THE QUARTERLY PUBLICATION FOR CAP MEMBERS

CAPsules®

COOPERATIVE OF AMERICAN PHYSICIANS

Supporting Members in a Time of Crisis – **We're in This Together**

During the COVID-19 health crisis, CAP understands the challenges endured by our members are like no other in our lifetimes. While some physicians are sidelined with shuttered offices or drastically reduced patient loads, others are pressed into service outside of their routines with significant personal risks.

Last month, we announced the return of $4.7 million to CAP members of record on April 15 who have made full or installment payments on the assessment levied on November 14, 2019. Members who qualify received a check representing their portion of the returned assessment based on their original assessment.

"Just as we know that no financial payment can restore what has been lost in the pandemic, the CAP Board of Directors and the MPT Board of Trustees believe that this return of funds is financially responsible," said CAP Chief Executive Officer Sarah Scher. "In our more than 40-year history, CAP has helped members succeed by offering financially secure protection. This is just one more way we can support physicians during this unprecedented time in healthcare."

In addition to the return of funds, CAP has taken dramatic measures to provide its membership with crucial resources to help them implement and use telemedicine in their practices, navigate human resources issues, access federally mandated financial relief, and much more.

"It is our responsibility to harness the skills, knowledge, and teamwork of CAP's risk and practice management experts to offer physicians easy access to essential tools that can help them continue to provide quality care for patients and maintain the viability of their practices. We are in this together and by that, CAP will stand by its promise to deliver financially secure coverage options and practice support when it is needed most," Scher added.

We continue to be awed and inspired by the heroism of your efforts to care for patients and are heartened by your messages of gratitude and appreciation.

As we leverage our collective strengths to overcome this pandemic, the best dividend we can hope for is that the physician-patient relationship will be stronger than ever, and the public's fresh understanding of what healthcare means to an appreciative society will be the hallmark in a new age of healthcare delivery.

Risk Management and Patient Safety News

Focused Review: A Look into Anesthesia

Anesthesiologists play a vital role in a patient's surgical experience. They are charged with ensuring medical readiness for surgery, providing medical management and anesthetic care, and evaluating a patient's readiness for discharge/or transfer to a medical floor or intensive care unit.

In the latest *Risk Management and Patient Safety Focused Review, A Look into Anesthesia*, CAP identified 637 medical negligence claims against CAP anesthesiologists over a 10-year period dating from January 1, 2006 through December 31, 2017, and analyzed the top areas of liability and risk management concern among 51 of those claims that incurred an indemnity payment greater than $200,000, which included:

- Failure of pre-operative anesthesia assessment/evaluation
- Failure to recognize and treat
- Failure to monitor
- Delay or failure in treatment with regards to intubation, or re-intubation
- Lack of communication between care providers
- Failure of informed consent
- Complications related to a retained foreign body (epidural catheter tip)

From the 1950s through the 1970s, anesthesiology was considered one of the riskiest specialties. Anesthesiology claims had one of the highest paid-to-closed percentages and represented a disproportionate amount of large-payout indemnities.[1] As a result, in 1985 the American Society of Anesthesiologists (ASA) created an important patient safety initiative, the Anesthesia Closed Claims Project. The closed claims data project produced numerous new standards, practice guides, and enhancements to clinical education using simulations.

These changes have led to a decrease in anesthesia indemnity payments. Today, anesthesiologists have a lower claims frequency largely due to advances in patient monitoring, improved anesthetic agents, and new drug therapies.[2]

A Look into Anesthesia features three case studies that exemplify the patient outcomes that occur when there


Risk Management & Patient Safety
Focused Review
A Look Into Anesthesia
In this Focused Review . . .
Awaken to the Risks
Anesthesiology as a Specialty: 2006-2017

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is not a thorough pre-anesthetic patient assessment and includes risk control strategies focusing on areas of patient consent, documentation, patient history, and unanticipated outcomes.

