Memo: Social Security Disability Advocacy Examination Information
From: Elizabeth Collins, Director of Examinations and State Accreditations

OVERVIEW:

The Legal Specialization program was created to provide a method for attorneys to earn the designation of certified legal specialist in particular areas of law for the purposes of increasing public protection and encouraging attorney competence. As part of the certification process, an applicant must pass a written examination in the specialization area. Board Certification is the process that is designed to identify the highly qualified attorneys in the practice area.

FORMAT:

The examination consists of a combination of multiple choice and essay questions and is a total of 6 hours: A Morning Section (8:30 a.m. – 11:30 a.m.) with a one-hours break and an Afternoon Section (12:30 p.m. – 3:30 p.m.) given on a Saturday. The 3-hour morning section is entirely multiple choice and the 3-hour afternoon section is made up of essays. The examination consists of hypothetical cases and fact patterns that require knowledge of Social Security Disability (SSDI and SSI) administrative procedures and ethics. The examination may include one appellate brief writing question or questions involving a pre-hearing memorandum or brief to be submitted to an Administrative Law Judge. Questions may include reopening prior applications and pursuing subsequent applications, hearing level strategic decisions, Social Security Disability (SSDI and SSI) law and practice, including administrative and judicial appeals and common medical impairments, etc. The questions test knowledge of the current law and are geared to evaluate basic knowledge of the usual legal procedures, core substantive law and ability that is common to specialists in the area of social security disability law. **NBTA's examination is nationally administered. Questions are to be answered by applying the permitted reference materials below:**

- **ABA Model Rules of Professional Conduct - FOR MULTIPLE CHOICE & ESSAYS OR**
- **ONLY FOR THE ESSAY SECTION OF THE EXAMINATION - If an applicant's state laws differ from Federal Law, an applicant may indicate the state and the applicable state law but is to respond using Federal Law as it applies to a given set of facts in the outcome of the issues presented**
- **The Social Security Act and Social Security Regulations (West's Federal Social Security Laws is an acceptable compilation of this information)**

It is not designed to be a bar or law school type of examination.

- **Multiple Choice Questions**
  The Multiple-Choice questions test an applicant's knowledge of federal law. Individual state law is not tested on the Multiple-Choice section of the examination.

- **Essay Questions**
  The examination's essay questions are also designed to be answered under federal law. However, if an applicant's state laws differ from federal law an applicant may indicate the state and the applicable state law but is to respond using federal law as it applies to a given set of facts in the outcome of the issues presented.

- **A passing score is 75%.**

Multiple Choice questions are 40% of the score and Essays are 60%. A combined score of 75% must be achieved in order to pass the examination. There are 75 multiple choice questions. A failing score in the Multiple-Choice ETHICS portion of the examination results in a failure of the entire examination. However, only the ETHICS portion of the examination must be retaken and passed.

TIMING:
The examination is given twice a year. Registration material for an examination is sent two months prior to the examination date. You will automatically receive registration material before every examination until you have actually taken and passed one (contingent upon file eligibility). There is no need to contact our office if you cannot take a particular examination.

LOCATION:
The NBTA Board Certification Examination in all areas of law will be offered only as an online examination that can be taken from your home or office using software from Examsoft called Examplify. You must sign up at least 30 days prior to the date of the administration of the examination and NO EXCEPTIONS can be made.

COST:
The application fee is $400. The Examination fee is $400. Please click here for the entire NBTA Fee Schedule.

CONTACT:
If you have any additional questions, please call me at 508.384.6565 or email me at ecollins@nbtalawyers.org. I look forward to helping you complete our examination requirement.

Specifications for the National Board of Trial Advocacy
Social Security Disability Certification Examination

Purpose of the Examination: The Social Security Disability Examination consists of a combination of multiple choice and essay questions. It is designed to verify the applicant's basic knowledge of the usual legal procedures, core substantive law (*including recent changes in law and regulations)* and representative ability that is common to specialists in the area of Social Security Disability Advocacy. The practice of law in Social Security Disability Advocacy involves dealing with legal issues arising from the representation of individuals before the Social Security Administration in claims for disability benefits under the two primary programs for receiving benefits (Title II and Title XVI). In addition to actual representation at an administrative hearing, Social Security Disability Advocacy includes understanding medical issues in order to collect, evaluate, and submit evidence demonstrating disability, as well as understanding eligibility for each program, *and the appeal process both before and after an administrative hearing. In addition to the administrative process, Social Security Disability Advocacy includes evaluating and handling appeals in federal court and any legal issues associated with federal court practice, including attorney fees.*

An applicant is expected to demonstrate the ability to identify and resolve the issues, state and apply the applicable law, analyze and apply the law to the facts given and show knowledge and understanding of the pertinent principles and theories of law, their relationship to each other and their qualifications and limits. Of primary importance in the essay questions will be the quality of the analysis and explanation. It is recognized that the subject areas below may overlap, which may require incorporation of more than one substantive or procedural area in Social Security Disability Advocacy which may apply to several skills responding to a single question.

