMANT REPRESENTATIVES, CJB 09-04 (2009) [hereinafter CJB 09-04], *available at* http://www.ssd-forms.com/SSDFacts/ChiefJudge.pdf (select "CJB 09-04).

2. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, HALLEX: HEARINGS, APPEALS & LITIGATION MANUAL at I-1-1-50.A, I-1-2-81 (2005) [hereinafter HALLEX], *available at* www.ssd-forms.com/SSDFacts/HALLEX.pdf. HALLEX I-1-1-50.A required any staff person who observed or detected suspected violations of the rules pertaining to a representative's conduct to report that information to the Office of General Counsel, but there was no provision prohibiting reporting suspected misconduct to a state bar or other state disciplinary agency. *See* HALLEX, *supra*, at I-1-1-50 (B)(9). The other outdated provision, HALLEX I-1-2-81, dealt with violations of charging and collecting of fees by representatives.

3. CJB 09-04, *supra* note 1 (requiring that attorney misconduct be reported to the Office of General Counsel for the Social Security Administration, and that only if the Commissioner finds misconduct will it be reported to the relevant state bar association

violations to the alleged violator's state bar association. Any such report could constitute a violation of the Privacy Act, 5 U.S.C. § 552a and Section 1106 of the Social Security Act, both of which carry criminal penalties."[4] It ends by stating that if the Commissioner of the Social Security Administration suspends or disqualifies a representative, the Office of General Counsel (OGC) will inform relevant state bars of the sanction imposed as with the previous regulation.[5]

An individual serving as an administrative law judge for the Social Security Administration or any other federal agency must possess a professional license to practice law and be authorized to practice law under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the U.S. Constitution.[6] To maintain that professional license, he or she has to abide by the rules set forth by the state bar or other entity that granted the professional license, and many state bar associations require its members to report attorney misconduct.

II. STATE BARS' RULES AND THE REPORTING OF ATTORNEY MISCONDUCT

The various state bars have taken several different approaches to reporting rules for attorney misconduct.[7] These rules range from requiring the reporting of *any* discovered attorney misconduct to having no requirement to report any attorney misconduct at all. For example, Alabama,[8] Iowa,[9] and Illinois[10] require mandatory reporting of *any* unprivileged knowledge of attorney misconduct that violates their respective rules of professional conduct. Louisiana and Ohio require the reporting of attorney misconduct that raises any questions as to a lawyer's

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pursuant to HALLEX I-1-50(B)(9)). This policy was since added to the Hearing Appeals and Litigation Manuel in 2011. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, HALLEX: HEARINGS, APPEALS AND LITIGATION MANUAL at I-1-1-50 (2011) [hereinafter HALLEX II], *available at* http://www.ssa.gov/OP_Home/hallex/I-01/I-1-1-50.html.

4. CJB 09-04, *supra* note 1.

5. *Id.*

6. 5 C.F.R. § 930.204(b)(1) (2011).

7. *See generally* Julie L. Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265 (1999) (comparing misconduct reporting requirements across jurisdictions).

8. ALA. RULES OF PROF'L CONDUCT R. 8.3(a)–(b) (2011).

9. IOWA RULES OF PROF'L CONDUCT R. 32:8.3(a) (2010).

10. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

honesty, trustworthiness, or fitness as a lawyer.[11] Kansas, on the other hand, requires an attorney to report conduct that in his or her own opinion constitutes professional misconduct.[12] Alabama's rule is by far the most stringent in that it still provides that the failure to report attorney misconduct is in itself attorney misconduct[13]—a proposition that the American Bar Association's *Model Rules of Professional Conduct (Model Rules)* and many states have rejected as "unenforceable."[14] On the other end of the spectrum, California does not require its members to report any attorney misconduct.[15] Georgia and Washington fall in the middle of the spectrum, as they do not require reporting but suggest that an attorney who discovers professional misconduct "should" report it.[16]

Generally, most states are between the two extremes and follow either a duplicate or a close variation of the Model Rule 8.3.[17] The *Model Rules*

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11. LA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), *available at* http://www.ladb.org/publications/ropc.pdf; OHIO RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

12. KAN. RULES OF PROF'L CONDUCT R. 226 8.3(a) (2007), *available at* http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorney&r2=3.

13. *See* ALA. RULES OF PROF'L CONDUCT R. 8.3(a)–(b) (mandating that a lawyer "shall" report unprivileged knowledge of an attorney's misconduct to the state bar and "shall reveal fully" that information if it is requested).

14. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2011); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) cmt. 3 (2005), *available at* http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf; N.M. RULES OF PROF'L CONDUCT R. 16-803 cmt. (2008); N.C. REV. RULES PROF'L CONDUCT R. 8.3 cmt. 4 (2008).

15. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 264 & n.18 (2003) (citations omitted) (stating that in lieu of mandatory reporting of attorney misconduct, California has instead relied upon seven triggering events that require automatic reporting such as when a court determines there has been misconduct). While California does not require attorneys to report other attorney professional misconduct, its *Rules of Professional Conduct* do prohibit threatening to report attorney misconduct so as to obtain a litigation advantage in a civil case. CAL. RULES OF PROF'L CONDUCT R. 5-100 (2012), *available at* http://www.ethics-lawyer.com/images/2009_Rules_Professional-Conduct.pdf.

16. GA. RULES OF PROF'L CONDUCT R. 8.3(a) (2001), http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=157; WASH. RULES OF PROF'L CONDUCT R. 8.3(a) (2012).

17. ALASKA RULES OF PROF'L CONDUCT R. 8.3(a) (2011); ARIZ. RULES OF PROF'L CONDUCT R. 8.3(a) (2010); ARK. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); COLO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); CONN. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.jud.ct.gov/publications/PracticeBook/PB_2012.pdf; DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); FLA. RULES OF PROF'L CONDUCT R. 4–8.3(a) (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3(a) (1994), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf; IDAHO RULES OF PROF'L CONDUCT R. 8.3(a) (2004), *available at* http://isb.idaho.gov/pdf/rules/irpc.pdf; IND. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); KY. RULES OF PROF'L CONDUCT R.

provide, "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[18] Naturally, there are some variations that can further limit reporting misconduct beyond the requirement that the conduct raise "a substantial question"[19] as to an attorney's ability to practice law. Michigan, for example, requires an attorney to report a "significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer,"[20] whereas Virginia requires the individual reporting misconduct to have "reliable information"

