EXHIBIT 40

From: Newman, Russ [/O=APA/OU=DC/CN=RECIPIENTS/CN=RSN]
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NOTE

The Council on Ethical and Judicial Affairs presents CEJA Report 10, A-06, "Physician Participation in Interrogation," as a Late Report, acknowledging that this limits the time during which Delegates can review the full report. However, the Council sought input from a large number of interested organizations and individuals by sharing an early draft of the Report in order to ensure broad input. Because this topic has been the focus of considerable ongoing public debate, the Council believes it is in the best interest of the AMA and particularly of colleagues currently serving in the military to present the Report to the House at this time, as a Late Report.

The Council considers that the time required to process the wide range of comments that were solicited, which resulted in the delay in submitting this Report to the House, was time well spent. After thorough reflection and deliberation on the broad spectrum of sharply conflicting opinions of reviewers, the Report now strongly and clearly describes the ethics of physicians as they relate to interrogations. The Council members are deeply grateful to all those who participated in this process.

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 10-A-06

Subject: Physician Participation in Interrogation (Res. 1, I-05)

Presented by: Priscilla Ray, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws (Joseph H. Reichman, MD, Chair)

INTRODUCTION

At the 2005 Interim Meeting, the House of Delegates adopted amended Resolution 1, I-05, "Physician Participation in the Interrogation of Prisoners and Detainees," which directed the Council on Ethical and Judicial Affairs to delineate the boundaries of ethical practice with respect to physicians' participation in the interrogation of prisoners and detainees.

The resolution arose from concerns in recent years regarding the role of physicians in interrogation practices, including involvement in Behavioral Science Consultation Teams (BSCTs) to advise interrogators.[1, 2, 3, 4, 5] This report focuses on the role of physicians in the interrogation process in the specific contexts of domestic law enforcement and military or national security intelligence gathering.

ELEMENTS OF THE DEBATE

Interrogation: Definition and Description

For the purpose of this Report, we define a "detainee" as a criminal suspect, prisoner of war, or any other individual who is detained and is potentially subject to interrogation. An individual who undergoes interrogation is referred to as an "interrogatee." Most broadly, interrogation has been defined as formal and systematic questioning.[6] However, in this Report, we define interrogation more narrowly, as questioning related to law enforcement or to military and national security intelligence gathering designed to prevent the occurrence or recurrence of harm or danger to individuals, the public, or national security. The interrogation aims to elicit information from a detainee that is useful to the purposes of the interrogators. Interrogations are also distinct from questioning used to assess the medical condition of an individual or to determine mental status. Accordingly, forensic medicine practices that include assessing competence to stand trial or criminal responsibility, and pre-sentencing evaluations are excluded from this report. Appropriate interrogations should be carefully distinguished from those coupled with coercive acts that are intended to intimidate and that may cause harm through physical injury or mental suffering. In

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* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

general, this Report does not address participation of physicians in developing strategies to deal with individuals who are not in detention, such as negotiations with hostage takers and profiling of criminal suspects. From the physician's perspective, an interrogation is distinct from questioning conducted for purposes of making a diagnosis, assessing physical capacity, or determining mental capacity related to legal status.

The military and related government agencies refer to interrogations, debriefings and tactical questioning as means to gain intelligence from captured or detained personnel.[7] The Army Field Manual further defines interrogation as "the process of questioning a source to obtain the maximum amount of usable information. The goal is to obtain reliable information in a lawful manner, in a minimum amount of time, and to satisfy intelligence requirements of any echelon of command."[8]

Interrogation Techniques

The Army Field Manual provides detailed guidance on interrogations and describes methods to establish rapport with or exert control over a detainee. Specific psychological strategies that rely primarily on incentives, emotions, fear, pride and ego are generally considered acceptable, although it is recognized that approaches that rely on fear presents "the greatest potential to violate the law of war"[NOTEREF _Ref130202695 \h * MERGEFORMAT]

Significant concerns regarding interrogations arise from the risk of abuse. Domestic and international law prohibit the use of coercive interrogations that might involve the application of mild to severe physical or mental force.[9, 10]

In criminal law, coercion or undue intimidation violates the rights of individuals being interrogated. Moreover, such abuses can undermine the veracity of information derived from an interrogation and can jeopardize subsequent legal proceedings intended to establish true facts about a crime.[11] Therefore, safeguards of due process have been placed on interrogatory powers in order to protect against coercive techniques.[12] Actions by law enforcement agents may be legally reviewed, and information gathered by coercive means may be rejected from court proceedings.