The order of the subject areas does not reflect their relative importance, nor does the sequence represent an implied order of their application in practice. Knowledge of the following fundamental lawyering skills may be assessed.

Subject Area 1: Professional Responsibility

1.1 Ethical duties to client and the tribunal
1.2 Social Security Administration rules of conduct
1.3 ABA Model Rules
1.4 Fee agreements/basis for fees/multiple representatives
1.5 Fee Agreement Process/Fee Petitions
1.6 Prohibited referrals and inducements/Contact with prospective clients

1.7 Basis of Sanctions
1.8 Supervising paralegals and other non-attorneys
1.9 Declining terminating representation

Subject Area 2: Practice and Procedure

2.1 Client intake
2.2 File development
2.3 Consultative examinations
2.4 Hearing preparation
2.5 Pre/Post-Hearing Briefs
2.6 Gathering/Submitting evidence
2.7 Cross-examination of experts
2.8 Appeal process, including time limits
2.9 Applicable law – Act, Regulations, Rulings, Caselaw, Employee Operating Instructions
2.10 Medical improvement/Continuing Disability Review (CDR)
2.11 *Res Judicata*? Collateral Estoppel and reopenings
2.12 Post entitlement – trial work period, extended period of eligibility PASS
2.13 Overpayment/ Waiver

Subject Area 3: Evaluation of Medical/Vocational Issues

3.1 Definition of disability
3.2 Anatomy/physiology
3.3 Reviewing medical records/tests/laboratory findings
3.4 Severe/not Severe Impairment
3.5 Meeting/Equaling a Listed Impairment
3.6 Physical Impairment and exertion levels –i.e. sedentary, light, medium, etc.
3.7 Drug and Alcohol abuse
3.8 Medical Opinions – source statement, interrogatories, and relative weight
3.9 Residual Functional Capacity
3.10 Past relevant work
3.11 Medical/Vocational Rules (“Grids”)
3.12 Age Categories
3.13 Transferable skills

Subject Area 4: Eligibility

4.1 Applications – Title II and Title XVI (SSI)
4.2 Types of benefits – adult, adult children, widow and survivors
4.3 Protective filings
4.4 Income and resources for SSI

4.5 Worker's compensation offsets
4.6 Effect of other income – unemployment, LTD, and VA benefits
4.7 Substantial Gainful Activity
4.8 Onset date/Date Last Insured

Subject Area 5: Present and Object to Evidence
5.1 Introduction of evidence/mode and order/five day rule
5.2 All evidence rule
5.3 Subpoenas
5.4 Claimant/witness testimony
5.5 Medical source records/opinions/testimony
5.6 Consultative examinations and tests
5.7 State agency medical/psychological consultant opinions/testimony
5.8 Medical expert opinions/testimony
5.9 Vocational expert opinions/testimony
5.10 Non-medical source evidence
5.11 OIG Fraud Investigation Reports
5.12 Internet information/social media
5.13 Post-hearing evidence
5.14 New and material evidence – Appeals Council
5.15 New and material evidence – judicial review
5.16 Administrative/judicial notice

Subject Area 6: Post Hearing Appeals
6.1 Request for Review
6.2 New and Material Evidence
6.3 Appeals Council procedures
6.4 Federal Court – including jurisdiction and venue
6.5 Briefing/Issue selection
6.6 Strategy decisions
6.7 Standard of Review – legal error and substantial evidence
6.8 Remands – sentence four and six
6.9 Attorney Fees - EAJA and 406(b)
6.10 Circuit caselaw

SSD EXAMINATION MANUAL

(Revised 9/2016)

Please note: your demonstration of knowledge of ETHICS is important.

Failure of the ETHICS portion will result in failure of the examination.

The following are samples of the multiple choice portion of the examination:

SSD

1. **Which of the following is not correct under the Equal Access to Justice Act (EAJA). Fees-**

   A. can be awarded for merely obtaining a "sentence four" remand in the federal courts.

   B. can only be awarded if reversal for award of benefits is ordered by a federal court.

   C. can be awarded in conjunction with Section 406(b) attorney fees.

   D. require that the lesser amount of the EAJA fee award or the 406(b) award for the same services be refunded to the claimant.

