

### ***9.4.2 Reporting Incompetent or Unethical Behaviors by Colleagues***

Medicine has a long tradition of self-regulation, based on physicians' enduring commitment to safeguard the welfare of patients and the trust of the public. The obligation to report incompetent or unethical conduct that may put patients at risk is recognized in both the ethical standards of the profession and in law and physicians should be able to report such conduct without fear or loss of favor.

Reporting a colleague who is impaired, incompetent, or who engages in unethical behavior is intended not only to protect patients, but also to help ensure that colleagues receive appropriate assistance from a physician health program or other service to be able to practice safely and ethically. Physicians must not submit false or malicious reports.

Physicians who become aware of or strongly suspect that conduct threatens patient welfare or otherwise appears to violate ethical or legal standards should:

- (a) Report the conduct to appropriate clinical authorities in the first instance so that the possible impact on patient welfare can be assessed and remedial action taken. This should include notifying the peer review body of the hospital, or the local or state medical society when the physician of concern does not have hospital privileges.
- (b) Report directly to the state licensing board when the conduct in question poses an immediate threat to the health and safety of patients or violates state licensing provisions.
- (c) Report to a higher authority if the conduct continues unchanged despite initial reporting.
- (d) Protect the privacy of any patients who may be involved to the greatest extent possible, consistent with due process.
- (e) Report the suspected violation to appropriate authorities.

Physicians who receive reports of alleged incompetent or unethical conduct should:

- (f) Evaluate the reported information critically and objectively.
- (g) Hold the matter in confidence until it is resolved.
- (h) Ensure that identified deficiencies are remedied or reported to other appropriate authorities for action.
- (i) Notify the reporting physician when appropriate action has been taken, except in cases of anonymous reporting.

***AMA Principles of Medical Ethics: II***

*Background report(s):*

CEJA Report 3-A-16 Modernized *Code of Medical Ethics*

CEJA Report A-I-91 Reporting impaired, incompetent or unethical colleagues

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## CEJA Report A – I-91 Reporting Impaired, Incompetent or Unethical Colleagues

### INTRODUCTION

At the 1991 Annual meeting of the House of Delegates, Report C of the Council on Ethical and Judicial Affairs, regarding the reporting of impaired, incompetent, or unethical colleagues, was referred to the Council for further examination. The Council has reviewed the issue and issues the following report.

The medical profession has a long tradition of self-regulation. This tradition is based, at least in part, on the unique qualifications physicians possess, by virtue of their specialized knowledge and skills, to evaluate the clinical performance of their colleagues. The tradition of self-regulation in medicine also is based on the enduring commitment of physicians to safeguard the welfare and trust of the public, regardless of their personal interests or concerns.

Society generally has honored the right of professions to regulate the conduct of their members, provided the efforts employed for this purpose are effective in protecting members of society and promoting the public welfare. However, when the public perceives that appropriate initiative has not been displayed by members of a profession in promoting ethical standards or in safeguarding the public from abuse, the perceived deficiencies tend to be remedied through enhanced external control.

Despite a lengthy tradition of self-governance, the medical profession frequently has been a target of public criticism for its perceived failure to adequately identify and discipline impaired, incompetent, and unethical physicians. A public opinion survey conducted by the American Medical Association, (AMA), in 1988 revealed that 60% of respondents believe the medical profession is doing only a fair to poor job of policing its ranks and confronting physician impairment.<sup>1</sup> The profession has been accused of inappropriately protecting the careers and reputations of colleagues at the expense of the health and well-being of the public. Such practices, whether by many or by few, are contrary to the ethical principles which serve as the basis for medical practice and must not be tolerated by the profession.

### DUTY TO REPORT: HISTORICAL ASPECTS

The ethical standards of the medical profession have required, for nearly 200 years, that physicians report to appropriate authorities potentially injurious conduct by colleagues. In 1803, an English physician and philosopher, Thomas Percival, published a treatise entitled "Medical Ethics; or a Code of Institutes and Precepts, adapted to the Professional Conduct of Physicians and Surgeons." This historic publication, which served as the basis for the American Medical Association's first code of ethics in 1847, was perhaps the most significant document since the Oath of Hippocrates in the fifth century B.C. to establish standards of professional conduct for physicians and surgeons. Although Percival's code admonished physicians not to reveal to patients information or occurrences that may tend to injure the reputation of a colleague, the code also contained the following provision:

