REPORT OF THE BOARD OF TRUSTEES

B of T Report 19-A-24

Subject: Attorneys' Retention of Confidential Medical Records and Controlled Medical Expert's Tax Returns After Case Adjudication (Resolution 240-A-23)

Presented by: Willie Underwood, III, MD, MSc, MPH, Chair

Referred to: Reference Committee B

INTRODUCTION

Resolution 240-A-23, introduced by the Illinois State Medical Society, consisted of the following proposals:

> RESOLVED, That our American Medical Association advocate that attorney requests for controlled medical expert personal tax returns should be limited to 1099-MISC forms (miscellaneous income) and that entire personal tax returns (including spouse's) should not be forced by the court to be disclosed (Directive to Take Action); and be it further
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> RESOLVED, That our AMA advocate through legislative or other relevant means the proper destruction by attorneys of medical records (as suggested by *Haage v. Zavala*, 2021 IL 125918)[1] and medical expert's personal tax returns within sixty days of the close of the case. (Directive to Take Action).

FIRST RESOLVED

In cases requiring physicians as medical expert witnesses, their testimony is critical to the resolution of the case. They provide an invaluable service. At the same time, it is the right of the opposing party's attorney to request discovery that allows the attorney to cross-examine the witness to show potential bias. *See United States v. Abel*, 469 U.S. 45, 49-52 (1984). This discovery often involves the expert's financial history. Still, discovery must be balanced with the expert's privacy rights and the burden imposed. *See Grant v. Rancour*, 157 N.E.3d 1083, 1094-95 (Ill. 2020). ("[W]hile cross-examination is permissible to show bias, partisanship, or financial interest, there is a point at which such inquiries trample on the legitimate bounds of cross-examination and unduly harass or unnecessarily invade the privacy of the witness.").

There is no general rule or universal leaning that courts take when it comes to an expert's personal tax returns. Personal tax returns may be relevant to show an expert's potential biases – how often they have testified, how much they have earned for that testimony, what sources are paying for that testimony, etc. Courts decide whether personal tax returns should be allowable discovery on a case-

[1] The form of citation quoted in the First Resolved refers to an Illinois-specific publication, one that might not be available to those outside of Illinois. For ease of reference and accessibility, the Board will use the citation of the case as published in the North Eastern Reporter, a widely available publication. The citation is *Haage v. Zavala*, 183 N.E.3d 830 (Ill. 2021).

by-case basis, depending on the specific facts of the case. *See, e.g*., *Olson v. State Farm Fire & Cas. Co*., No. C14-0786RSM, 2015 WL 753501, at *3 (W.D. Wash. Feb. 23, 2015) ("there is no need for the expert to have to produce his or her tax returns, if the party seeking the discovery has accurate information regarding the percentage of income earned as an expert"); *but see Noffke v. Perez*, 178 P.3d 1141, 1150 (Alaska 2008) ("trial court determined that the income tax returns were relevant and that production of the returns would help clarify any stake the witness might have in the outcome of the case"). As with most discovery disputes, the resolution is within the court's discretion. "Courts must use their discretion to oversee the process and ensure that it is fair to both sides." *Grant*, 157 N.E.3d at 1095.

With this background, the Board agrees that seeking a medical expert's entire personal income tax returns is, in most instances, overly broad and unnecessarily invades the expert's privacy. The Board also agrees that limiting personal tax return discovery of a medical expert to miscellaneous income (1099-MISC forms) strikes a reasonable balance between allowing the probing for potential bias and protecting the expert's privacy and burdens. Miscellaneous income discovery would encompass the income that is received from serving as an expert, and the source of that income. In most cases, this should shed sufficient light on potential bias.

This position is also in line with current AMA policy, which states, "(c) The AMA supports the right to cross examine physician expert witnesses on the following issues: (i) the amount of compensation received for the expert's consultation and testimony; (ii) the frequency of the physician's expert witness activities; (iii) the proportion of the physician's professional time devoted to and income derived from such activities; and (iv) the frequency with which he or she testified for either plaintiffs or defendants." *Expert Witness Testimony*, H-265.994.

On the other hand, the Board believes the phrase "and that entire personal tax returns (including spouse's) should not be forced by the court to be disclosed" should be removed from the First Resolved. It would be an overreach for the AMA to tell courts how to use their discretion in managing discovery, which as discussed, varies on a case-by-case basis. In any event, the first part of the Resolved makes this latter part largely unnecessary. Advocating for the limitation of tax return discovery to miscellaneous income means that the discovery of entire personal tax returns is generally unnecessary and inappropriate. Along those lines, we suggest that the word "usually" be inserted between "should" and "be."

As such, the Board believes the First Resolved should be rewritten as follows:

> RESOLVED, That our American Medical Association advocate that attorneys' discovery requests for the personal tax returns of a medical expert for the opposing party should usually be limited to 1099-MISC forms (miscellaneous income).

SECOND RESOLVED

The Second Resolved likely lumps together two different categories of documents: 1) client medical records, and 2) tax returns of medical experts. The first category is personal health information ("PHI"), likely protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The second category is financial information that has nothing to do with HIPAA. Yet the Second Resolved advocates for the destruction of both types of documents within 60 days of the conclusion of a case, using *Haage v. Zavala*, 183 N.E.3d 830 (Ill. 2021) as an example.

In *Haage*, a personal injury matter, the trial court issued HIPAA qualified protective orders ("QPOs") expressly requiring the destruction of PHI within 60 days after the conclusion of the litigation. The insurance company objected to the QPOs, arguing that the orders prevented insurers from performing functions related to fraud detection and deterrence. The appellate court disagreed and enforced the QPOs, finding that no law or regulations required the insurance company to use or disclose plaintiffs' PHI after the conclusion of the litigation. *See Haage*, 183 N.E.3d at 853.

Thus, *Haage* may be relevant to the return or destruction of PHI under a HIPAA QPO, but it is irrelevant to the return or destruction of an expert's tax return information. Thus, the Second Resolved does not need to mention *Haage*.

Regarding the return of client records, the American Bar Association's ("ABA") Rules of Professional Conduct state: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled[.] The lawyer may retain papers relating to the client to the extent permitted by other law." ABA Rule 1.6(d). The ABA rules do not address exactly *when* attorneys are to return or destroy their client's records.

As a general matter, the Board agrees with the intent of the Second Resolved – that certain documents contain clients' or experts' sensitive and confidential information, and it is logical that those individuals do not want that sensitive information used or available for longer than absolutely necessary. Sixty days after the conclusion of litigation also seems like a reasonable time period for the return or destruction of those documents. At the same time, the Board notes that reaching this goal will likely be an uphill battle, as it would likely entail specific changes to the ABA's Model Rules of Professional Conduct, and could require changes to state and federal laws. Nonetheless, advocating for this goal seems like a worthwhile effort.

As such, the Board believes the Second Resolved should be rewritten as follows:

> RESOLVED, That our AMA support through legislative or other relevant means the proper return or destruction of client medical records and medical expert's personal tax returns by attorneys within sixty days of the conclusion of the litigation.

RECOMMENDATION

The Board of Trustees recommends that the following be adopted in lieu of Resolution 240-A-23 and the remainder of this report be filed:

1. That our American Medical Association advocate that attorneys' discovery requests for the personal tax returns of a medical expert for the opposing party should usually be limited to 1099-MISC forms (miscellaneous income) (New HOD Policy); and

2. RESOLVED, That our AMA support through legislative or other relevant means the proper return or destruction of client medical records and medical expert's personal tax returns by attorneys within sixty days of the conclusion of the litigation (New HOD Policy).

Fiscal Note: TBD