THE MONTHLY PUBLICATION FOR CAP MEMBERS

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COOPERATIVE OF AMERICAN PHYSICIANS

CAP's Online COVID-19 Resource Center Helps Physician Members Stay Informed

With input from several subject matter experts, CAP has created a free online COVID-19 Resource Center that includes webinars focused on a variety of issues Including telemedicine, the CARES Act, and medical practice staffing. Originally created as a member resource in March at the onset of the pandemic, CAP continues to update and refresh this microsite, and is now making it available to all physicians as a public service. Included on the site are resources compiled from CAP, as well as the latest information from the Centers for Disease Control and Prevention (CDC), the California Department of Public Health (CDPH), and other relevant federal, state, and local agencies.

This month, CAP is also releasing the latest issue of its flagship publication, *Physician Today*. In addition to an in-depth interview with CAP CEO Sarah E. Scher addressing how CAP helps physicians protect themselves and remain successful, this issue also covers:

- Politics: The power of physicians in shaping public policy
- Telemedicine coding and compliance during the COVID-19 pandemic
- California workers' compensation benefits and COVID-19
- Patient safety in your medical practice during COVID-19

The COVID-19 Resource Center also includes links to a series of CAP-hosted webinars that are now available for replay. They include:

Immunity and Scope of Practice Issues During COVID-19

As the COVID-19 pandemic continues, physicians are facing unprecedented challenges both in and outside of their practices. Some physicians may be asked to expand their scope of practice outside of their specialties to provide care for patients who have contracted COVID-19. Does this open up a physician to increased civil liability? What protections are available for physicians who are treating patients during a pandemic?

Gordon Ownby, CAP General Counsel, and Michael Lamb, Managing Attorney, Schmid & Voiles, discuss these critical issues and are available for interviews.

The webinar also covers:

- Identifying the basic elements of a medical malpractice lawsuit and why scope of practice is important
- How a physician can mitigate concerns on scope of practice during the pandemic
- Explanation of the importance of additional informed consent language related to COVID-19
- Federal and state provisions for healthcare immunity during the pandemic

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Telemedicine Coding and Compliance During the COVID-19 Pandemic

The COVID-19 crisis has brought about increased interest in the use of telemedicine and, with that, regulatory changes have been implemented to meet the needs of physicians. In this free webinar, MGMA healthcare consultant and medical coding expert Nancy M. Enos, FACMPE, CPMA, CPC-I, CEMC, offers guidance for coding with telemedicine during the pandemic.

The webinar covers:

- Telemedicine codes overview
- Waivers under Section 1135 waiver requests for CMS
- Documenting E/M for remote visits
- Telehealth modifiers diagnosis coding

Managing Human Resources During the Pandemic

In their role as employers, physicians may be dealing with many challenges arising from the COVID-19 crisis. Nancy Brusegaard Johnson, CAP Senior Vice President of Human Resources and Operations, and Alexis D. James, Managing Partner of Workwise Law, PC, discuss pressing HR issues.

The webinar covers common concerns including:

- The need to downsize staff or reduce hours due to decreased patient visits
- Employees who become sick or are caring for sick family members
- Employees who are unable to come to the office due to childcare needs
- Employees who are afraid to return to work
- Understanding the Families First Coronavirus Response Act (FFCRA)

August 2020

Risk Management
and
Patient Safety News

Curbside Consultations: What the Practitioner Must Know

by Cynthia Mayhan

Informal consultations among practitioners represent an important part of clinical practice. They can increase knowledge among physicians and may also improve care and treatment of patients who present with complex comorbidities. Also known as curbside consultation, the informal consultation is for general advice. With an informal consult, a patient exam is not performed nor is there a review of the record. In fact, even patient identity should not be revealed.

Benefits

An informal consult is beneficial for physicians who are seeking general information outside of their area of expertise. When done properly, this consult promotes the sharing of knowledge, which can improve patient outcomes. Moreover, the informal consultation can help determine if a formal consult is required.

