

## ARC Issue Brief: Confidential care to support physician health and wellness<sup>1</sup>

Prior to the COVID-19 pandemic, physician burnout was already a major challenge for the U.S. health care system, impacting nearly every aspect of clinical care. Recent studies show a national burnout rate of 43.9 percent among physicians in practice,<sup>2</sup> including private practice, academic medical centers, and the U.S. Department of Veterans Affairs. Physician burnout can lead to devastating consequences. Physicians are among the most resilient<sup>3</sup>, and yet the environments in which physicians work drive these high levels of burnout. The majority of burnout is driven by systems factors and thus, the majority of solutions are at the system level. The factors that lead to burnout are not necessarily the same for someone with a mental illness, so while the AMA urges actions at the systems level to reduce burnout, we also strongly support initiatives and programs that allow for opportunities for physicians and medical students to seek help or focus on what they need to remain resilient and healthy.<sup>4</sup>

*“We must be vigilant for signs of burnout and depression within ourselves and among our colleagues, and we must not hesitate to seek help when we recognize something is amiss,”* [said Susan R. Bailey, MD](#), AMA Immediate Past President.

The multiple phases of the COVID-19 pandemic have in some parts of the country pushed physician stress to crisis levels, as physicians have been desperately needed to care for patients on the frontlines. Many physicians have been subject to extremely stressful conditions during the pandemic—conditions that have made them particularly vulnerable to negative mental and physical health effects. Stressors already present in their lives may have been exacerbated, making the need for confidential counseling, wellness services or other care more important than ever.

It is important, however, to distinguish that seeking assistance to ensure wellness is often separate and distinct from seeking care for an impairment—and that policy and care options provide for different

“Physicians face stigma and professional obstacles to seeking appropriate care and treatment for burnout and related mental health concerns. Physician institutions—including physician associations—should take deliberate steps to facilitate appropriate treatment and support without stigma or unnecessary constraints on physicians’ ability to practice.”  
[A Crisis In Health Care: A Call To Action On Physician Burnout](#)

<sup>1</sup> The information and guidance provided in this document is believed to be current and accurate at the time of posting but it is not intended as, and should not be construed to be, legal, financial, medical, or consulting advice. Physicians and other qualified health care practitioners should exercise their professional judgement in connection with the provision of services and should seek legal advice regarding any legal questions. References and links to third parties do not constitute an endorsement or warranty by the AMA and AMA hereby disclaims any express and implied warranties of any kind.

<sup>2</sup> Shanafelt TD, West CP, Sinsky C, et al Changes in burnout and satisfaction with work-life integration in physicians and the general US working population between 2011 and 2017. *Mayo Clin Proc.* 2019;94(9):1681–1694. doi: 10.1016/j.mayocp.2018

<sup>3</sup> West CP, Dyrbye LN, Sinsky C, Trockel, M, Tutty M, Nedelec L, Carlasare LE, Shanafelt TD. Resilience and Burnout Among Physicians and the General US Working Population. *JAMA Netw Open.* 2020;3(7):e209385. doi:10.1001/jamanetworkopen.2020.9385

<sup>4</sup> Annie Nedrow, MD, MBA, Nicole A. Steckler, PhD, and Joseph Hardman, MD. Physician Resilience and Burnout: Can You Make the Switch? *Fam Pract Manag.* 2013 Jan-Feb;20(1):25-30.  
<https://www.aafp.org/fpm/2013/0100/p25.html>

levels of care while retaining key confidentiality protections to encourage physicians to seek the care they may need voluntarily.

**This issue brief highlights several different options** for physicians seeking care and provides tangible legislative, regulatory and other options for medical societies and other stakeholders to support those efforts. It seeks to further the goals of balancing privacy and confidentiality while also reducing stigma and protecting the public health.<sup>5</sup>

The options discussed in this issue brief have different avenues for entry and levels of complexity. Some may be more relevant to meet a physician’s or medical student’s individual need, but the goal is for each option to allow for confidential care that supports a physician’s or medical student’s ability to manage the anxiety, depression, and other forms of occupational stress or mental illness. The AMA stands ready to work with all states to help ensure that safe, confidential, voluntary options<sup>6</sup> are available and known to those who need access to such services.<sup>7</sup>

## Actions to take to support physicians and medical students

- Ensure that your state’s licensing, credentialing, employment, and other related applications do not contain stigmatizing language that inappropriately asks about past diagnoses rather than current impairment.
- Enact state legislation that provides for safe haven reporting systems and wellness programs for physicians, medical students and other health care professionals to seek care for burnout and other stressors, as well as mental health issues. Medical societies should consider implementing and/or supporting these programs.
- Review your state’s Physician Health Program laws and policies to ensure they provide strong confidentiality protections for physicians seeking care.
- Support—and help implement—provisions in the Dr. Lorna Breen Health Care Provider Protection Act<sup>8</sup>, which would, among other things, establish:
  - Grants for health care professionals to help create evidence-based strategies to reduce burnout and the associated secondary mental health conditions related to job stress
  - A national campaign to encourage health care professionals to prioritize their mental health and to use available mental and behavioral health services
  - Grants for employee education, peer support programming
  - A comprehensive study on the mental health and burnout of health care professionals.