3.130(8.3(a)) (2009), *available at* http://www.kybar.org/documents/scr/scr3/scr_3.130_(1.2).pdf; ME. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); MD. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); MASS. RULES OF PROF'L CONDUCT R. 3.07 § 8.3(a) (2008); MISS. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); MO. RULES OF PROF'L CONDUCT R. 4–8.3 (2007), *available at* http://www.courts.mo.gov/page.jsp?id=667; MONT. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) (2005), *available at* http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf; NEV. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); N.H. RULES OF PROF'L CONDUCT R. 8.3 (2012), *available at* http://www.courts.state.nh.us/rules/pcon/; N.J RULES OF PROF'L CONDUCT R. 8.3(a) (2004), *available at* http://www.judiciary.state.nj.us/rules/apprpc.htm#x8dot3; N.M. RULES OF PROF'L CONDUCT R. 16-803(A) (2008); N.Y. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; N.C. REV. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); N.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2006), *available at* http://www.ndcourts.gov/rules/conduct/contents.htm; OKLA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR&level=1; OR. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.osbar.org/_docs/rulesregs/orpc.pdf; PENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf; R.I. RULES OF PROF'L CONDUCT R. 8.3(a) (2007), *available at* http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf; S.C. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); S.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03(a) (2005), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96; UTAH RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.utcourts.gov/resources/rules/ucja/; VT. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentsthroughJune2011.pdf; W. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); WIS. RULES OF PROF'L CONDUCT R. 20:8.3(a) (2009); WYO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), *available at* http://courts.state.wy.us/courtrules_entities.aspx?RulesPage=AttorneysConduct.xml.

18. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

19. *Id.*

20. MICH. RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

regarding the misconduct.[21] No states' rules of professional conduct, however, *prohibit* reporting attorney misconduct to the state bar.

Just as there is a spectrum of what is to be reported, there is also a range of options as to whom the misconduct is to be reported. Of those states that require reporting of attorney misconduct, the following require the misconduct to be reported to one specified entity:

- Kentucky (Association's Bar Counsel)[22]
- Louisiana (Office of Disciplinary Counsel)[23]
- Massachusetts (Bar Counsel's Office of the Board of Bar Overseers)[24]
- Michigan (Attorney Grievance Commission)[25]
- North Dakota (Disciplinary Board of the North Dakota Supreme Court)[26]
- Oregon (Oregon State Bar Client Assistance Office)[27]
- Tennessee (Disciplinary Counsel of the Board of Professional Responsibility)[28]

Other states that require reporting of attorney misconduct give options as to whom the misconduct needs to be reported—normally expressed as either the state bar (or disciplinary agency) or an "appropriate professional authority"[29] as recommended in Model Rule 8.3.[30] North Carolina,

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21. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

22. RULES SUP. CT. KY. R. 3.130(8.3(a)) (2009), *available at* http://www.kybar.org/documents/scr/scr3/scr_3.130_(1.2).pdf.

23. LA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), *available at* http://www.ladb.org/publications/ropc.pdf.

24. MASS. RULES OF PROF'L CONDUCT R. 3.07 § 8.3(a) (2008).

25. MICH. RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

26. N.D. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2006), *available at* http://www.ndcourts.gov/rules/conduct/contents.htm.

27. OR. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.osbar.org/_docs/rulesregs/orpc.pdf.

28. TENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

29. ALA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); ARIZ. RULES OF PROF'L CONDUCT R. 8.3(a) (2010); ARK. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); COLO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); FLA. RULES OF PROF'L CONDUCT R. 4–8.3(a) (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3(a) (1994), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf; IDAHO RULES OF PROF'L CONDUCT R. 8.3(a) (2004), *available at* http://isb.idaho.gov/pdf/rules/irpc.pdf; ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); IND. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); IOWA RULES OF PROF'L CONDUCT R. 32:8.3(a) (2010); KAN. RULES OF PROF'L CONDUCT R. 226 8.3(a) (2007), *available at* http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=3; ME. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); MD. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); MISS. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); MO. RULES OF PROF'L CONDUCT R. 4–8.3(a) (2007), *available at* http://www.courts.mo.gov/

however, specifies that lawyers report attorney misconduct to either the state bar or to the court that has jurisdiction over the matter at issue.[31]

What exactly is an "appropriate professional authority"? The Maine *Rules of Professional Conduct* define it as "the Maine Board of Overseers of the Bar, or in certain circumstances . . . the Maine Assistance Program for Lawyers."[32] Other states' rules of professional conduct likewise indicate that a report of misconduct "should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances."[33] The *Texas Disciplinary Rules of Professional Conduct* provide that for attorneys to fulfill their ethical duty of reporting attorney misconduct, they must either initiate a disciplinary

page.jsp?id=667; MONT. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) (2005), *available at* http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf; NEV. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); N.H. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.courts.state.nh.us/rules/pcon; N.J. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); N.M. RULES OF PROF'L CONDUCT R. 16-803(A) (2008); N.Y. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; OHIO RULES OF PROF'L CONDUCT R. 8.3(a) (2011); OKLA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR&level=1; PENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf; R.I. RULES OF PROF'L CONDUCT R. 8.3(a) (2007), *available at* http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf; S.C. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); S.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03(a) (2005), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96; UTAH RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* http://www.utcourts.gov/resources/rules/ucja/; VT. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentsthroughJune2011.pdf; VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); W. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); WIS. RULES OF PROF'L CONDUCT R. 20:8.3(a) (2009).

30. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

31. N.C. REV. RULES OF PROF'L CONDUCT R. 8.3(a) (2008).

32. ME. RULES OF PROF'L CONDUCT R. 8.3(a) n.6 (2011).

33. CONN. RULES OF PROF'L CONDUCT R. 8.3 cmt. (2012); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3 cmt. (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (1994), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf; PENN. RULES OF PROF'L CONDUCT R. 8.3 cmt. 5 (2008), *available at* http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf; *see also* VT. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2009), *available at* http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentsthroughJune2011.pdf ("A report should be made to the bar disciplinary agency unless some other agency, such as the court in which the violation occurred, is more appropriate in the circumstances.").

investigation with an appropriate authority, or when the situation involves "chemical dependency on alcohol or drugs or by mental illness, [lawyers must] initiate an inquiry by an approved peer assistance program."[34]

A great deal of literature addresses attorney misconduct linked to substance abuse or mental impairments.[35] It is well documented that the legal profession has vastly higher incidence rates of substance abuse and mental illness than the general population.[36] Substance abuse rates among attorneys (including alcoholism) have been cited as being at least twice as high as those in the general population, and indeed, 70% of attorneys are "likely candidates for alcohol-related problems at some time within the duration of their legal careers."[37] Merely having a substance abuse problem or a mental impairment is not in itself punishable by state legal disciplinary authorities.[38] If, however, substance abuse or a mental impairment *materially* affects an attorney's representation of a client or his or her conduct in practicing law, the corresponding misconduct can be actionable against the impaired attorney, and state rules of professional responsibility may require nonoffending attorneys to report such action to the state bar or other disciplinary authority.[39] While exact numbers are not known, various studies have shown that anywhere between 40% to 75% of

34. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03 cmt. 2 (2005), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96.

