REPORTS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS

The following reports, 1–5, were presented by Stephen L. Brotherton, MD, Chair:

1. ETHICAL PRACTICE IN TELEMEDICINE

Reference committee hearing: see report of Reference Committee on Amendments to Constitution and Bylaws.

HOUSE ACTION: RECOMMENDATIONS ADOPTED
REMAINDER OF REPORT FILED
See Policy H-140.839

This report is being considered for publication, so the full content is not included in the Proceedings at this time. The recommendations appear here along with the action of the House of Delegates.

Members of the American Medical Association may contact hod@ama-assn.org to request a copy, which may not be further distributed. Questions may also be directed to the Council on Ethical and Judicial Affairs.

RECOMMENDATION

In light of these considerations, the Council on Ethical and Judicial Affairs recommends that Opinions E-5.025, "Physician Advisory or Referral Services by Telecommunication," and E-5.027, "Use of Health-Related Online Sites," be amended by substitution as follows and the remainder of this report filed:

Innovation in technology, including information technology, is redefining how people perceive time and distance. It is reshaping how individuals interact with and relate to others, including when, where, and how patients and physicians engage with one another.

Telehealth and telemedicine span a continuum of technologies that offer new ways to deliver care. Yet as in any mode of care, patients need to be able to trust that physicians will place patient welfare above other interests, provide competent care, provide the information patients need to make well-considered decisions about care, respect patient privacy and confidentiality, and take steps to ensure continuity of care. Although physicians' fundamental ethical responsibilities do not change, the continuum of possible patient-physician interactions in telehealth/telemedicine give rise to differing levels of accountability for physicians.

All physicians who participate in telehealth/telemedicine have an ethical responsibility to uphold fundamental fiduciary obligations by disclosing any financial or other interests the physician has in the telehealth/ telemedicine application or service and taking steps to manage or eliminate conflicts of interests. Whenever they provide health information, including health content for websites or mobile health applications, physicians must ensure that the information they provide or that is attributed to them is objective and accurate.

Similarly, all physicians who participate in telehealth/telemedicine must assure themselves that telemedicine services have appropriate protocols to prevent unauthorized access and to protect the security and integrity of patient information at the patient end of the electronic encounter, during transmission, and among all health care professionals and other personnel who participate in the telehealth/telemedicine service consistent with their individual roles.

Physicians who respond to individual health queries or provide personalized health advice electronically through a telehealth service in addition should:

(a) Inform users about the limitations of the relationship and services provided.

(b) Advise site users about how to arrange for needed care when follow-up care is indicated.

(c) Encourage users who have primary care physicians to inform their primary physicians about the online health consultation, even if in-person care is not immediately needed.

Physicians who provide clinical services through telehealth/telemedicine must uphold the standards of professionalism expected in in-person interactions, follow appropriate ethical guidelines of relevant specialty societies and adhere to applicable law governing the practice of telemedicine. In the context of telehealth/ telemedicine they further should:

(d) Be proficient in the use of the relevant technologies and comfortable interacting with patients and/or surrogates electronically.

(e) Recognize the limitations of the relevant technologies and take appropriate steps to overcome those limitations. Physicians must ensure that they have the information they need to make well-grounded clinical recommendations when they cannot personally conduct a physical examination, such as by having another health care professional at the patient's site conduct the exam or obtaining vital information through remote technologies.

(f) Be prudent in carrying out a diagnostic evaluation or prescribing medication by:

(i) establishing the patient's identity;

(ii) confirming that telehealth/telemedicine services are appropriate for that patient's individual situation and medical needs;

(iii) evaluating the indication, appropriateness and safety of any prescription in keeping with best practice guidelines and any formulary limitations that apply to the electronic interaction; and

(iv) documenting the clinical evaluation and prescription.

(g) When the physician would otherwise be expected to obtain informed consent, tailor the informed consent process to provide information patients (or their surrogates) need about the distinctive features of telehealth/telemedicine, in addition to information about medical issues and treatment options. Patients and surrogates should have a basic understanding of how telemedicine technologies will be used in care, the limitations of those technologies, the credentials of health care professionals involved, and what will be expected of patients for using these technologies.

