

Report of the Special Committee on Professional Conduct and Ethics

Adopted as policy by the House of Delegates of the Federation of State Medical Boards

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Table of Contents

Section I	
Introduction and Charge	1
Section II	
Enhancing Medical Board Authority	2
Section III	
Disruptive Behavior	4
Section IV	
Internet Prescribing	7
Section V	
Sale of Goods from Physician Offices	9
Section VI	
Recommendations	10
Section VII	
Bibliography	12

Federation of State Medical Boards of the United States, Inc.

Report of the Special Committee on Professional Conduct and Ethics

Section I. Introduction and Charge

In May 1998, Federation President William H. Fleming, III, MD, established the Special Committee on Professional Conduct and Ethics to evaluate physician behaviors and practices that are potentially unethical or unprofessional and to develop recommendations designed to assist state medical boards in the discipline of physicians who engage in such behaviors and practices. The Special Committee was composed of the following members: Clarke Russ, MD, Chair; Ann Marie Berger; Thomas Joas, MD; Philip Margolis, MD; Lawrence W. O'Connell, PhD; Joel C. Pittard, MD; George A. Porter, MD; Rosemary C. Selinger, MD; Janet Tornelli-Mitchell, MD; Cheryl Winchell, MD; and Terry L. Wolff, DO. William H. Fleming, III, MD; Alan E. Shumacher, MD, and George C. Barrett, MD, were ex officio members.

The Special Committee on Professional Conduct and Ethics was charged as follows:

- To identify physician behavioral patterns or practices that may, either directly or indirectly, negatively impact patient care;
- To identify physician behavioral patterns or practices that may negatively impact patients by creating a hostile environment in the delivery of health care;
- To evaluate how medical boards define unprofessional conduct and to assess if current language adequately empowers medical boards to discipline physicians displaying such behavioral patterns or engaging in such practices;
- To determine boundaries beyond which those behavioral patterns or practices constitute unprofessional conduct;
- To develop recommendations to assist state medical boards in the regulation of physicians displaying such behavioral patterns or engaging in such practices;
- To evaluate current business or contractual arrangements within managed care or other health care delivery systems which may encourage physician behavioral patterns or practices that may be unethical, thereby negatively impacting patient care;

- To develop recommendations to assist state medical boards in addressing licensees' behavioral and ethical responsibilities concomitant to participating in business or contractual arrangements.

In carrying out its charge, the Committee focused on physician behaviors and practices within the scope of unprofessional conduct that negatively impact (1) patient safety and welfare and/or (2) the physician/patient relationship. The Committee gathered and evaluated extensive information on various physician behaviors and practices during the course of its work and prioritized them based upon prevalence, threat to public safety, potential for patient exploitation, and need for regulation. Behaviors and practices identified as significant to state medical boards and relevant to the Committee's charge include:

1. Boundary issues as related to patient surrogates and key third parties
2. Participation in business or contractual arrangements
3. Disruptive behavior in physicians
4. Internet prescribing
5. Sale of health-related and nonhealth related goods from physician offices

The Committee has developed recommendations to strengthen medical board authority to regulate physicians whose behavioral patterns or professional practices may negatively impact patient safety and welfare and/or the physician/patient relationship. Additionally, the recommendations contained herein will assist medical boards in communicating their expectations regarding professional conduct and high standards of practice and outline the parameters beyond which conduct and practice would constitute unprofessional conduct.

At the core of any discussion regarding professional medical conduct is the potential for compromise and exploitation that each of these issues pose to the physician/patient relationship. In the evaluation of physicians' professional conduct, the Committee on Professional Conduct and Ethics strongly believes that state medical boards should assess any adverse impact of such conduct on the sacred relationship between physician and patient.

Section II. Enhancing Medical Board Authority: Amendment to *A Guide to the Essentials of a Modern Medical Practice Act*

State medical boards should be adequately empowered to take disciplinary action against physicians whose behaviors or practices are not in the interest of patient safety and welfare and are outside the bounds of professional practice. The Federation's model medical practice act, *A Guide to the Essentials of a Modern Medical Practice Act (Essentials)*, a dynamic policy document revised biennially, was developed to assist state medical boards in drafting legislative language for the effective regulation of medical practice. Accordingly, the Committee proposes revision of the *Essentials* strengthening board authority to discipline physicians by expanding and clarifying recommended grounds for "unprofessional conduct" and affirmatively stating expectations regarding compliance with recognized ethical standards of professional conduct.