***The Risk Management and Patient Safety Focused Review: A Look into Anesthesia* can be downloaded at www.CAPphysicians.com/reviews.**

CAP's goal in publishing this study is to share the real experiences of member anesthesiologists with all CAP physicians — regardless of their specialty or location of practice — with the hope of improving healthcare and patient safety, as well as reducing medical liability risk.

CAP's Risk Management and Patient Safety staff is available to discuss ways to implement effective risk strategies and assist with systems process improvement challenges. Questions or comments about the focused review may be sent to riskinternet@CAPphysicians.com.

[1]Stoelting, Robert, M.D. Retrieved from the Anesthesia Patient Safety Foundation at https://www.apsf.org/about-apsf/foundationhistory/ on February 22, 2020.

[2]*Inside Medical Liability Magazine;* Second Quarter 2018. MPL. Association Copyright 2018.

Cooperative of American Physicians, Inc. and Mutual Protection Trust Notice of Joint Meeting of Members, July 15, 2020

A regular annual meeting of members of the Cooperative of American Physicians, Inc. (CAP), a non-stock membership cooperative corporation, and the members of the Mutual Protection Trust (MPT), an unincorporated interindemnity arrangement, will be held at:

333 S. Hope St., 8th Floor, Los Angeles, CA 90071

at 1:00 p.m. on July 15, 2020

to transact such business as may properly come before the meeting or any adjournment thereof.

Please note that safety precautions related to the COVID-19 health crisis may require moving this meeting to an electronic format. Notice is hereby given that further instructions on access to the meeting by electronic means will be available no later than July 3, 2020, by signing into the Member section of www.capphysicians.com or by calling CAP at 800-252-7706.

The business day prior to the mailing of this notice shall operate as the record date for the determination of those members entitled to notice of the meeting. The Boards will present no items on the agenda for membership vote.

The next election for members of the CAP Board of Directors and MPT Board of Trustees will be scheduled for summer 2021.

Sheilah Clayton, MD
Secretary of the CAP Board of Directors

Lisa Thomsen, MD, FAAFP
Secretary of the MPT Board of Trustees

May 2020

Asset Protection: Personalized Attention for CAP Physicians

NAS CyberNet was created to help members of CAP Agency and we certainly hope you and your family were not affected by the deadly fires in California last year. When disasters like this happen, it is always an opportunity to reflect on your personal insurance. Once we get the coverage for our home, we often forget to review it regularly to make sure we still have the protection we need if something were to occur. We want to be sure if something does happen, you will be able to replace your home and all personal assets.

When it comes to protecting your personal assets, you deserve the same expert, trustworthy, personalized attention from your insurance broker that you give to your patients. That is why CAP Physicians Insurance Agency has partnered with Epic Insurance Brokers Private Client Group as your strategic partner committed to delivering superior service. We are available whenever you need us, and confidentiality is always guaranteed. Laura Schneider is our Epic Brokers personal lines expert who will review your program on an ongoing basis to evaluate potential revisions in response to economic changes, market trends, or changes in your needs.

Custom Services Designed for Cooperative of American Physicians

Significant personal assets require higher levels of protection, often with uncommon coverage requirements not available with standard policies. Because your needs are unique, we work with you to create a plan designed specifically for you.

As a Cooperative of American Physicians member, you are eligible to receive an offer for a variety of personal, traditional, and specialty coverages, including:

- Home and Auto
- Vacation Homes and Rentals
- Fine Art, Jewelry, and Collections, including Wine
- Recreational Vehicles
- Yachts and Watercraft
- Private Aircraft
- Gentleman Farming and Wineries

Group Personal Umbrella

Most of us do not like to think about the possibility of something bad happening to us or our family, such as an automobile accident, slip and fall, or someone drowning in your pool. Bad luck can strike at any time and inadequate liability insurance coverage can prove financially devastating.

As a physician-owned cooperative, CAP is able to secure exceptionally competitive rates through a Group Personal Umbrella Insurance Program with an A+ carrier, Chubb, which sits on top of your homeowners and automobile coverage to ensure you have adequate protection. This coverage applies to all family members residing in your residence.

