



# “MEDICAL LITIGATION AND HOW TO MANAGE IT”

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# BACKGROUND

- THE BOARD IS ESTABLISHED UNDER SECTION 4 OF THE MEDICAL PRACTITIONERS AND DENTISTS ACT CAP. 253.
- THE ACT WAS ENACTED BY PARLIAMENT IN 1977 AND BECAME OPERATIONAL ON 1<sup>ST</sup>. JANUARY 1978.
- THE MANDATE OF THE BOARD IS TO REGULATE THE PRACTICE OF MEDICINE , DENTISTRY AS WELL AS HEALTHCARE STANDARDS IN HEALTH INSTITUTIONS AND CLINICS IN THE COUNTRY



# COMPOSITION OF THE BOARD

- A chairman who is appointed by the Cabinet Secretary, Ministry of Health
- The Director of Medical services who is the Registrar
- A Deputy Director of Medical Services appointed by the Cabinet Secretary
- Four medical/dental practitioners nominated by the Cabinet Secretary
- A representative of each of the universities in Kenya which have the power to grant a medical/dental qualification which is registerable under the Act

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# COMPOSITION OF THE BOARD

- Five medical practitioners elected by registered medical practitioners
- Two dental practitioners elected by registered dental practitioners.
- The current Board was inaugurated on 1<sup>st</sup> December, 2009. Every Board serves for a term of five (5) Years.
- The process of electing new Board members will start in July, 2014.



# FUNCTIONS OF THE BOARD

- **Education & Training-** Approval of Medical & Dental Schools, Core Curricula, Examination, CPD
- **Registration-** of Medical, Dental practitioners and Health Institutions
- **Licencing-** Medical & Dental Practitioners, Health Institutions and Clinics
- **Inspections-** Medical/ Dentals Schools, Internship Centers, Health facilities
- **Disciplinary-** PIC, PCC and Tribunal
- **Database-** maintaining a Database of all registered and licenced medical & dental practitioners & health institutions
- **Advisory-** Advise CS MoH on matters pertaining to healthcare
- **Collaboration & Partnership:** International Association of Medical Regulatory Authority (IAMRA), General Medical Council (GMC), Association of Medical Councils of Africa (AMCOA), EAC partner States Medical Boards and Councils
- **Monitoring & Evaluation,** of the Board's Performance Contract in line with the Annual Work Plan & Strategic Plan



## INTRODUCTION

### *“medical litigation and how to manage it”*

- Health services are determined by the following factors; history, culture, geography, economic empowerment, political persuasion, spatial distribution and a host of other unique factors.
- The practice of medicine is an indispensable service to the public.
- Medical malpractice cases have been there since mid-nineteenth century. There has been a periodic rise due to public awareness.



# MEDICAL MALPRACTICE

- Definition:  
“professional negligence by an act or omission of a health care provider in which the treatment provided falls below the accepted standards of practice in the medical community and causes injury or death to the patient”.
- Standards and regulations for medical malpractice vary by country and jurisdictions;

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# MEDICAL MALPRACTICE

- Medical errors can be categorized into the following:
  - a) Mis-diagnosis, failure to diagnose
  - b) Wrong treatment
  - c) Emergency room errors
  - d) Surgical , medical and other errors
  - e) Patient abandonment
  - f) Transfer without proper instruction
  - g) Lack of informed consent
  - h) Dental errors ..... among others

contd...



## **TYPES OF CONDUCT BY MEDICAL AND DENTAL PRACTITIONERS WHICH RAISE DISCIPLINARY ISSUES**

- 1. Termination of pregnancy-** the Laws of Kenya do not permit termination of pregnancy: Constitution, 2010 Article 26 (4) “ unless in the opinion of a trained health professional, there is need for emergency treatment or the life or health of they mother is in danger...”
- 2. Gender reassignment-** is not permitted on demand.
- 3. In-vitro Fertilization (IVF) and assisted reproduction-**patients in need of IVF should always be referred to an IVF accredited center and attended to by a multi-disciplinary team.
- 4. Sex selection-** it is unethical for practitioners to engage in such a practice, to support or to encourage sex selection.

contd.....