While informal consults are commonplace and provide clear benefits, physicians must use caution when agreeing to provide one in order to avoid implying a relationship with the patient that in turn can create liability for the consulting physician.

Risks and Potential Pitfalls

- A patient-physician relationship can be implied if the recommendation given during the consult is patient-specific. An example is advice regarding discharge/admission/diagnosis. Offering recommendations in these areas may be perceived as directing care and will potentially be seen as creating a duty-to-care.

- Reviewing the patient record and/or documenting patient-specific advice would be perceived as creating a duty-to-care.

- Should the treating physician document the consultation in the record, this will imply that the consultant is a member of the patient's care team.

- If the patient is aware of the informal consultation, then the consultant can be viewed as a member of the treating team.

- In the event of a poor outcome and subsequent litigation, if the plaintiff's attorney is aware of the consultation and is able to correlate that the information provided may have contributed to the outcome, then the consulting physician can expect to be named in the lawsuit.

Mitigating and Avoiding Liability

In order to engage in the practice of providing informal consultations and avoid the aforementioned pitfalls, we recommend the following strategies.

- The consultant should clearly communicate that their intention is to provide non-specific advice, not a treatment decision.

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- Ask the treating physician not to document the consult in the record. If the physician indicates that he or she would like to, then ask that it be indicated that the case was presented anonymously or consider that a formal consult is more appropriate.

- If the case requires the consultant to know a detailed history or conduct an exam, then a formal consult should be requested.

- There is no need to document in the record if the information provided is not patient-specific. Conversely, patient-specific advice should be documented and, as such, a formal consult would be required.

- If the treating physician indicates that he or she will be making a treatment decision based on the information being provided, then a formal consultation is called for.

- If it is identified that a formal consultation is required, then ask that one be requested; this will be better for both the patient and the consulting physician. The formal consult will allow for the record to be reviewed to provide a better understanding of the patient condition.

While the use of the informal consultation is beneficial for both the requesting physician and the patient, it may be difficult to identify what is garnered by the practitioner providing it, other than the risks we have identified. However, by taking part in this unique type of peer-to-peer exchange while utilizing the recommendations outlined in this article, the consultant can also benefit by supporting the collegial environment that the profession of medicine is dependent on supporting safe clinical practices.

Cynthia Mayhan is a Senior Risk Management and Patient Safety Specialist for CAP. Questions or comments related to this article should be directed to cmayhan@CAPphysicians.com.

Resources

1. Chesanow, N. (2017, October 04). When a Curbside Consult Is a Liability Risk. Retrieved August 12, 2019, from https://www.medscape.com/viewarticle/883538

2. Klumpp, E. (2010, May). Curbside consultations. Retrieved August 12, 2019, from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2882285/ (Psychiatry (Edgmont). 2010 May; 7(5): 51–53. Published online 2010 May.)

3. Miller, J. (2019, April 13). How to engage in 'curbside consultations.' Retrieved August 12, 2019, from https://malpractice-law.net/how-to-engage-in-curbside-consultations-2/

4. Ownby, G. (2018, December 17). "Curbside Consults and EHR." Retrieved August 12, 2019, from http://www.CAPphysicians.com/articles/curbside-consults-and-ehr

Save the Date

Open Enrollment
October 1, 2020

CAP Agency is excited to announce another open enrollment for CAP benefits and we have even more great news to share! Last year, we heard from you that the enrollment site was difficult to use and did not work well. To improve your enrollment experience, we have moved to a better, hassle-free enrollment platform through Empryean. The Agency is confident this site will be easy to use and help you in your decision-making process so you can provide the best protection for you and your family.

It is important to CAP that our members have access to the insurance protection they need, as well as the support and expertise of the Agency to make critical decisions for the well-being of you and your family. Open enrollment only occurs once a year, so this will be your best chance to take advantage of all of the excellent benefits CAP Agency has to offer members through MetLife at low group rates.

