

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS

CEJA Report 5 - A-03

Subject: Professional Self-Regulation and the Judicial Function
of the Council on Ethical and Judicial Affairs

Presented by: Leonard J. Morse, MD, Chair

1 The Council on Ethical and Judicial Affairs has recently undertaken a careful review of its judicial
2 function. This review was motivated in part by the considerable attention the concept of
3 professionalism has received in many areas of medicine. When professionalism is defined, three
4 key elements are generally identified: the expertise that is acquired by a professional through
5 specialized training; the societal value of the activity the professional performs; and the public trust
6 that the profession will regulate itself, which often leads to the establishment of a code of conduct.
7 These characteristics clearly pertain to the medical profession and have been embodied in many of
8 the activities of the American Medical Association since it was established in 1847. Since then, the
9 Council on Ethical and Judicial Affairs, or its predecessors, has been instrumental in defining the
10 elements of medical professional integrity by establishing standards of ethical conduct and by
11 encouraging AMA members to uphold these standards.

12
13 The Council's work pertaining to the review of physician misconduct (on the basis of our AMA's
14 *Principles of Medical Ethics*) and possible action against membership in the Association needs to
15 be emphasized. Based on anecdotal information, CEJA believes that many AMA members are not
16 fully aware of how CEJA exercises its judicial functions. This report is intended to clarify certain
17 aspects of CEJA's procedures, particularly as they concern: the categories of physicians whose
18 ethical conduct may be investigated; the evidence CEJA considers when it makes a determination;
19 the types of disciplinary sanctions CEJA can impose and the criteria used for imposing sanctions;
20 and certain other procedural aspects of the disciplinary peer review process.

21 22 BACKGROUND AND RELEVANT AMA BYLAWS

23
24 The following sections of the AMA Bylaws are most relevant to this report:

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26 **1.111 Admission.** A person eligible for active constituent membership in the American
27 Medical Association becomes a member of the AMA upon certification by the secretary of the
28 constituent association to the Executive Vice President of the AMA, provided there is no
29 disapproval by the Council on Ethical and Judicial Affairs. The Council may consider information
30 pertaining to the character, ethics, professional status and professional activities of the applicant.
31 The Council shall provide by rule for an appropriate hearing procedure to be provided to the
32 applicant.

33
34 **1.121 Admission.** Active direct members are admitted to membership upon application to the
35 Executive Vice President of the American Medical Association, provided that there is no
36 disapproval by the Council on Ethical and Judicial Affairs. The Council may consider information
37 pertaining to the character, ethics, professional status and professional activities of the applicant.

1 The Council shall provide by rule for an appropriate hearing procedure to be provided to the
2 applicant.

3
4 **1.1212 Objections.** Objections to applicants for active direct membership must be received by
5 the Executive Vice President of the American Medical Association within forty-five (45) days of
6 receipt by the constituent association of the notice of the application for such membership. All
7 objections will immediately be referred to the Council on Ethical and Judicial Affairs for prompt
8 disposition pursuant to the rules of the Council on Ethical and Judicial Affairs.

9
10 **1.20 Maintenance of Membership.** A member may hold only one type of membership in the
11 American Medical Association at any one time. Membership may be retained only as long as the
12 member complies with the provisions of the Constitution and Bylaws and *Principles of Medical*
13 *Ethics* of the AMA.

14
15 **1.611** The Council on Ethical and Judicial Affairs, after due notice and hearing may censure,
16 suspend or expel an active constituent member from the American Medical Association for an
17 infraction of the Constitution or these Bylaws, for a violation of the *Principles of Medical Ethics*,
18 or for unethical or illegal conduct.

19
20 **1.621** The Council on Ethical and Judicial Affairs, after due notice and hearing, may censure,
21 suspend or expel any active direct, affiliate, honorary or international member of the AMA for an
22 infraction of the Constitution or these Bylaws, for a violation of the *Principles of Medical Ethics*,
23 or for unethical or illegal conduct.

24
25 **6.403 Original Jurisdiction.** The Council on Ethical and Judicial Affairs shall have original
26 jurisdiction in:

27
28 **6.4031** All questions involving membership.