## **TYPES OF CONDUCT BY MEDICAL AND DENTAL PRACTITIONERS WHICH RAISE DISCIPLINARY ISSUES**

- 5. Abuse of professional confidence-** practitioner shall not disclose to a third party information which has been obtained in confidence from the patient or patient's guardian. However; there are exceptions to this rule
- 6 . Abuse of relationships between practitioners and patients:-** health practitioners are privileged people who gain confidential information by virtue of their position of trust.
- 7. Abuse of financial opportunities-** improperly obtaining money from patients or insurance organizations as well as sanctioning payments or financial claims under insurance schemes
- 8. Advertising, canvassing and related professional offences**
- 9. Conduct negatively affecting the reputation of the profession**



## **1. The Constitution of Kenya, 2010**

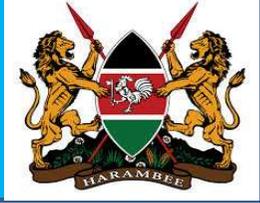
Article 43 (1) (a) states that “ *Every person has the right to the highest attainable standard of health care services, including reproductive healthcare*”.

Article 46 (1) (a) states that “ *Consumers have the right to goods and services of reasonable quality*”

## **2. The Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya and the enabling Rules**

*Mandates the Board to regulate the practice of medicine and dentistry in the country.*

- *Note : The above Laws do not cover all the cadres in the health sector, as each cadres is regulated by it own set of Laws and Rules.*



# DISCIPLINARY FUNCTION OF THE BOARD

is under taken by the following;

## Preliminary Inquiry Committee (“PIC”)

The functions of the PIC are highlighted under Rule 3 of the Medical Practitioners and Dentists

( Disciplinary Proceedings) ( Procedure) (Amendment) Rules, 2013

## Professional Conduct Committee (“PCC”)

The functions of the PCC are highlighted under Rule 4(1) of the Medical Practitioners and Dentists

( Disciplinary Proceedings) ( Procedure) (Amendment) Rules 2013,

- Constituted at County Level, three members from the county **one of who shall be the chairperson** and a **representative of the general public.**



# TRIBUNAL

The Full Board exercising judicial or quasi judicial functions to determine disciplinary matters is known as a Tribunal

The primary duty of the is to protect the public and the profession. Subject to this over-riding duty, it also considers what is in the best interest of the doctor or the dentist.



# LEGAL ELEMENTS OF MEDICAL MALPRACTICE

A patient alleging medical malpractice must generally prove four elements or legal requirements to make out a successful claim. These elements include:

- a) The existence of a legal duty on the part of the medical doctor or dentist to provide care or treatment of the patient;
- b) A breach of this duty by a failure of the treating doctor to adhere to the standards of the profession;
- c) A causal relationship between such breach of duty and injury to the patient;
- d) The existence of damages that flow from the injury such that the legal systems can provide redress.



# LEGAL ELEMENTS OF MEDICAL MALPRACTICE

- a) The first element is that a legal duty existed toward the patient. This duty comes into play whenever a professional relationship is established between the patient and the health care provider. Whenever a doctor provides service to a patient, the doctor is said to owe a duty of reasonable professional care to the patient.
- b) To show that a breach of professional duty occurred, a patient must invoke the concept of standard of care. The standard of care generally refers to that care which a reasonable, a similarly situated professional would provide to the patient.
- c) The third element of causation, the patient must show a direct relationship between the alleged misconduct and a subsequent injury.
- d) The fourth is damages; a calculation of damages ( **“quantum of damages”** ) is usually determined by the courts of law.

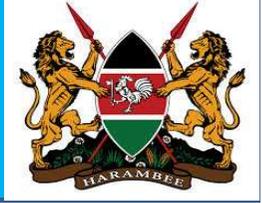


# ADDRESSING MEDICAL MALPRACTICE: “KENYAN LEGAL SYSTEM”

Claims can be filed in the courts of law or in the Boards and Council's which regulate the practice of medicine in the different cadres.

Claims/complaints against medical doctors or dentists are filed in the Medical Practitioners and Dentists Board (“the Board”), Court of Law or both. The Board conducts investigations into the allegations raised by the complainant, has hearings and gives determinations under the PIC, PCC or the Tribunal.

In giving its determination the Board does not have legal mandate to award damages. This is in the purview of the courts of law which can calculate the quantum of damages to be awarded.



# GENERAL PENALTIES

## Preliminary Inquiry Committee (“PIC”)

- a. To admonish a doctor, dentist or the institution and conclude the case.
- b. Make an order compelling a medical practitioner or dentists to undergo continuous professional development of not more than fifty points.
- c. Suspend the licence of a medical institution for a period of not more than six months.
- d. Make an order for the closure of an institution pending the compliance by that institution, of a condition or requirement under the licence issued to it under the Act;
- e. Make such further recommendations as the committee deems fit;
- f. Levy reasonable costs of the proceedings from the parties.

Contd.....