(h) As in any patient-physician interaction, take steps to promote continuity of care, giving consideration to how information can be preserved and accessible for future episodes of care in keeping with patients' preferences (or the decisions of their surrogates) and how follow-up care can be provided when needed. Physicians should assure themselves how information will be conveyed to the patient's primary care physician when the patient has a primary care physician and to other physicians currently caring for the patient.

Collectively, through their professional organizations and health care institutions, physicians should:

(i) Support ongoing refinement of telehealth/telemedicine technologies, and the development and implementation of clinical and technical standards to ensure the safety and quality of care.

(j) Advocate for policies and initiatives to promote access to telehealth/telemedicine services for all patients who could benefit from receiving care electronically.

(k) Routinely monitor the telehealth/telemedicine landscape to:

(i) identify and address adverse consequences as technologies and activities evolve; and

(ii) identify and encourage dissemination of both positive and negative outcomes.

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2. MODERNIZED *CODE OF MEDICAL ETHICS*

Reference committee hearing: see report of Reference Committee on Code Modernization.

HOUSE ACTION: RECOMMENDATION ADOPTED AS EDITORIALLY CORRECTED BY THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REMAINDER OF REPORT FILED

As previously reported to the House of Delegates, in 2008 the Council on Ethical and Judicial Affairs undertook a project to critically review the Opinions that interpret AMA *Principles of Medical Ethics* and to update Opinions as needed. The Council's goal was threefold: to ensure that the *Code*'s ethical guidance keeps pace with the demands of a changing world of medical practice and at the same time, to re-organize chapters and format Opinions uniformly to make guidance easy to find and easy to read, and at the same time, to preserve and clarify the accumulated wisdom of the House reflected in the Opinions of the *Code of Medical Ethics*. With this report, the Council presents the draft modernized Opinions of the *Code* to the House for the fourth time.

Over the course of the project, the Council has sought input from stakeholders through:

- requests for comment on current Opinions in the earliest phase of the project
- solicitation of comments through its online discussion forum beginning in January 2014
- Open Forum presentations on "*Code* modernization" at the 2013 Interim and 2014 Annual meetings
- informal open house discussions in November 2014 and June 2015
- testimony in reference committee at the 2014 and 2015 Interim Meetings and the 2015 Annual Meeting

Most recently, the Council removed security protections on the draft modernized *Code* and reposted all materials. The Council asked to receive comments by March 1, 2016 to allow adequate time to revise the draft as might be appropriate and post updated materials well in advance of the 2016 Annual Meeting.

CURRENT REVISIONS TO THE DRAFT MODERNIZED CODE

The Council thanks the individuals, delegations, and work groups who provided feedback on the draft modernized *Code* in testimony at the 2015 Interim Meeting as well as in comments to its online forum and direct letters and emails after the meeting. The Council received several types of feedback:

- suggestions to modify or eliminate proposed new guidance
- requests that CEJA define or otherwise clarify new terminology
- suggested copyedits for specific passages in the draft
- substantive concerns about guidance preserved from current Opinions
- general comments about the process of modernizing the *Code*

At its March 2016 meeting, the Council formally reviewed all feedback and discussed how best to address each comment received. In some instances, the Council adopted proposed copyedits as submitted (e.g., 2A.1.2, 11.3.4), including recommendations to restore the language of the current Opinion in passages that otherwise preserve current guidance (e.g., 2A.1.1). In other instances, especially if there was more than one suggested edit for a particular passage, the Council settled on other language to achieve what it understood to be the intended goal of proposed edits (e.g., 2A.1.4). However, where proposed copyedits would have changed language carried over from the current Opinion, the Council generally took no action (e.g., 2A.2.2).

The Council made modest editorial changes in response to requests to define terminology or clarify meaning. For example, it replaced the ethics term of art "right to an open future" with a sentence that briefly defines the concept in a way that is tailored to the topic of the Opinion in which the term is used (2B.2.4, 2B.2.5). (A glossary is also being developed for the modernized *Code.*) It similarly introduced new language in some passages to make key values or ethical considerations explicit in response to feedback (2A.1.3).

The Council spent considerable time discussing comments that suggested eliminating or significantly modifying proposed new guidance. In some cases, the Council came to concur that the proposed guidance was problematic in ways it had not fully appreciated. In such cases, the Council deleted the problematic guidance point from the modernized *Code* at this time, with the thought that it may ultimately revisit the matter in the future (e.g., 2A.1.5).