Each of these issues are discussed below.

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<sup>6</sup> While this issue brief highlights areas where medical societies and legislative/regulatory options are available, there also are other options to help those at risk of self-harm or suicide, including the Interactive Screening Program offered by the American Foundation for Suicide Prevention: <https://afsp.org/interactive-screening-program>

<sup>7</sup> These issues also are experienced by medical students and residents as well as practicing physicians. See “Programs and Resources to Alleviate Concerns with Mental Health Disclosures on Physician Licensing.” Welcher, C., Radabaugh, C., Aparicio, A., Chaudhry, H., Statz, M., Kirk, L., Bresnahan, L. *Journal of Medical Regulation* (2019) 105 (2): 24–32. <https://doi.org/10.30770/2572-1852-105.2.24>

<sup>8</sup> The AMA is among many organizations supporting this federal legislation. See AMA letter here: <https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2020-8-27-Letter-to-Kaine-Reed-Young-Cassidy-re-S-4349-Lorna-Breen-Act.pdf>; and also visit The Dr. Lorna Breen Heroes’ Foundation to learn more about Dr. Breen and the work that her life and career has inspired: <https://drlornabreen.org/about-the-legislation/>

## Licensing and other applications should focus on current impairment

One major issue that deters physicians and medical students from seeking care is the inappropriate medical board licensing questions (or those that appear on employment or credentialing applications).<sup>9</sup> As noted by the Federation of State Medical Boards (FSMB):

“The FSMB recommends that state medical boards review their medical licensure (and renewal) applications and evaluate whether it is necessary to include probing questions about a physician applicant’s mental health, addiction, or substance use, and whether the information these questions are designed to elicit in the interests of patient safety may be obtained through means that are less likely to discourage treatment-seeking among physician applicants”

When medical boards do include questions pertaining to a physician applicant’s health, the FSMB recommends “**Application questions must focus only on current impairment and not on illness diagnosis, or previous treatment in order to be compliant with the Americans with Disabilities Act (ADA)**”. (emphasis added)

Some states have already made changes to their application and renewal forms to move in this direction.<sup>10</sup> But much work remains to be done and research continues to show a wide variety of obstacles.<sup>11,12</sup>

Examples of problematic questions:

- “Have you received treatment within the last five years for use of alcohol or a controlled substance, prescription-only drug, or dangerous drug or narcotic or a physical, mental, emotional, or nervous disorder or condition that currently affects your ability to exercise the judgment and skills of a medical professional?”<sup>13</sup> A “yes” answer requires applicants to submit additional information, including medical records and any public or confidential documents. Applicants are warned that “Failure to *properly* answer these questions can result in Board disciplinary action, including revocation or denial of license.” (emphasis added)
- During the last 7 years, have you suffered from any physical, psychiatric, or substance use disorder that could impair or require limitations on your functioning as a professional or has resulted in the inability to practice medicine for more than 30 days, or required court-ordered treatment or hospitalization? (If yes, provide treatment history documentation to include diagnosis, treatment regimen, hospitalization, and ongoing treatment/medication to the Board.

<sup>9</sup> Dyrbye LN, West C, Sinsky CA, Goeders LE, Satele DV, Shanafelt TD. *Medical Licensure Questions and Physician Reluctance to Seek Care for Mental Health Conditions*. Mayo Clin Proc. 2017;92(10):1486-1493

<sup>10</sup> The partnership of the North Carolina Medical Society, North Carolina PHP and others were instrumental in changing the question in North Carolina, for example. “Physicians Are Human, Too.” Available at <https://www.forbes.com/sites/physiciansfoundation/2018/07/18/physicians-are-human-too/#3f6cde754a29>

<sup>11</sup> See, for example, Wible, P., Palermini, A. “Physician-Friendly States for Mental Health: A Comparison of Medical Licensing Board Applications.” *Qualitative Research in Medicine & Healthcare* 2019; volume 3:107-119. Available at <https://www.pagepressjournals.org/index.php/qrmh/article/view/8649/8600>

<sup>12</sup> Saddawi-Konefka D, Brown A, Eisenhart I, Hicks K, Barrett E, Gold JA. Consistency Between State Medical License Applications and Recommendations Regarding Physician Mental Health. *JAMA*. 2021;325(19):2017–2018. doi:10.1001/jama.2021.2275. “. . .in most states, recommendations from the FSMB have not yet been fully adopted. Consequently, medical license applications may continue to deter physicians from seeking mental health care. “

