The Practical Professional
in Healthcare

PBI EDUCATION™
issue seventeen
AUGUST/SEPTEMBER 2018

the DUTY *to* REPORT MISCONDUCT

"It takes a great deal of courage to stand up to your enemies, but a great deal more to stand up to your friends."

— Albus Dumbledore

Between the time former USA Gymnastics national team doctor Larry Nassar began abusing young athletes and the day the first criminal complaint was filed against him, nearly 20 years elapsed. During that time, numerous victims and their families told Nassar's colleagues what was going on, but according to Kim Gaedeke, deputy director of the Michigan Department of Licensing and Regulatory Affairs, no one ever filed a complaint with the Michigan Board of Medicine. The Board itself opened

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WHAT DO YOU THINK? SHARE YOUR THOUGHTS AND JOIN THE CONVERSATION

PBI WANTS TO ACKNOWLEDGE AND THANK THE FSMB FOR PERMISSION TO PUBLISH AND USE CONTENT FROM BOUNDARY VIOLATIONS AND THE DUTY TO REPORT, A BREAKOUT SESSION AT ITS 2018 ANNUAL MEETING.

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a file on Nassar after reading a newspaper account of the criminal charges against him, and within a few months had permanently revoked his license and fined him $1 million. By then, more than 160 victims had come forward with claims of abuse. No one knows the total number of patients who suffered or how many might have been spared if Nassar's colleagues had spoken up.

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> **Alarming cases like Nassar's have focused attention as never before on the duty to report sexual misconduct.**

Alarming cases like Nassar's have focused attention as never before on the duty to report sexual misconduct. In April 2016, the Federation of State Medical Boards (FSMB) adopted a formal Position Statement on Duty to Report. Less than a year later, FSMB published the results of its summit meeting, titled *Duty to Report: Protecting Patients by Improving the Reporting and Sharing of Information about Health Care Practitioners.* And earlier this year, an expert panel addressed *Boundary Violations and the Duty to Report* in a breakout session at the Federation's annual meeting.

In this issue, we look at salient questions swirling around this topic: Why is the duty to report so important? Why have so many healthcare professionals failed to fulfill this duty? What can be done to remedy the situation? ■

WHAT DO YOU THINK?

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UPCOMING LIVE COURSES

BOUNDARIES
SEP 7-9 | California

ETHICS (ME22)
SEP 7-8 | California

RECORDS
SEP 8-9 | California

ETHICS (ME22)
SEP 21-22 | California

BOUNDARIES
SEP 21-23 | Connecticut

BOUNDARIES
OCT 12-14 | Florida

FLORIDA LAW (FLLR5)
OCT 13 | Florida

PRESCRIBING
OCT 13-14 | Florida

ETHICS (ME22)
OCT 13-14 | Connecticut

PRESCRIBING
OCT 13-14 | Connecticut

ETHICS (ME22)
OCT 26-27 | California

ETHICS (PE22 PHARM)
OCT 27-28 | California

BOUNDARIES
NOV 2-4 | Georgia

RECORDS
NOV 3-4 | Georgia

PRESCRIBING
NOV 3-4 | Georgia

BOUNDARIES
NOV 16-18 | Texas

ETHICS (ME15)
NOV 17 | Georgia

RECORDS
NOV 17-18 | Texas

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UNDERSTANDING THE DUTY TO REPORT:

Why providers don't report misconduct, and why they should

Asked about their reluctance to report colleagues' misconduct, many physicians say they are unclear about what's required. What kinds of misconduct should they report? What if it's only one instance? What if they are unsure of the facts?

From a legal point of view, the answers to these questions vary considerably from state to state, according to a recent review of state laws by the *Atlanta Journal-Constitution*. Delaware requires medical professionals to report a colleague when they reasonably believe that person is or may be guilty of unprofessional conduct or unfit to practice. Just down the road in Washington, DC, however, the law does not require physicians to report possible violations by fellow doctors. In Minnesota, physicians must report any conduct that constitutes grounds for disciplinary action *if* they have personal knowledge of the violation. In Pennsylvania, physicians have to report colleagues for issues related to addiction and incompetence, but nothing else.

This crazy quilt of laws certainly complicates providers' attempts to understand their legal obligations. Still, all state residents, including physicians, are obligated to obey state law, and ignorance of the law is no excuse. Board websites generally provide links to the state's Medical Practice Act, and it is up to each provider to make use of the information.