Disruptive Behavior in Physicians

The Committee evaluated grounds for “unprofessional conduct” as defined in state medical practice acts as well as in the *Essentials* to ascertain whether state medical boards are sufficiently empowered to discipline physicians for practices or behaviors that create a hostile environment which could threaten the quality of health care delivered to patients. No specific language was identified in Federation policy that would clearly denote disruptive or aberrant behavior patterns toward peers, hospital staff, or others as unprofessional conduct. Additionally, a survey of state medical boards indicated boards have limitations and difficulties in handling complaints of disruptive behavior in physicians because there may be no clear violation of the state medical practice act as currently written. Accordingly, the Committee proposes amending the *Essentials* to strengthen Federation policy regarding boards’ ability to discipline physicians whose behavioral interactions with physicians, hospital personnel, patients, family members, or others creates an environment hostile to the delivery of quality health care or otherwise interferes with patient care. In addition to recommending stronger statutory authority, the Committee’s report provides recommendations to assist boards in evaluating and assessing complaints of disruptive behavior in physicians and managing physicians exhibiting such behavioral patterns.

Boundary Issues as Related to Patient Surrogates

The Committee evaluated sexual boundary issues related to patient surrogates. Surrogates are those individuals closely involved in patients’ medical decision-making and care and include (1) spouses or partners (2) parents (3) guardians, and/or (4) other individuals involved in the care of and/or decision making for the patient. Physician sexual misconduct involving a patient surrogate is an exploitation of the physician-patient relationship because such conduct may inappropriately influence the medical judgment of the physician as well as the surrogate’s decision-making regarding care of the patient. The Committee reviewed related Federation policy, including the *Essentials* and the *Report on Sexual Boundary Issues of the Ad Hoc Committee on Physician Impairment*, as well as the AMA Council on Ethical and Judicial Affairs’ *Code of Medical Ethics*. No references to patient surrogates were found in the *Essentials* or *Report on Sexual Boundary Issues*. Due to the potential for patient exploitation, the Committee recommends state medical boards revise their medical practice acts, rules and regulations to include sexual contact with patient surrogates in its definition of sexual misconduct. The Committee also recommends Federation policy be expanded to include sexual violation or impropriety occurring between physicians and patient surrogates and therefore, the Committee proposes the definition of sexual misconduct currently contained in the *Essentials* be amended to include any sexual contact with patient surrogates that occurs concurrent with the physician-patient relationship.

Adherence to Professional Codes of Ethics

The Committee strongly encourages state medical boards to proactively communicate the expectation that licensees maintain high ethical standards and professional integrity in all aspects of medical practice, including contractual and/or business arrangements related to such medical practice. The Committee supports boards’ use of recognized codes of medical ethics in evaluating physician conduct, such as those promulgated by the American Medical Association (AMA) and the American Osteopathic Association (AOA). However, codes of medical ethics developed and promulgated by a pro-

fessional organization, separate and apart from the medical board, are subject to ongoing amendment and modification, beyond the control of the medical board. It is the position of the Committee that state boards advocate compliance with “recognized codes of ethics” rather than referencing a specific external organization in statute. Therefore, the Committee recommends the *Essentials* incorporate language affirmatively stating medical boards’ expectations regarding licensees’ duty to comply with a national code of ethics acknowledged by the state medical board.

Business and Contractual Relationships

The Committee evaluated business and contractual arrangements that may negatively impact the physician-patient relationship, including managed care contracts that include financial incentives, practice management arrangements, and refund or shared risk programs offered to patients based upon a successful medical outcome. Physicians should be discouraged from entering into any business or other arrangement that could either directly or indirectly compromise the physician-patient relationship or diminish the quality of care provided. The Committee recognized and reaffirmed current Federation policy contained in the *Report of the Special Committee on Managed Care* (HOD 5/98), which states: *State medical boards should modify their medical practice acts or appropriate statutes to include as unprofessional conduct, subject to disciplinary action, the following actions when such actions are taken for the sole purpose of positively influencing the physician’s or plan’s financial well-being: failure to refer, failure to offer appropriate procedures/studies, failure to protest inappropriate managed care denials, failure to provide necessary service or failure to refer to an appropriate provider.* However, the Committee recommends Federation policy be expanded beyond contracts solely related to managed care to include any contractual, business or other arrangements or conduct that exploit the physician-patient relationship for the physician's personal financial gain. Accordingly, the Committee proposes the *Essentials* be amended to include conduct which violates patient trust and/or exploits the physician-patient relationship for personal gain be grounds for disciplinary action.