[T]hough the character of a professional busybody, whether from thoughtlessness or craft, is highly reprehensible, there are occasions which not only justify but require a spirited interposition. When artful ignorance grossly imposes on credulity; when neglect puts to hazard an important life; or rashness threatens it with still more imminent danger; a medical neighbor, friend, or relative, apprized [sic] of such facts, will justly regard his interference as a duty.<sup>2</sup>

The obligation of physicians to report inappropriate conduct by colleagues was strengthened considerably in 1912, when the AMA's Principles of Medical Ethics were revised. The revised code of ethics stated, in

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part, that physicians "should expose without fear or favor, before the proper medical or legal tribunals, corrupt or dishonest conduct of members of the profession."

This ethical duty has been preserved for nearly a century despite numerous changes in the medical profession's standards of ethical conduct. In 1972, for example, the AMA Council on Mental Health issued a report on physician impairment,<sup>3</sup> in which it was noted that every physician has an ethical responsibility to recognize impairment or incompetence in colleagues and to provide appropriate counsel with respect to obtaining treatment and curtailing or suspending the practice of medicine. Today, the Principles of Medical Ethics of the AMA state that physicians must "strive to expose those physicians deficient in character or competence, or who engage in fraud or deception." In addition, the fundamental duty of physicians to report inappropriate conduct by colleagues has been reinforced by the Council on Ethical and Judicial Affairs of the AMA, through an ethical opinion on Discipline and Medicine:

Discipline and Medicine. Incompetence, corruption or dishonest or unethical conduct on the part of members of the medical profession is reprehensible. In addition to posing a real or potential threat to patients, such conduct undermines the public's confidence in the profession. A physician should expose, without fear or favor, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession. (Section 9.04, *Current opinions of the Council on Ethical and Judicial Affairs of the American Medical Association*)<sup>4</sup>

#### REPORTING RESPONSIBILITIES MANDATED BY LAW

The duty of physicians to report conduct that may be injurious to patients has been incorporated not only into the code of ethics of the medical profession, but also, in one form or another, into the laws of numerous jurisdictions. Physicians in many states are obligated by law to report to the licensing board the conduct of any colleague who may be impaired, incompetent, or unethical. Failure to do so is grounds in such states for disciplinary action. In Minnesota, for example, three physicians were reprimanded and fined in 1987 by the state board of medical examiners for their failure to report the chemical dependency of a member of their group medical practice.<sup>5,6</sup> The penalties were imposed despite actions by the partners to enroll their colleague in a treatment program for impaired physicians and to prevent him from practicing medicine while under the influence of chemical substances. In some jurisdictions, physicians who fail to comply with reporting requirements not only are subject to disciplinary action, but also are liable for injuries sustained by patients as a result of any inappropriate treatment rendered by colleagues known to be impaired or incompetent.<sup>7</sup> Reporting also may be required of hospitals, professional liability insurers, court officials, medical societies, and other licensed professionals.

Despite the widespread adoption by states of mandatory reporting laws, few complaints against physicians are received from hospitals and physicians. In New York, for example, during a three-year period between September 1975 and September 1978, physicians were responsible for just over 3% of the 3,084 complaints filed with the licensing board.<sup>8</sup> Similarly, in Florida, during a six-year period from 1979 to 1985, hospitals accounted for fewer than 3% of the 6,400 complaints received against physicians.<sup>9</sup> In Texas, however, where reporting by individual physicians is mandated by law, 12% of the complaints received in 1985 and 1986 by the Texas State Board of Medical Examiners originated with licensed physicians.<sup>10</sup> Reports from such sources are important because, in comparison to patient complaints, they tend to result in more disciplinary actions.<sup>11</sup>

These data do not conclusively demonstrate that inappropriate conduct by physicians is underreported by their colleagues. They reflect only reports made directly to state licensing entities. It is likely that many physicians choose to confront a colleague directly when inappropriate conduct is suspected, or to bring the matter to the attention of a supervisor such as the chief of the department. This type of reporting is an important method of addressing inappropriate behavior of colleagues, since it is often a more direct and

efficient way of resolving problem behavior. However, when the number of reports by physicians directly to the licensing authorities are contrasted with the sensational accounts occasionally reported by the media, they tend to reinforce the widespread perception that physicians are reluctant to openly challenge the conduct of peers and to conscientiously protect the health and well-being of the public.