35. *See, e.g.*, Page Thead Pulliam, *Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders*, 32 J. LEGAL PROF. 289, 289 (2008) (listing recent articles that address mental impairments, attorney discipline, and the practice of law); Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 238 n.5 (2004) (listing articles that argue disciplinary authorities, such as the state bars, should focus more on protecting the public from substance-abusing attorneys than on the attorneys' rehabilitation or livelihood).

36. Robert Dowers, *Duties Invoked Under the* Model Rules of Professional Conduct *by a Mentally Impaired Lawyer*, 19 GEO. J. LEGAL ETHICS 681, 681 (2006); *see also* George Edward Bailly, *Ethics and Professional Responsibility: Impairment, the Profession and Your Law Partner*, 15 ME. BAR J. 96, 96 (2000) (stating that attorneys are particularly vulnerable to psychological distress). It should be noted, however, that at least one author suggests that while greater numbers of attorneys suffer from substance abuse or mental impairment issues, the actual number of cases that these attorneys will negatively affect due to their abuse or impairments is probably rather small based on the overall number of attorneys and the cases they handle. *See* Len Klingen, Comment, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 161–62 (2002).

37. Bailly, *supra* note 36, at 97 (citation omitted); *see* Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263, 1264 (1993) (providing additional statistics, such as one in five attorneys have substance abuse problems).

38. Dowers, *supra* note 36, at 685; Klingen, *supra* note 36, at 160.

39. Dowers, *supra* note 36, at 685–86; *see also* Bailly, *supra* note 36, at 100 (listing assistance programs for impaired attorneys to prevent them from making material errors).

attorney disciplinary proceedings involve substance abuse.[40]

Because of the number of attorneys with substance abuse or mental impairments, state bar associations have created lawyers assistance programs, which offer support groups for a variety of impairments (including gambling addiction, substance abuse, and psychological disorders) and provide referrals to other agencies for counseling.[41] The first lawyer assistance program began in Washington in 1975, and now all fifty states have some sort of program to assist attorneys with substance abuse or mental health issues separate from the disciplinary authority of the state.[42] The *Model Rules* and many state bar rules "shield lawyers who participate in such programs from disclosure of violations or impairments that may come out in the course of attending such a program"[43] or provide them with immunity from disciplinary action as long as they have joined the program prior to being notified of any disciplinary actions being initiated against them.[44] Depending upon the specific state rules, however, misconduct discovered while an attorney is attending a lawyer assistance program may still be reported to the state bar regardless of the nature of an impairment of the attorney in question.[45]

Obviously, the Social Security Administration is not a lawyer assistance group providing substance abuse or mental health treatment to attorneys as defined by the various state bars' rules of professional conduct. As discussed *infra*, while the Social Security Administration can ban attorneys and nonattorney representatives from representing claimants before it,[46] it

40. Bailly, *supra* note 36, at 97–98 (citations omitted) (between 50% and 75% in Georgia); Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741 (1999) (as low as 40%, as high as 70%); *see also* Heil, *supra* note 37, at 1265 (stating that untreated alcoholism will likely become the subject of grievance committee investigations).

41. Currall, *supra* note 40, at 748; Dowers, *supra* note 36, at 688; Heil, *supra* note 357, at 1284–85. *See generally* Jeffrey J. Fleury, Comment, *Kicking the Habit: Diversion in Michigan—The Sensible Approach*, 73 U. DET. MERCY L. REV. 11 (1995) (detailing Michigan's substance abuse program for lawyers, which is completely autonomous from public formal disciplinary proceedings, for the impaired lawyer who has engaged in professional misconduct).

42. Bailly, *supra* note 36, at 100; *see* Stephen M. Hines, Note, *Attorneys: The Hypocrisy of the Anointed—The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731, 746 & n.158, 747 (1996) (discussing a program that many states have called "Lawyers Helping Lawyers," which helps members who have personal problems that may affect their practices); *see also* Heil, *supra* note 37, at 1284 (discussing Lawyers Assistance Programs that protect the public from attorney misconduct).

43. Dowers, *supra* note 36, at 688.

44. Pulliam, *supra* note 35, at 303.

45. Dowers, *supra* note 36, at 688–89.

46. 20 C.F.R. § 404.1745 (2011); HALLEX II, *supra* note 3, at I-1-1-50.C(5).

is neither a state bar that licenses attorneys to practice law nor an "appropriate professional authority"[47] for reporting attorney misconduct to, as specified by the various states' rules of professional conduct. Merely reporting attorney misconduct to the Social Security Administration would not comply with many state bars' rules.

Social Security Administration administrative law judges and attorneys who belong to state bars that require reporting of attorney misconduct are therefore placed in an untenable situation if they discover attorney misconduct in a disability case. They can either report the misconduct as possibly required by their state bar and violate CJB 09-04, or they can comply with CJB 09-04's prohibition of reporting attorney misconduct and possibly violate the rules of their state bar. Either way, they are potentially violating the rules of their state bar or those of the Social Security Administration. One should not be forced to violate one's own ethical duty to hide the misconduct of another, but CBJ 09-04's prohibition on reporting attorney misconduct does exactly that. While other federal agencies require their employees to abide by their respective state bar rules regarding reporting attorney misconduct,[48] the Social Security Administration places its employees in a position where they may have to violate their own state bar's rules to comply with internal reporting requirements.

III. WHY REPORTING ATTORNEY MISCONDUCT IS IMPORTANT

Attorneys defend individuals' rights and strive to protect their clients' interests. For the system to work fairly, practicing attorneys must follow established ethical rules. The objectives of these rules are "(1) to protect the public; (2) to protect the integrity of the legal system; (3) to insure the administration of justice; and (4) to deter further unethical conduct."[49] Stated another way, "Ethical parameters for lawyers are designed to shape conduct in an effort to ensure client confidences, maintain the quality of the profession, and combat the countervailing negative view of legal practice."[50]

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47. *See supra* note 29 and accompanying text.