# GENERAL PENALTIES

## Professional Conduct Committee (“PCC”)

- a) Admonish a doctor, dentist or the institution and conclude the case;
- b) Levy reasonable costs of the proceedings from the parties;
- c) Order a medical practitioner or dentist to undergo continuous professional development for a maximum of up to fifty points;
- d) Suspend the licenses of medical institutions for up to six months;
- e) Order the closure of institutions until compliance with requirements of the operating licence;
- f) Make such further recommendations as the Committee deems fit;

Contd.....



# GENERAL PENALTIES

## TRIBUNAL

- a) Admonish a doctor, dentist or institution and conclude the case.
- b) To place the doctor or dentist under probation( the Board may at its own discretion direct the doctor or dentist to be supervised during the probation period which does not exceed six (6) months.
- c) To order for the payment of costs for the Board's sitting(s) to be paid by the medical or dental practitioner or the institution on such terms as shall be deemed fit in the circumstances;
- d) To direct the suspension of a doctor's or dentist's registration or licence for a period not exceeding twelve (12) months
- e) To direct removal from the register;
- f) To suspend licenses for medical institutions for up to six (6) months
- g) To order the closure of medical/ dental institution until compliance with requirements of operating licenses.

Contd.....



## OVERVIEW OF OTHER LEGAL SYSTEMS

### South Africa

The system is similar to the Kenyan System. Claims/complaints are filed at the **Health Professional Council of South Africa (HPCSA)** and a **Professional Conduct Committee** established under the recommendation of the HPCSA.

To recover damages from a practitioner or institution one has to institute proceedings in a court of law.

### United Kingdom

Complaints are made to the **General Medical Council**, a body which registers all medical practitioners in the UK.

GMC refers complaints for hearing to Medical Practitioners Tribunal Service (MPTS) which has two panels, **Fitness to Practice Panel** and **Interim Orders Panel**

### United States of America

Claims are filed in state trial courts while some are filed in the Federal court.

A **jury trial** is used to adjudicate the claim. The system is adversarial, and designed to promote pre-litigation settlement of the disputes between the parties.



## **OVERVIEW OF OTHER LEGAL SYSTEMS**

### **Sweden, Finland, Denmark and Norway**

Operate **out-of-court, no-fault systems** of medical malpractice designed to compensate patients for injuries they suffer. A patient can still file a claim in court.

### **Germany**

Claims are referred to **Mediation Boards/Mediation Centers and Expert Panels** set up by the physicians' guild. Patients can reject the outcome of the mediation, and take their case to court.

### **France**

Claims are referred to a **Regional Government-appointed Review Board**. The money to compensate the patients comes from a national fund that is funded by insurance premiums placed on doctor and hospitals or from the general fund revenues.



## Frequency of complaints/cases of medical malpractice

From the year 1999 - date

No. of cases lodged as at 17 <sup>th</sup> April, 2014-	<b>742</b>
No. of cases determined at PIC	<b>659</b>
No. of cases determined at Tribunal	<b>15</b>
No. of cases determined at PCC	<b>8</b>