In addition to our group disability and life coverage, you will want to look into our other great products, such as dental and vision insurance for you and your family, as well as our group accident and critical illness programs, all of which can be accessed through our new, improved benefit platform. We are excited about also adding hospital indemnity coverage this year, to help members cover the high costs of hospitalization their health insurance may not cover due to copays and deductibles.

Keep an eye out for more information as we get closer to this important date.

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August 2020

Save the Date

CAP's 2nd Annual Public Affairs Symposium

Please join us on Wednesday, September 16, from noon to 1:30 p.m. for CAP's 2nd Annual Public Affairs Symposium. Hear directly from our political and policy experts on some of the most pressing issues affecting the current electoral landscape. This virtual event will be moderated by CAP General Counsel Gordon Ownby.

Panelists include:

- CAP's Federal Lobbyist Robert Bradner, Holland & Knight
- CAP's State Lobbyist Shane LaVigne, Capitol Advocacy
- CAP's Principal Political Consultant Peter Mitchell, P.M. Consulting, Inc.

More details are forthcoming, so be sure to keep an eye on your inbox.

COVID-Challenged California State Budget Outlook

by Gabriela Villanueva

Public Policy

This year opened with a robust financial outlook for the state of California. In January, the budget surplus was expected to come in at $6 billion. In early March, it was projected the state would reach an historical cash reserve of $21 billion by next summer. Then, COVID-19 happened and a new reality emerged.

In the usual course of things, the traditional May budget revisions by the Governor's Office would have reflected increased funding and new appropriations for the Governor's policy priorities. Instead, come May, the state was faced with a budget deficit of $54.3 billion. According to the Governor's June budget summary, in a matter of four months, the state's economy took a swing of $60 billion caused by the COVID-19 induced recession. The state has endured significant economic downturns in the recent past but none like what the COVID health crisis unleashed, giving lawmakers very little time or options for corrective measures.

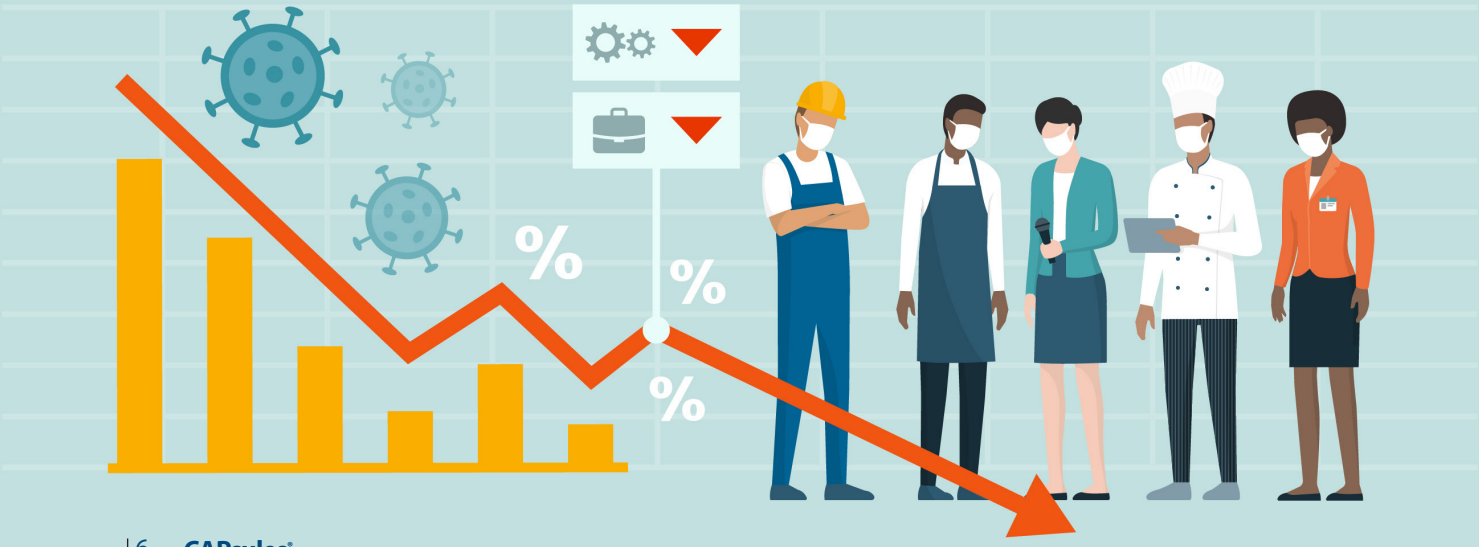
At the time of the "May Revise," the Governor proposed significant cuts and reaching consensus with state legislators on a final budget bill was not easy as legislators rejected the bulk of proposed cuts and instead proposed "trigger solutions."
While negotiations spared K-12 education and health programs from budget reductions, deep cuts were sustained to the courts and the state's public university systems.