48. *See, e.g.*, DEP'T OF THE ARMY REG. 27–26, RULES OF PROF'L CONDUCT FOR LAWYERS R. 8.3 (1992) (delineating the requirements of Army judge advocates for reporting professional misconduct). Rule 8.3(d) notes that the Army's rules for reporting attorney misconduct do "not affect any reporting requirements a lawyer may have under other rules of professional conduct" mandated by the state bar in which the lawyer is admitted to practice. *Id.*

49. Cynthia L. Gendry, Comment, *Ethics—An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L. J. 603, 605–06 (1994).

50. Thomas A. Kuczajda, Note, *Self Regulation, Socialization, and the Role of* Model Rule

There is, however, no government agency that monitors lawyers' behavior.[51] Rather, the practice of law in the United States is self-regulating.[52] In order for the profession to self-regulate, clients, fellow attorneys, and judges have to report misconduct to those entities that are willing and able to investigate complaints and, if warranted, take disciplinary action.[53] Of these groups, lawyers and judges are in the best position to report attorney misconduct because clients are not schooled in what constitutes ethical behavior.[54] In order to enforce ethical rules and maintain self-regulation of the profession, attorneys and judges have to report misconduct.[55]

IV. WHY WOULD THE SOCIAL SECURITY ADMINISTRATION WANT TO PROHIBIT THE REPORTING OF ATTORNEY MISCONDUCT?

But why would the Social Security Administration not want to protect the public from attorney misconduct? The answer appears to be that the agency prioritizes eliminating the backlog of disability cases over the conduct of the attorneys who appear before it.[56] In 2010, one source estimated that approximately 3.3 million people would apply for disability

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5.1, 12 GEO. J. LEGAL ETHICS 119, 119 (1998).

51. Lindsay M. Oldham & Christine M. Whitledge, *The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881, 881 (2002).

52. *E.g.*, Greenbaum, *supra* note 15, at 269; Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 175 (1999); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the "Civil" War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 DAYTON L. REV. 151, 175 (1998); Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 941 (2008).

53. *See, e.g.*, Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 753 (1997) (discussing the importance of reporting attorney misconduct in the context of confidentiality in mediation sessions). *But see* Greenbaum, *supra* note 15, at 267–68 (questioning whether mandatory reporting of attorney misconduct by other attorneys is necessary to protect the public image of the legal profession).

54. *See* Smith, *supra* note 52, at 175 ("[T]he best method of ensuring that attorneys are living up to their responsibilities of professional and civil behavior is to ensure that the members of the profession are, in fact, regulating one another.").

55. *See* Williams, *supra* note 52, at 941; Gendry, *supra* note 49, at 605–606.

56. *See, e.g.*, Damian Paletta, *Disability-Claim Judge Has Trouble Saying "No"*, WALL ST. J., May 19, 2011, at A1, A14 ("Critics blame the Social Security Administration, which oversees the disability program, charging that it is more interested in clearing a giant backlog than ensuring deserving candidates get benefits."); Amy Reifenrath, *Cheaters Cost Social Security Billions*, OREGONIAN (Dec. 8, 2008, 7:18 AM), http://www.oregonlive.com/news/index.ssf/2008/12/disability_fraud_saps_social_s.html.

benefits.[57] That figure estimated 300,000 more applications than the Administration received in 2009, and 700,000 more than it did in 2008.[58] A source in 2011 reported a 50% increase in applications that year over the number of applications in 2006.[59] The main reason for this huge increase in applications has been the poor economy and not an increase in disabling injuries or illnesses—even though Social Security disability benefits were never designed to be a safety net for the jobless or a substitute for unemployment insurance compensation.[60] Because of this growth in applications for Social Security disability benefits, in fiscal year 2010 there were 705,370 disability hearings pending.[61] This backlog of disability cases has been growing over the past five years, and it is only getting worse.[62]

Congress has consistently investigated, criticized, and publically chastised the Social Security Administration for this backlog.[63] In response

57. Stephen Ohlemacher, *Social Security Disability System Bogged Down With Requests*, ONEIDA DAILY DISPATCH (May 9, 2010), http:///www.oneidadispatch.com/articles/2010/05/09/news/doc4be763e825022593194203.txt?viewmode=fullstory.

58. *Id*.

59. Gilda Mehraban, *The SSA's New Methods for Improving the Disability Claim Backlog*, PRWEB (Feb. 2, 2011), http://prweb.com/releases/2011/2/prweb8104909.htm.

60. *Id.*; *see Disability Payments: The Elephant in the Waiting-Room*, ECONOMIST, Mar. 12, 2011, at 36 [hereinafter *Disability Payments*]; Russell Grantham, *Some Gains Made on Social Security Backlog*, ATLANTA JOURNAL-CONSTITUTION (Nov. 1, 2010, 9:21 AM), http://www.ajc.com/business/some-gains-made-on-709806.html; Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J., Mar. 22, 2011, at A1; Lisa Rein, *Claims for Social Security Benefits on the Rise*, WASH. POST (Mar. 28, 2011), http://www.washingtonpost.com/politics/claims_for_social_security_benefits_on_the_rise/2011/03/28/AFTPNgrB_story.html?wprss=rss_politics. Since the ultimate question in a Social Security disability decision is whether an individual can work, the fact that many of these individuals are applying for disability benefits because they had been working but lost their jobs due to the downturn in the economy, and not their disabilities, seems to answer the question as to whether they can work.

61. Rein, *supra* note 60.

62. Mehraban, *supra* note 59. Another obstacle in trying to combat the backlog of disability cases has been budget problems. Recent Social Security Administration budgets have not covered the increase in claims and the backlog in appeals. Because of the 2011 budgetary crisis, the Social Security Agency suspended efforts to open eight new hearing offices, eliminated overtime, and instituted a hiring freeze—all of which make it much more difficult to attempt to reduce the backlog of disability claims. With the government operating spring 2011 on continuing resolutions for funding, the Social Security Administration lost $200 million that was designed to address the claims backlog, delaying the processing of claims for about 700,000 people. *See* Rein, *supra* note 60.

63. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-667T, MANAGEMENT OF DISABILITY CLAIMS WORKLOAD WILL REQUIRE COMPREHENSIVE PLANNING (2010) (representing one example of such an investigation); Ed Madrid, *Benefits Backlog Swells as Social Security Slims*, OREGONIAN (Aug. 4, 2008, 3:35 PM), http://www.oregonlive.com/special/index.ssf/2008/08/benefits_backlog_swells_as_soc.html (noting that Congress has

to this criticism, the Social Security Administration has repeatedly stated that the elimination of the backlog—and the source of public and Congressional disapproval—is a main priority.[64] In fiscal year 2008, the Social Security Administration's Office of Disability Adjudication and Review focused its annual report entirely on its plans to eliminate the hearing backlog.[65] Another Social Security Administration publication offers information on twenty-two program initiatives that are being used to reduce the backlog.[66] Investigating representative misconduct takes agency resources, such as time and people, away from this goal of eliminating the backlog.

A. The Failure of the Social Security Administration to Pursue Misconduct

Critics have faulted the Social Security Administration for prioritizing the quick processing of cases over making accurate determinations.[67] That the Agency fails to report attorney misconduct, despite its ability to do so,'[68] further demonstrates the Agency's emphasis on speed over accuracy. While the Social Security Administration regulations describe its authority to investigate and take action against representative misconduct,[69] it is extremely unlikely to do so. As of 2007, there were approximately 31,000 attorney and nonattorney representatives participating in Social Security Administration disability hearings.[70] Since 1980, when records were first maintained, a total of 178 attorneys and nonattorneys have been suspended

"consistently failed to meet [the Social Security Administration's] budget requests").