One recent study supports the explanation that impaired and incompetent colleagues are confronted directly when potential problems in care are observed, or that physicians tend to report such conduct to someone other than the licensing board, such as the chief of a hospital program or appropriate clinical service.<sup>12</sup> The study surveyed 76 resident physicians at an urban teaching hospital. Five scenarios involving impaired and incompetent physicians (including house officers and attending physicians) were described to each study participant. Five potential courses of action were presented and each participant was asked to specify which action, if any, was appropriate for each of the case scenarios. When faced with a fellow house officer who was alcohol-impaired, 96% of the residents would confront the impaired physician directly. However, when faced with an attending physician who was alcohol impaired, 72% indicated that they would report the impaired physician to the chief resident. In contrast, most of the residents who participated in the study, when faced with an incompetent physician, would inform the chief resident, regardless of whether the physician involved was an attending physician or house officer. It is impossible in this type of study however, to predict whether the actual behavior of physicians corresponds to the participants' responses.

Physicians are often discouraged from reporting by the burdens of the legal system. Reporting of impaired and incompetent colleagues often entails long and complex legal procedures.<sup>13</sup> Physicians may suspect inappropriate behavior but not feel that they have a sufficient factual basis to defend a formal report to licensing authorities. While statutes which are meant to protect good faith reporting are often helpful, often there is still fear of legal retaliation from the accused physician.<sup>13</sup> It is therefore important for physicians to work to assure that state laws regarding immunity for reporting are crafted to protect the reporting physician from retaliatory legal action on the part of the accused physician.

Physicians may also be discouraged from making reports to official authorities because of fear of negative professional repercussions, either from the accused physician or from colleagues. In cases where the potential for negative effects on the reporting physician's practice or career are great, some physicians may be prompted to make anonymous reports to an authority. While necessary under certain circumstances in order to minimize potential damage to the reporting physician, anonymous reports are not encouraged because of the potential for abuse. However, because physicians may have legitimate justification for making anonymous reports, such reports should receive appropriate review and confidential investigation by any disciplinary or investigatory bodies.

## TYPES OF CONDUCT THAT ARE SUBJECT TO REPORTING

The ethical and legal standards to which physicians are expected to conform require the reporting of various kinds of conduct that typically falls within one of three categories: (1) impairment, (2) incompetence, and (3) unethical conduct.

### *Impairment*

In a 1972 report of the AMA Council on Mental Health,<sup>3</sup> physician impairment was defined as "the inability to practice medicine with reasonable skill and safety to patients by reason of physical or mental illness, including deterioration through the aging process, the loss of motor skills, or the excessive use or abuse of drugs, including alcohol." Impairment can also include conditions such as extreme fatigue and emotional distress. Numerous studies published in the medical literature have included estimates of the number of impaired physicians practicing medicine in the United

States. These studies, however, have been criticized for being inconsistent or unreliable.<sup>14</sup>

However, reliable information does indicate that drug and/ or alcohol abuse by physicians, combined with inappropriate prescribing practices, account for 75% or more of the disciplinary actions currently reported by state licensing boards.<sup>15</sup> For every official action reported, five to ten licensed physicians are sanctioned informally by the state licensing boards,<sup>16,17</sup> generally through binding agreements that impose specific restrictions or conditions (e.g., submission to random drug screens) on the physician's license to practice medicine. Also, the first national survey of substance abuse among physicians showed that 8.2% of physician respondents report abuse or dependence on drugs or alcohol.<sup>18</sup> It is difficult to infer an accurate estimation of physician impairment from the data, since the study only surveyed physicians about usage and not impairment resulting from usage of these substances.

It has been found, however, that regardless of its prevalence, physician impairment-particularly when caused by drug and/ or alcohol abuse-can be curtailed dramatically through early identification and rehabilitation. Studies consistently have documented successful long-term rehabilitation rates of 66% to 75%.<sup>19,20</sup> Treatment is most effective when combined with random urine monitoring conducted over a two to four year period and when legal restrictions against the physician's medical license are avoided.<sup>20</sup>

To assist in the identification and rehabilitation of impaired physicians, medical societies in all 50 states have established impaired physician programs. In addition, many hospitals and state licensing boards have impaired physician programs.