Meeting the state's constitutional obligation to enact a balanced budget, on June 29th, Governor Newsom signed the 2020 Budget Act — a $202.1 billion state spending plan reached through a combination of using previous reserves, available federal funds, temporary revenues, internal borrowing, and deferred payments. Of note, the budget includes an $11 billion spending cut that would be "triggered' should the state not receive the additional $14 billion it has identified as needed from federal fiscal relief legislation by an October 15 deadline.

Without the additional fiscal assistance by the federal government to help offset the hit to state budgets due to the health crisis, California is looking at decreasing state employee salaries by up to 10 percent, resulting in furloughs, layoffs, and a $602 million cut to the Cal State and UC systems.

As of this printing, Congress has yet to vote on a fourth COVID fiscal relief bill package.

Gabriela Villanueva is CAP's Government & External Affairs Specialist. Questions or comments related to this article should be directed to gvillanueva@CAPphysicians.com.



Case of the Month

by Gordon Ownby

The Black Box Is Not the Standard of Care, but . . .

Though drug manufacturers' recommended dosages and "black box" warnings do not establish the standard of care, they can certainly create a glidepath for a plaintiff's case against a physician.

A 21-year-old woman presented to Dr. P, a psychiatrist, for alcohol dependence. Dr. P took a history of depression and mood swings for five years, anxiety for three years, and paranoia for two years. She reported being diagnosed several years earlier with bipolar disorder, but did not recall the medications she took at that time. She lived with her grandmother during her teen years following her father's DUI incarceration and her mother's immigration issues. The patient had her own recent DUI convictions, was unemployed and on probation, and was undergoing a divorce.

Dr. P charted the patient being appropriately attired, in no apparent acute distress. Her mood was somewhat depressed but her affect was mood congruent and her speech was topical, logical, and coherent with normal pitch and tone. Though she said at times she felt "paranoid," the young lady denied hallucinations, showed no suicidal or homicidal ideations, and demonstrated good insight and judgment.

Dr. P assessed 1) Bipolar I disorder without psychotic behavior; and 2) Alcohol dependence. His plan was to prescribe a trial of lamotrigine for mood stabilization. He also discussed network therapy to assist the patient with sobriety.

Dr. P's electronic chart described the discussion on medication as, "Explained rationale for medication choice, reviewed mixture of medications, discussed possible risks, benefits, effectiveness (if applicable), and alternative treatment with the individual (parent/guardian): Yes." The chart also states, "Individual: Understands information; Agrees to take medication."

Dr. P's prescription for lamotrigine 100 mg stated: "Take ½ 100 mg tab daily 7 days; then 1 tab 7 days, then 1 ½ tab 7 days, then 2 tabs 9 days." Follow-up was to be in four weeks.

(The manufacturer's recommended dosing for lamotrigine was: 25 mg for 14 days; 50 mg for 14 days; 100 mg for 7 days; 200 mg for 7 days.)