64. *See, e.g.*, *Eliminating the Social Security Disability Backlog, Hearing Before the H. Comm. on Ways & Means*, 111th Cong. 12–29 (2009) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.); *Clearing the Disability Backlog: Giving the Social Security Administration the Resources It Needs to Provide the Benefits Workers Have Earned: Hearing Before the H. Comm. on Ways and Means*, 110th Cong. 9–16 (2008) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.); News Release, Soc. Sec. Admin., Soc. Sec. Admin. Attacks Disability Backlog (Oct. 9, 2007), http://www.ssa.gov/pressoffice/pr/disability-backlog-pr.htm.

65. *See* SOC. SEC. ADMIN., PLAN TO ELIMINATE THE HEARING BACKLOG AND PREVENT ITS RECURRENCE: FY 2008 SSA ANNUAL REPORT (2008), http://www.ssa.gov/appeals/Backlog_Reports/Annual_Backlog_Report_FY_2008-Jan.pdf.

66. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION AND REVIEW, HEARING BACKLOG INITIATIVES (2011) (on file with Author).

67. *See, e.g.*, Paletta, *supra* note 56.

68. *See supra* note 46 and accompanying text (describing the Agency's authority to suspend or disqualify individuals from appearing before it in a representative capacity).

69. 20 C.F.R. § 404.1745 (2011).

70. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT A-12-07-17057: CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION 1 n.3 (2007), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf (stating that of the 31,000 representatives, 26,000 were attorneys and 5,000 were nonattorneys).

or disqualified from representing claimants before the Social Security Administration.[71] This averages annually to 5.56 of the estimated total 31,000 attorney and nonattorney representatives—or .018%—being suspended or disqualified by the Social Security Administration per year. Of the 178 representatives, 77 have been attorneys and 101 have been nonattorney representatives.[72] The average number of attorneys (as opposed to nonattorneys) suspended or disqualified each year by the Social Security Administration is 2.4, or .009% of the estimated total number of attorney representatives.[73] This percentage of suspended or disqualified attorneys is sixteen times less than the number of attorneys disbarred in an average year in either Georgia or Maryland.[74] Considering that disbarment or other punishment by a state bar has been historically very rare,[75] it is incredible that the Social Security Administration disbars attorneys at the equivalent rate of sixteen times fewer than do state bars. To put this in perspective, the odds of an attorney being suspended or disqualified by the Social Security Administration are the same as the odds that an American service member will win the Congressional Medal of Honor.[76] It is something that just does not happen very often.

Could it be that the attorneys who appear before the Social Security Administration are sixteen times more ethical than attorneys in general? The anecdotal evidence would suggest the opposite.[77] Why then are so few

71. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION AND REVIEW, LIST OF SANCTIONED REPRESENTATIVES (2011) (on file with author).

72. *Id.*

73. Of those attorneys suspended or disqualified by the Social Security Administration, the majority were already sanctioned by their own state bar, and the Social Security Administration's disciplinary action was merely to prohibit those individuals from representing claimants before it based on the action of their respective state bar and not because the agency had pursued its own misconduct investigations regarding the conduct of those attorneys. Newsletter and President's Report, Ass'n of Admin. L. Judges (June 13, 2011) (on file with author).

74. *See, e.g.*, THE ATTORNEY GRIEVANCE COMM'N OF MD., 33RD ANNUAL REPORT, at 4, 14 (2008), http://www.courts.state.md.us/attygrievance/pdfs/annualreport.pdf (reporting that in Maryland in fiscal year 2008, forty-five of the approximately 33,400 attorneys in the state were disbarred or suspended, totaling 0.14% of attorneys); STATE BAR OF GA. BD. OF GOVERNORS, 2010 REPORT OF THE OFFICE OF THE GENERAL COUNSEL, YEAR 2009–2010, at 9 (2010) (on file with author) (demonstrating that fifty-nine attorneys were either disbarred or suspended out of a total of 36,500, equaling 0.16% of attorneys).

75. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999) (suggesting that studies of the lawyer discipline system show that "lawyers rarely suffer any consequences for incompetence or other failings"); *see also National Affairs: Disbarred*, TIME, Nov. 27, 1939, at 15 (demonstrating that even over seventy years ago, disbarment was not common).

76. THE ODDS #1, http://www.funny2.com/odds.htm (last visited May 10, 2012).

77. It has already been acknowledged that some claimants (and some representatives)

representatives disqualified or suspended by the Social Security Administration? Just as the reporting of attorney misconduct by its employees to state bars would take employees' time away from processing disability cases, so too would the Agency's enforcement of its own disciplinary policies divert the Agency's resources away from furthering the single, overarching goal of processing disability cases as quickly as possible to eliminate the backlog.

V. WHY BOTHER PURSUING ATTORNEY MISCONDUCT IF THE CASE IS MERELY GOING TO BE PAID ANYWAY?

Before a case reaches a Social Security administrative law judge, it has already been adjudicated with adverse decisions issued twice by the state-level Social Security Administration Disability Determination Services.[78] Social Security Administration doctors and trained policy experts render both state-level decisions by applying the exact same rules and regulations that administrative law judges use. At the initial level, the Disability Determination Services deny a high percentage of claims; in 2009, approximately 63% of Social Security disability claims were denied at this stage.[79] Of those claimants who appealed the initial determination, approximately 86% were denied at the Disability Determination Services' reconsideration level in that year.[80] In 2009, on average almost half (46%) of all applications were paid through the first two levels of review at the state level and the case never had to reach an administrative law judge.[81]

While the hearings before the administrative law judges are de novo, traditionally there are three basic rationales for an administrative law judge

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have learned how to game the system by determining which doctors to see to support their claims of disability and which administrative law judges to appear before, which explains the high concentration of beneficiaries in certain areas. Paletta, *supra* note 60; *see also* Sam Dolnick, *Suit Alleges Bias in Disability Denials by Queens Judges*, N.Y. TIMES, Apr. 13, 2011, at A23 (stating that some attorneys advise their clients to move to different locations so as to select offices with higher payment rates of disability benefits).

78. Grantham, *supra* note 60. The Social Security Administration experimented in ten states with having only a single review, eliminating the reconsideration step at the state-level. This experiment was a failure. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 14, 19–24 (2002), http://www.gao.gov/new.items/d02322.pdf.

79. Ohlemacher, *supra* note 57.

80. *Id.*

81. *Id.*; *see also* Grantham, *supra* note 60 (noting that in Georgia, 70% of claims are denied initially, less than half of those people appeal, and 85% of those appeals are denied again; but 60% of those who appeal to the Social Security Administration will win their claims).

to issue a different decision than the one issued by the state-level agency: (1) the state agency made the wrong decision regarding the evidence and the application of the Social Security Administration's rules and regulations; (2) new evidence that was not before the state agency has subsequently been submitted to the administrative law judge that justifies paying the claim for disability benefits; or (3) due to a change in the claimant's age since the date of the state-agency determination, the rules and regulations would require the paying of the case upon reaching the later age category.

