REPORT OF THE BOARD OF TRUSTEES

BOT Report 15-N-21

Subject:	Opposing Attorney Presence at and/or Recording of Independent Medical Examinations (Resolution 1-A-19)
Presented by:	Bobby Mukkamala, MD, Chair
Referred to:	Reference Committee on Amendments to Constitution and Bylaws

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At the 2019 Annual Meeting, the House of Delegates (HOD) referred Resolution 1-A-19, "Opposing Attorney Presence at and/or Recording of Independent Medical Examinations" to the Board of Trustees for report. Resolution 1-A-19, introduced by the Illinois Delegation, asked that our American Medical Association (AMA) amend by addition Policy H-365.981, "Workers' Compensation," to include language that opposes the ability of courts to compel recording and videotaping of, or allow a court reporter or an attorney to be present during the independent medical examination, as a condition precedent to allowing the physician's medical opinion in court.

The reference committee heard testimony in opposition to this resolution. Speakers opposing the resolution noted the variability of state laws addressing the recording or videotaping of, or attorney presence at independent medical examinations (IME) for the purpose of resolution of workers' compensation claims. Furthermore, the state specific nature of workers compensation statutes precludes prescribing a national workers' compensation guideline. Testimony supportive of adopting the resolution noted that the resolution is consistent with the ethical guidelines of our AMA and of other organizations, and the recording or presence of a third party is intrusive to a private medical exam. Given the diverse testimony regarding the resolution, the HOD referred Resolution 1-A-19.

This report considers the discordancy of existing state laws regarding the physician's role in IME and presents current AMA policy and *Code of Medical Ethics* opinions. This report analyzes the existing body of AMA policy on the IME in workers' compensation matters and the physician patient relationship and evaluates the consistency of the proposed resolution with existing policy and concludes with a recommendation for HOD action.

BACKGROUND

An IME is a physical examination conducted at the request of a third party, such as an employer or an insurance company. IMEs arise in the context of workers' compensation injury claims, although an IME may also be utilized in any personal injury claim or in employer mandated pre-employment or annual physical examinations. Our AMA Policy on workers' compensation (Policy H -365.981) was initially adopted in 1993 and was most recently modified in 2017 to reflect certain goals that had been met. In addition, a number of states allow for attorney presence during examinations pursuant to a showing of good cause, and/or with the consent of the patient.

DISCUSSION

AMA Code of Ethics Opinion 1.1.1, *Patient-Physician Relationship*, describes the practice of medicine as a moral activity where the relationship between the physician and patient is based on trust. The opinion further addresses circumstances wherein a *limited* patient-physician relationship is created. One example of a limited patient-physician relationship is in the context of an IME. In keeping with ethics guidance, the IME creates a limited patient-physician relationship imposing a duty of care on the physician conducting the IME examination. While this relationship is subject to variable interpretations across the states, our AMA tasks the physician with responsibilities to both the employer or insurer and the patient.

AMA Code of Medical Ethics E-1.2.6, *Work Related & Independent Medical Examinations*, states that physicians who provide medical examinations at the request of employers or insurance companies face a conflict of duties. The physician has responsibilities to *both* the patient and the employer or third party. The core obligations of industry-employed physicians to their patients include disclosure of the nature of the relationship between the physician and the patient and the physician's departure from the traditional fiduciary role. The physician's ethical responsibility further obligates the physician to inform the patient about incidental findings discovered during the exam, and when appropriate, suggest follow-up care. If requested, the physician also provides reasonable assistance in securing follow-up care.

The integrity of the physician-patient relationship is paramount with long-standing and unequivocal policy support by our AMA. Recording equipment, or the presence of an attorney at an IME, interferes with and lends a degree of artificiality to the examination. The need for a confidential and open exchange between the patient and the examining physician is evident. Allowing a third party who has an interest in the outcome of the examination, or recording the examination, could inhibit and intimidate the patient from candid communication during the exam. The intrusion of counsel in the examining room thrusts the adversarial process into the examination room.