In some instances, comments indicated that the rationale for specific proposed revisions is not transparent. In these instances, the Council revised the updated Opinion in an effort to make the underlying reasoning clearer. For example, updated Opinion 2A.2.4 recommends that physicians routinely have a chaperone present, even when the patient is accompanied by someone he or she trusts. Feedback expressed concern that this sets an unreasonable expectation for physician conduct and is likely to be especially burdensome for smaller practices. In updating this guidance, the Council intended to protect both patients *and* physicians, not only from possible conduct that is unambiguously inappropriate, but also from the kinds of misunderstandings and misinterpretations that the Council has seen reflected in disciplinary matters that come before it in its judicial function. The Council has proposed revisions in the draft Opinion to clarify the nature and scope of concerns it believes 2A.2.4 should address. Likewise, the Council updated guidance on treating oneself or a family member (Opinion 2A.2.1), including prescribing controlled substances, in part because the fact that it regularly sees cases in which state boards have disciplined AMA members on this matter indicates clearer guidance is needed.

A significant proportion of comments expressed concern or disagreement with existing guidance that the Opinions of the modernized *Code* preserve. The Council has noted previously that concerns of this nature fall outside the scope of the project to modernize the *Code.* The House of Delegates has and surely always will encompass a diversity of perspectives on matters of ethics. The House adopted the Opinions of the current *Code* through its usual processes and existing guidance thus reflects agreements reached through thoughtful deliberation over time. Respecting that history, the Council has intentionally been conservative in modernizing the *Code*, seeking to preserve the accumulated wisdom of the House and updating Opinions only when the Council judged guidance to be significantly out of step with current best ethics, biomedical science, or the structures of contemporary health care. Where disagreement with the decision of the House to adopt a specific Opinion persists, those issues of substantive concern deserve the carefully focused attention and debate that is best achieved through a resolution from the House that asks the Council to revisit the particular guidance. The Council is prepared to address concerns about existing Opinions, some of which have been in the *Code* for decades, through the resolution process and believes this would best be accomplished following adoption of the modernized *Code of Medical Ethics* as presented in this report.

At the 2015 Annual Meeting and again at the 2015 Interim Meeting the Council heard concerns that the process has not allowed adequate time for the House to review the draft modernized *Code.* The Council recognizes that this is a complex undertaking and respectfully reminds the House that the draft has been posted online continuously for more than two years. As comments have been received and revisions made, documents have been reposted to ensure that AMA delegates and members had ongoing access to the most current iteration of the work. The Council has previously set out its rationale for presenting the work as a single, unitary whole, which it continues to believe is the most appropriate path.

The Council wishes to express its appreciation for all the feedback received since the work was first posted online in January 2014 and to thank particularly those delegations that have combined their efforts to jointly review these materials and share their input.

RECOMMENDATION

The Council on Ethical and Judicial Affairs recommends that the individual Opinions of the AMA *Code of Medical Ethics* be amended by substitution as follows and that the remainder of this report be filed.

3. CEJA's SUNSET REVIEW OF 2006 HOUSE POLICIES

Reference committee hearing: see report of Reference Committee on Amendments to Constitution and Bylaws.

HOUSE ACTION: RECOMMENDATIONS ADOPTED AS FOLLOWS
REMAINDER OF REPORT FILED

At its 1984 Interim Meeting, the House of Delegates (HOD) established a sunset mechanism for House policies (Policy G-600.110). Under this mechanism, a policy established by the House ceases to be viable after 10 years unless action is taken by the House to retain it.

The objective of the sunset mechanism is to help ensure that the American Medical Association (AMA) policy database is current, coherent, and relevant. By eliminating outmoded, duplicative, and inconsistent policies, the sunset mechanism contributes to the ability of the AMA to communicate and promote its policy positions. It also contributes to the efficiency and effectiveness of HOD deliberations.