These programs focus on rehabilitation, rather than on discipline and punishment. Physicians in these programs frequently are able to confront their impairment in a constructive manner, before irreparable harm occurs to their patients and their medical careers. General public good is best served by programs which emphasize rehabilitation of the impaired physician rather than punitive measures against a physician's license or ability to practice medicine. Because of their special expertise, physicians are a valuable social resource. Providing rehabilitation ensures that an impaired physician's valuable skills are not lost.

To safeguard patients, the hospital in which an impaired physician practices must be able to monitor the physician's actions. Accordingly, impairment should be reported to the hospital's in-house impairment program, if one is available. If the hospital does not have its own program, then either the chief of an appropriate service or the chief of the hospital staff should be alerted. Either of these individuals may then be able to facilitate the impaired physician's entrance into an external impaired physician program.

The extent of communication and coordination between hospital personnel or bodies and impaired physician programs may vary. If making a report of impairment through the usual hospital channels is inappropriate or unfeasible, then a report should be made to an external impaired physician program, such as one run by the county or state medical society or by the state licensing board.

Impaired physician programs vary in size, scope, and effectiveness. Reports of impairment should be directed toward that impaired physician program which would most effectively address the impaired physician's needs while safeguarding patient welfare. Although 96.8% of physicians – even when engaged in an office based practice - have clinical privileges at a hospital,<sup>19</sup> those with no hospital affiliation should be reported directly to an impaired physician program.

If reporting to an individual or program which would facilitate the entrance of the impaired physician into a rehabilitation program cannot be accomplished, then the impaired physician should be reported directly to the state licensing board.

### *Incompetence*

Physician incompetence has been defined as "the inability to provide sound medical care because of deficient knowledge, poor judgment, or substandard clinical skills."<sup>12</sup> Data regarding the extent of physician incompetence not only is scarce, but it also is highly unreliable. Estimates of incompetence frequently are tied to the volume of malpractice litigation or to studies of adverse medical outcomes. However, these criteria are not reliable measures of true incompetence.

When identified early, the effects of incompetence frequently can be alleviated. Educational requirements can be imposed on physicians deficient in knowledge or training, clinical privileges can be restricted, or mandatory supervision of specified procedures can be imposed. The objective, as with physician impairment, is to identify and, when possible, to remedy deficiencies that may tend to compromise patient care. The primary emphasis is on remedial measures, which encompass education and additional training, and which complement the existing skills of the physician, rather than on punishment of the physician. Remedying the effects of incompetence also serves the public interest by ensuring that a physician's valuable skills are retained.

Initial reports of incompetence therefore should be made to the appropriate clinical authority who would be empowered to assess the potential impact on patient welfare and facilitate remedial action, such as the chief resident, the chief of an appropriate clinical service, or the chief of staff. For members of a group medical practice, the medical director would be the most appropriate individual to whom to address reports of incompetence. The physician's competence can then be evaluated and immediately addressed. The individual who receives a report of incompetence should notify the hospital peer review committee where warranted by the circumstances. Physicians who receive reports of incompetence have an ethical duty to critically and objectively evaluate the reported information and to assure that identified deficiencies are either remedied or further reported to the state licensing board. Instances of incompetence by physicians who have no hospital affiliation should be reported to the local or state medical society. In all cases, continued behavior that is potentially injurious to patients must be reported to the state licensing board.

Some specific instances of incompetence may be of a sufficiently serious nature as to warrant an immediate report to the licensing board, in order to prevent harm or injury to patients. Actions which would constitute an imminent danger to the health of patients should be reported directly to the licensing board. The licensing board may then temporarily suspend the physician's license until the proper remedial or disciplinary action can be taken.

### *Unethical Conduct*

Unethical conduct in the practice of medicine encompasses a variety of behaviors, including fraud, corruption, dishonesty, greed, exploitation of patients, and violations of professional ethics. Physicians may behave in an unethical manner either because they are unaware of specific professional standards which they are expected to observe, or they may, through deliberate and conscious decisions, disregard such standards. Although the incompetent practice of medicine and the practice of medicine while impaired can also be considered unethical, both types of behavior should be reported according to the guidelines stated above.

Local medical societies are concerned with all violations of ethical standards, from withholding of medical records to life-threatening clinical practices. Unethical conduct which threatens patient care or welfare is under the purview of the appropriate authority for a particular clinical service. In addition, much of unethical behavior violates the standards set by the state licensing board. Some unethical acts also violate criminal laws and are under the jurisdiction of law enforcement authorities. Therefore,

unethical practices should be reported to the entity concerned with monitoring or reviewing a particular practice. If the reported activity resulted from a lack of awareness about ethical standards, the problem may be remedied simply by providing the physician with appropriate counsel and education. Actions of a more deliberate nature, however, may warrant punitive action by appropriate bodies, such as the hospital peer review committee, the state or county medical society, or the state licensing board.