<sup>13</sup> See [https://azmbfileblob.blob.core.windows.net/azmd/MD\\_202001301440\\_b1c963bbbb534262af49a2c02a3aee3e.pdf](https://azmbfileblob.blob.core.windows.net/azmd/MD_202001301440_b1c963bbbb534262af49a2c02a3aee3e.pdf) (last accessed October 11, 2021)

**NOTE: If you are currently enrolled in GAPHP, you may check NO.**<sup>14</sup> (emphasis in original)

Examples of questions that focus on current impairment:

- Maryland asks, “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a physical, mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice your profession in a safe, competent, ethical, and professional manner?”<sup>15</sup>
- Kansas asks, “Do you have any physical or mental health condition (including alcohol or substance use) that currently impairs your ability to practice your profession in a competent, ethical, and professional manner?”<sup>16</sup>
- Texas asks, “Are you currently suffering from any condition for which you are not being appropriately treated that impairs your judgment or that would otherwise adversely affect your ability to practice medicine in a competent, ethical and professional manner?”<sup>17</sup>

Example of a state medical board that recently changed a problematic question:

- Minnesota recently changed a question that focused on past diagnosis to one that focuses on current impairment.
  - *Before:* MN required the release of medical records for “Applicants who have a medical condition during the last five years which, if untreated, would be likely to impair their ability to practice with reasonable skill and safety must have their treating physician complete this form.”<sup>18</sup>
  - *After* medical society advocacy, as of January 1, 2022, MN will ask: “Do you currently have any condition that is not being appropriately treated which is likely to impair or adversely affect your ability to practice medicine with reasonable skill and safety in a competent, ethical and professional manner?”

Professional liability insurance carriers also are strongly encouraged to review the questions they ask physicians to remove the type of stigmatizing, inappropriate and potentially legally questionable language. This includes questions such as:

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<sup>14</sup> See “Initial Licensure Application” <https://medicalboard.georgia.gov/initial-physician-licensure> Last accessed October 11, 2021.

<sup>15</sup> See [https://www.mbp.state.md.us/forms/dr\\_initial.pdf](https://www.mbp.state.md.us/forms/dr_initial.pdf) Maryland used to ask, “Do you have any physical or mental condition that currently impairs your ability to practice medicine or that would cause reasonable questions to be raised about your physical, mental, or professional competency?” See, <http://jaapl.org/content/46/4/458>

<sup>16</sup> See [http://www.ksbha.org/forms/md\\_do\\_app\\_fillable.pdf](http://www.ksbha.org/forms/md_do_app_fillable.pdf) Application current as of August 9, 2021. Kansas used to ask, “Do you presently have any physical or mental problems or disabilities which could affect your ability to competently practice your particular branch of the healing arts or your particular specialty?” See, <http://jaapl.org/content/46/4/458>

<sup>17</sup> See <https://www.tmb.state.tx.us/idl/C265E983-7678-5228-4434-29DF7A1F37EF> Last accessed October 2, 2021. Texas previously asked: “Within the past five years, have you been diagnosed with or treated for any psychotic disorder, delusional disorder, mood disorder, major depression, personality disorder, or any other mental condition which impaired or does impair your behavior, judgment, or ability to function in school or work?” See, <http://jaapl.org/content/46/4/458>

<sup>18</sup> See [https://mn.gov/boards/assets/MNBMP%20PYAppPacketSep2021\\_tcm21-36587.pdf](https://mn.gov/boards/assets/MNBMP%20PYAppPacketSep2021_tcm21-36587.pdf)

- Have you ever had or been diagnosed/treated for alcoholism, narcotics addiction, or mental illness? If yes, please provide a current letter from your treating physician and rehabilitation establishment outlining dates of and results from treatment and current status.

**Creating a “safe haven” within the licensing application.** Other states may also have safe-haven approaches that provide an alternative to reporting health information on licensure applications. For example, the state of Washington created a safe haven by allowing applicants to answer “no” to questions related to impairment when the applicant is known to the physician health program. The Washington application states, “You may answer ‘No’ if the behavior or condition is already known to the Washington Physician Health Program (WPHP). ‘Known to WPHP’ means that you have informed WPHP of your behavior or condition and you are complying with all of WPHP’s requirements for evaluation, treatment, and/or monitoring.”

## Medical Society Physician Wellness Programs

**Confidential support as a member benefit.** Some medical societies and Physician Health Programs have established proven models to provide access to confidential and voluntary support for physicians seeking non-medical counseling or other support such as professional coaching to help with stress or other issues in a physician’s personal or professional life. This approach is differentiated from services that might be required when there is concern of impairment. Both approaches have helped thousands of physicians.

