THE MONTHLY PUBLICATION FOR CAP MEMBERS

CAPsules®

COOPERATIVE OF AMERICAN PHYSICIANS

Case of the Month

Court Backs PA's License Revocation Over MD Supervision Setup

by Gordon Ownby

The California Court of Appeal has ruled that a physician assistant's practice arrangement attenuated his required physician supervision so as to amount to the unauthorized practice of medicine.

Rodney Eugene Davis, a physician assistant, set up a liposuction business and met with an anesthesiologist, Jerrell Borup, MD, to provide the physician supervision of his activities required under California Business & Professions Code Section 3502. Dr. Borup practiced anesthesiology beginning in 1982 but stopped practicing medicine in 1998 after suffering a stroke. When Davis and Dr. Borup met in 2010, Dr. Borup had recently joined the American Academy of Anti-Aging Medicine and had attended approximately six weeks of didactic training meetings with the Anti-Aging Academy in Florida. After the meeting with Davis, Dr. Borup attended a liposculpture program consisting of a week of video and didactic instruction followed by a weekend consisting of two unnamed procedures under the observation of a "teacher."

Davis hired Dr. Borup as the office's "Medical Director" while Davis took the title "Director of Surgery." The office opened in September 2010. In 2015, however, the California Physician Assistant Board filed an accusation against Davis accusing him of unlicensed practice of medicine, gross negligence, misleading advertising, and other charges.

During the Board proceedings, witness Dario Moscoso, the administrator and chief financial officer for the business set up by he and Davis, testified on meetings that he attended with Davis and Dr. Borup. At the first meeting, Moscoso testified that Dr. Borup said he was not interested in performing liposuction, to which Davis responded that he would be performing all the liposuction procedures himself and that Dr. Borup's role would be an "off-site type of supervisory experience." Moscoso testified that at a second meeting two weeks later, the three discussed the "structure" of the arrangement – "that [Dr. Borup] could be away from the office and should be away from the office enjoying his retirement."

According to Moscoso's testimony, Dr. Borup would come into the office once or twice a month. In his own testimony, Dr. Borup said he did not perform a single procedure at the business and that the full extent of his liposuction surgery experience was the weekend training session "and what [he] observed."

In Davis' testimony before the Board, he recounted that he learned how to do liposuction procedures while working at the office of an interventional radiologist and that he performed "several thousand procedures" under that physician's supervision. Two years later, Davis performed liposuction procedures daily at a practice owned by another physician.

In his testimony before the Board on setting up a new business, Davis said he "preferred to be the primary provider of lipo." Davis said that during the initial discussions regarding Dr. Borup doing procedures, he said, "'I want to get this off the ground. Let me get this going, of

continued on page 2

Continued from page 1

course, under your supervision. But I know that we need to have good photos on the website. We need to have good reviews.'"

Davis continued in his testimony that he was very confident he could get good results himself and that "it seemed more straightforward to just have the person whose work is displayed on the site" perform the procedures. "I think we can avoid more problems by making sure we stay consistent with that versus having Dr. Borup . . . practicing on people just for the sake of practicing . . . ."

In 2016, the Board adopted the proposed decision of its Administrative Law Judge revoking Davis' physician assistant license after finding by "clear and convincing evidence" that Davis had engaged in the unlicensed practice of medicine. In finding that Davis practiced medicine without a license, the ALJ found: "Throughout the hearing [Davis] made it clear that he resented performing liposuction surgeries for doctors who he felt were less qualified than him, and who made their living from his work, skills and talents . . . [T]o have the control he wanted and get the pay he believed he deserved. [Davis] purposefully . . . set out to create a business arrangement that looked legitimate on paper, but allowed him to . . . run a liposuction business without the interference of a physician."

Davis was unsuccessful in seeking a reversal of the Board's decision by a Superior Court judge and on appeal asserted that he had no intent to practice medicine without a license, did not hold himself out as a physician, and had a delegation of services agreement with Dr. Borup, who he argued had sufficient knowledge and ability to serve as his supervising physician.