The patient got the prescription filled, took the half-tablets over the next week, and then began taking a full tablet before developing a skin rash that led to her hospitalization several days later for Stevens-Johnson syndrome with toxic epidermal necrolysis.

The patient experienced significant skin involvement on over half of her body, suffered ocular involvement, and required mechanical debridement and saline irrigation.

The patient sued Dr. P, alleging that lamotrigine's "black box" warned of life-threatening rashes and that factors that may increase the risk of rash include "exceeding recommended initial dose of lamotrigine."

While Dr. P could testify of past satisfactory experience with similar dose levels for other patients, plaintiff would undoubtedly bring to trial an expert to describe why Dr. P should have adopted a "start low and go slow" approach to avoid serious injury.

Significantly, Dr. P's generic documentation of informed consent lacked any reference as to why he departed from the commonly understood

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recommendations for avoiding the low frequency/high-risk rash associated with steep lamotrigine dosing. The patient and Dr. P resolved the litigation informally.

Actual testimony from medical expert witnesses — not written guidelines or manufacturer warnings — still rules the day in medical malpractice litigation. But those guidelines and warnings will still come into evidence, and without a documented and detailed rationale for a physician's departure from those guidelines, defending such care will always be an uphill battle.

Gordon Ownby is CAP's General Counsel. Questions or comments related to "Case of the Month" should be directed to gownby@CAPphysicians.com.

Update Your Membership Information to Help with Your Year-End Planning

If you are contemplating a change in your practice, please notify CAP as soon as possible so our Membership Services Department can review your options with you and make your coverage transition a smooth one. Changes include, but are not limited to:

- Retirement from practice at age 55+
- Part-time practice (e.g., 20 or fewer hours per week or 16 hours for anesthesiologists)
- Reduction or any change in the scope of your practice
- Employment with a government agency or non-private practice setting
- Employment with an HMO or other self-insured organization
- Joining a practice insured by another carrier
- Moving out of state
- Termination of membership

The Board of Trustees of the Mutual Protection Trust will levy an assessment in November 2020. To allow ample processing time, we recommend that members advise us in writing no later than October 31, 2020, of any of the above changes to be considered eligible for waiver or proration of the next assessment.

The online Membership Information Update form will be available soon in the Members' Area of the CAP website at www.CAPphysicians.com. Members will be notified via email when the form goes live, so keep an eye on your inbox.

If you have not yet registered for the Member's Area, please register for an account at **https://member.CAPphysicians.com/register.** You will need your member number and last four digits of your Social Security number.

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Ask My Practice

by Andie Tena

Exclusive Savings for Members

Question: Are there any member programs that can help my practice's bottom line?

Answer: CAP offers several member-exclusive programs that can help you save time and money, now when it is needed most. You may be interested to learn more about the following free resources that can help a practice of any size.

With CAP Purchasing Alliance, members can save money on medical supplies and services and get the same discounted pricing that the nation's largest health systems enjoy. Enroll for free in CAP Purchasing Alliance and save up to 20 percent on medical supplies, vaccines, pharmaceuticals, office supplies, travel expenses, and more. Enrollment is quick and easy: **https://CAPpurchasingalliance.com/**

With My Practice, CAP's free practice management and business services solutions program, you have access to experienced professionals who can offer advice, connect you to first-rate resources, and customize solutions to a wide variety of practice- and business-related issues to help you increase your revenue and decrease your costs. Email mypractice@CAPphysicians.com or call 800-610-6642 for assistance.

Your success and well-being remain our top priority. That is why CAP remains committed to continually delivering benefits and programs that can help you and your practice succeed.

Andie Tena is CAP's Director of Practice Management Services. Questions or comments should be directed to **atena@CAPphysicians.com.**

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The information in this publication should not be considered legal or medical advice applicable to a specific situation. Legal guidance for individual matters should be obtained from a retained attorney.