After a series of four physician suicides in Eugene, Oregon, the Lane County Medical Society created a model program in 2012 that provided a confidential, preclinical option for physicians seeking help with managing stressful situations. Those situations might include workplace conflicts, grief, depression, marriage or financial stress, or any other issue that a physician believes may be adversely affecting his or her personal and/or professional life. The model was subsequently replicated by several county medical society leaders who eventually published a free toolkit to disperse the model even more broadly. To date, there are around 30 programs at the county medical society level that are known to be operating. While these programs go by different names<sup>19</sup>, there are several common elements:

- Typically, the county medical society privately contracts with a local psychiatry or psychology group to allow a certain number of confidential sessions per member. Less often, programs may employ a therapist directly. These visits are free or discounted as a membership benefit. Claims are not submitted to insurance and instead the bill is sent to the medical society with no identifying information on it.
- The county medical society sets up a mechanism for appointments to be made without knowing the member’s name. Some have 24/7 hotlines staffed by call centers and some allow physicians to set up an appointment directly with therapists.
- Funding for the programs may come from medical society membership dues, their society’s foundation, hospital medical staff funds or foundations, and other sources.

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<sup>19</sup> The free LifeBridge toolkit can be downloaded at [www.physicianwellnessprogram.org](http://www.physicianwellnessprogram.org). It explains how to start such a program, provides a reusable program name and logo, and lists the known county medical society programs in operation for reference.

- Limited non-demographic information such as age, gender, specialty, employment type, and presenting challenges are sent back to the society in a way to keep individual identification from happening.

“Being able to establish a confidential, evidence-based support system for my members is by far the most gratifying success of my professional career,” said Bryan Campbell, the former executive director of the Duval County Medical Society, who now is the chief executive officer of the Colorado Medical Society.

“We developed the LifeBridge Physician Wellness Program toolkit that can be used to help build a program from the ground-up,” said Belinda Clare, chief operations officer of the Travis County Medical Society in Austin, Texas.

“Ensuring confidentiality has been the number one factor in why these programs work,” said Steven Reames, executive director of the Ada County Medical Society in Boise, Idaho. “And since we pushed our therapists onto telehealth due to COVID-19, utilization has increased two-fold.”

“Since Eugene and Portland Oregon’s medical societies were the first to start these programs in 2012 and 2015, we’ve since seen the development of a network that allows physicians in rural counties statewide to access existing programs via telehealth,” said Amanda Borges, Executive Director for Medical Society of Metropolitan Portland.

The Wisconsin Medical Society, for example, in July 2021 announced a partnership with Dane County Medical Society to launch the [LifeBridge Physician Wellness Program](#) for Dane County Medical Society Members. This pilot program provides up to six free telemedicine counseling/coaching sessions per year from a psychologist with Cornerstone Counseling Services, Inc. or Marshfield Clinic Health System, Inc. The sessions are completely confidential.

## **Virginia, South Dakota, and Indiana laws provide low barrier entry to support confidential physician wellness**

### **Legislative and regulatory changes to support low-barrier entry to confidential care.**

Legislative or regulatory changes can be made that create a “safe space” through which physicians and other health care professionals could seek and obtain confidential care in ways that would not impact their careers. Legislative and regulatory changes could also require that medical licensing and credentialing applications inquire only about *current* impairment and not about past diagnoses.

Thus far, at least three states, Virginia, South Dakota, and Indiana have enacted laws specifically intended to protect physicians seeking help with career fatigue and wellness. Virginia led the way by enacting H.B. 115 in 2020, and Indiana and South Dakota followed in 2021 by passing S.B. 365 and H.B. 1179, respectively.

These three laws further the goal of supporting physicians and other health care professionals to seek professional support to address career fatigue, burnout and behavioral health concerns with confidentiality and civil immunity protections. These new laws enable physicians, who may avoid seeking help in other programs because of the fear of potential negative repercussions, to get the help they need. It is important to note that H.B. 115, S.B. 365, and H.B. 1179 use the phrase “career fatigue and wellness” rather than “burnout.” H.B. 115 modifies prior Virginia law in two ways that lower barriers to physicians who want

to be members of, or otherwise work with, PHPs<sup>20</sup> to assist physicians seeking help with carrier fatigue and wellness, and for physicians seeking that assistance.

### **Providing qualified immunity for wellness programs and persons, facilities, and organizations participating in wellness programs.**

H.B. 115 expanded the civil immunity that currently exists for physicians serving as members of, or consultants to, entities that function primarily to review, evaluate, or make recommendations related to health care services, to include physicians serving as members of, or consultants to, entities that function primarily to address issues related to physician career fatigue and wellness. Like H.B. 115, South Dakota's H.B. 1179 gives civil immunity to any person or facility participating in a wellness program if they act in good faith. Indiana's S.B. 365 provides states that wellness programs and their participants may not be named in a civil lawsuit if they acted in good faith and in furthering the work of the wellness program.