The Court of Appeal in *Davis v. Physician Assistant Board* began its analysis of the matter by emphasizing the terms in California Code of Regulations Section 1399.545(b): "'A supervising physician shall delegate to a physician assistant only those tasks and procedures consistent with the supervising physician's specialty or usual and customary practice and with the patient's health and condition.'" The appellate court said that substantial evidence supported the ALJ's finding that Dr. Borup "improperly delegated medical tasks and procedures" to Davis.

The Court of Appeal continued its analysis by emphasizing that the relevant regulations also provide, "'The supervising physician has continuing responsibility to follow the progress of the patient and to make sure that the physician assistant does not function autonomously.'" Here, the Court focused on an email from Davis to Moscoso saying, "I hope that [Borup] will be able to stick with our system once has [sic] some knowledge." Davis also wrote in the email: "We don't want another clumsy physician getting in the way." Though Davis argued that the passage referred to his past dissatisfaction with a physician on staff management issues, the Court of Appeal said that "it could be reasonably inferred from the email that Davis desired and intended to function autonomously at the business], free from any interference in the form of 'another clumsy physician getting in the way.'"

On Davis' contention that he did not have any "intent" on practicing medicine without a license, the Court of Appeal pointed out that statutory language addressing the aiding or abetting of an unlicensed person in the practice of medicine does not include words such as "knowingly" or "intentionally" and quoted with approval another court's conclusion that "reading an intent element into the statute 'would not further the legislative purpose of public protection.'"

Even so, the Court of Appeal concluded that the evidence supports the conclusion that operating autonomously "was Davis' very aim" in the establishment of the liposuction business.

In upholding the Board's finding that Davis practiced medicine without a license, the appellate court commented: "His contention that there was no showing that he had the intent to practice medicine without a license is meritless."

California public records show that Dr. Borup's medical license has been surrendered.

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

C-3PO Will See You Now…

by Lee McMullin, CPHRM

It's time for your annual checkup. While making your appointment on your cell, the "virtual assistant" asks a series of questions. Based on your responses, your appointment is made. Leading into the date with your doctor, the system leaves you several reminders – "press 1 to confirm and 2 to reschedule." The assistant is smart enough to know your medical history and not offer you "option 3 to cancel" because it knows you're past due for the exam.

If you miss your appointment, the assistant forwards you a text explaining in layman's terms about the healthcare ramifications of deferring your visit and requirements for periodic evaluations. It auto-logs that admonition into your digital healthcare record and notifies your attending physician with an algorithm that codes messages by acuity and importance. Based on your personal medical history, the assistant tailors the medical content of the interaction specifically to you. At your office visit, your doctor asks if you're feeling better today because their virtual assistant analyzed your voice pattern noting you were depressed and anxious at the time you made the appointment.

If you're a fan of *Star Wars* or *Star Trek*, you know about robotic and holographic doctors. While not the advanced complexity of a starship's sick bay, you may be surprised to learn that technological advancements in artificial intelligence, or AI, is advancing at warp speed. The above scenario is very real and while not yet deployed into the healthcare stream as the above scenario plays, the use of chat bots as intermediary healthcare conduits and providers are. Kintsugi has an AI prototype that in 20 seconds of unstructured speech analyzing biomarkers and spectral inflections of voice can diagnose anxiety and depression as accurately as a physician using the Patient Health Questionnaire and General Anxiety Disorder surveys (PHQ-9/Gad7) – and it can do it in 30 languages. A study at the Mayo Clinic is attempting to analyze the relationship between voice and arteriosclerotic heart disease – Cardiac Vocal Biomarkers – where a patient's voice is analyzed 40,000 times a second. Then we have gait socks created for use by athletes that record gait, speed, and running patterns. These can be used in geriatrics to provide data that allows AI to predict when a patient will fall based on changes in gait patterns.[1]

Meet Eva, a chat bot capable of human emotional expressions and responsive interactions from surprise, anger, and disbelief powered by AI. Add complex medical AI software to her interface and does she become your virtual doctor? What about your pharmacist?

continued on page 4

Continued from page 3

Meet Melody, your virtual doctor[2] app on your phone.