Section III. Managing Complaints of Disruptive Behavior in Physicians

Complaints alleging disruptive behavior in physicians present a distinct challenge to medical boards. The Committee therefore developed recommendations to assist boards in recognizing physician behavior that may negatively affect patient safety and/or create a hostile practice environment, thereby adversely affecting the quality of patient care.

While disruptive behavior may not, in and of itself, constitute a clear violation of the medical practice act, the effects of this behavior have serious implications on the quality of patient care and patient safety. Patterns of disruptive behavior can have a deleterious impact on patient care and can result in errors in clinical judgment and performance. Additionally, the increased anxiety and intimidation associated with a disruptive physician’s behavior may severely compromise the effectiveness of the health care team providing patient care by increasing the level of workplace stress and creating an environment in which errors are more likely to occur.

A. Definitions

For the purposes of this report, the following terms are defined:

Disruptive behavior in physicians - aberrant behavior manifested through personal interaction with physicians, hospital personnel, health care professionals, patients, family members, or others, which interferes with patient care or could reasonably be expected to interfere with the process of delivering quality care.

Behavioral sentinel events - episodes of inappropriate or problematic behavior which indicate concerns about the physician's level of functioning and suggest potential for adversely affecting patient safety and welfare.¹

Characteristics of physicians exhibiting disruptive behavior (behavioral sentinel events) may include, but are not limited to:

1. Profane or disrespectful language
2. Demeaning or intimidating behavior
3. Sexual comments or innuendo
4. Inappropriate touching, sexual or otherwise
5. Racial or ethnic jokes
6. Outbursts of rage or violent behavior
7. Throwing instruments or charts or other objects
8. Inappropriately criticizing health care professionals in front of patients or other staff
9. Boundary violations with staff, patients, surrogates or key third parties
10. Comments that undermine a patient's trust in a physician or hospital
11. Inappropriate chart notes
12. Unethical or dishonest behavior
13. Difficulty working collaboratively with others
14. Repeated failure to respond to calls
15. Inappropriate arguments with patients, family, staff, and other physicians
16. Resistance to recommended corrective action
17. Poor hygiene, slovenliness

Hostile environment - an environment which is intimidating, adverse or offensive to the patient and/or any individual working in that environment and which may interfere with patient care.

Impaired physician program (IPP) - may be synonymous with "physician health program" and refers to a program approved by the state medical board and charged with the management of physicians who are in need of evaluation and/or treatment.

B. Statement of the Problem

Disruptive behavior in physicians creates a hostile environment that interferes with the physician/patient relationship in the following manner(s):

1) Neff, KE, Two Hundred Physicians Referred for Disruptive Behavior: Findings and Implications for Reducing Errors in Health Care

1. The physician's inappropriate behaviors or emotional outbursts shift the physician's focus from the patient, which can result in errors in clinical judgment and performance.
2. Physician's emotional outbursts or other inappropriate behavior can increase apprehension and anxiety of the physician's patients as well as other patients who may witness such outbursts and inappropriate behavior.
3. Decreased effectiveness of the entire health team. Peers, nurses, allied health professionals, and other members of the health care team may be intimidated and anxious, causing a loss of their clinical focus and productivity and thereby increasing the propensity for medical errors.
4. Decrease in effective communications among the health care team.²

Disruptive behavior in physicians is often a symptom of underlying pathology. The differential diagnosis should include (1) addiction (2) stress (3) psychiatric disorders (e.g., bipolar disorder) or (4) personality disorders (e.g., narcissism). Personality disorders appear to contribute to the majority of referrals for disruptive behavior.³ Physicians impaired due to disruptive behavior may be effectively treated, without or concurrent with punitive action. Physician health programs may be an appropriate vehicle for evaluation and treatment if such programs incorporate the elements set forth in the *Report of the Ad Hoc Committee on Physician Impairment* (HOD 1995).

Adequate Authority

State medical boards, through legislative or regulatory process, should amend their medical practice acts or regulations to include disruptive behavior by physicians as grounds for disciplinary action. Due to the potential for patient harm, it is imperative that state medical boards be adequately empowered to investigate complaints of disruptive behavior by physicians and take appropriate action to protect the public.