Even in places where the law does not specifically require reporting, or narrowly defines the responsibility, all physicians have an unambiguous ethical obligation to report colleagues who they suspect are harming patients. The American Medical Association's Ethics Code is explicit and extensive on this point. It even spells out to whom various kinds of offenses should be reported.

"Unethical conduct that threatens patient care or welfare should be reported to the appropriate authority for a particular clinical service. Unethical conduct that violates state licensing provisions should be reported to the state licensing board. It is appropriate to report unethical conduct that potentially violates criminal statutes to law enforcement authorities. All other unethical conduct should be reported to the local or state professional medical organization. When the inappropriate conduct of a physician continues despite the initial report(s), the reporting physician should report to a higher or additional authority." — Opinion 9.031 of the AMA Code, "Reporting Impaired, Incompetent, or Unethical Colleagues"

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OBSTACLES OFTEN DISCOURAGE REPORTING. When medical professionals weigh the pros and cons of reporting a colleague's misconduct, a few considerations often tip the balance towards silence, especially when the chance of being disciplined for not reporting seems vanishingly slight (more on that in the following article).

- Some physicians blame their reluctance on a system that is overly bureaucratic and ineffective. Filing a report, they say, consumes inordinate amounts of time, better spent on patient care. And besides, from what they can see, the reports don't do any good. Those with power seem never to suffer consequences, while those less powerful are disciplined too harshly.
- According to participants in FSMB's recent Duty to Report summit meeting, physicians often fear they will suffer repercussions if they report a colleague's misconduct. If they report a supervisor, they worry about the risk of outright retribution. If they report a peer, they worry about being ostracized and, notes the FSMB report, "For physicians or other professionals who rely on referrals, such ostracization can have economic impacts."
- The punitive orientation of the system and its focus on extreme cases also discourage physicians and others from "turning in" colleagues and friends they work with every day. This is especially true when the misconduct is less severe. "Health care providers with moderate performance or behavior issues," notes the summit report, "may not be reported by others out of concern that taking such an action would be too extreme a step."

THE BENEFITS OF REPORTING OUTWEIGH THE NEGATIVES. These obstacles can make the duty to report seem onerous, but they cannot obscure its value. Speaking at FSMB's annual meeting earlier this year, Catherine Caldicott, MD, outlined why reporting misconduct is so important.

The first reason she cited was the obligation to protect patients. As the Nassar case so clearly demonstrates, patients who are sexually exploited by their doctors often keep the experience to themselves, choosing to suffer in silence rather than risk humiliation and trauma by speaking up.

The best hope of protecting patients, then, is for colleagues to report any case of misconduct they are aware of.

According to a study of the risk of recidivism in physicians with histories of sexual misconduct published in 2000, fewer than 10% of patients who have been sexually mistreated in a clinical context ever report the violation. "That's a stunning figure," said Caldicott. "That statistic means that most physicians who commit sexual misconduct are never held to account. And most patients who are victims of sexual misconduct do not have an opportunity for justice and are not offered support and opportunities for recovery and healing."

The best hope of protecting patients, then, is for colleagues to report any case of misconduct they are aware of. Since most sexual boundary violations happen behind closed doors, says Caldicott, it's important for providers to let others know not just what they are certain of, but also what they have reason to suspect, even if hard evidence is lacking. That doesn't mean every piece of unsubstantiated gossip is to be taken seriously. But whenever providers believe patients may be at risk, they have an obligation to speak up.

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Not everything has to be immediately reported to the board. Caldicott, who is a PBI faculty member, says, "Generally, we recommend that people talk to the colleague first. If their suspicions are heightened or the colleague will not report themselves, then we recommend that the doctor go up the food chain until someone does something about the issue."

At the FSMB meeting, Caldicott emphasized the importance of reporting lesser infractions as well as more serious ones. These relatively minor incidents may not inflict serious harm, but they are often harbingers of trouble to come—a first step onto the slippery slope leading to a violation. Confronting issues before they evolve into more serious problems protects both patients and physicians, said Caldicott.

Early or late, reporting can also ensure that colleagues get the care they need to remain a valuable member of the healthcare community. "The physicians that commit sexual violations are often considered a second victim," said Caldicott, "because their behavior doesn't come out of nowhere. It comes out of wants and needs and pain and hurt and trauma—all sorts of background issues that merit attention."

One objection healthcare professionals raise when they hear this argument is that remediation efforts simply don't work. The fact is, there is very little research either way, demonstrating or refuting the effectiveness of remediation. "I can't tell you how many times I've been asked about recidivism and whether or not there are any data," said Caldicott.