ANSWER: B

2. Service of a complaint filed in District Court in a Social Security Claim or SSI claim must be made upon the United States Attorney, the Commissioner of Social Security and the US Attorney General. **At which office is service on the Commissioner considered completed:**

   A. The Office of Central Operations in Baltimore, MD.

B. The Program Service Center where favorable decisions are processed.

C. The Regional Program Service Center for the region in which the complaint is filed.

D. The Regional or General Counsel office for the region which is defending the case.

ANSWER D

SSD ETHICS

1. Your client's alleged impairment is based primarily on residual pain, numbness, and radiculopathy from a failed back surgery. The surgery was performed after the client was injured during a fall at work. Your client also has a workers' compensation claim but you are only handling the disability case. Besides being seen by the surgeon, your client has been treated for his back condition by a primary care physician ("PCP"). You have asked both doctors for medical source statements and only the PCP has obliged. The statement is favorable for your client. Just minutes before the hearing your client informs you for the first time that two weeks previous the surgeon sent him to a functional capacity evaluation ("FCE") at the request of the workers' compensation insurer. The client also tells you that his workers' compensation attorney has reviewed the FCE and had told him that it did not help his claim. At the hearing your client is questioned by the ALJ about his treatment with both the surgeon and PCP. The issue of the FCE does not arise. However, at the end of the examination the ALJ tells your client she has reviewed his PCP's medical source statement but wishes the surgeon had also provided a medical opinion because it would be helpful to her if she had more information about how his functioning was affected by the impairment. The ALJ then turns to you and asks if you anticipate submitting any other evidence from the surgeon's office.

Which of the following options do you think is the best course of action? Tell the ALJ you-

A. do not anticipate submitting any more evidence because you know the FCE is not beneficial for your client and you have a duty to be a zealous advocate for your client.

B. do not anticipate submitting any more evidence because the ALJ wanted a medical source statement from the surgeon and the FCE was performed by someone else and is not the surgeon's own opinion.

C. are uncertain as to whether you will submit additional evidence and then, after the hearing is over, obtain a copy of the FCE, review it, and submit it only if it is helpful for your client.

D. do anticipate submitting more evidence and then, after the hearing is over, obtain a copy of the FCE and submit it regardless of its helpfulness to your client.

ANSWER: D

2. Several years ago your client was driving a bus when she was rear-ended by a drunk driver and injured her neck and had to have surgery. The client recently received her initial denial and has just hired you on her Social Security disability case. Right before signing your attorney-client contract, she hands you a report from physical consultative examination. The report is favorable to a finding of disability. Your client tells you that her workers' compensation case is in the final stages of litigation and that she just fired the attorney who was working on the case. When you ask why, she indicates their professional relationship deteriorated for a number of reasons, including the fact that he told her that she should not file for Social Security disability until she received an impairment rating from her doctor and she did not receive a rating until about two years after the injury. The client then points to the report and tells you that she thinks this may help with her workers' compensation case. A day later the attorney for the workers' compensation insurer calls you and says your client gave him your number. The attorney says it looks like they are close to settling the workers' compensation case and asks you to send over the Social Security disability file so he can review it. You tell that although you will not send him the file, there is a medical report which is supportive of your client's

allegations. The attorney then asks if you can send just that report over as it could help with speeding up the resolution of the workers' compensation case.

Which of the following options do you think is the best course of action?

A. Send the report to the attorney because you should always act in a manner beneficial for your client, even in cases where you will not receive a professional fee.

B. Send the report to the attorney because your client has already given you implied permission when she told you she thought the report would help her workers' compensation case and she gave the attorney your number.

C. Do not send the report to the attorney because a medical opinion which is favorably disposed towards your client's disability might actually harm her workers' compensation claim because the burden of proof is different in each matter.

D. Do not send the report to the attorney until you get written permission from your client to do so.

ANSWER: D

The following are samples of the essay portion of the examination:

SAMPLE 1:

PRE-HEARING MEMORANDUM OR BRIEF

Ms. R. is a 41-year old woman who attended special education classes through the eighth grade. She is dyslexic and never learned to read or write. She went to work in the agricultural fields where she drove a farm tractor and operated other heavy equipment for many years. Her past relevant work included the agricultural work as well as eight months of work as a caretaker. In the caretaker job, Ms. R. had to drive an elderly man to dialysis treatments and assist him in and out of the shower.

In 2000, she was involved in an automobile accident in which she injured her cervical and lumbar spine, and she had a cervical fusion at C5-6 and C6-7. After the surgery she could no longer perform her agricultural driving job due to physical restrictions. On September 14, 2002, while working as a caregiver, she was injured in a fall when she

helped her patient into the shower. Subsequent to that fall she was treated by a pain management physician “A” who noted her low back and left leg pain complaints when he first treated her on June 17, 2003. A lumbar MRI revealed a herniated disc at L4-5 as well as spondylosis. The doctor prescribed Vicodin ES, Gabitril and Xanax as well as lumbar epidural steroid injections.

