

## Focus | Employee Benefits/Health Law

# The Ethical Duties with a Testifying Medical Expert

BY MARTIN MERRITT AND MAZIN SBAITI

The "Barry Goldwater Rule" is an ethical rule of the American Psychiatric Association (APA) dating back to 1964, when the editors of *Fact* magazine asked 12,356 psychiatrists during the presidential campaign between Goldwater and Lyndon Johnson, "Do you believe Barry Goldwater is psychologically fit to serve as President of the United States?" The answers caused such an uproar that the APA sprang into action, forbidding psychiatrists from making statements about a public figure's mental health unless the doctor had examined the person and was authorized to make disclosures about his or her mental health.

The Goldwater Rule is still honored by psychiatrists today and often clears their educated opinions from public discourse, which brings to mind a couple of other observations: "space abhors a vacuum" and "empty vessels make the most noise." In the age of Twitter and Facebook, the Goldwater Rule thus may result in a cloud of uneducated opinion on psychiatry matters in public forums.

In 2022, a colleague wrote about a similar problem with a medical doctor who was willing to serve as a testifying expert. The problem was that the doctor wanted a "letter of approval" from the Texas Medical Board (TMB) authorizing him to testify in Texas, even though he was not licensed in Texas.

The expert was concerned his testimony may constitute the "unauthorized practice of medicine." An old American Medical Association (AMA) policy pronouncement, Policy H-265.993, which was repeated in a 2003 AMA Policy Compendium, took the position that providing expert testimony is "practicing medicine." However, this pronouncement was questionable. The following year, a lengthy article in the *Journal of Medical Regulation*, "The Role of Licensing Boards in the Evaluation and Discipline of the Expert Witness," Volume 90, Issue 3 (2004), concluded the AMA Policy was probably wrong.

AMA ethics opinions are not law, and no court case law appears to suggest that the Texas Medical Board has ever adopted the position that a testifying doctor, by the

mere act of testifying, meets the definition of "practicing medicine" under Tex. Occ. Code 151.002(13). (The TMB provided "no comment" when asked.) The AMA, for its part, also seems to have backed off its position in Policy H-265.993, because the prior language about "practicing medicine" is not found in more recent versions of the AMA Code of Medical Ethics.

ining a testifying expert. There are several articles published by trial attorneys on the internet with sample questions based on AMA Opinion 9.7.1, among other AMA Ethics Opinions. A good example is "Using the AMA Code of Medical Ethics," from a series of *Plaintiff Trial Lawyer Tips* by Paul Luvera.

## AMA Ethics Opinion 9.7.1 "Medical Testimony"

AMA Ethics Opinion 9.7.1 warns that a doctor (just like a lawyer) can be disciplined for "dishonest acts," even if such acts do not involve "practicing medicine" (or "practicing law," in the case of a lawyer). Everyone understands "perjury" is "dishonest," but interestingly, Opinion 9.7.1 goes further to provide a "laundry list" of areas in which doctors must also provide "accurate" and "honest" testimony.

Among these duties, doctors must: (1) accurately represent their qualifications, (2) testify honestly, (3) not allow their testimony to be influenced by financial compensation, (4) testify only in areas in which they have appropriate training and recent, substantive experience and knowledge, (5) evaluate cases objectively and provide independent opinions, and (6) ensure that their testimony reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field considers standards that prevailed at the time the event under review occurred when testifying about a standard of care.


AMA Opinion 9.7.1 thus provides a particularly useful source for cross-exam-

## The Lawyer's Duty

It is worth remembering that lawyers also have a duty of "Candor Toward the Tribunal" with respect to testimony under Rule 3.03 of the Texas Disciplinary Rules of Professional Conduct. This Rule provides that "a lawyer shall not knowingly, offer or use evidence that the lawyer knows to be false." Section (b) of this Rule further states: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts."

In conclusion, doctors (or lawyers) should consider the ethical rules when agreeing to serve as a testifying expert, as violating these rules can affect their ability to practice medicine (or law). However, the law governing the admissibility of expert testimony may sometimes turn on varying standards. **HN**

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(D Mag. Best 2018, 2020, 2022)

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