29
30 DESCRIPTION OF CEJA DISCIPLINARY ACTIVITIES

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32 *Categories of Physicians Whose Ethical Conduct May Be Investigated: AMA Members and*
33 *Applicants for Membership*

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35 The Council's disciplinary function primarily pertains to current AMA members and to
36 membership applicants. The Bylaws specifically require that CEJA ascertain the ethical fitness of
37 AMA members. The Bylaws do not grant CEJA the explicit authority to investigate non-member
38 physicians, although Bylaw B-6.4023 allows CEJA to investigate matters of general interest to the
39 medical community and Bylaw B-6.4025 allows the President to appoint investigating juries in
40 special situations.

41
42 If CEJA were to investigate the conduct of a non-member and determine that he or she had violated
43 the *Principles of Medical Ethics* or other ethical standard, action would be limited to censure of the
44 physician or reporting of the conduct to an appropriate entity. Also, such extension of the
45 Council's role could require time and resources beyond the current capabilities of the Council.
46 Finally, although both the common law and the Federal Health Care Quality Improvement Act, 42
47 U.S.C. § 11111, may shield CEJA from defamation actions when it has reviewed the ethical
48 conduct of AMA members, these legal defenses are less likely to apply if CEJA should extend its
49 scope of review beyond AMA membership. Therefore, the Council has not adjudicated complaints
50 against non-AMA member physicians.

1 *Evidence Considered in Making Disciplinary Determinations*

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3 The Council generally considers disciplinary cases in which the person under investigation has
4 previously been found liable by, or pleaded guilty before, a governmental tribunal, such as a state
5 licensing board, a criminal court, or a court martial, or before a governmental agency, such as the
6 Federal Drug Enforcement Agency or the United States Department of Health and Human
7 Services. It may also consider a case in which another medical society or a hospital medical staff
8 has taken disciplinary action against a physician.

9
10 Except in the rarest of circumstances, CEJA does not reexamine the determination of liability or of
11 guilt. It confines its inquiry to evidence bearing on whether to impose sanctions against the
12 existing member or to reject an application for membership. It also weighs evidence relevant to the
13 type of disciplinary sanction to be imposed. These restrictions are based, in part, on the fact that
14 the time and other resources available to CEJA for its disciplinary function are limited.

15
16 Evidence Regarding Potential Misconduct of Medical Experts

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18 Over time, much attention has been paid to the conduct of physicians who participate in litigation
19 as expert witnesses. The Council regularly receives complaints from physicians who have been
20 defendants in medical malpractice suits, asking for a review of the conduct of expert witnesses who
21 have testified against them and the imposition of sanctions on the basis that such testimony violates
22 Opinion E-9.07, "Medical Testimony." This opinion generally encourages physicians, when called
23 upon, to assist in the administration of justice. It also requires that medical experts testify
24 "honestly and truthfully, to the best of their medical knowledge."

25
26 It is worth noting that the decision in *Austin v. American Association of Neurological Surgeons*,
27 253 F.3d 967 (7th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), supports a professional
28 association's right to discipline members for false testimony. In light of this decision, various other
29 medical societies and our AMA House of Delegates itself have expressed interest in such
30 procedures.

31
32 With regards to misconduct by an expert witness, CEJA reviews a violation of Opinion E-9.07 in
33 the same manner as other violations of the *Code of Medical Ethics*. The Council would, as a
34 routine matter, review such a violation if a court were to find a member or applicant guilty of
35 perjury for false testimony or a licensing board were to make its own determination and impose
36 licensure sanctions for this reason. However, such a situation has not yet occurred.* Absent such
37 finding by a court or licensing board, CEJA would be unlikely to investigate or impose sanctions
38 for this type of alleged violation.

* The North Carolina Medical Board recently found that a physician had testified falsely against another physician in a professional liability suit and revoked his license. *In re Gary James Lustgarten, M.D.* The matter is being appealed. This physician, however, is not an AMA member.

1 *Types of Disciplinary Sanctions*

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3 Bylaw B-1.111 explicitly authorizes CEJA to disapprove a membership application, and Bylaws B-
4 1.611 and B-1.6121 explicitly authorized CEJA to censure, suspend, or expel current members.