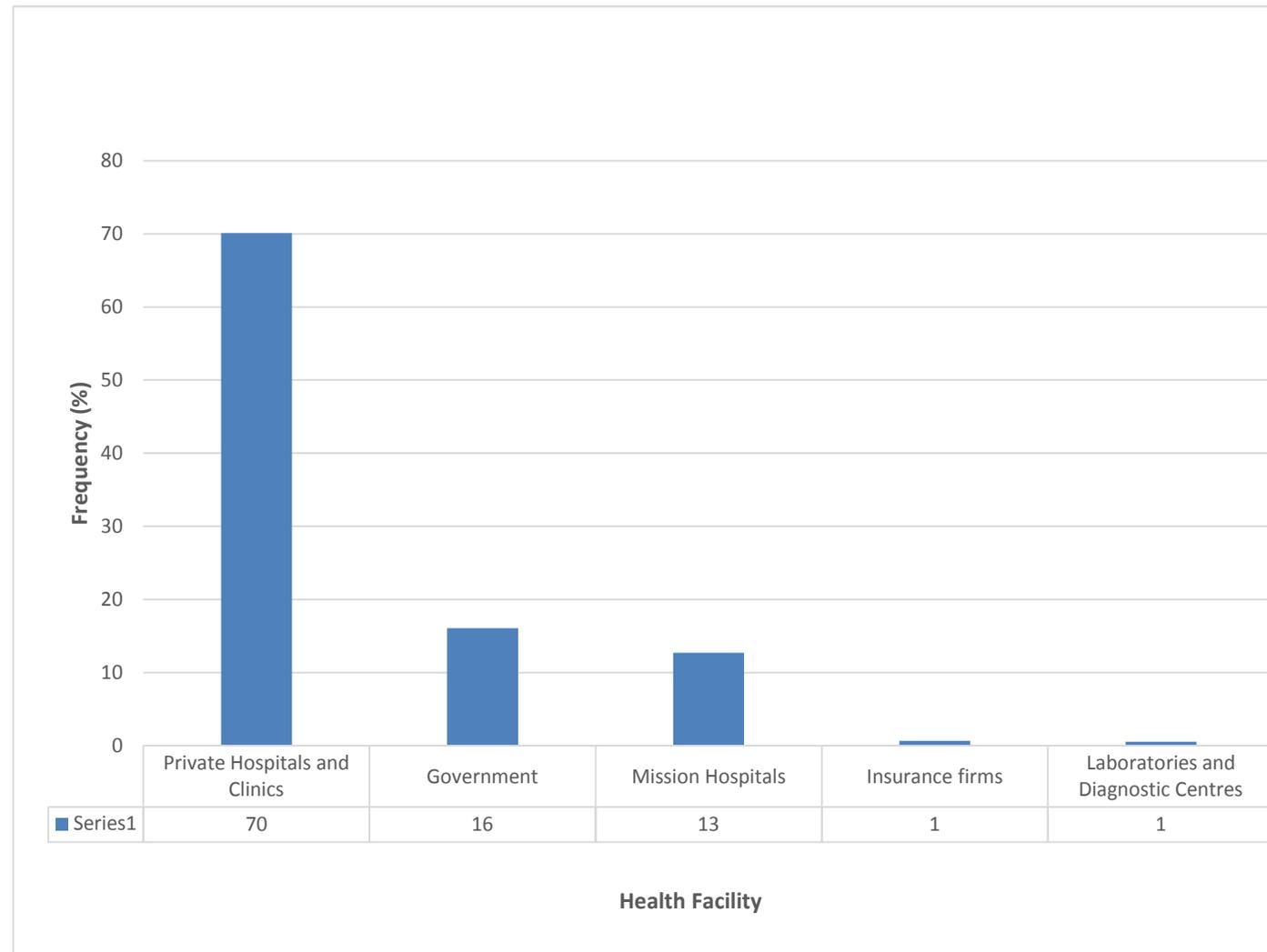
**January - March 2014 the Board received fourteen (14) new complaints.**

A sample statistical analysis of complaints in the Board of 2007-2012 clearly shows the trend of complaints in the medical fields/ specialties.



## Analysis stratified by type of health institution/ facility

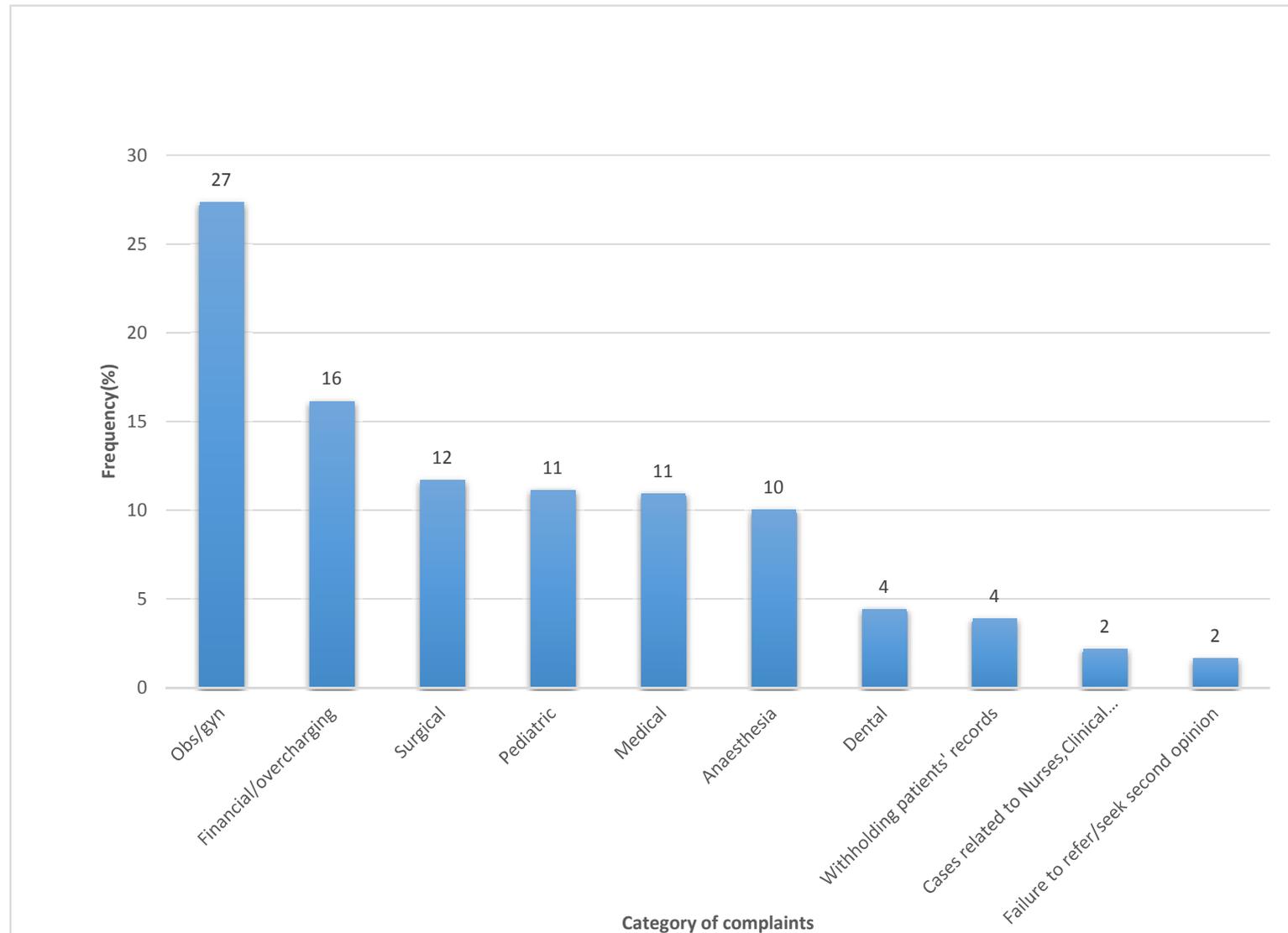
Health Facility	Percentage
Private Hospitals and Clinics	70
Government	16
Mission Hospitals	13
Insurance firms	1
Laboratories and Diagnostic facilities	1