In all circumstances, the physician or person who receives a report of impairment, incompetence, or unethical behavior should, to the greatest extent possible, maintain the confidentiality of both the reporting physician and the physician who has been reported.

## SUMMARY-GUIDELINES FOR FULFILLING REPORTING OBLIGATIONS

The Council on Ethical and Judicial Affairs has developed a series of guidelines to assist physicians in fulfilling their ethical obligation to report the potentially injurious conduct of colleagues.

Physicians have an ethical obligation to report impaired, incompetent, and unethical colleagues. Physicians should be familiar with the reporting requirements of their own state and comply accordingly.

1. Impairment
  - a. Impairment should be reported to the hospital's in-house impairment program, if available. If no in-house program is available, or if the type of impairment is not normally addressed by an impairment program, e.g., extreme fatigue and emotional distress, then the chief of an appropriate clinical service, the chief of staff of the hospital, or other appropriate supervisor ( e.g., the chief resident) should be alerted.
  - b. If a report cannot be made through the usual hospital channels, then a report should be made to an external impaired physician program. Such programs typically would be operated by the local medical societies or state licensing boards.
  - c. Physicians in office-based practices who do not have clinical privileges at an area hospital should be reported directly to an impaired physician program.
  - d. If reporting to an individual or program which would facilitate the entrance of the impaired physician into an impaired physician program cannot be accomplished, then the impaired physician should be reported directly to the state licensing board.
2. Incompetence
  - a. Initial reports of incompetence should be made to the appropriate clinical authority who would be empowered to assess the potential impact on patient welfare and to facilitate remedial action, e.g., the chief resident, the chief of an appropriate clinical service, the chief of the hospital staff, or the medical director of a group medical practice.
  - b. The individual who receives a report of incompetence should, in turn, notify the hospital peer review body where appropriate. Physicians who receive reports of incompetence have an ethical duty to critically and objectively evaluate the reported information and to assure that identified deficiencies are either remedied or further reported to the state licensing board.
  - c. Instances of incompetence by physicians who have no hospital affiliation should be reported to the local or state medical society.

- d. Continued behavior that is potentially injurious to patients must further be reported to the state licensing board.
- e. If the incompetence is of a sufficiently serious nature as to pose an immediate threat to the health of the physician's patients, then it should be reported directly to the state licensing board.
- 1. Unethical conduct. Unethical behavior (which does not fit into the category of either incompetence or impairment) should be reported in accordance with these guidelines:
  - a. Unethical conduct which threatens patient care or welfare should be reported to the appropriate authority for a particular clinical service, i.e., the chief resident, the chief of an appropriate clinical service, or the chief of the hospital staff.
  - b. Unethical behavior which violates the provisions of the state licensing board should be reported to the state licensing board.
  - c. Unethical conduct which violates criminal statutes should be reported to the appropriate law enforcement authorities.
  - d. Examples of unethical conduct which do not fall into the above three categories, or unethical conduct which has not been addressed through other channels should be reported to the local or state medical society.
- 4. Where the impairment, incompetence, or unethical behavior of a physician continues despite the initial report(s), the reporting physician should report to a higher or additional authority. In order to aid physicians who report inappropriate behavior of colleagues in carrying out this obligation, the person or body receiving the initial report should notify the reporting physician when appropriate action has been taken.
- 5. Physicians should work to assure that state laws provide immunity to those who report impaired, incompetent, or unethical colleagues.
- 6. In certain circumstances, an anonymous report may be the only practical method of alerting an authoritative body to a colleague's misconduct. Anonymous reports of misconduct should receive appropriate review and confidential investigation by authorities.
- 7. Principles of due process must be observed in the conduct of all disciplinary matters involving physician participants at all levels. However, the confidentiality of the reporting physician should be maintained to the greatest extent possible within the constraints of due process, in order to minimize potential professional recriminations.
- 8. The medical profession as a whole must correct the misperception that physicians are not adequately protecting the public from incompetent, impaired, or unethical physicians by better communicating its efforts and initiatives at maintaining high ethical standards and quality assurance.

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