H.B. 115 also clarified that, absent evidence indicating a reasonable probability that a physician who is a participant in a PHP addressing issues related to career fatigue or wellness is not competent to continue in practice or is a danger to himself or herself, his or her patients, or the public, participation in such a PHP does not trigger the requirement that the physician be reported to the state, e.g., the state medical board. Again, both Indiana S.B. 365 and South Dakota H.B. 1179 provide similar confidentiality protections. For example, under S.B. 365 no person participating in a wellness program may reveal the content of any wellness program communication; record; or determination to any person or entity outside of the wellness program, and a physician's participation in a wellness program does not require reporting the physician to the medical board. H.B. 1179 states that any record of a person's participation in a physician wellness program is confidential unless the physician voluntarily provides for written release of the information or the disclosure is required to meet the physician's obligation to report a criminal charge or action, or unprofessional or dishonorable conduct.

Pursuant to H.B. 115, the MSV helped create a program to offer physicians and physician assistants a comprehensive set of well-being resources they can use to deal with stress, burnout and the effects of COVID-19, without risk to their licenses. MSV will administer the program—called [SafeHaven™](#)—for the state of Virginia. The resources offered to organizations enlisted in the program, include peer coaching, elite concierge services and expanded behavioral health resources to promote work/life balance and well-being for physicians, PAs and their families. It also is important to note that H.B. 115 exists in addition to the Virginia PHP<sup>21</sup>, which remains a trusted source to help physicians in need of support. The [South Dakota State Medical Association](#) identifies a number of wellness program physicians. The [Indiana State Medical Association](#) Physician Assistance Program provides physicians with consultation, screening, referral and case management, as needed, for substance use and mental health disorders, behavioral issues, and physical illnesses.

## **Confidentiality Central to Physician Health Programs**

**Physician health programs remain a proven model to help physicians with impairment.** State physician health programs (PHPs) remain an evidence-based, comprehensive system supported by

<sup>20</sup> It is important to highlight that the Virginia Health Practitioner Monitoring Program has helped physicians for more than 20 years. For more information:

<http://www.dhp.virginia.gov/PractitionerResources/HealthPractitionersMonitoringProgram/index.html>

<sup>21</sup> Virginia Health Practitioners Monitoring Program,

<http://www.dhp.virginia.gov/PractitionerResources/HealthPractitionersMonitoringProgram/index.html>

the AMA and state medical societies to help physicians at risk of potential impairment who may come forward voluntarily or when referred by a colleague, workplace or, the licensing board.

It is important to highlight that depending on state law, a PHP may be the only legally authorized entity that may receive reports of possible impairment in lieu of reporting to the disciplinary authority. Individuals and entities may be able to discharge a mandatory reporting obligation by contacting the PHP. This can provide another layer of confidential support when physician wellness programs or treating professionals encounter concerns of impairment. According to the Federation of State Physician Health Programs, in most states, PHPs can receive those reports and assist the physician confidentially, without revealing the identity of the physician to the disciplinary authority.

Additional unique qualities of successful PHP programs include the ability of PHPs to provide objective confirmation and documentation to concerned others (employers, credentialing entities, etc.) that a physician is following recommendations to support their health and safe practice. PHP verification of health monitoring compliance, at the request of the PHP participant, is often a requirement of continued employment and/or medical staff privileges.

The AMA has developed model state legislation that, if enacted, ensures that PHP participation is a confidential, therapeutic alternative to discipline. Stigma is an ongoing barrier that can discourage physicians from seeking support including that from PHPs, which have helped thousands of physicians in a confidential, therapeutic alternative to discipline when there is not a risk to patient safety<sup>22</sup>.

In addition to provisions taken from Virginia’s H.B. 115, Indiana’s S.B. 365, and South Dakota H.B. 1179, the draft recommendations below contain key language from the Advocacy Resource Center’s (ARC) model legislation entitled the “Physician Health Programs Act,” which focuses more generally on physicians seeking and receiving treatment for substance use disorder, mental health condition, other medical disease or, other potentially impairing conditions through a PHP. Provisions below also are taken from FSMB recommendations to focus on current impairment rather than past diagnosis.

“PHPs are a proven model to help physicians at risk of a potential impairment receive evidence-based care in a structured, confidential manner,” said Chris Bundy, MD, MPH, President, Federation of State Physician Health Programs. “PHPs have long recognized that confidentiality is critical to service utilization and effectiveness. It’s the cornerstone of the PHP model and should extend to all programs that support physician well-being.”