5 Implicit in their grants of authority is the right to impose lesser or substantially similar sanctions.

6 Disciplinary sanctions that CEJA may impose against an existing AMA member or a membership
7 applicant are:

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9 (a) rejection of an application;

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11 (b) acceptance of an application, but conditioned on terms of probation;

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13 (c) expulsion of an existing member;

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15 (d) probation of an existing member;

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17 (e) suspension of an existing member or

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19 (f) admonishment, reprimand, or censure.

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21 Rejection or expulsion is imposed only when CEJA determines that the conduct of the physician
22 under review has seriously violated the *Principles of Medical Ethics* and that it would discredit our
23 AMA to have that physician as a member.

24

25 Probation stems from a determination that a physician may obtain or retain AMA membership, but
26 only so long as the physician behaves ethically and submits periodic written reports to CEJA
27 attesting to that conduct. Probation is imposed on applicants or members who have committed
28 serious professional offenses but for whom rejection or expulsion would be inappropriate, because,
29 for example, the physician has participated in a remediation or rehabilitation program. The right to
30 impose probation arises from CEJA's authority to reject applicants or expel them outright.

31

32 The Council will frequently consider probation in situations involving substance abuse, provided
33 that the physician participates in an appropriate treatment program. The physician periodically
34 reports on his or her progress throughout the treatment program. Optimally, after the successful
35 completion of the program, full membership will be reinstated.

36

37 Suspension is a conditional or temporary revocation of membership rights, which CEJA rarely
38 invokes.

39

40 Admonishment, reprimand, or censure are also disciplinary options, which arise from the
41 provisions in the Bylaws that allow CEJA to censure existing members. Admonishment is less
42 severe and censure is more severe than a reprimand. All of these terms refer to a declaration that a
43 member has violated the *Principles of Medical Ethics*. With such decisions, the physician
44 nevertheless would retain his or her AMA membership.

1 *Criteria for Imposing Sanctions*

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3 Background

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5 The AMA Bylaws require CEJA to determine membership fitness based on “character, ethics,
6 professional status and professional activities,” Bylaws B-1.111 and B-1.121, and on violations of
7 the *Principles of Medical Ethics* or unethical or illegal conduct. (See Bylaws B-1.611 and B-
8 1.621). At its 1987 Annual Meeting, the House of Delegates adopted Board of Trustees Report II,
9 which states:

10
11 The AMA has developed the following criteria for identifying physicians who should be
12 immediately expelled from the Association, subject to the notice and hearing procedures set
13 forth in the Rules of the Council on Ethical and Judicial Affairs:

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15 --Physicians with convictions for fraud or a felony involving professional misconduct or moral
16 turpitude by a court of law or other tribunal with acknowledged jurisdiction;

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18 --Physicians who have had a license revoked or have been forced to surrender a license for
19 reasons relating to incompetence or unprofessional conduct;

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21 --Physicians who have been discharged from the armed forces or government employ for
22 reasons related to and based on a finding of incompetence or unprofessional conduct.

23
24 The report also notes that even physicians who have committed offenses within these criteria might
25 be suitable for AMA membership if they have “demonstrated rehabilitation” and their past
26 difficulties have been “fully resolved.” Furthermore, it acknowledges that physicians may fall into
27 an “intermediate” category, in which case individual consideration would be required.

28
29 Criteria for Determining when To Impose Sanctions

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31 When it engages in its disciplinary function, CEJA gives careful consideration to the criteria set
32 forth in Board of Trustees Report II (A-87). However, the report itself states that even those
33 physicians who fall within the categories of peremptory exclusion nevertheless might be suitable
34 for membership if they have been rehabilitated. Therefore, while CEJA generally will terminate
35 the membership of physicians who fall under the report’s “immediate expulsion” categories, it will
36 not invariably do so. The Council determines a physician’s suitability for AMA membership by
37 deliberating the circumstances of each case individually.

38
39 The Council also carefully considers the findings and decisions of courts or of governmental
40 agencies, which may have previously adjudicated an action against an AMA member or
41 membership applicant. For example, if a medical licensing board has revoked an AMA member’s
42 medical license because of criminal or immoral behavior, CEJA will generally exercise a parallel
43 action and expel the member. Likewise, if a medical licensing board has imposed probationary
44 terms on an AMA member, CEJA will generally also impose a co-terminus probation. However,
45 CEJA does exercise individual discretion in each case it reviews.