## Analysis stratified by Category of the complaint

Category	Percentage
Obs/gyn	27
Financial	16
Surgical	12
Pediatric	11
Medical	11
Anaesthesia	10
Dental	4
Withholding patients' records	4
Cases related to Nurses, Clinical Officers and Lab Tech.	2
Failure to refer/seek second opinion	2



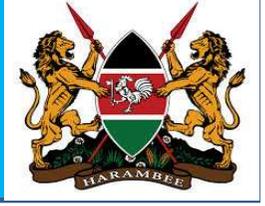


## DISCUSSION

One of the biggest challenges facing the Kenyan health care is the shortage of qualified health care practitioners. With the increase in population and no corresponding increase in the number of health care practitioners, health care providers carry a very heavy work load and limited resources.

The new GOK policy on providing additional funding has enabled women to gain access to free maternity services increasing the number of women receiving health care from health personnel from 44% to 66% within the period of one year.

The rise in litigation can perhaps not be attributed purely to a rise in the increase of negligence. As a result of greater actualization of constitutional rights, there is an increase in access to information, transparency, and accountability. It is submitted that this together with great consumer awareness, has led to the increase in medical litigation.



## **WHO recommended doctor patient ratio**

1 doctor per 1,000 population by 2015

1 doctor per 600 population by 2020

## **Based on ever registered doctors medical (8,705) dentists (1,046)**

1 doctor per 5,000 population

1 dentist per 40,000 population

## **Based on retained (Active) medical doctors (4,523) dentists**

**(514)**

1 doctor per 9,000 population

1 dentist per 78,000 population

Contd.....



## **Defensive medicine**

With the rise in medical litigation most doctors more often than not resort to practicing “*Defensive Medicine*” ; where doctors order tests, procedures or visits all designed to avert the future possibility of malpractice suits. Defensive medicine is one of the least desirable effects of the rise in medical litigation.

This however; should not be the norm as it only increases the cost of health care and may expose patients to unnecessary risks.

### **Way forward**

In most developed jurisdictions medical practitioners take out Professional Indemnity Cover/ Insurance- this is a form of liability insurance that helps protect professionals ( medical & dental practitioners) from bearing the full cost of defending against a negligence claim by a patient or damages awarded in a civil suit.



In the practice of medicine let all the practitioners at all times be guided by The Geneva Declaration approved by World Medical Association, 1948

“Hippocratic Oath”

*“ I solemnly pledge myself to consecrate my life to the service of humanity...*

*The Health of My Patient will be my first consideration;...*

*I will not permit considerations of age, diseases or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation or social standing intervene between my duty and my patient*

*I will maintain the utmost respect for human life from its beginning even under threat and I will not use my medical knowledge contrary to the laws of humanity”*



**THANK YOU**