"Ping An Good Doctor"[3] has a booth where the patient interacts with a chat bot only. The patient is diagnosed, and the machine dispenses. It can make referrals. It has 400 million subscribers. Even Amazon is getting into the telehealth business with chat bots and mobile medics.

"OnMed" has a self-contained pod with sophisticated sensors to gather data. Patients are connected to a physician and the device can dispense a variety of medications or produce a script if not a stock med.[4] OnMed is really a technically sophisticated telehealth model but add AI and Dr. Eva, and you have a game changer. Imagine one of these in every CVS?

Imagine your phone having the ability to diagnose you with an MI or a stroke and summon EMS to your exact GPS location in seconds of onset? Included in the data stream is your medical and Rx history and demographic profile. Paramedics confirm your identity by facial recognition and an "EMS" chat bot virtual ED initiates treatment on the spot prior to transport.

The capability and extent of integration of AI into healthcare's future seems limited only by processor power and software design. AI has been a software enhancement in radiology here in the U.S. for some time now. Once quantum computing breaks the current processing barriers, it's foreseeable the power of AI may become "explosive." Will it be regulated? If so, how? AI's computational power in 2019 was pegged at doubling every 3.4 months.[5] The doubling time of medical knowledge in 2020 was projected to be 0.2 years — just 73 days.[6] Its risks are unclear, but it is clear it's only going to get smarter and faster. Think about that the next time you have a question for Alexa or Siri.

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

[1]Deep learning-enabled triboelectric smart socks for IoT-based gait analysis
[2]https://www.mobihealthnews.com/content/chinese-web-company-baidu-launches-medical-chatbot-doctors-and-patients
[3]http://www.pagd.net/allPage/aboutUs/47?lang=EN_US
[4]https://newatlas.com/onmed-station-telepresence-doctor/58820/
[5]https://www.computerweekly.com/news/252475371/Stanford-University-finds-that-AI-is-outpacing-Moores-Law
[6]https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3116346/

Save the Date

Saturday, October 23, 2021

8:45 a.m. to Noon

LITIGATION EDUCATION RETREAT

Supporting CAP Members During a Medical Professional Liability Lawsuit

Whether you are in the process of a medical professional liability lawsuit, or simply interested in learning more about the litigation process, the Cooperative of American Physicians' Litigation Education Retreat can provide valuable support and guidance.

During this virtual, interactive event, you will learn techniques to help you secure the most favorable litigation result and alleviate the anxiety that most physicians experience during this exceptionally stressful time.

If you are interested in reserving a spot, please email **LERinfo@CAPphysicians.com**.

CAP Members Can Now Save on **Home and Auto Coverage**

On average, participants saved $562* on auto insurance with Farmers GroupSelect℠. Get even more savings when you bundle your auto and home policies!**

CAP Physicians Insurance Agency (CAP Agency) has teamed up with Farmers GroupSelect℠ to save members hundreds on home and auto insurance through preferred rates available to members of the Cooperative of American Physicians. There's no need to wait until your current policies expire. As a CAP member, you're eligible for these savings right now. If you're looking for customized coverage, you can access excellent rates on your auto and home insurance with the following benefits:

- Automatic payment options
- Claim-free driving incentives
- Superior 24/7 claim support
- Good driving rewards
- Multi-policy discounts
- Multi-vehicle savings

Start saving money on your home and auto insurance now! Get your custom quote today.

Call Farmers GroupSelect at 1-800-438-6381 and mention your discount code E8B, or Visit www.myautohome.farmers.com

This outstanding auto and home offer is just one way the licensed insurance professionals with CAP Agency are committed to saving you money.

CAP PHYSICIANS INSURANCE®
License No. 0F97719

*Based on the average nationwide annual savings in 2020 reported by new customers who called the Farmers GroupSelect employee and affinity member call center, switched their auto insurance to a Farmers® branded insurance policy issued through the Farmers GroupSelect employee or affinity member program, and realized savings. Potential savings vary by customer and may vary by state and product.