For example, as a member of CAP, you can purchase a policy that provides three million in excess liability coverage for $675 per year. Additional limits are available at the same low prices, up to 20 million dollars in excess liability coverage. CAP's personal umbrella coverage also includes, at no additional cost, one million in uninsured and underinsured motorist coverage. No underwriting is required, just complete the enrollment form, pay the premium, and you are covered. It's that easy!

If you would like to learn more these fantastic coverages, you can go to www.CAPphysicians.com and click on Risk Management-Personal to review coverages and complete an online application. Or call us at 800-819-0061.

CAP PHYSICIANS INSURANCE®
License No. 0F97719

May 2020

The Power of Physicians in Shaping Public Policy

by Gabriela Villanueva

When the COVID-19 health crisis subsides, the contributions by healthcare providers to lessening the suffering of the population will be one of the pandemic's major stories. But when the lessons learned in 2020 become part of necessary changes in healthcare-related laws and regulations, will physicians personally take part in that conversation?

As constituents, physicians have great influence on public policy when they bring their concerns to elected representatives and their staff. Direct constituent interactions, whether they be with local council members, school board representatives, or state or congressional representatives, can often yield greater influence on policymakers' decisions than professional lobbyists and other industry representatives. Constituents possess two major keys that hold great value: Their vote and, when strategically used, the influence of personal stories.

A 2017 study by the Congressional Management Foundation found that 79 percent of congressional staff surveyed believed that personal stories from constituents who had reached out to voice a concern or a position on a bill or issue were helpful in shaping and informing their opinions on issues. In an environment where elected representatives are constantly moving from issue to issue, it is the pause that is taken to give an issue the consideration from a real-life experience or consequence that will most strongly inform and educate the elected member. Put together a few dozen or several hundred individual voices expressing a concern and suddenly, it gets hard to ignore.

In the sphere of public relations, there are many arms — lobbying, fundraising, donations, and campaigns— but when it comes to the true essence of our political process, the most powerful action happens in the ballot box and that remains an individual power. One phone call, one fax, one email, one text, one Tweet, one Facebook posting — performed by many — becomes a roaring voice.

Here in California, we enjoy a robust political structure from not only the state's 40 million residents, but also from its vast array of industries, natural resources, and even topographies. In a state as large and as layered as California, there is sure to be an office or a representative to be found for every one of those layers. As an example, 80 Assembly members and 40 state Senators want your input on issues affecting the people who put them in office. In Congress, an additional 53 House members and two Senators represent your interests. Depending on the issue, there are multiple avenues to contact these elected representatives — plus others even more local.

CAP's physicians have thousands of stories to tell. Hone yours and let us know how we can help you tell it. Following are links to locate your elected representatives.

California State Representatives: http://findyourrep.legislature.ca.gov/

California Congressional Representatives: https://www.house.gov/representatives/find-your-representative

California U.S. Senators: https://www.govtrack.us/congress/members/CA

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

Public Policy

Case of the Month

by Gordon Ownby

Court Says No Special Treatment for Medical Opinion in False Claims Act

Though subjective, a medical opinion can still be proven "false" under the federal False Claims Act, a federal appellate court has ruled.

"A doctor's clinical opinion must be judged under the same standard of any other representation," the Ninth Circuit Court of Appeal said in a case involving a suit alleging Medicare false claims practices. "A doctor, like anyone else, can express an opinion that he knows to be false, or that he makes in reckless disregard of its truth or falsity."

The suit, a *qui tam* action pursued on behalf of the federal government by a fired hospital care management director, alleges that the hospital where she had worked experienced a spike in admissions when the owner/operator of nursing facilities gained an ownership interest in the management company overseeing operations at the hospital.

(As is common in appellate decisions, all the facts used in *Winter v. Gardens Regional Hospital, et al.*, are taken from the plaintiff's complaint and assumed true. They have not yet been actually assessed by a finder of fact.)