At its 2012 Annual Meeting, the House modified Policy G-600.110 to change the process through which the policy sunset review is conducted. The process now includes the following steps:

- Each year the House policies that are subject to review under the policy sunset mechanism are identified.
- Policies are assigned to appropriate Councils for review.
- For the Annual Meeting of the House, each Council develops a separate policy sunset report that recommends how each policy assigned to it should be handled. For each policy it reviews, a Council may recommend one of the following actions: (a) retain the policy; (b) sunset the policy; (c) retain part of the policy; d) reconcile the policy with more recent and like policy. A justification must be provided for the recommended action to retain a policy.
- A policy will typically sunset after ten years unless action is taken by the House of Delegates to retain it. A reaffirmation or amendment to policy by the House of Delegates resets the sunset clock, making the reaffirmed or amended policy viable for another 10 years.

Although the policy sunset review mechanism may not be used to change the meaning of AMA policies, minor editorial changes can be accomplished through the sunset review process.

2006 POLICIES

In this report, the Council on Ethical and Judicial Affairs presents its recommendations regarding the disposition of 2006 House policies that were assigned to or originated from CEJA.

DUPLICATIVE POLICIES

On the model of the Council on Long Range Planning & Development (CLRPD)/CEJA Joint Report I-01 and of subsequent reports of CEJA's sunset review of House policies, this report recommends the rescission of House policies that originate from CEJA Reports and duplicate current opinions issued since June 2006. As noted previously, the intent of this process is the elimination of duplicative ethics policies from PolicyFinder. The process does not diminish the substance of AMA policy in any sense. Indeed, CEJA Opinions are a category of AMA policy.

MECHANISM TO ELIMINATE DUPLICATIVE ETHICS POLICIES

The Council continues to present reports to the HOD. If adopted, the recommendations of these reports continue to be recorded in PolicyFinder as House policy. After the corresponding CEJA Opinion is issued, CEJA utilizes its annual sunset report to rescind the duplicative House policy.

For example, at the 2007 Interim Meeting, the HOD adopted the recommendations of CEJA Report 8-I-07, "Pediatric Decision-Making." It was recorded in PolicyFinder as Policy H-140.865. At the 2008 Annual Meeting, CEJA filed the corresponding Opinion E-2.026, thereby generating a duplicative policy. Under the mechanism to eliminate duplicative ethics policies, CEJA recommended the rescission of Policy H-140.865 as part of the Council's 2009 sunset report.

The Appendix provides recommended actions and their rationale on House policies from 2006, as well as on duplicate policies.

RECOMMENDATION

The Council on Ethical and Judicial Affairs recommends that the House of Delegates policies that are listed in the Appendix to this report be acted upon in the manner indicated and the remainder of this report be filed.

APPENDIX - Recommended Actions

Policy No.	Title	Recommended Action & Rationale
H-140.872	Physician Pay-for-Performance Programs	Retain.
H-160.999	Statements on the Medical Profession	Retain: Policy remains relevant
H-175.993	Fraudulent Health Practices	Retain: Policy remains relevant
H-250.992	World Health Organization	Retain: Policy remains relevant
H-440.880	Definition of Health	Retain: Policy remains relevant
H-450.990	Physician Information for Credentialing	Retain: Policy remains relevant

4. ETHICAL PHYSICIAN CONDUCT IN THE MEDIA

Informational report; no reference committee hearing.

HOUSE ACTION: FILED

Policy D-140.957 asks that AMA:

1. Report on the professional ethical obligations for physicians in the media, including guidelines for the endorsement and dissemination of general medical information and advice via television, radio, internet, print media, or other forms of mass audio or video communication;

2. Study disciplinary pathways for physicians who violate ethical responsibilities through their position on a media platform; and

3. Release a statement affirming the professional obligation of physicians in the media to provide quality medical advice supported by evidence-based principles and transparent to any conflicts of interest, while denouncing the

dissemination of dubious or inappropriate medical information through the public media including television, radio, internet, and print media.

Following the 2015 Annual Meeting Resolution 016-A-15 was assigned to the Council on Ethical and Judicial Affairs to prepare a report for the House of Delegates to be submitted at the 2016 Annual Meeting.

The resolution seeks to address concerns about the conduct of physicians who make medical information available to the public through various media outlets. The resolution focuses primarily on the potential for medical information to influence behavior, the importance of ensuring the accuracy of medical information, and the obligation to report unethical behavior among physicians. It does not explicitly acknowledge conflict of interest, physicians' responsibilities with respect to health promotion, or physicians' use of online and social media.