On August 27, 2003 Ms. R. complained to her treating doctor that she had continuing pain in the low back and right hip with noticeable muscle spasms. The doctor prescribed physical therapy and Robaxin for the spasms. On March 25, 2004, the doctor recommended a discogram and surgery, medication and physical therapy.

In August 2004, Ms. R. was involved in another motor vehicle accident when the vehicle she was driving was hit by a truck. She was evaluated by a neurosurgeon, and she was briefly treated by pain management specialist “B” who first saw Ms. R. on January 21, 2005. Pain management specialist “B” noted that a cervical MRI revealed a three-level disc herniation at C2-3, C3-4 and C4-5. A January 25, 2008 abnormal EMG study reflected paravertebral spasms suggestive of nerve root irritation, chronic bilateral C5 radiculopathy, and left carpal tunnel syndrome. Pain management specialist “B” diagnosed cervical radiculopathy, prescribed a splint for the claimant’s left hand and wrist, and recommended continued pain management with her original pain management physician A. Ms. R. had multiple physical complications and hospitalizations, including a stay for a lung embolism.
During her hospital stay in January 2008, Ms. R complained that she was experiencing breathing problems. Doctor C noticed lesions which had developed over Ms. R.’s extremities. Doctor C concluded that Ms. R. suffered from sarcoidosis.

Ms. R. subsequently began treatment with a primary care physician “D” who continues to treat her. Doctor D prescribed numerous medications including hydrocodone for back pain as well as alprazolam and amitriptyline for anxiety and sleep. Ms. R. is also on a regimen of prednisone in an attempt to control her sarcoidosis which causes severe problems with breathing.

After she injured herself at work in 2002, she was paid biweekly indemnity benefits for almost two years before she entered into a workers’ compensation lump sum settlement of $100,000.00. Ms. R.’s date last insured was December 31, 2007.

1. Write a pre-hearing memorandum or brief in support of Ms. R’s claim for Social Security Disability benefits. Please indicate the medical records and other documentary evidence that you have submitted to the ALJ.

SAMPLE 2:

You were recently retained on October 1, 2012 to represent Brenda on her claim for Title II benefits. Brenda filed a claim for Title II benefits on December 31, 2011 and she claimed an alleged onset date of August 8, 2010. Brenda was born on December 5, 1961, she completed the 11th grade and she divorced in 2007. Brenda completed her work history report in connection with her initial application and stated she worked as the manager of a bar from 1985 to 1993 and she worked off and on from 1994 thru 2010 as a waitress. Brenda's date last insured was December 31, 2012. Brenda has well documented moderate-to-severe avascular necrosis of the right hip, she had arthroscopic surgery on her left knee in 2007 and in 2010 with residual severe degenerative joint disease, fairly well controlled hypertension, mild asthma and fairly well controlled diabetes mellitus. Although she is able to ambulate well enough to take care of her activities of daily living, she claimed she was unable to stand or walk for more than a couple of hours throughout the day and she can no longer carry more than negligible weight due to the pain she has in her knee and hip. You conducted a pre-hearing conference with Brenda on December 17, 2012 for her hearing scheduled for February 5, 2013. At the pre-hearing conference, you discussed with Brenda that her orthopedic records mention she originally injured her knee when she fell while working as an exotic dancer. Brenda confides in you that she did not work as bar manager but rather as an exotic dancer. You advised her to complete an affidavit to the ALJ informing him that she never worked as a bar manager but rather as an exotic dancer. You advised her of the perjury implications. Also, you informed her that the vocational expert at the hearing always finds transferable skills from managerial jobs. Brenda said that she recently moved back to a small town and was forced to live with her mother. She stated she was embarrassed by the fact that she was an exotic dancer. She was also concerned about what her mother and other people in the town would think. Brenda was open to the idea of the affidavit but wanted to think about it. She stated she would get back with you when she decided what to do. On December 31, 2012, Brenda was involved in a Motor Vehicle Accident and suffered a closed-head injury. Her doctors state that she will never be the same mentally. The doctors state she will need to move in to an assisted living facility because she cannot mentally take care of herself. You and Brenda attend the hearing on December February 5, 2013, but Brenda's mother has to testify (Brenda's mother has no knowledge of Brenda's work history other than as a waitress) on her behalf because Brenda's diminished memory.

2. **How do you proceed with the representation at the hearing? Discuss all procedural issues and whether you disclose Brenda's true work history.**