The plaintiff, Jane Winter, claims that the emergency room at Gardens Regional Hospital saw an unusually high number of patients transported from nursing homes owned by RollinsNelson LTC Corp., which was also a new 50-percent owner in the management company at Gardens Regional. Based on an increase in the number of Medicare beneficiaries being admitted, Winter alleged RollinsNelson and the management company "exerted direct pressure on physicians to admit patients to [Gardens Regional] and cause false claims to be submitted based on false certifications of medical necessity."

Prior to her termination, Winter, a registered nurse, reviewed hospital admissions using the InterQual Level of Care Criteria. In the month following the management ownership change, 83.5 percent of the patients transported from RollinsNelson nursing homes were admitted as inpatients to Gardens Regional – an unusually high number in Winter's experience and judgment. Winter also alleged that in the month after the change in management, the number of Medicare beneficiaries surpassed that of any month prior.

In her complaint, Winter details 65 separate patient admissions that allegedly did not meet Garden Regional's admissions criteria and were unsupported by the patients' medical record. The complaint alleges that none of the 65 admissions were medically necessary as required under Centers for Medicare & Medicaid Services (CMS) rules. She alleges that between mid-July and early September 2014, Gardens Regional submitted more than $1.2 million in false claims to the Medicare program. She claims that efforts to bring her findings to the attention of hospital management were unsuccessful and that when she was fired in November, she was replaced with an employee who never questioned any inpatient admissions.

The defendants sought a dismissal of the complaint and argued that the plaintiff "has alleged nothing more than her competing opinion with the treating physicians who actually saw the patients at issue."

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The federal district court judge dismissed plaintiff's complaint and held that "to prevail on an FCA claim, a plaintiff must show that a defendant knowingly made an objectively false representation."

On appeal, the Ninth Circuit focused on the district court's insistence that a representation must be "objectively false" to trigger liability under the FCA.

"The Medicare program trusts doctors to use their clinical judgment based on 'complex medical factors,' but does not give them unfettered discretion to decide whether inpatient admission is medically necessary," the court explained.

"A physician's certification that inpatient hospitalization was 'medically necessary' can be false or fraudulent for the same reasons that any opinion can be false or fraudulent," according to the unanimous three-judge panel. "These reasons include if the opinion is not honestly held, or if it implies the existence of facts – namely, that inpatient hospitalization is needed to diagnose or treat a medical condition, in accordance with accepted standards of medical practice – that do not exist."

In overturning the lower's court's dismissal and sending the case back to district court, the Ninth Circuit said that under CMS regulations, medical necessity is a "question of fact" and that a physician's order "gets no presumptive weight."

The Ninth Circuit acknowledged the defendants' warning of increased liability exposure under the rule argued by the plaintiff. The appellate court said, however, that such arguments "cannot supersede the clear statutory text" and that the court's role is to "apply, not amend, the work of the People's representatives."

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

Question: Our medical office is getting ready to start accepting patients again and we have risk management and patient safety protocols put into place. What is the best way to let our patients know that we'll be ready when they are?

Answer: The goal is to communicate how the practice has prepared for the safe return of patients. Patient announcements can be shared via phone, secure email, website, social media site or patient portal.

In addition to a formal announcements, staff should also communicate the following to patients:

- Staff must wear appropriate PPE and staff member temperatures are taken daily.
- Patients must wear face coverings while in the office.
- Patient scheduling will be staggered to maintain social distancing. Office may also offer "virtual waiting room" with patients waiting in vehicles until their appointment time.
- A COVID-19 questionnaire must be completed by every patient. If the patient shows signs of respiratory infection or fever, take appropriate preventative measures.
- Office cleaning and sanitization procedures follow OSHA and CDC guidelines.
- Telehealth visits are available (if this is an option for your practice).

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

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We welcome your comments! Please submit to communications@CAPphysicians.com.