Each year, the Social Security Administration's administrative law judges issue over 700,000 decisions utilizing this basic paradigm.[82] As each of these cases had already been denied twice by the doctors and policy specialists who work at the state level using the same rules and regulations that administrative law judges use, it is surprising that administrative law judges pay a substantial number of these claims. In 2009, the Social Security Administration's administrative law judges paid around 63% of the cases.[83] Even more remarkable, in fiscal year 2010, thirty-one administrative law judges reversed state agencies' decisions (i.e., paid) 95% or more of the time.[84] One hundred administrative law judges likewise reversed the state agency decisions 90% or more of the time.[85] Two administrative law judges reversed the decisions of the state agency over 99.7% of the time—one paying 1,371 out of 1,375 cases and the other paying 748 out of 750 cases, even though they are supposed to be applying the same rules and regulations as the state agencies that twice denied each of these cases.[86] Of the top five administrative law judges who have issued the most dispositions, three have paid over 95%—with respective amounts of 1,242 out of 1,302, 1,371 out of 1,375, and 1,785 out of 1,855 cases paid.[87]

The Social Security Administration claims a nearly perfect accuracy rate in its decisions.[88] That claim does not explain, however, the number of times that the Social Security Administration Appeals Council and federal district courts remand administrative law judges' decisions for another de

82. *Information About Social Security's Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/about_odar.html (last updated 2011).

83. Ohlemacher, *supra* note 57.

84. SOC. SEC. ADMIN., ALJ DISPOSITION DATA FY 2010, HEARINGS & APPEALS (2011) [hereinafter ALJ DISPOSITION DATA FY 2010], http://www.ssa.gov/appeals/DataSets/Archive/03_FY2010/03_September_ALJ_Disp_Data_FY2010.pdf; *see also Disability Payments*, *supra* note 60, at 36; Paletta, *supra* note 56; Paletta, *supra* note 60.

85. ALJ DISPOSITION DATA FY 2010, *supra* note 84; *see also* Paletta, *supra* note 56.

86. *See* ALJ DISPOSITION DATA FY 2010, *supra* note 84.

87. *Id.*

88. *See, e.g.*, Paletta, *supra* note 60 (describing an external review finding that "cases in Puerto Rico were decided accurately 99% of the time in 2010").

novo hearing.[89] In fiscal year 2007, the Appeals Council and the federal district courts remanded 34,700 out of 550,000 decisions issued.[90] If the initial decisions were overwhelmingly correct, only a very small percentage of those decisions would ever need to be remanded—not the 6.3% that were remanded in fiscal year 2007.[91] The actual number of incorrect decisions is naturally higher than the number of decisions appealed because neither the claimant nor his or her representative has an incentive to appeal an erroneous award of lifetime benefits. Only unfavorable decisions are appealed to the Appeals Council and subsequently to the federal district court.[92] Nor does the claim of a nearly perfect record of accurate decisions match with an analysis the agency conducted of its own administrative law judges' decisions, which found that 15% of the decisions to grant benefits and 8% of the decisions to deny benefits were not supported by even a preponderance of the evidence.[93] Given that Social Security administrative law judges issue over 700,000 cases per year[94] with an average total lifetime benefit amount of $300,000,[95] a 15% error rate equals billions of dollars each year in improperly awarded benefits.

What is also not explained is that the number of favorable disability benefits decisions has risen 28% since 2007, even though there has been absolutely no evidence of a 28% rise in the number of disabilities in the United States since 2007.[96] In 2010, the Social Security Administration approved 489,488 disability cases—the largest amount ever.[97] The Social

89. *See, e.g.*, SOC. SEC. ADMIN., SSA PUB. NO. 05-10041, THE APPEALS PROCESS (2008), http://www.ssa.gov/pubs/10041.pdf (describing that the Appeals Council reviews appeals from decisions rendered by the administrative law judge and federal courts review the decisions of the Appeals Council).

90. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT A-12-08-28036: HEARING OFFICE REMAND PROCESSING 2 (2008) [hereinafter HEARING OFFICE REMAND PROCESSING], http://oig.ssa.gov/sites/default/files/audit/full/html/A-12-08-28036.html.

91. *See id*.

92. The Appeals Council randomly conducts "own motion" reviews of less than 0.8% (eight-tenths of a percent) of decisions where the claimant is paid benefits; more than in 99.2% of the decisions where claimants are paid, benefits are never reviewed. SOC. SEC. ADMIN., ANNUAL NATIONAL JUDICIAL EDUCATION PROGRAM (2011) (on file with Author).

93. SOC. SEC. ADMIN., OFFICE OF QUALITY PERFORMANCE, DISABILITY CASE REVIEW OF ADMINISTRATIVE LAW JUDGE HEARING DECISIONS 1 (2011) (on file with Author).

94. *Information About Social Security's Office of Disability Adjudication and Review*, *supra* note 82.

95. Paletta, *supra* note 60. This amount is merely for the average of Social Security disability benefits, and not the total amount, which could include additional government benefits that can become available—such as Medicaid—with a grant of Social Security benefits.

96. *Disability Payments*, *supra* note 60, at 36.

97. Paletta, *supra* note 60.

Security Administration claims that the rise in the approval rate of disability claims is due to it having hired more people to process applications, which in turn "expedite[s] the process."[98]

While an increase in staff may explain why more cases are being paid, since more cases have been processed overall in recent years, it cannot explain an increase in the *approval rate* or percentage of cases being awarded benefits. Increases in staff or improved efficiency should have no effect whatsoever on the *rate* at which disability cases are approved, but rather result in merely more cases being processed overall. There must be some other reason for the 28% rise in the approval rate of Social Security disability cases in just a few years. It could be attributed to something that has also risen during this same time period: the Social Security Administration's interest in reducing the disability case backlog.

Of course the Social Security Administration does not care if cases are paid by their administrative law judges.[99] If a claimant is paid, then no one—not the claimant, not the claimant's family, not even the claimant's congressman—complains. This is obviously not true if the case is denied. Better yet, the backlog is reduced with every case that is paid, which is not true if an administrative law judge denies a case.