Resolution 016-A-15 cites the following AMA policies regarding physicians' relationships with the media:

- E-5.04, Communications Media: Standards of Professional Responsibility
- H-445.997, Interviews with News Media
- H-460.978, Communication Among the Research Community, the Media and the Public
- H-445.995, Responses to News Reports and Articles

It also cites ethics Opinions regarding physicians' responsibilities to report unethical conduct:

- E-9.031, Reporting Impaired, Incompetent, or Unethical Colleagues
- E-9.04, Discipline and Medicine

However, the resolution overlooks several other ethics Opinions relevant to its core concerns:

- E-5.027, Use of Health-Related Online Sites
- E-8.063, Sale of Health-Related Products
- E-8.03, Conflict of Interest: Guidelines
- E-2.07, Clinical Investigation (at [9])
- E-5.02, Advertising and Publicity
- E-5.015, Direct-to-Consumer Advertisements of Prescription Drugs
- E-8.045, Direct-to-Consumer Diagnostic Imaging Tests

After a thorough review of the literature and of current policies CEJA has concluded that the appropriate response would require developing new guidance regarding the more inclusive topic of physicians' ethical responsibilities in educating the public about health-related topics. To ensure sufficient opportunity to adequately explore these far-reaching issues with other interested parties, CEJA will continue its deliberations and submit its final report at the 2016 Interim Meeting.

5. JUDICIAL FUNCTION OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS: ANNUAL REPORT

Informational report; no reference committee hearing.

HOUSE ACTION: FILED

At the 2003 Annual Meeting, the Council on Ethical and Judicial Affairs (CEJA) presented a detailed explanation of its judicial function. This undertaking was motivated in part by the considerable attention professionalism has received in many areas of medicine, including the concept of professional self-regulation.

CEJA has authority under the Bylaws of the American Medical Association (AMA) to disapprove a membership application or to take action against a member. The disciplinary process begins when a possible violation of the *Principles of Medical Ethics* or illegal or other unethical conduct by an applicant or member is reported to the AMA. This information most often comes from statements made in the membership application form, a report of

disciplinary action taken by state licensing authorities or other membership organizations, or a report of action taken by a government tribunal.

The Council rarely re-examines determinations of liability or sanctions imposed by other entities. However, it also does not impose its own sanctions without first offering a hearing to the physician. CEJA can impose the following sanctions: applicants can be accepted into membership without any condition, placed under monitoring, or placed on probation. They also may be accepted but be the object of an admonishment, a reprimand, or censure. In some cases, their application can be rejected. Existing members similarly may be placed under monitoring or on probation, and can be admonished, reprimanded or censured. Additionally, their membership may be suspended or they may be expelled. Updated rules for review of membership can be found at ama-assn.org/ama/pub/about-ama/our-people/ama-councils/council-ethical-judicial-affairs/governing-rules/rules-review-membership.page.

Beginning with the 2003 report, the Council has provided an annual tabulation of its judicial activities to the House of Delegates. In the appendix to this report, a tabulation of CEJA's activities during the most recent reporting period is presented.

APPENDIX – CEJA, Judicial Function Statistics: April 1, 2015 ~ March 31, 2016

Physicians Reviewed	SUMMARY OF CEJA ACTIVITIES
2	Determinations of no probable cause
51	Determinations following a plenary hearing
31	Determinations after a finding of probable cause, based only on the written record, after the physician waived their plenary hearing right
	FINAL DETERMINATIONS FOLLOWING INITIAL REVIEWS
13	No sanction or other type of action
6	Monitoring
22	Probation
20	Revocation
4	Suspension
1	Resignation accepted
1	Application denied
16	Censure/Admonishment/Reprimand
1	Annulled/Disapproved
	PROBATION/MONITORING STATUS
17	Members placed on Probation/Monitoring during reporting interval
11	Members placed on Probation without reporting to Data Bank
28	Probation/Monitoring concluded satisfactorily during reporting interval
7	Memberships revoked due to non-compliance with the terms of probation
46	Physicians on Probation/Monitoring at any time during reporting interval who paid their AMA membership dues
21	Physicians on Probation/Monitoring at any time during reporting interval who did not pay their AMA membership dues