**Home insurance has limited availability in MA and is not part of the Farmers GroupSelect benefit offering in FL.

CYBERSECURITY

Beyond IT Departments

by Gabriela Villanueva

Public Policy

The widespread use of internet-connected consumer "smart" devices brings not only an increasing dependence on technology for daily living, but also the need to shield users' privacy and to protect vast amounts of data collected through their use.

The need to secure data based primarily on concerns over individual's privacy issues has evolved to the need of keeping entire systems in every industry free from threats – an area we commonly refer to as cybersecurity. Threats to cybersecurity all share the common trait of a breach and/or attack on those systems by malicious actors. As a result of breaches in security ("cyberattacks"), threats to a system can spill directly into threats to individual privacy, leaving creators, administrators, and users exposed.

Meanwhile, the increased use of communications technology during the pandemic has further revealed how vulnerable these systems and devices can be. As the ongoing health crisis shifted many aspects of life to an internet-connected device, it has revealed the extent to which a cyberattack has the potential to dangerously interrupt, cripple, or paralyze everyday functions.

With threats so great, cybersecurity is no longer the exclusive concern of IT departments of private enterprise. It is now showing up with greater frequency in the committee rooms of state capitols.

Spurred by his own personal experience as a victim of identity theft from a cyberattack, California State Senator Dave Min (D-Irvine) has started a committee on Cybersecurity and Identity Theft Prevention. As a "select committee," Senator Min's new panel is designed to help legislators focus on specific issues and learn more about them. While the cybersecurity select committee is a first in the state's Senate, the state Assembly has had a select committee on cybersecurity since 2015.

Throughout the pandemic, there has been an increase of cyberattacks, including breaches involving businesses, hospitals, a police station, and a major pipeline.

The use of a select committee is utilized in the Legislature to help bring sharpened attention to an issue. With so many competing interests, establishing a select committee allows for a deeper delve into the issues, the ability to hear from experts and stakeholders, and an opportunity to conduct meaningful discussions. Though technically select committees do not hear bills and are not expected to produce tangible outcomes, Senator Min's panel has the potential to generate enough information and education on the issue to eventually support policy proposals to create and enforce a legal or policy framework to best protect society against cyberattacks.

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

by Andie Tena

Scarce Access to Interpreters Leads to High Risks in Healthcare

In 2003, California passed a law and set a precedent requiring that interpretation services be provided by health insurance organizations free of charge to any person with limited English proficiency. Since 2009, when health plans had to comply with the law, patients and/or healthcare professionals can request that a qualified medical interpreter be available either in-person or through a telephone or video conferencing system.

The only problem is that the medical facility and health plan typically need a 72-hour advance notice to provide this service. Often, as a substitute, patients will bring a family member to interpret for them, but the family member may not be trained in medical terminology and important facts may get lost in translation, which in addition to poorer patient compliance, can lead to increased liability. When this situation arises, medical professionals, in many cases, are at a loss for where to turn for support and are frequently forced to reschedule the patient's visit.

A story that may be all too familiar is a perfect example of why not to use a loved one as the interpreter. A patient's husband still becomes emotional when he remembers having to tell his wife that she had breast cancer, because no other interpreter was available to share the news. She had no way of truly understanding how her chemo worked or what the pain would be like because her husband who spoke limited English was her interpreter. Although now cancer free, the patient and her family will forever be impacted by their experience.

Census data suggests that as many as 1 in 10 working adults in the U.S. has limited English-language proficiency. Hospitals and other medical facilities are required to have "meaningful access" to patients so they can make informed decisions about their health while understanding what is being told to them.

Research has shown that requiring interpreters in clinical settings can improve outcomes and reduce persistent disparities in healthcare. And yet, thousands of hospital and medical practices nationwide continue to fall short when it comes to providing the services that are critical to relaying important information to patients with reduced English-language proficiency.