The states have an interest in maintaining the integrity of Workers Compensation claims processes. Numerous states have implemented recording requirements for IME and/or allow an attorney's presence during the exam. While one can recognize the state's interest in attempting to interject a method to document proof of the veracity of the IME, AMA policy is unequivocal on patient privacy and the sanctity of the patient-physician relationship. Furthermore, the claims process is not disadvantaged by the lack of a recording or attorney at the IME. The attorneys and the employer or insurer each receive a copy of the examining physician's written report and can request an additional IME. Most importantly, the attorneys have the opportunity to cross examine the physician in a deposition or at trial. Cross examination of an expert is the industry standard and best practice for obtaining evidence.

Your Board recognizes the concerns expressed by those who testified in opposition to adoption of the resolution. There are numerous state law approaches to the issue raised by Resolution 1-A-19. The state-specific nature of the laws precludes the prescribing of workers compensation guidelines. Your Board further acknowledges a state's legitimate reasons for recording or having an attorney present during an IME. However, your Board does not believe these considerations outweigh the sanctity of the patient-physician relationship, even in the more limited context of an IME, particularly given the availability of other documentation methods such as written reports and cross examination.

CONCLUSION

As noted in the preceding paragraph, testimony at the reference committee indicated that state laws may differ widely in how they deal with the issues that Resolution 1-A-19 raises, and testimony did not indicate that physicians in all states opposed the manner in which their state's law addressed those issues. Consequently, your Board does not recommend that our AMA adopt a blanket policy requiring your AMA to always oppose instances where a state law or proposed legislation permits the recording of an independent medical examination. Adopting such a blanket policy would obligate our AMA to oppose state laws and legislative proposals in cases where physicians in the state may not wish our AMA to oppose the law or proposal. Your Board recommends that your AMA oppose attorney presence and the recording of IMEs when asked to do so by a state medical association or national medical specialty society. This approach avoids committing our AMA to opposition where none has been requested by the state medical association, yet empowers your AMA to assist those state medical associations who wish to challenge laws or legislative proposals that the association believes unjustifiably intrude into the limited patient-physician relationship created in the context of an IME.

RECOMMENDATION

Your Board of Trustees recommends that the following recommendation be adopted in lieu of Resolution 1-A-19 and that the remainder of the report be filed.

> That, upon request of state medical associations and national medical specialty societies, our AMA will provide assistance and consultation in opposing the ability of courts to compel recording and videotaping of, or allow a court reporter or an attorney to be present during the independent medical examination, as a condition precedent to allowing the physician's medical opinion in court. (Directive to Take Action)

Fiscal Note: Less than $1,000

AMA POLICY

H-365.981, “Workers' Compensation”
Our AMA: (1) will promote the development of practice parameters, when appropriate, for use in the treatment of injured workers and encourages those experienced in the care of injured workers to participate in such development. (2) will investigate support for appropriate utilization review guidelines for referrals, appropriate procedures and tests, and ancillary services as a method of containing costs and curbing overutilization and fraud in the workers' compensation system. Any such utilization review should be based on open and consistent review criteria that are acceptable to and have been developed in concert with the medical profession. Physicians with background appropriate to the care under review should have the ultimate responsibility for determining quality and necessity of care. (3) encourages the use of the Guides to the Evaluation of Permanent Impairment. The correct use of the Guides can facilitate prompt dispute resolution by providing a single, scientifically developed, uniform, and objective means of evaluating medical impairment. (4) encourages physicians to participate in the development of workplace health and safety programs. Physician input into healthy lifestyle programs (the risks associated with alcohol and drug use, nutrition information, the benefits of exercise, for example) could be particularly helpful and appropriate. (5) encourages the use of uniform claim forms (CMS 1500, UB04), electronic billing (with appropriate mechanisms to protect the confidentiality of patient information), and familiar diagnostic coding guidelines (ICD-9-CM, CPT; ICD-10-CM, CPT), when appropriate, to facilitate prompt reporting and payment of workers' compensation claims. (6) will evaluate the concept of Independent Medical Examinations (IME) and make recommendations concerning IME's (i) effectiveness; (ii) process for identifying and credentialing independent medical examiners; and (iii) requirements for continuing medical education for examiners. (7) encourages state medical societies to support strong legislative efforts to prevent fraud in workers' compensation. (8) will continue to monitor and evaluate state and federal health system reform proposals which propose some form of 24-hour coverage.
(9) will continue to evaluate these and other medical care aspects of workers' compensation and make timely recommendations as appropriate. (10) will continue activities to develop a unified body of policy addressing the medical care issues associated with workers' compensation, disseminate information developed to date to the Federation and provide updates to the Federation as additional relevant information on workers' compensation becomes available.