Investigation of Behavioral Sentinel Events

Disruptive behavior in physicians is characteristically a chronic or habitual pattern of behavior. When investigating such complaints, state medical boards must demonstrate how the disruptive behavior presents a real and substantial danger and/or that patient care has been or is likely to be adversely affected. State medical boards should investigate complaints of disruptive behavior in physicians to determine if the complaint is an isolated incident or indicates a behavioral pattern consistent with the definition of disruptive behavior in physicians.

Evaluation

Once a pattern of disruptive behavior has been identified through investigation of behavioral sentinel events, state medical boards should be authorized to require the physician to submit to a mental and

2) Benzer, et al, The Disruptive-abusive physician: A New look at an old problem, Wisconsin Medical Journal, 1995:94(8)

3) Summer et al, The Disruptive Physician, I: The Alabama Physicians Recovery Network, Federation Bulletin, Vol. 84, No. 4, 1997

physical evaluation to identify any underlying diagnoses causal to their behavior such as chemical dependency, personality disorders, or psychiatric disorders. Physicians who are determined to have an underlying diagnosis that is causal to their behaviors should be directed by the state medical board for professional evaluation, counseling or treatment acceptable to the board.

Referral

The Federation has defined the elements of a model IPP whose purpose is to evaluate physicians with possible impairments and recommend appropriate management. The program should also have a mechanism to monitor the progress of treatment and provide periodic reports to appropriate individuals, committees, or organizations. Elements of a model physician health program are outlined in Federation policy.⁴ State medical boards should implement a process to monitor and follow the treatment progress of physicians referred for disruptive behavior. The Committee encourages that state medical boards utilize aftercare contracts in the management of physicians referred for treatment for disruptive behavior to ensure compliance with the corrective action recommended, as well as to exercise appropriate oversight of treatment.

Section IV. Regulating Internet Prescribing

The Internet has had a profound impact on society, including the practice of medicine and pharmacy, and offers opportunities for improving the delivery of health care. However, the practice of medicine, including prescribing and dispensing medications, via the Internet has created complex regulatory challenges for state medical boards in protecting the public.

Accepted standards of medical practice must be upheld regardless of means of communication or delivery of health care services. The Internet allows the delivery of health care services easily across state boundaries and emphasizes the need for cooperation and consistency in regulation among state medical boards and other federal and state regulatory authorities. The Committee encourages medical boards to adopt consistent language, standards and approaches for the regulation of medical practice, including regulations governing practicing medicine utilizing the Internet.

This report contains recommendations designed to assist state medical boards in regulating physicians who practice medicine, including issuing a prescription, over the Internet or by other remote means, while allowing the public access to the convenience and benefits of Internet commerce.

A. Analysis of the Issue

The increasing prevalence of Internet web sites that allow consumers to obtain prescriptions, medications, and/or medical treatments without an adequate evaluation by a physician poses an immediate threat to the public health and safety. Health risks to the public include (1) adverse drug reactions and/or interactions, (2) misdiagnosis or delay in diagnosis, and (3) failure to identify complicating conditions. Regulators are challenged due to difficulties in discerning the identity and location of participating physicians, thereby making jurisdictional determinations difficult.

4) Report of the Ad Hoc Committee on Physician Impairment, FSMB, April 1995, p. 2-3.

Prescribing of medications by physicians based solely on an electronic medical questionnaire clearly fails to meet an acceptable standard of care and is outside the bounds of professional conduct. In order to meet a standard of practice acceptable to the state medical board, the physician should demonstrate that there has been (1) a documented patient evaluation, including history and physical examination, adequate to establish the diagnosis for which the drug is being prescribed and identify underlying conditions and contra-indications; (2) sufficient dialogue between the physician and patient regarding treatment options and the risks and benefits of treatment(s); (3) a review of the course and efficacy of treatment to assess therapeutic outcome and, (4) maintenance of a contemporaneous medical record that is readily available to patients and their other health care professionals.

B. Appropriate Licensure

The practice of medicine as defined in Federation policy includes “offering or undertaking to pre-scribe, order, give or administer any drug or medicine for the use of any other person.”⁵ Physicians who treat or prescribe through Internet web sites are practicing medicine and must possess appropriate licensure in all jurisdictions where patients reside.⁶

C. Addressing the Problem

In order to adequately protect the public health, safety and welfare, the Committee encourages state medical boards to consider it unprofessional conduct for a physician to provide treatment recommendations, including issuing a prescription, via electronic or other means, unless the physician has obtained a history and physical evaluation of the patient adequate to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided. However, the Committee recognizes that exceptions exist in specific instances such as those (1) involving an emergency, (2) limited to patient care in consultation with another physician who has an ongoing relationship with the patient, and who has agreed to supervise the patient’s treatment, including use of any prescribed medications, or (3) on-call or cross-coverage situations in which the physician has access to patient records.