The Solution

In most healthcare-related situations, clear and concise communication is a pre-requisite if you want to effectively treat care for your patient. In many instances, access to interpretation services is compulsory and compliance-mandated.

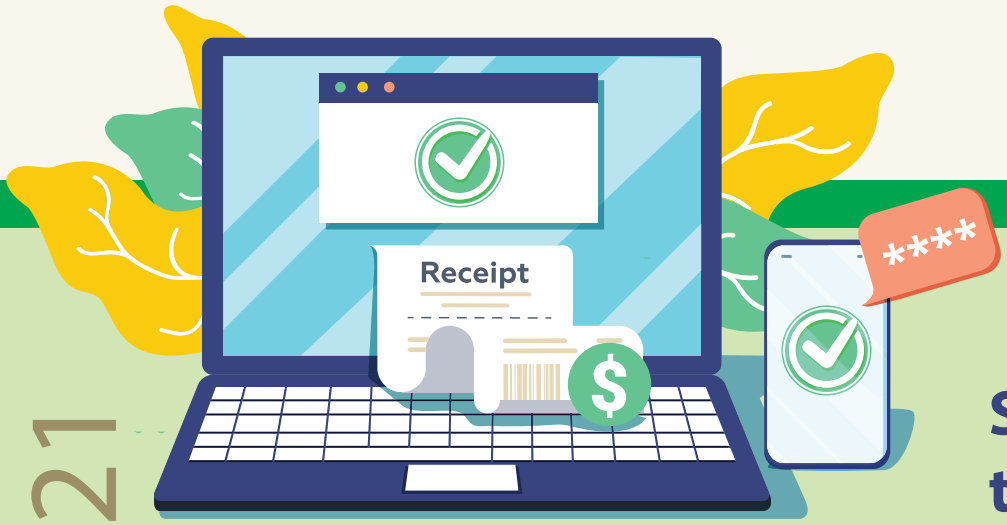
CAP remains committed to delivering time and money-saving practice management programs to help your practice grow. Through the CAPAdvantage program, members

continued on page 8

Continued from page 7

can access Boostlingo, which offers complete and on-demand language access solutions for medical practices at discounted rates. The Boostlingo Unified Platform helps physicians reduce their own medical interpretation costs by combining video remote interpreting, over-the-phone interpreting, and traditional on-site scheduling services for full end-to-end coverage on any language need of any complexity as it may arise.

To learn more, visit https://boostlingo.com/boostlingo-x-cooperative-of-american-physicians or contact Andie Tena, CAP's Director of Practice Management Services, at ATena@CAPphysicians.com or via phone at 213-473-8630.



Sign up to Enjoy the Benefits of Paperless Billing

CAP members can now sign up for paperless billing and enjoy the ease and convenience of managing their account online. Save time and money by easily opting in to receive statements via email, pay your bill online, and eliminate the need for another piece of mail.

Enroll today with the click of a button. Here's how:

1. **Click here to log into your CAP account. If you do not have an account, you will need to register to create one.**
2. **Once logged in, select the green "Setup Paperless Billing" button.**
3. **Select the "Via Email Only" button.**
4. **Verify your email address and click the "Save Changes" button.**

It's that easy!

For assistance with your account or if you have questions about your membership, please call **800-610-6642** or email **MS@CAPphysicians.com**.

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

September 2021

If you are considering a change in your practice this year or in 2022, 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 2021. To allow ample processing time, we recommend that members advise us in writing no later than October 31, 2021, of any of the above changes to be considered eligible for waiver or proration of the next assessment.

The online Membership Information Update form is now available in the Members' Area of the CAP website at https://member.CAPphysicians.com.

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 the last four digits of your Social Security Number.

COOPERATIVE OF
AMERICAN PHYSICIANS

Cooperative of American Physicians, Inc.
333 S. Hope St., 8th Floor
Los Angeles, CA 90071

September 2021

IN THIS ISSUE

333 S. Hope St., 8th Floor, Los Angeles, CA 90071 | 800-252-7706 | www.CAPphysicians.com.

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