E-1.1.1. Patient-Physician Relationships. The practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering. The relationship between a patient and a physician is based on trust, which gives rise to physicians’ ethical responsibility to place patients’ welfare above the physician’s own self-interest or obligations to others, to use sound medical judgment on patients’ behalf, and to advocate for their patients’ welfare.
A patient-physician relationship exists when a physician serves a patient’s medical needs. Generally, the relationship is entered into by mutual consent between physician and patient (or surrogate). However, in certain circumstances a limited patient-physician relationship may be created without the patient’s (or surrogate’s) explicit agreement. Such circumstances include:
(a) When a physician provides emergency care or provides care at the request of the patient’s treating physician. In these circumstances, the patient’s (or surrogate’s) agreement to the relationship is implicit.
(b) When a physician provides medically appropriate care for a prisoner under court order, in keeping with ethics guidance on court-initiated treatment.
(c) When a physician examines a patient in the context of an independent medical examination, in keeping with ethics guidance. In such situations, a limited patient-physician relationship exists.

E-1.2.6: Work Related & Independent Medical Examinations. Physicians who are employed by businesses or insurance companies, or who provide medical examinations within their realm of specialty as independent contractors, to assess individuals’ health or disability face a conflict of duties. They have responsibilities both to the patient and to the employer or third party. Such industry-employed physicians or independent medical examiners establish limited patient-physician relationships. Their relationships with patients are confined to the isolated examinations; they do not monitor patients’ health over time, treat them, or carry out many other duties fulfilled by physicians in the traditional fiduciary role. In keeping with their core obligations as

medical professionals, physicians who practice as industry- employed physicians or independent medical examiners should:
(a) Disclose the nature of the relationship with the employer or third party and that the physician is acting as an agent of the employer or third party before gathering health information from the patient.
(b) Explain that the physician's role in this context is to assess the patient's health or disability independently and objectively. The physician should further explain the differences between this practice and the traditional fiduciary role of a physician.
(c) Protect patients' personal health information in keeping with professional standards of confidentiality.
(d) Inform the patient about important incidental findings the physician discovers during the examination. When appropriate, the physician should suggest the patient seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care.

E-3.2.3 Industry Employed Physicians and Independent Medical Examiners. Physicians may obtain personal information about patients outside an ongoing patient-physician relationship. For example, physicians may assess an individual's health or disability on behalf of an employer, insurer, or other third party. Or they may obtain information in providing care specifically for a work-related illness or injury. In all these situations, physicians have a responsibility to protect the confidentiality of patient information. When conducting third-party assessments or treating work-related medical conditions, physicians may disclose information to a third party:
(a) With written or documented consent of the individual (or authorized surrogate); or
(b) As required by law, including workmen's compensation law where applicable.
When disclosing information to third parties, physicians should:
(c) Restrict disclosure to the minimum necessary information for the intended purpose.
(d) Ensure that individually identifying information is removed before releasing aggregate data or statistical health information about the pertinent population.

E- 3.2.1 Confidentiality. Patients need to be able to trust that physicians will protect information shared in confidence. They should feel free to fully disclose sensitive personal information to enable their physician to most effectively provide needed services. Physicians in turn have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient. In general, patients are entitled to decide whether and to whom their personal health information is disclosed. However, specific consent is not required in all situations. When disclosing patients' personal health information, physicians should:
(a) Restrict disclosure to the minimum necessary information; and
(b) Notify the patient of the disclosure, when feasible.
Physicians may disclose personal health information without the specific consent of the patient (or authorized surrogate when the patient lacks decision-making capacity).
(c) To other health care personnel for purposes of providing care or for health care operations; or
(d) To appropriate authorities when disclosure is required by law.
(e) To other third parties situated to mitigate the threat when in the physician's judgment there is a reasonable probability that: (i) the patient will seriously harm him/herself; or (ii) the patient will inflict serious physical harm on an identifiable individual or individuals.
For any other disclosures, physicians should obtain the consent of the patient (or authorized surrogate) before disclosing personal health information.