

## **Opinion No. 68-92**

September 5, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** H. Leslie Williams Assistant District Attorney Second Judicial District Bernalillo County Court House Albuquerque, New Mexico

### **QUESTION**

#### **FACTS**

In this opinion we are asked to consider the following work description which a person might propose to do:

Announce to the public or any individual a desire or willingness or readiness to undertake, for compensation, research into medical and surgical questions under investigation by government or private lawyers pertaining to criminal or civil personal injury matters. He would take a factual history from the lawyer which would include, among other things, the injured person's statement or history; he would be furnished with medical records and reports; and he would be furnished with the opinions of treating physicians and surgeons, as well as other consultants. His purpose would be to investigate all factual aspects of the case including, but not limited to, a research into medical writings. His specific purpose would be to advise the lawyer as to the essential and operative facts of a medical nature which are present or missing in the case, and to advise the lawyer as to his opinion as to the medical-legal effect of these facts in light of the medical writings which were the subject of the research made.

#### **QUESTIONS**

1. Must a person who would propose to do work as described above be licensed under Section 67-1-1 through Section 67-1-23, N.M.S.A., 1953 Compilation (Statutes that relate to the basic Sciences of the Human Arts)?
2. Must a person who would propose to do work as described above be licensed under Section 67-5-1 through Section 67-5-26, N.M.S.A., 1953 Compilation (Statutes relating to Medicine and Surgery)?
3. Assuming the above person had received a Doctor of Medicine Degree from an accredited university, but had not been licensed under any of the above sections, would he be able to testify in litigated cases and give his opinion as to the proper treatment and care which should be given the patient involved in the litigation.

#### **CONCLUSIONS**

1. See analysis.
2. No.
3. See analysis.

## OPINION

### **{\*144} ANALYSIS**

Section 67-1-1 through 67-1-23, New Mexico Statutes Annotated, 1953 Compilation, The Basic Sciences of the Healing Arts, was repealed by the New Mexico Legislature by Laws 1968, Chapter 3, Section 16. The repeal was to take effect immediately. Since the statutes in question have been repealed there is no need to decide whether a person undertaking work as proposed would have to be licensed under the basic sciences of the healing arts.

The main consideration of question 2 is whether the work description which has been summarized by the language:

"his specific purpose would be to advise the lawyer as to the essential and operative facts of a medical nature which are present or missing in the case, and to advise the lawyer as to his opinion as to the medical-legal effect of these facts in light of the medical writings which were the subject of the research made."

constitutes the practice of medicine. If the anticipated work did constitute the practice of medicine then the person would have to be licensed under Section 67-5-1 through 67-5-26, N.M.S.A., 1953 Compilation. After a thorough search of the statutes, New Mexico case law and case law of other jurisdictions, it is the opinion of this office that a person whose work adhered to the work description as given would not have to be licensed under the statutes governing medicine and surgery.

The work proposed to be done by the person in question does not constitute the "practice of medicine". The "practice of medicine" is defined in Section 67-5-10, N.M.S.A., 1953 Compilation. The statute states in part:

"For the purpose of this act (67-5-1 to 67-5-5, 67-5-8 to 67-5-14), the words "practice of medicine" shall mean to open an office for such purpose or to announce to the public or any individual in any way, a desire or willingness or readiness to treat the sick or afflicted, or to investigate or {\*145} to diagnose, or offer to investigate or diagnose any physical or mental ailment or disease of any person, or to suggest, recommend, prescribe or direct, for the use of any person any drug, medicine, appliance or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture or bodily injury or deformity, after having therefor, either directly or indirectly, any bonus, gift or compensation."

Nowhere in the proposed work description are there any elements of the practice of medicine as defined in the statute.

The proposed work description does not constitute the "practice of medicine" if viewed in the light of definitions of "practicing medicine" that are found in various case decisions. One of the commonly used definitions of the practice of medicine is found in **Underwood v. Scott**, 43 Kan. 714, 23 Pac. 942 (1890).

"The practice of medicine may be said to consist of three things: First, judging the nature, character, and symptoms of the disease; second, in determining the proper remedy for the disease; and third, in giving or prescribing the application of the remedy to the disease."

Also see **State v. Catellier**, 63 Wyo. 123, 179 P.2d 203 (1947); **Ex Parte Holsted**, 147 Tex. Crim. Rpts. 453, 182 S.W. 2d 479 (1944) and 41 Am. Jur. Physicians and Surgeons, Section 24 "What Constitutes Practicing Medicine within the Meaning of Licensing Statutes".

In Opinion of the Attorney General No. 65-104, issued June 22, 1965 the Attorney General ruled that an agreement whereby an unlicensed psychiatrist was to be hired in an administrative capacity only at the New Mexico State Hospital did not constitute a practice of medicine in violation of New Mexico law. (See also opinion of the Attorney General No. 58-167, issued August 13, 1958).

Finding no basis for stating that the proposed work description as set forth constitutes the practice of medicine this office is of the opinion that the person in question need not be licensed.

The Office of the Attorney General can give no opinion as to whether the person in question would be able to testify in litigated cases. The general rule of evidence is stated in **Jones on Evidence**, 5th Edition 1958 Vol. 2, Section 414.

"The question as to whether or not a witness who is offered as an expert possesses the requisite qualifications to entitle him to give expert-opinion testimony, is one which is to be determined by the court."

By: Warren O. F. Harris

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