For example, if an administrative law judge denies benefits, the Appeals Council, or subsequently the federal district court, may remand the case back to the administrative law judge for a de novo hearing. There were 34,700 such remands in fiscal year 2007.[100] The denied and remanded disability case needs to be docketed and heard like any other disability case, which adds to the backlog. Often, in addition to filing appeals, the claimant will file a *new* application for disability. Until July 2011, there was no limit on how often a person could file an application for Social Security disability benefits,[101] and there is never a cost to the person to do so. The

98. *Id.*

99. As opposed to a private insurer, because someone else pays the bills (e.g., the taxpayer), there is no incentive for the Social Security Administration to keep the number of cases paid low. *See id.* (discussing the common belief of claimants that "big, rich Uncle Sam's money" pays for their Social Security disability benefits, when in reality it is the American taxpayer).

100. HEARING OFFICE REMAND PROCESSING, *supra* note 90, at 2.

101. Beginning July 28, 2011, a claimant who has a claim pending in the Social Security Administration's administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is neither a prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person's lifetime. Social Security Ruling 11-1p; Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45,309, 45,309–11 (July 28, 2011).

cost to the taxpayer, however, of processing the case through the state level and preparing it for a hearing before an administrative law judge is substantial.[102] With each new application for disability benefits filed, the backlog grows. When a claimant both appeals a denial of benefits and files a new application for benefits, the backlog grows by two cases. Only when a case is *paid* by the administrative law judge is the backlog diminished to the satisfaction of the Social Security Administration and the ever-watchful Congress.[103]

So if 90%, 95%, or 99% of the disability cases are going to be paid anyway, why should the Social Security Administration worry if the claimant's representatives were unethical in the pursuit of their client's claim? If the representative falsified evidence or suborned perjury, who cares since the Social Security Administration just wants the case to go away, seemingly regardless of the merits, thus reducing the backlog by one case?[104]

VI. WHY DOES IT MATTER?—THE HARM OF THE SOCIAL SECURITY ADMINISTRATION'S BAN ON REPORTING MISCONDUCT

But what is the harm to the public of the ban on Social Security Administration employees reporting attorney misconduct? Presently, 6,246,920 individuals receive Title XVI disability benefits, with an average award of $493.70 per month,[105] and 7,426,691 individuals receive Title II disability benefits, with an average award of $1,063.10 per month.[106] The latter amount is equal to the amount an individual would earn working a full-time, minimum-wage job for forty-four weeks a year.[107] Additionally,

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102. Tim Moore, *How Much Does it Cost to Process a Social Security Claim?*, MY DISABILITY BLOG (June 8, 2008, 1:37 PM), http://disabilityblogger.blogspot.com/2008/06/how-much-does-it-cost-to-process-social.html (stating that the cost to the taxpayer to process a case through the initial state level is $1,180, while the cost to the taxpayer of a case reaching the administrative law judge level is $4,759).

103. *See* Paletta, *supra* note 56 (discussing the pressure put on Social Security administrative law judges to process cases and how some judges, by paying all of their cases after only a cursory review, process the most).

104. *Id.* (noting that some believe the Social Security Administration is more interested in clearing out the backlog of cases rather than ensuring that candidates who really need benefits receive them).

105. SOC. SEC. ADMIN., SSA PUB. NO. 05-10041, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2009, at 5.55 (2010) [hereinafter ANNUAL STATISTICAL SUPPLEMENT], http://www.ssa.gov/policy/docs/statcomps/supplement/2009/supplement09.pdf.

106. *Id.* at 5.59; Paletta, supra note 60.

107. Paletta, *supra* note 60 (noting that applicants should be unable to work in a "substantial, gainful way" when applying for benefits); *Wages: Minimum Wage*, U.S. DEP'T OF

154,230 spouses and 1,691,873 children of disabled individuals are eligible to receive benefits due to the award of Title II benefits.[108] All told, this equals over $138 billion per year. On average, the successful Title II claimant receives $300,000 in disability benefits over his or her lifetime.[109] In addition to direct monetary payments, receiving Social Security disability benefits opens up access for recipients to other government programs—such as Medicare or Medicaid—multiplying the ultimate cost to taxpayers many times over.[110] Whether Title II or Title XVI, there is a lot of taxpayer money at stake.

Each disability case that is improperly paid due to attorney misconduct, therefore, has huge monetary consequences for the taxpayer. The system is rife with corruption,[111] but it is unknown exactly how much attorney misconduct there is in Social Security disability cases because of the prohibition on reporting attorney misconduct and the agency's failure to discipline misconduct through its internal policies. For example, if even 1% of cases were improperly paid due to representative misconduct (such as in manufacturing false medical evidence or suborning perjury) that would equate to almost $1.4 billion a year in improperly paid benefits. If 5% of disability cases were improperly paid due to attorney misconduct that would equal almost $7 billion per year in improperly paid benefits. Even by government standards, either figure is "real" money.

The consequences of the Agency improperly paying benefits are dire due to the financial insolvency of the Social Security disability programs. In 2005, the Title II program began spending more money than it brought in

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LABOR, http://www.dol.gov/dol/topic/wages/minimumwage.htm (stating that federal minimum wage is currently $7.25 per hour).

108. ANNUAL STATISTICAL SUPPLEMENT, *supra* note 105, at 2. The average amount paid to eligible spouses ranges from $229.40 to $287.60 per month, and children receive an average of $317.60 per month in addition to what the disabled individual receives. *Id.* at 5.60.

109. Paletta, *supra* note 60.

110. *Disability Payments*, *supra* note 60; Paletta, *supra* note 60.

111. *See, e.g.*, Paletta, *supra* note 60. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-849, SUPPLEMENTAL SECURITY INCOME, PROGRESS MADE IN DETECTING AND RECOVERING OVERPAYMENTS, BUT MANAGEMENT ATTENTION SHOULD CONTINUE 1–3 (2002), http://www.gao.gov/new.items/d02849.pdf; SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., AUDIT REPORT A-01-08-18022, SUPPLEMENTAL SECURITY INCOME RECIPIENTS WITH EXCESS INCOME AND/OR RESOURCES (2008), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-08-18022.pdf; SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., AUDIT REPORT, A-01-04-24022, SUPPLEMENTAL SECURITY INCOME OVERPAYMENTS (2004), http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-04-24022.pdf; *Social Security Fraud*, 52 U.S. ATT'YS BULL., No. 6, 2004, http://www.justice.gov/usao/eousa/foia_reading_room/usab5206.pdf (publishing several articles on the problem caused by Social Security Fraud).

through tax receipts.[112] Within the next three years, it is projected to spend $22 billion more than it receives.[113] The Title II trust fund that has been accruing for years is projected to expire in 2018, twenty-two years prior to the Social Security retiree trust fund.[114]

Beyond the monetary cost to the taxpayer, attorney misconduct that results in improper payment of Social Security disability benefits undermines the legitimacy and integrity of the entire system. Fraudulently paid disability claims stigmatize the people who properly received disability benefits, as it calls into question the validity or degree of their own disabilities.[115] "[T]he fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true."[116] Individuals whose attorneys did not cheat are also harmed by improperly awarded disability benefits. "It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not."[117]

In addition to these groups of people, the Social Security Administration's ban on reporting attorney misconduct clearly harms its own employees who take their ethical obligations seriously. An administrative law judge who discovers attorney misconduct is prohibited, on the threat of criminal prosecution, from reporting it to the state bar, even though there may be a legal requirement to do so. It is inconceivable that an organization would willingly create policies that actually require its members to commit ethical violations.[118]

"[T]he taxpaying, voting public will only support need-based welfare programs if they believe that those actually in need of aid are the ones actually receiving the aid."[119] Thus, the Social Security Administration's failure to pursue its own mechanisms for dealing with attorney misconduct and its prohibition on allowing its employees to fulfill their ethical obligation to report attorney misconduct to their respective state bars harms the very same people the agency is supposed to be helping and the taxpaying public that supports it.