She did point to one recent analysis by PBI as a notable exception. Attendees of a 2013 PBI course, which included a longitudinal follow-up component, were tracked over five years. To ensure accuracy, only people from states that provided reliable online access to timely disciplinary updates were chosen. The preliminary analysis found that of the 94 people included, only 10 had actions taken against their licenses for unrelated infractions, such as shoplifting or failure to take a drug test, Caldicott reported. "But none of them repeated the original violation."

One other concern about offering offenders remediation came from an audience member at the FSMB meeting. After hearing about the kinds of intense efforts needed to help a serious offender—possibly including remedial education, psychotherapy and Physician Health Programs—Alexander Gross of the Georgia Board wondered if the public might think, "That's too little, too late."

"I don't know if it's too little," answered Caldicott. "But it may very well be too late, which argues for early intervention." When less harmful behaviors are reported and acted on, she said, less intervention is required and many more patients are spared the trauma of sexual misconduct. ■

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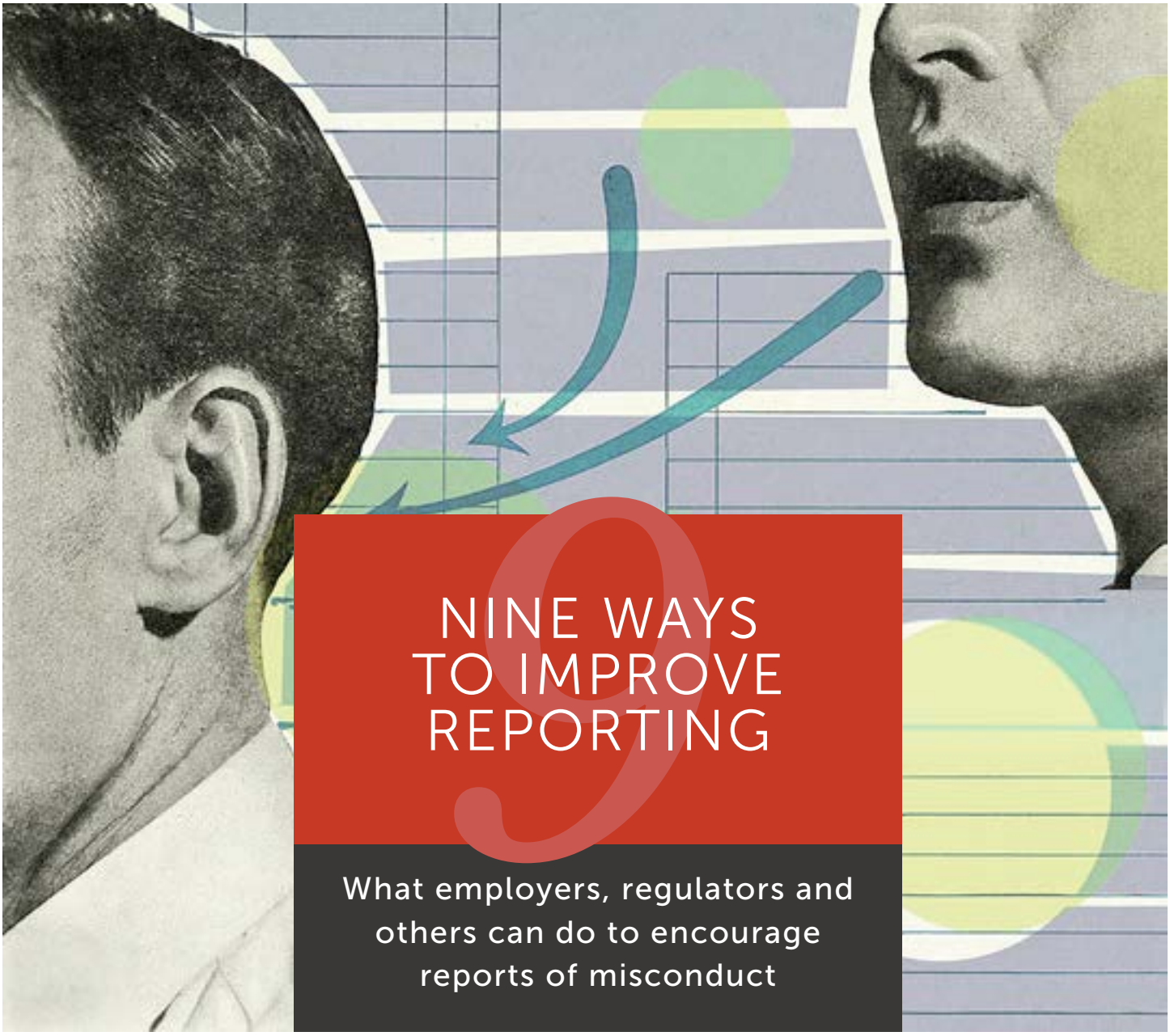