Policies that traditionally have governed military or national security interrogations expressly prohibit "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogations."[NOTEREF _Ref130202695 \h * MERGEFORMAT] Thus, there are limits to manipulating or exploiting an individual's physical and mental status to elicit information. These limits are grounded in the Geneva Conventions, which in part state: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[13]

Similar limitations are found in the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession…".[14] Accordingly, determining the point at which any interrogation becomes coercive is of great significance. While physicians can provide insights into the physically and mentally harmful effects of interrogation practices,

they alone cannot authoritatively define the tipping point between appropriate and inappropriate interrogation practices.

PHYSICIANS AND THE INTERROGATION PROCESS

Some physicians, most often psychiatrists, may engage in activities that are closely linked to interrogations. For example, in the course of criminal proceedings, physicians may be asked to assess the mental condition of an individual who is to be interrogated, either to prevent an interrogation that would be harmful to the individual's health[15] or to identify mental impairments that could negate the value of disclosed information. Other assessments may include the determination of an individual's mental competency to stand trial, or the availability of the insanity defense. Physicians sometimes provide consultations to law enforcement officers regarding fruitful approaches to interacting with suspects, for example, in criminal profiling and hostage negotiations. Specific guidelines for ethical behavior of psychiatrists serving as forensic consultants have been developed by the American Academy of Psychiatry and the Law.[16] In most of these examples, a physician's training and skills help determine whether a mental impairment exists that would have some bearing on legal proceedings.[17] The physician's primary aim is not to persuade the individual to reveal incriminating information, although such information may be revealed as a secondary consequence of questioning. Similarly, the determination of physical or mental impairments may bear on administrative proceedings, such as eligibility to receive funds or services, but these assessments are also distinct from interrogations as defined in this report.

General Arguments for and against Physician Involvement in the Interrogation Process

Without being coercive, interrogations rely on psychological manipulation producing stress, anxiety, or other forms of discomfort. The physical or mental impact of these practices may justify a role for physicians in interrogations.[18] Physicians could enhance the likelihood of successful interrogation by identifying useful strategies, providing information that may be useful during questioning, or putting interrogatees at ease. Furthermore, physicians could protect interrogatees if, by monitoring, they prevent coercive interrogations. However, physician involvement could also lead to the belief on the part of interrogators that they can escalate the use of force until the physician intervenes.[19, 20]

From the perspective of ethical responsibilities, all physicians who engage in activities that rely on their medical knowledge and skills must uphold the principles of beneficence and non-maleficence and refrain from participating in situations that may cause harm without corresponding benefit. They must also respect patient autonomy and must protect the confidentiality of personal information, unless breaching them is clearly justified by tenets of medical ethics. Some benefits of interrogation may accrue to the detainee or to other individuals (e.g., exoneration from a crime), but the intention of interrogation is not to benefit the detainee; rather, it is to protect the public or other individuals from harm due to domestic or foreign threats. These are laudable goals, but it is not clear that the medical knowledge and skills of physicians should be used for purposes unrelated to medicine or health to further the interests of groups against those of individuals, such as detainees. Striking a balance between obligations to individuals and obligations to society may be difficult, but when the obligations seem approximately equal, the weight should shift toward individuals.

The principles of respect for autonomy, beneficence, non-maleficence and protection of confidentiality are at risk of being violated during interrogations. Therefore, it is essential that the ethical role of physicians in interrogations be clearly defined.

Physicians' Dual Loyalties

In the clinical setting, physicians' obligations are first to their patients. However, in many other settings, physicians confront dual loyalties, which place the medical interests of the individuals with whom they interact in tension or conflict with those of third parties to whom the physicians are accountable. For example, when a physician assesses an employee's health for an employer, the physician has certain ethical responsibilities to the examinee as well as contractual responsibilities to the employer. However, the AMA's Code of Medical Ethics makes clear that the physician must not fulfill responsibilities to the employer in a manner that is detrimental to the employee's medical condition,[21] nor disclose medical information without the consent of the employee.[22]

Physicians who provide medical care in detention or correctional facilities face divided loyalties: to the medical interests of the detainees and respect for their (legally limited) autonomy, and to the correctional facility's control over detainees and need for information. Concerns are heightened when interrogations are conducted.[23] Some, including military and government officials,[24] have suggested that physicians who do not provide medical care to individuals who will be interrogated are not bound by physicians' ethical obligations to patients because they act outside of the patient-physician relationship. However, various Opinions in the AMA's Code of Medical Ethics suggest that physician interactions under the authority of third parties are governed by the same ethical principles as interactions involving patients.[25] Physicians must apply medical knowledge and skills within the profession's ethical standards, which are distinct from and often more stringent than those of the law.