It is the responsibility of state medical boards to maintain comprehensive and current information relating to its licensees, including professional activity. This information is initially received through the initial licensure application and verification process and updated periodically through reregistration or renewal. In order to enhance the comprehensiveness of information maintained on licensees, medical boards should include information regarding web-based professional activity on initial and license renewal applications and require licensees to provide timely updates of practice information. The Committee encourages state medical boards require licensees, at the time of license application or renewal, to disclose whether any portion of the physician’s practice is web-based and all related web site(s). Additionally, the physician’s web site should be considered a practice location and any change in that location, including opening or closing of such web site, must conform to board requirements regarding notification of address change.

Difficulty in discerning the identity and practice location of physicians participating in Internet web sites offering health care services, treatments, and medications creates barriers to effective regulation and compromises accountability. If the identity of the physician is veiled, patients are not able to discuss their course of treatment or report unexpected complications and perhaps more importantly, they

5) A Guide to the Essentials of a Modern Medical Practice Act, 8th Edition, FSMB April 1997

6) A Model Act to Regulate the Practice of Medicine Across State Lines from the Ad Hoc Committee on Telemedicine, FSMB April 1996

have little recourse or remedy for untoward incidents or outcomes. Therefore, state medical boards should require licensees to disclose identifying information on all professional web sites. Medical boards should require physicians who practice medicine via the Internet, including prescribing, to clearly disclose on the web site physician identifying information, including name, practice location, all states in which licensure is held, and financial interests in any products prescribed or recommended.

Due to the regulatory complexities regarding the use and abuse of the Internet in the practice of medicine, the Committee believes a study should be conducted and guidelines developed to promote consistency and high standards of care to ensure the public is adequately protected. As an advocate, researcher and information source for its members, the Federation is the appropriate entity to conduct the study and develop guidelines for recommendation to state medical boards. These guidelines would be a valuable tool to assist and support state medical boards in educating licensees as to the appropriate use of the Internet in medical practice.

Section V. Regulating the Sale of Goods from Physician Offices

The practice of physicians who offer both health-related and nonhealth-related goods for sale from their offices is of concern to state medical boards due to the significant potential for patient exploitation. The Committee proposes principles and guidelines designed to assist state medical boards in regulating the sale of health-related and nonhealth-related goods from physician offices, while recognizing the legitimate need to supply medically necessary goods if such is incidental to patient care and offers no financial benefit to the physician.

A. Statement of Principle

The physician-patient relationship constitutes a fiduciary relationship between the physician and patient in the strictest sense of the word “fiduciary.” In this fiduciary capacity, physicians have a duty to serve the interests of patients above their own financial or other interests. Inherent in the in-office sale of products is a perceived conflict of interest with regard to the physicians’ fiduciary duty. The for-profit sale of goods by physicians to patients creates an ethical conflict because the goods may or may not be in the patients’ best interest. To avoid appearance of impropriety, physicians should avoid the sale of products that can easily be purchased by patients locally.

B. Guidelines for the Sale of Goods from Physician Offices

The following guidelines are designed to assist state medical boards in regulating the sale of health-related and nonhealth-related goods from physician offices, while recognizing the legitimate need to supply medically necessary goods if such is incidental to patient care and offers no financial benefit to the physician. The Committee encourages state medical boards to adopt and distribute guidelines to educate licensees regarding appropriate practice as related to the sale of goods from physician offices.

1. Due to the potential for patient exploitation, physicians should not sell, rent or lease health-related products or engage in exclusive distributorships and/or personal branding;

2. Physicians should provide a disclosure statement with the sale of any goods, informing patients of their financial interests; and
3. Physicians may distribute products to patients free of charge or at cost in order to make products readily available.

Exceptions should be made for the sale of durable medical goods essential to the patient's care, as well as nonhealth-related goods associated with a charitable or service organization.