NINE WAYS TO IMPROVE REPORTING

What employers, regulators and others can do to encourage reports of misconduct

1 **TAKE REPORTS SERIOUSLY.** It's hard enough for physicians to report a colleague's misconduct. Hospitals and practices that fail to respond make it that much more difficult. Employers can encourage responsible reporting by taking all reports seriously, and holding everyone—including high-profile clinicians and researchers—to the same high standards.

2 **LEAD BY EXAMPLE.** According to the Federation's 2016 Position Statement on Duty to Report, "FSMB has heard complaints from its member boards that hospitals and health organizations regularly ignore reporting requirements, find ways to circumvent them, or provide reports that are too brief and general to equip the board with relevant information for carrying out its regulatory functions." If hospitals want physicians and other healthcare professionals to live up to their reporting obligations, the institutions must do the same.

3 **MINIMIZE THE HURDLES.** "In a complex and bureaucratic health care system, with multiple layers of oversight, regulation and accountability, it is often difficult for individuals to know with whom they should be sharing information, or what steps are required of them," notes

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the FSMB position statement. While this is particularly true for patients and their families, many professionals make the same complaint. Simplifying hospital policies and procedures as much as possible, and communicating them to everyone, removes an important obstacle.

4 **INCREASE EDUCATION.** The Federation suggests that healthcare professionals be taught the importance of sharing information and the role they need to play in helping protect patients from misconduct. "Early education of medical students and residents is especially important in helping to change attitudes about reporting," noted the FSMB position statement.

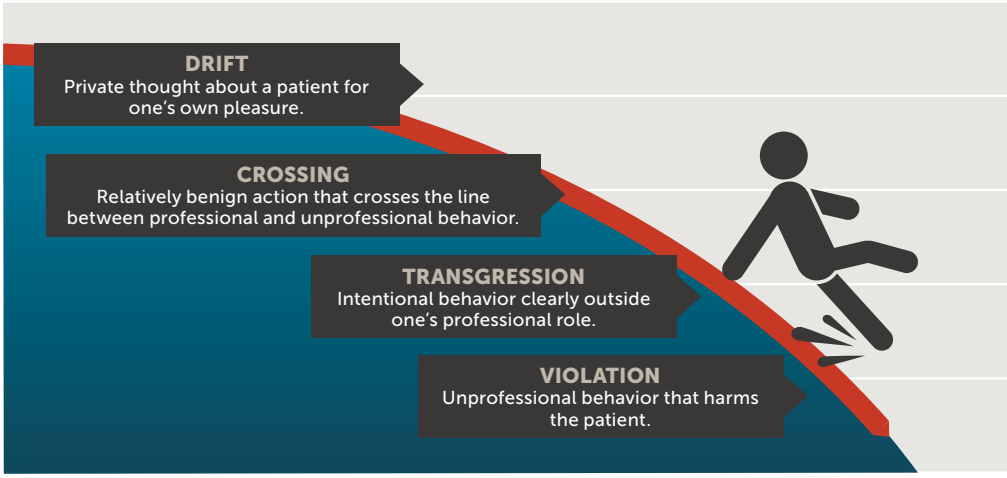
5 **MANDATE TRAINING.** In most states, physicians cannot be licensed without proof that they have been properly trained to recognize and report suspected child abuse. No such requirement exists when it comes to reporting misconduct. One way to ensure that physicians understand their duty to report would be to require such training as a condition of licensure.

6 **SHIFT THE PARADIGM.** "If reporting is always viewed as a punitive exercise, few will share information," notes the Federation statement. Caldicott suggests physician think of reporting not as policing one another, but in terms of healing. "Physicians are skilled observers and they are healers," she said. "By keeping our eyes and ears open for clues that our colleagues may be at risk of committing a violation, we can put those skills to good use." The word remediation, she adds, means 'to heal again.'"