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112. Paletta, *supra* note 60.

113. *Id*.

114. *Disability Payments*, *supra* note 60, at 37; Paletta, *supra* note 60 (projecting that the Social Security Disability Program will run out of money in the next four to seven years).

115. *See generally* Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J. L. PUB. POL'Y 614 (2011); Grantham, *supra* note 60.

116. Swank, *supra* note 115, at 639.

117. *Id.*

118. This is so with the exception of organizations such as the mafia or drug cartels.

119. Swank, *supra* note 115, at 639–40.

VII. SOLUTIONS

Possibly the worst problem with the Social Security Administration's ban on reporting attorney misconduct to state bar associations is that the philosophy behind the policy is legally flawed. Neither the Privacy Act, 5 U.S.C. § 552a, nor 42 U.S.C. § 1306(a)(1) require the ban on reporting attorney misconduct as claimed in CJB 09-04. The Privacy Act governs the collection, storage, and dissemination of information maintained by the federal government on individuals.[120] Section (b) provides subject to certain exceptions, "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.".[121] An individual is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence."[122] A record is defined as the following:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . . .[123]

Nothing in the Act, however, applies to an individual's attorney or representative—their actions and their information are not protected as they are not the "individual" for whom "records" are maintained. Rather, the claimant is the individual for whom records are maintained, so the Privacy Act should not apply.

Furthermore, the Privacy Act specifically allows for civil and criminal law enforcement entities—which would include state bars or other disciplinary agencies—to request information from a federal agency that would normally be protected by the Act if it is made in writing and specifies the civil or criminal law enforcement activity for which the records are being sought.[124] Reporting attorney misconduct, therefore, does not necessarily disclose any privacy-related information regarding the claimant, but rather merely provides information on the conduct of the representative

120. 5 U.S.C. § 552a (2006).

121. *Id.* § 552a(b).

122. *Id.* § 552a(a)(2).

123. *Id.* § 552a(a)(4).

124. *Id.* § 552(b)(7). *See generally* Covert v. Harrington, 876 F.2d 751, 753 (9th Cir. 1989); Doe v. Naval Air Station, 768 F.2d 1229, 1233 (11th Cir. 1985); Stafford v. SSA, 437 F. Supp. 2d 1113, 1121 (N.D. Cal. 2006) (finding, in part, that the state agency that contacted and requested information from the Social Security Administration failed to do so in writing).

that is neither privileged nor confidential. Any reference to the claimant or to any of his or her information that is protected by the Privacy Act or other statute can be appropriately redacted, thereby preserving the claimant's privacy while still appropriately reporting the attorney's misconduct. A Social Security administrative law judge could inform his or her state bar of the name of the attorney, the type of misconduct, and the jurisdictional information (such as the location and date of the misconduct) as appropriate under that judge's own specific state bar rules without reference to the protected individual's information, which could be kept confidential in accordance with the Privacy Act. The state bar or other appropriate authority could then contact the Social Security Administration if it needed any additional information, which would be subject to disclosure under the enumerated exception to the Privacy Act. Thus, the individual's information remains protected as required by the Privacy Act, and the administrative law judge is able to perform his or her ethical duty of reporting attorney misconduct.

Just as the Privacy Act has an exception that would allow employees of the Social Security Administration to comply with their ethical obligations, 42 U.S.C. § 1306(a)(1) likewise contains a provision that information may be disclosed if "the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law."[125] The Social Security Administration, as part of its employee administrative grievance process, allows for the disclosure of any information it maintains "[t]o an appropriate licensing organization or Bar association responsible for investigating, prosecuting, enforcing or implementing standards for maintaining a professional licensing or Bar membership, if the Social Security Administration becomes aware of a violation or potential violation of professional licensing or Bar association requirements."[126]

The purpose of allowing the release of information maintained by the Social Security Administration to state bars is for when the agency wishes to punish one of its own employees and further seek to have that employee disbarred. It is ironic that the Social Security Administration has no apparent qualms about disclosing information for the purpose of disciplining one of its own employees but takes the position that it cannot release that exact same information to allow an administrative law judge to report an attorney's misconduct. Regardless of the motive behind it, the provision announced in the *Federal Register* allows for information from hearings to be reported to state bars or other appropriate professional

125. 42 U.S.C. § 1306(a)(1) (2006).

126. Social Security Administration Notice of System of Records Required by the Privacy Act of 1974, 71 Fed. Reg. 1862, 1863 (Jan. 11, 2006).

authorities that otherwise would be prohibited by 42 U.S.C. § 1306.[127] Therefore, the two statutes the Social Security Administration cites as the basis for prohibiting its employees to fulfill their ethical duties by reporting attorney misconduct to state bars both contain exceptions allowing the release of this information, which negates the legal authority cited in CJB 09-04.

CONCLUSION

The Social Security Administration needs to take seriously its obligation to prevent and report attorney misconduct. Even though the Social Security Administration can bar individuals from practicing before the Agency for misconduct, it rarely does so. Instead, it prohibits its employees—on the threat of criminal prosecution—from complying with their ethical obligations, forcing them in some cases to face the possibility of being disbarred for failing to report attorney misconduct. The legal basis cited for the prohibition on reporting attorney misconduct in the *Chief Judge Bulletin* is legally flawed, as both of the statutes cited as its basis allow for information regarding misconduct to be transmitted to state bars. The *Chief Judge Bulletin* needs to be rescinded to allow Social Security Administration employees to fulfill their ethical requirements.

The Social Security Administration's position on barring its employees from reporting attorney misconduct harms its employees, the disabled people it serves, and the American taxpayer. Nothing and no one benefit from its prohibition on reporting attorney misconduct, except for the attorneys who cheat and their clients who receive disability benefits for which they do not qualify. If the Social Security Administration will not rescind this policy, then Congress should force it to do so. All Americans, whether disabled or not, are owed at least that much.

127. This is contrary to the justifications cited in CJB 09-04, *supra* note 1.