PHPs offer a therapeutic alternative for evidence-based care to physicians at risk of a potential impairment in a structured, confidential manner. Many PHPs also offer well-being programs and services to refer those in need to professional coaching, therapy and, other support services in a confidential, voluntary, safe manner. While not all referrals to a PHP result in time of out of practice, there is expertise in place to facilitate a safe return to practice.<sup>23</sup> When time out of practice is indicated, PHPs work with the physician and his/her treatment providers to focus on how to safely return the physician to caring for

<sup>22</sup> The Federation of State Physician Health Programs (FSPHP) maintains a full list of PHPs available to physicians and other health care professionals: <https://www.fsphp.org/state-programs>

<sup>23</sup> A 2008 study of 16 state PHPs found that of 904 physicians admitted to a PHP between 1995 to 2001, more than 80 percent “completed treatment and returned to practice under supervision and monitoring. After five years, 631 (78.7%) physicians were licensed and working. McLellan AT, et al. Five year outcomes in a cohort study of physicians treated for substance use disorders in the United States. *BMJ*. 2008;337:a2038. Published 2008 Nov 4. Available at <https://pubmed.ncbi.nlm.nih.gov/18984632/>



his/her patients.<sup>24</sup> Most PHPs began with the state medical society, and remain affiliated or aligned with their state medical society.

## Draft legislative and regulatory options to support physician wellness<sup>25</sup>

- A. Definitions.** Both the South Dakota and Indiana laws define the phrase “physician wellness program” or “wellness program.”
- (1) **Indiana S.B. 365.** *“Wellness program” means any board, committee, commission, group, organization, or other entity that provides services by licensed health care providers and physician peer coaches for the purpose of evaluating or addressing issues concerning the wellness of licensed physicians and career fatigue in licensed physicians. The term does not include an impaired physician committee or an employee assistance program (EAP).*
  - (2) **South Dakota H.B. 1179.** *The term, “physician wellness program,” means a program of evaluation, counseling, or other modality to address an issue related to career fatigue or wellness in a person licensed to practice medicine or osteopathy or a physician assistant. The term does not include the provision of services intended to monitor for impairment.*
- B. No obligation to report to regulatory authorities.** The Virginia, Indiana, and South Dakota laws all make clear that wellness programs are not obligated to report to the relevant regulatory authority a physician’s participating in a wellness program, with certain exceptions. *This issue brief strongly recommends that any legislative physician wellness proposals include a requirement that a physician, graduate medical resident or medical student who’s seeking assistance from, or participates in, a wellness program is not reportable to any regulatory board or authority, subject to limited exceptions.* The following shows how the Virginia, Indiana, and South Dakota address this reporting issue.
- (1) **Virginia H. 115.** *No person or entity shall be obligated to report information regarding a health care provider licensed to practice medicine or osteopathic medicine who is a participant in a professional program to address issues related to career fatigue and wellness that is organized or contracted for by a statewide association exempt under 26 U.S.C. § 501(c)(6) of the Internal Revenue Code and that primarily represents health care professionals licensed to practice medicine or osteopathic medicine in multiple specialties to the Board. The protections under this section do not apply if the person or entity has determined that there is reasonable probability that the participant is a danger to themselves or to the health and welfare of their patients or the public.*
  - (2) **Indiana S. B. 365.** The Indiana law removes reporting requirements in two contexts, referral to a physician impairment program as well as participation in a physician wellness program. Specifically, S.B. 365 states:
    - (a) **Referral to impairment program.** *The referral of a licensed physician from a wellness program to an impaired physician committee shall not require the reporting of the licensed physician to the medical licensing*

<sup>24</sup> A 2017 report found that “24 percent of the 225 people who received services from the North Carolina PHP last year were self-referrals.” The NCPHP found that more than 90 percent felt they benefited from the services provided. Participants in the PHP said that they sought help due to “substance related issues (66.67 percent), followed by workplace stress (28.6 percent) and anxiety (28.6 percent).” See “Physicians Health Program Offered Help to Hundreds Last Year.” Elaine Ellis. North Carolina Medical Society. Jan 24, 2018. Available at <https://secure.ncmedsoc.org/physicians-health-program-offered-help-to-hundreds-last-year/>

<sup>25</sup> While this language may be useful to consider in your state, it is not a comprehensive AMA model bill. Additional considerations for peer review, PHPs and medical licensing likely are applicable.

*board under and does not violate any privilege or confidentiality established by S.B. 365.*

**(b) No obligation to report participation.** *No member, consultant, or participant who participates in a wellness program shall be required to report a licensed physician to the medical licensing board for any act, omission, statement, discovery, or disclosure subject to a wellness program's consideration or review.*

**i. Exceptions to (a) and (b).** *The exception from the obligation to report under (a) and (b) does not apply if (1) the licensed physician is not competent to continue practice; or (2) the licensed physician presents a danger to: (a) himself or herself; or (b) the health and welfare of: (i) the licensed physician's patients; or (ii) the general public.*

**(3) South Dakota S.D. 1179.** *Any record of a person's participation in a physician wellness program is confidential and not subject to discovery, subpoena, or a reporting requirement to the applicable board, unless the person voluntarily provides for written release of the information or the disclosure is required to meet the licensee's obligation to report a criminal charge or action, or unprofessional or dishonorable conduct.*

**C. No obligation to disclose to persons or organizations other than regulatory authorities.<sup>26</sup>**

This issue brief strongly recommends that any legislative physician wellness proposal ensures that a physician, graduate medical resident or, medical student seeking assistance from, or participating in, a wellness program is not obligated to report or disclose that fact to any third party, e.g., on a hospital credentialing application. The following is draft language for consideration.