46
47 In light of this framework, CEJA has considered whether it should publish written guidelines to
48 determine membership eligibility status. After careful deliberation, CEJA believes that it should
49 not codify such criteria at this time. The Bylaws and Board of Trustees Report II (A-87) establish
50 general standards, which CEJA considers to be appropriate and sufficient.

51 Of necessity, new membership applicants with questionable backgrounds must be placed in a
52 pending status, without full membership rights, until CEJA has had an opportunity to examine the

1 applicants' credentials. Current members, however, retain full membership status and have access
2 to all benefits until final adjudication by CEJA.

3 4 *Other Procedural Aspects of the Disciplinary Process*

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6 The disciplinary process begins when a possible violation, by a present member or by a
7 membership applicant, of the *Principles of Medical Ethics* or of illegal or other unethical conduct is
8 reported to the AMA. Such information generally arises from statements made in the membership
9 application form or from a report of disciplinary action taken by a state licensing board, state
10 medical association, or specialty society. On occasion, CEJA may learn of a member's improper
11 conduct through media reports.

12
13 Bylaws B-1.1212 defines a procedure wherein objections to an applicant for active direct
14 membership can be made by an external source. This situation has never, within CEJA's
15 knowledge, occurred.

16
17 If it appears that an ethical or legal violation could merit CEJA's attention, the member or applicant
18 is contacted to ascertain whether he or she wishes to present any additional information for CEJA's
19 consideration. Based on all information that is presented to it, CEJA determines whether the
20 physician's conduct may be excused or whether it warrants a plenary hearing. A plenary hearing
21 affords the member or applicant the right to present further arguments or other information to
22 CEJA either personally or through an attorney. Although the physician could participate in such
23 hearings in person, invariably hearings have been conducted by teleconference. An attorney from
24 the AMA's Office of General Counsel, along with Council members and the Secretary to the
25 Council, participate in the hearing.

26
27 The Council never imposes a sanction without offering a hearing to the physician. If CEJA does
28 take a disciplinary action, the decision is, to the extent required under the procedures of the Health
29 Care Quality Improvement Act, reported to the National Practitioner Data Bank and to the
30 respective state medical or specialty societies.

31
32 The rules that guide CEJA's disciplinary function are published as an appendix to *Code of Medical*
33 *Ethics*.

34 35 CONCLUSION

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37 This report provides information on the scope of the Council's disciplinary activities and the
38 process that is followed. The Council also believes this report can serve as a reminder of the
39 responsibility a profession holds in preserving professional integrity by establishing as well as
40 enforcing standards of conduct. The *Code of Medical Ethics* of our American Medical Association
41 serves as a guide for physician behavior, and the Council's judicial function serves as a model for
42 professional self-regulation. Moreover, by conferring membership only upon those physicians who
43 uphold the values of medical ethics and professionalism, the AMA assumes a leading role in
44 demonstrating that the medical profession considers self-regulation a paramount responsibility.
45 These efforts, along with those of state societies and specialty associations, are critical to protecting
46 the public's trust in medicine.

Appendix

CEJA Judicial Function: February 3, 2002 – April 13, 2003

Physician Members and/or Applicants	REPORTS OF POSSIBLE VIOLATIONS
25	Initial letters informing physician of CEJA's review
40+	Physicians currently under consideration for possible notification
	<i>Approximately 200 physicians were reviewed and their cases were found not to necessitate CEJA's attention</i>

Physician Members and/or Applicants	SUMMARY OF CEJA ACTIVITIES
3	Determination of no probable cause
2	Reviewed and deferred
17	Reviewed/found probable cause/offered the right to plenary hearing
17	Plenary hearings
10	Final determinations without a plenary hearing (hearing waived or non-response to the offer)
10	Members currently on probation and reviewed semi-annually

Physician Members and/or Applicants	FINAL ACTIONS
5	No discipline imposed
4	Denial (applicants)
5	Revocation (existing AMA members)
2	Suspension
2	Censure
1	Admonishment
8	Probation