Confidentiality of Detainee Information

Confidentiality is of particular concern when physicians provide medical care in settings where interrogations may occur. Interrogators may believe that interrogation will be more effective if informed by medical information, and may pressure physicians to share information obtained in the course of a patient-physician encounter. Opinion E-5.05, "Confidentiality" places great emphasis on the confidentiality of personal information that patients provide to physicians. The Opinion recognizes limited circumstances in which breaching confidentiality may be justifiable, for example, disclosures related to foreseeable and preventable harm to identifiable third parties. It is otherwise unethical to divulge personal information without the authorization of the patient. When medical records belong to the detention facility, physicians should warn detainee-patients that the information they provide for the medical record is accessible to facility authorities.

Moreover, in the context of physician employment by third parties, information should not be communicated to the third party without prior notification of the interrogatee that any information they provide may be passed on to a third party.[NOTEREF _Ref136943753 \h * MERGEFORMAT] The fact that interrogation may be legally mandated or protected does not ethically justify communication of confidential information by a physician without notification and the individual's approval.

Specific Roles

To assess the ethics of physician involvement in interrogations, it is useful to distinguish various activities in which physicians may be involved.

Physicians are ethically justified in acting to prevent harm to individuals. In this regard, the suggestion that physicians should observe or monitor interrogations to prevent harm requires careful scrutiny. As defined in this report, appropriate interrogations present no reason for medical monitoring, because interrogators ought to abstain from coercive questioning. Physicians can determine that harm has been inflicted but, in many instances, cannot predict whether an interrogation practice will or not cause harm.

Physicians may be asked to determine the overall medical fitness of detainees or their mental capacity, and to use their knowledge and skills to assess the health of detainees; questioning to elicit medical information of this kind is distinct from interrogations and is appropriate. The presence of a physician at an interrogation, particularly an appropriately trained psychiatrist, may actually benefit the interrogatee because of the belief held by many psychiatrists that kind and compassionate treatment of detainees can establish trust that may result in eliciting more useful information. However, physicians who provide medical care to detainees should not be involved in decisions whether or not to interrogate because such decisions are unrelated to medicine or the health interests of an individual.

A physician may be requested or required to treat a detainee to restore capacity to undergo interrogation. If there is no reason to believe that the interrogation was coercive, there is no ethical problem. Nevertheless, physicians should not treat detainees without their consent, as is ethically required of all medical interventions. Moreover, in obtaining consent for treatment, implications of restoring health, including disclosure that the patient may be interrogated or an interrogation may be resumed, must be disclosed. If a physician identifies physical or psychological injuries that are likely to have occurred during an interrogation, the physician must report such suspected or known abusive practices to appropriate authorities.

Development of interrogation strategies constitutes indirect involvement in interrogation. Specific guidance by a physician regarding a particular detainee based on medical information that he or she originally obtained for medical purposes constitutes an unacceptable breach of confidentiality. Moreover, it is unethical for a physician to provide assistance in a coercive activity, because such activities fundamentally undermine the respect for individual rights that is basic to medical ethics. The question of whether it is ethically appropriate for physicians to participate in the development of interrogation strategies may be addressed by balancing obligations to society against those to individuals, as noted in the above section on "General Arguments". Direct participation in an individual interrogation is not justified, because physicians in the role of interrogators undermines their role as healers and thereby erodes trust in both themselves as caregivers and in the medical profession, and non-medical personnel can be trained to be expert interrogators. But a physician may help to develop guidelines or strategies that are related to a specific interrogatee, as long as they are not coercive and are neither intended nor likely to cause harm, and as long as the physician's role is strictly that of consultant, not as caregiver. Physicians may also participate in research, in which regulatory safeguards are in place to minimize risks to voluntary subjects, or in other settings where activities are transparent or readily reviewable.