- (1)** A physician, graduate medical resident or medical student who contacts, seeks help from, or is a participant in, a physician wellness program or physician health program (PHP) shall not be required to disclose such contact, seeking assistance, or participation to any health care facility, hospital, medical staff, accrediting organization, graduate medical education oversight body, health insurer, government agency, or other entity that requests such information as a condition of participation, employment, credentialing, payment, licensure, compliance or other requirement.
- (2)** The failure to disclose the information described in this section shall not be grounds for suspension, removal, termination of employment or contract, or any other adverse action by a graduate medical school of higher education, health care facility, hospital, medical staff, health insurer, government agency, or other entity.
- (3)** The obligation to disclose information described in this section shall not be a condition of participation, employment, credentialing, licensure, compliance or, other requirement by a graduate medical school of higher education, health care facility, hospital, hospital staff, health insurer, government agency, or other entity.

**D. Proceedings and physician identity are confidential and privileged.** The Virginia, Indiana, and South Dakota all confer confidentiality protections on wellness programs and participants. The sections of the Virginia law below appear to provide the most extensive protections of the three laws. The Virginia law provides the following confidentiality protections, which also can be

<sup>26</sup> Some states may allow for reporting to the medical board or an employer for compliance purposes that a participant in a PHP remains in treatment, is complying with the treatment plan, has completed treatment for the purposes of a safe return to practice.

used in PHP-related statutory or regulatory language.

- (1) **Proceedings, records, etc., are confidential and privileged.** The proceedings, minutes, records, and reports of any physician wellness program, together with all communications, whether oral, electronic, or written, originating in or provided to such committees or entities, are confidential and privileged communications that are privileged in their entirety, and are not discoverable.
- (2) **Analyses, deliberations, etc., are confidential and privileged.** The analysis, findings, conclusions, recommendations, and the deliberative process of any physician wellness program, as well as the proceedings, minutes, records, and reports, including the opinions and reports of experts, of such entities shall be confidential and privileged in their entirety, and are not discoverable.
- (3) **Physician's identity is confidential and privileged.** A physician who contacts, seeks assistance from, or is a participant in a physician wellness program or other entity providing counseling, coaching or similar services to address issues related to career fatigue and wellness shall have his or her participation and identify deemed confidential, privileged in its entirety, and not discoverable.

**E. Patient safety organization.** To facilitate communications among wellness programs themselves and between wellness programs and other organizations designed to address issues of patient safety and health care quality, it is essential that information relating to the activity of wellness programs retain their confidential and privileged nature. Indiana S.B. 365 provides good language here, stating that “The exchange of privileged or confidential information between or among one (1) or more wellness programs does not constitute a waiver of any confidentiality or privilege provision” contained in S.B. 365. Virginia H. 115 is broader, however, in that its confidentiality and privilege protections extend to patient safety organizations. Virginia H. 115 states as follows:

- (1) The exchange of any of the following shall not constitute a waiver of any privilege established under H. 115:
  - (a) Patient safety data among health care providers or patient safety organizations that does not identify any patient; or
  - (b) Privileged information between physician wellness programs. [Note: states also are encouraged to broaden the scope to include graduate medical education programs, PHPs or committees, boards, groups, commissions, or other entities described under section A.]

**F. Immunity for persons acting in performance of their duties.<sup>27</sup>**

- (1) Every member of, or consultant to, any physician wellness program or PHP or any committee, board, group, commission, or other entity that reviews, evaluates, or makes recommendations in connection with a physician wellness program or PHP, to address issues related to physician, graduate medical residents or medical student career fatigue and wellness shall be immune from civil liability or administrative action for any act, decision, omission, or utterance done or made in performance of his or her duties while serving as a member of or consultant to such physician wellness program, PHP or committee, board, group, commission, or other entity.

**G. No retaliation, discrimination, or other adverse action.** No individual, person, or entity may

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<sup>27</sup> It is important to highlight that these provisions may only be one component of more comprehensive protections, including peer review protections, needed as part of comprehensive legislation. One example can be found in Massachusetts:

[http://www.massmed.org/Physician\\_Health\\_Services/Education\\_and\\_Resources/Peer\\_Review\\_Committee\\_Definition\\_M\\_G\\_L\\_c\\_111\\_%C2%A7\\_1/#.Xz\\_U4chKiUk?](http://www.massmed.org/Physician_Health_Services/Education_and_Resources/Peer_Review_Committee_Definition_M_G_L_c_111_%C2%A7_1/#.Xz_U4chKiUk?)

retaliate, discriminate, or otherwise take adverse action with respect to a physician, graduate medical resident, or medical student who contacts, seeks assistance from, or is a participating in a physician wellness program or PHP to address issues related to career fatigue and wellness or based solely on those actions or participation.