Section VI. Recommendations of the Special Committee on Professional Conduct and Ethics

Recommendations regarding disruptive behavior in physicians

1. State medical boards, through legislative or regulatory process, should amend their medical practice acts or regulations to include disruptive behavior as grounds for disciplinary action and be adequately empowered to investigate complaints of disruptive behavior and take appropriate action to protect the public.
2. State medical boards should investigate complaints of disruptive behavior to determine if the complaint is an isolated incident or indicates a behavioral pattern consistent with the definition of disruptive behavior in physicians.
3. Physicians who are identified as displaying a pattern of disruptive behavior should be directed by the state medical board for professional evaluation, counseling or treatment acceptable to the board.
4. State medical boards should monitor physicians in treatment for behavioral or personality disorders, or other conditions causal to their disruptive behavior, and evaluate treatment outcome to ensure physicians' fitness to practice, including utilizing after-care contracts to ensure compliance with recommended corrective actions.

Recommendations regarding the regulation of Internet prescribing

5. State medical boards should consider it unprofessional conduct for a physician to provide treatment and consultation recommendations, including issuing a prescription, via electronic or other means, unless the physician has obtained a history and physical evaluation of the patient adequate to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided.

Exceptions should be defined to include:

- an emergency, as defined by the state medical board;
 - treatment provided in consultation with another physician who has an ongoing relationship with the patient, and who has agreed to supervise the patient's treatment, including use of any prescribed medications; or
 - on-call or cross-coverage situations in which the physician has access to patient records.
6. State medical boards should require licensees, at the time of license application or renewal, to disclose whether any portion of the physician's practice is web-based and provide all related web site(s).
 7. State medical boards should declare that a physician's web site from which medical services are provided is a practice location and any change in that location, including opening or closing of such web site, must conform with board requirements regarding notification of address change.
 8. State medical boards should require physicians who practice medicine via the Internet, including prescribing, to clearly disclose on the web site physician identifying information, including name, practice location, all states in which licensure is held, and financial interests in any products prescribed or recommended.
 9. The Federation of State Medical Boards should study the practice of medicine via the Internet as to the impact on public health and safety and develop guidelines for state medical boards to use in educating licensees as to the appropriate use of the Internet in medical practice.

Recommendation regarding the sale of goods from physician offices

10. State medical boards should adopt and distribute guidelines, based upon those contained in the Report of the *Special Committee on Professional Conduct and Ethics*, to licensees regarding boards' expectations regarding the sale of goods from physician offices.

Recommendation regarding boundary issues and patient surrogates

11. State medical boards should expand their definition of sexual misconduct to include sexual contact with patient surrogates that occurs concurrent with the physician-patient relationship.

Recommendations for amending *A Guide to the Essentials of a Modern Medical Practice Act*.

12. Amend *A Guide to the Essentials of a Modern Medical Practice Act*, Section IX(D) regarding grounds for action to include: aberrant behavior or interactions with physicians, hospital personnel, patients, family members or others that interferes with patient care or could reasonably be expected to interfere with the process of delivering good care.
13. Amend *A Guide to the Essentials of a Modern Medical Practice Act*, Section IX(D)(17) regarding grounds for action to include: commission of any act of sexual misconduct, including sexual contact with patient surrogates which exploits the physician-patient relationship.
14. Amend Federation policy, *A Guide to the Essentials of a Modern Medical Practice Act*, Section IX(D) regarding grounds for action to include: engaging in conduct that is calculated or has the effect of bringing the medical profession into disrepute, including but not limited to, violation of any provision of a national code of ethics acknowledged by the Board.
15. Amend Federation policy, *A Guide to the Essentials of a Modern Medical Practice Act*, Section IX(D) regarding grounds for action to include: conduct which violates patient trust and/or exploits the physician-patient relationship for personal gain.

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Special Committee on Professional Conduct and Ethics

Clarke Russ, MD, Chair
Board Member
Virginia Board of Medicine

Terry L. Wolff, DO
Past President
North Dakota State Board of
Medical Examiners

Ann Marie Berger, MPA
Executive Director
Arizona Board of Osteopathic Examiners
in Medicine and Surgery

Federation Staff

James R. Winn, MD
Executive Vice President

Thomas Joas, MD
Board Member
Medical Board of California

Lisa A. Robin
Director, Leadership Support Services

Philip M. Margolis, MD
Past Board Member
Michigan Board of Medicine
Past Member
Federation Board of Directors

Lawrence W. O'Connell, PhD
Board President
New Hampshire Board of Medicine

Joel C. Pittard, MD
Board Member
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Oregon Board of Medical Examiners

Rosemary C. Lee Selinger, MD
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Oregon Board of Medical Examiners

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Quality Assurance
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