Any physician involved with individuals who will undergo or have undergone interrogations should have current knowledge of known harms of interrogation techniques. For example, some research has shown that isolation is a harmful interrogation tactic.[26] Once an interrogation strategy is shown to produce significant harm, whether immediate or long term, it should be reported to appropriate authorities so that its use can be prohibited. If responsible authorities do not prohibit a clearly harmful interrogation strategy, physicians are ethically obligated to report the offenses to independent authorities that have the power to investigate or adjudicate such allegations.

CONCLUSION

The practice of medicine is based on trust. Physicians are expected to care for patients without regard to medically irrelevant personal characteristics. This fundamental tenet of medical ethics underlies the doctrine of medical neutrality, whereby in times of war physicians are expected to treat all casualties, irrespective of patients' military or civilian status, within triage protocols. Also, for physicians as physicians, the "first, do no harm" ethic remains applicable in all settings, including during wartime.

Any physician involvement with detainees who may undergo interrogation must be guided by the same ethical precepts that govern the provision of medical care: never using medical skills and knowledge to intentionally or knowingly harm a patient without corresponding benefit, respecting patient autonomy by obtaining consent to the provision of care, and protecting confidential information. Physicians have long dealt with problems of dual loyalties in forensic roles and as employees of government and business. The same ethical considerations that guide physicians under those circumstances also guide them in matters related to interrogation. Physicians in all circumstances must never be involved in activities that are physically or mentally coercive. If physicians engage in such activities, which are antithetical to the medical profession, the whole profession is tainted.

Questions about the ethical propriety of physicians participating in interrogations and in the development of interrogation strategies may be addressed by balancing obligations to society with obligations to individuals. Direct participation in interrogation of an individual detainee is not justified, because non-medical personnel can be trained to be expert interrogators, minimizing the need for presence of a physician. But, out of a general obligation to aid in protecting third parties and the public, a physician may help to develop guidelines or strategies for interrogations in general and for those that are related to a specific interrogatee, as long as the strategies are not coercive, and as long as the physician's role is strictly that of consultant, not as caregiver.

RECOMMENDATIONS

The Council on Ethical and Judicial Affairs recommends that the following be adopted and the remainder of this report be filed:

> For this report, we define interrogation as questioning related to law enforcement or to military and national security intelligence gathering, designed to prevent harm or danger to individuals, the public, or national security. Interrogations are distinct from questioning used by physicians to assess the physical or mental condition of an individual. To be appropriate, interrogations must avoid the use of coercion—that is, threatening or causing harm through physical injury or

mental suffering. We define a "detainee" as a criminal suspect, prisoner of war, or any other individual who is being held involuntarily by legitimate authorities.

Physicians who engage in any activity that relies on their medical knowledge and skills must continue to uphold ethical principles. Questions about the propriety of physician participation in interrogations and in the development of interrogation strategies may be addressed by balancing obligations to individuals with obligations to protect third parties and the public. The further removed the physician is from direct involvement with a detainee, the more justifiable is a role serving the public interest. Applying this general approach, physician involvement with interrogations during law enforcement or intelligence gathering should be guided by the following:

(1) Physicians may perform physical and mental assessments of detainees to determine the need for and to provide medical care. When so doing, physicians must disclose to the detainee the extent to which others have access to information included in medical records, and must not record or reveal any information against the wishes of the detainee. Treatment must never be conditional on patients' participation in an interrogation.

(2) Physicians must neither conduct nor directly participate in an interrogation, because a role as physician-interrogator undermines the physicians' role as healer and thereby erodes trust in both the individual physician-interrogator and in the medical profession.

(3) Physicians should not monitor interrogations with the intention of intervening in the process, because this constitutes direct participation in interrogation.

(4) Physicians may participate in developing effective interrogation strategies that are not coercive but are humane and respect the rights of individuals.

(5) When physicians have reason to believe that interrogations are coercive, they must report their observations to the appropriate authorities. If authorities are aware of coercive interrogations but have not intervened, physicians are ethically obligated to report the offenses to independent authorities that have the power to investigate or adjudicate such allegations.

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[11] American courts recognize that confessions elicited by physical intimidation are involuntary and may not be admitted against the confessor at trial. Additionally, under certain circumstances threats, deception, and trickery may render a confession involuntary and inadmissible. 29 Am. Jur. 2d Evidence § 731.
[12] The Fifth and Fourteenth Amendments to the Constitution protect individuals against involuntary self-incriminating statements. *Dickerson v. United States*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 436 (1966).
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