7 **EMPHASIZE EARLY INTERVENTION.** The importance of reporting egregious misconduct cannot be overstated. But focusing exclusively on extreme cases ignores the value of early intervention. Boundary violations are not isolated or random events. They are the final stage of a process that often starts with purely private thoughts ("drifts") and proceeds through increasingly serious line-crossings. A practitioner might start out indulging in a harmless fantasy about a patient, then go on to schedule a follow-up sooner than clinically indicated. Eventually, the physician might ask the patient for a date and end up in a romantic relationship that is a clear boundary violation.

There are no bright lines marking the transition from one stage to the next, but each represents an opportunity for early intervention: the earlier the better. Programs that help bring this progression into focus and encourage people to speak up early on, are far more likely to prevent serious harm than those focused exclusively on outright violations.

THE STAGES LEADING TO A VIOLATION



8 **ENSURE CONFIDENTIALITY.** Since one of the common reasons for not reporting is a fear of reprisal, it is important to ensure that those who do report misconduct have the right to confidentiality. It's just as important to make sure everyone knows that right exists. Gaedeke now makes a point of telling physicians in Michigan that they are legally obligated to report misconduct and that their names will not be released without their written consent. By following her lead, hospitals and others can remove a serious barrier to timely reporting.

9 **INCREASE ACCOUNTABILITY.** In the PBI Violation Potential Formula (below), accountability acts as counterweight to the other forces people struggle with (individual vulnerabilities, risk factors and resistance). The more accountable someone feels, the less likely they are to commit a violation.

THE PBI VIOLATION POTENTIAL FORMULA©

$$\text{Violation Potential} = \frac{\text{Vulnerabilities} \times \text{Risk Factors}}{\text{Accountability}} \text{ Resistance}$$

Resistance

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The same holds true for the duty to report. The more someone believes they will be held accountable for failing in their duty, the less likely they are to remain silent.

And yet, those who neglect their legal and ethical obligations to report almost never suffer any consequences.

According to Caldicott, people are often referred to PBI and other similar organizations for failing to tell their boards about an arrest or loss of privileges. "That's a violation of their state Medical Practice Act, and they get disciplined for it," she says. "Yet I have never seen a physician disciplined for failing to report suspected sexual misconduct." In fact, when someone asked if anyone at the FSMB meeting knew of someone being disciplined for failing to report, only one person, Anita Steinbergh of the State Medical Board of Ohio, responded.

There are a number of reasons discipline is rare. Sometimes the law is unclear and, in many situations, evidence can be hard to come by. In the Ohio case, the Board learned that the junior partner in a pain management practice knew a senior colleague had been abusing fe-male patients for years. The law in Ohio, said Steinbergh, is explicit: "You only have to have a reasonable belief that something is occurring and you must report," she said. According to Ohio licensure defense attorney Beth Collis, the law "does not require absolute certainty or complete unquestioning acceptance, but only an opinion that a violation has occurred based upon firsthand knowledge or reliable information."

Steinbergh made it clear that the Ohio Board had convincing evidence, including solid documentation, that the doctor in question knew what was going on and yet remained silent. After the senior partner voluntarily surrendered his license, the junior partner was brought to a hearing, said Steinbergh, and his license was permanently revoked. "That probably has not been done before," she noted, "but we were certain that was the right action." ■

...those who neglect their legal and ethical obligations to report almost never suffer any consequences.

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RESOURCES

ARTICLES, REPORTS AND WEBSITES REFERENCED IN THIS ISSUE AND OFFERING MORE INFORMATION:

FSMB Guidelines on Sexual Boundaries (2006)

"Report Card: How each state protects patients from sexually abusive doctors," *Atlanta Journal-Constitution*

"Would You Report an Impaired Physician? Many Doctors Won't," by Shelly Reese, Medscape, April 11, 2018

"Physicians' Legal Obligation to Report to the State Medical Board of Ohio," Ohio Medical Board Defense Council blog, by Beth Collis. March 14, 2016

"Position Statement on Duty to Report," Adopted as policy by the Federation of State Medical Boards, April 2016

"Duty to Report: Protecting Patients by Improving the Reporting and Sharing of Information about Health Care Practitioners," A Summit Meeting of Health Care Stakeholders, held February 7, 2017

AMA Code of Medical Ethics' Opinions on Physicians' Health and Conduct

Assessing the risk of recidivism in physicians with histories of sexual misconduct, by Tillinghast E, Coumos F., *Journal of Forensic Sciences,* November, 2000