#### H. Focus on current impairment.

- (1) Medical and osteopathic school applications, medical and osteopathic board licensing applications, credentialing applications, hospital and other facility-based physician employers, and health insurance company credentialing applications shall focus on current impairment and not past diagnosis and only include the following on such applications: “Are you currently suffering from any condition for which you are not being appropriately treated that impairs your judgment or that would otherwise adversely affect your ability to practice medicine in a competent, ethical and professional manner? (Yes/No)”<sup>28</sup>
- (2) Any medical licensing, credentialing or employment application that does not focus on current impairment shall be deemed null and void.

### Additional federal and state laws

Although an in-depth discussion is beyond the scope of this Issue Brief, federal and state<sup>29</sup> disability, civil rights, and other laws also may provide protection from discrimination. For example, the U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's disability, race, age, and other factors. The laws enforced by the EEOC include Title I of the Americans with Disabilities Act of 1990 (ADA), Title VII of the Civil Rights Act of 1964, and sections 501 and 505 of the Rehabilitation Act of 1973.<sup>30</sup> The EEOC has stated that before a job offer has been made, a potential employer cannot ask questions about an applicant's disability or questions that are likely to reveal whether an applicant has a disability.<sup>31</sup>

Consequently, an employer cannot ask questions on a job application about history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability because such questions are likely to elicit information about a psychiatric disability.<sup>32</sup> Specific examples of prohibited questions include asking about medications the applicant might be taking, or whether mental health conditions such as bipolar disorder, depression or schizophrenia run in the applicant's family.<sup>33</sup> These rules apply to any communications with or about the applicant, including application forms, interviews and reference checks.<sup>34</sup> Different rules apply, however, after a job offer is made and after the employee starts employment.<sup>35</sup> While the EEOC's jurisdiction applies to the employer-employee relationship, a minority of courts have held that the ADA and the Rehabilitation Act protect

<sup>28</sup> Alternatively, states may wish to use the following question as implemented by the Medical Board of California in 2019: “Do you currently have any condition (including, but not limited to emotional, mental, neurological or other physical, addictive, or behavioral disorder) that impairs your ability to practice medicine safely?” See <https://www.mbc.ca.gov/Download/Forms/application-physician-11a-11f.pdf>

<sup>29</sup> See, e.g., New York laws at <https://ag.ny.gov/civil-rights/disability-rights#:~:text=In%20New%20York%2C%20federal%2C%20state,other%20term%20or%20condition%20of.>

<sup>30</sup> See <https://www.eeoc.gov/statutes/laws-enforced-eeoc> for a list of laws that the EEOC enforces.

<sup>31</sup> See, e.g., <https://www.eeoc.gov/employers/small-business/4-what-cant-i-ask-when-hiring>

<sup>32</sup> See e.g., <https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities>

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

independently-contractor physicians with respect to the granting or termination of hospital privileges.<sup>36</sup>

### For more information

The AMA has several resources to help physicians and medical societies, including:

- AMA STEPS Forward™ module: [Physician Suicide and Support: Identify At-Risk Physicians and Facilitate Access to Appropriate Care](#)
- AMA public health resources: [Managing mental health during COVID-19](#)

For more information about the information contained in this issue brief, please contact the Advocacy Resource Center attorneys Daniel Blaney-Koen, JD, at [daniel.blaney-koen@ama-assn.org](mailto:daniel.blaney-koen@ama-assn.org) and Wes Cleveland, JD, at [wes.cleveland@ama-assn.org](mailto:wes.cleveland@ama-assn.org)

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<sup>36</sup> See e.g., *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998)(holding that a non-employee surgeon with attention-deficit disorder whose medical staff privileges had been terminated by defendant hospital could pursue disability discrimination claims under Title III of the ADA and section 504 of the Rehabilitation Act); *Hetz v. Aurora Med. Ctr. of Manitowoc Cnty.*, 2007 U.S. Dist. LEXIS 44115, WL 1753428 (E.D. Wis. 2007)(ruling that an independent-contractor physician could maintain a Title III ADA claim against a hospital that denied his request for privileges because of his bipolar disorder and sleep apnea). See also *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 939 (9th Cir. 2009)(concluding that an independent contractor anesthesiologist with sickle-cell anemia could state a Rehabilitation Act discrimination claim against a hospital that refused to accommodate his operating room and call schedules). Other courts have reached a different conclusion. See e.g., *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338 (8<sup>th</sup> Cir. 2006)(declining to extend the Rehabilitation Act to a physician independent contractor with bipolar disorder whose hospital privileges were terminated after the physician had a manic episode while performing surgery).