THE MONTHLY PUBLICATION FOR CAP MEMBERS

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COOPERATIVE OF AMERICAN PHYSICIANS

Los Angeles Surgeon Carries the Ball for Public Health Education

by Barbara Dillard

James G. McPherson, MD, MPH, FACS, CAP Member

As he becomes an increasingly sought-after medical expert on television and in print, Dr. James G. McPherson is not letting it go to his head. This member of the Cooperative of American Physicians, Inc. says it is just another way he works for public health education.

James G. McPherson, MD, MPH, FACS, has two life-long loves: medicine and football. But he never anticipated that the two loves would come together in an appearance on the NFL Network and make him a media medical expert.

The Los Angeles cardiovascular and thoracic surgeon, who has been a member of the Cooperative of American Physicians, Inc. for more than 10 years, grew up in Roosevelt, Long Island, a suburb of New York City. He thrived in its small town atmosphere. His parents taught him that he could do anything and demonstrated their strong work ethic. He calls his mother, "the smartest person I ever met."

Inspired by her, he decided to become a surgeon when he was 13 years old. But already he had fallen in love with football, watching as many televised games as he could, especially his favorite team, the University of Southern California Trojans. Dr. McPherson was chosen the most valuable player of his high school football team and dreamed of playing in college. However, the first year of biology at USC made him realize, "I needed to dedicate myself to my studies and there would be no time to play." His dedication paid off.

He received both a medical degree and a master's degree in public health in 1989 from the Tulane University School of Medicine. He completed the challenging dual degree program because he wanted to learn about health care around the world, he says.

Dr. McPherson returned to New York for his general surgery residency at St. Luke's-Roosevelt Hospital Center, and then returned to USC for a cardiothoracic surgery fellowship, which he completed in 1997.

While an assistant professor of cardiothoracic surgery at USC from 1998 to 2002, Dr. McPherson developed a community heart program that brought the latest academic heart surgery techniques to community hospitals in Covina and Arcadia.

In 2002 he founded Los Angeles Cardiovascular and Thoracic Surgery Group where he treats both heart and lung diseases, and where he also provides endovascular therapy for peripheral arterial disease. In addition, he is chief of cardiothoracic surgery at Providence Little Company of Mary Medical Center in Torrance.

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DR. JAMES MCPHERSON AT-A-GLANCE
Medical Specialty: Cardiovascular and Thoracic Surgeon
Practice Location: Los Angeles
Years in Practice: 16
CAP Member Since: 2004

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Insurance Coverage for RAC Audits

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Our members have told us that one of the major concerns they are facing is a Recovery Audit Contractor (RAC) audit. Last month, our Risk Management & Patient Safety Department provided tips as to how prepare for a RAC audit in its bimonthly e-mail newsletter *Risk E-Notes*.

If you bill Medicare Parts A, B, and C, you can expect to be audited eventually. A little noticed provision in the "fiscal cliff" bill that President Barack Obama signed gives Medicare officials the ability recover back an estimated $500 million in payments that hospitals and physicians received as long as five years ago. The eight-line provision in the American Taxpayer Relief Act of 2012, Section 638, "Removing the Obstacles to the Collection of Overpayments," states that Medicare contractors now have five years to collect on errors in Medicare payments. The good news is that with your CAP membership, you receive the benefit of MedGuard.

MedGuard reimburses up to $25,000 in defense costs for defending against and appealing findings of overpayment based on RAC audit, subject to a $1,000 deductible. If CAP panel counsel is utilized, members are reimbursed 100 percent of their legal expense up to the $25,000 benefit limit once the deductible is satisfied. If members use non-panel counsel for their legal defense, this benefit will reimburse 80 percent of legal costs up to $25,000. MedGuard does not cover fines or penalties or the cost of copying and sending records.

Important time frames you must follow if you are audited:

- You have 45 days to respond to the initial records request by the RAC auditor. If you fail to do so, the Recovery Audit Contractor can recoup those Medicare funds without showing cause and you will have no opportunity to appeal.
- If you receive a demand letter issued by a recovery contractor, you have 15 days to discuss the improper payment determination with the contractor.
- If you receive a demand letter issued by a RAC audit, you have 120 days to appeal an improper payment determination with RAC.

As soon as you receive a demand letter from RAC, it is important to contact CAP by calling 1-800-852-0555, extension 1591.

A typical appeal against a RAC audit could cost up to $50,000 in defense costs or more. With MEDEFENSE™ Plus purchased through CAP Physicians Insurance Agency, Inc. you can increase coverage starting at $100,000 and up to $1 million—including private payor audits, fines, and penalties. To learn more about this coverage, send an e-mail to CAPAgency@CAPphysicians.com, or call 1-800-819-0061 and ask for Alfred De Leon or Diana Leoncio.

MICRA

New Law Makes Medicare Reporting More Efficient

A bill signed by President Barack Obama is expected to help avoid delays over how much to reimburse Medicare for health care rendered to patients in litigation.

This bipartisan bill, commonly called the SMART Act (for Strengthening Medicare and Repaying Taxpayers), overwhelmingly passed both houses of Congress in December.

The new law adds needed provisions to the Medicare Secondary Payer Act, which requires Medicare to be the "secondary" payer of health care claims when someone else is responsible for those costs. Typically, while the legal dispute over liability for a beneficiary's injuries is active, Medicare will pay the health care costs of the claimant through what are called "conditional payments." Those conditional payments are subject to repayment after the dispute is resolved and liability assigned. The new law does not change these requirements, but sets out a timeline for litigating parties and the Center for Medicare & Medicaid Services (CMS) to agree on how much CMS must be repaid.

The bill's proponents say that under the SMART Act, patients will receive their payments about six months faster because beneficiaries will know how much they owe Medicare prior to a legal settlement. In addition, the new law establishes a repayment threshold amount so that the expected recovery amount is greater than the cost to recover. The law also eliminates the use of sensitive information such as Social Security numbers during the secondary payer process and creates a three-year limit for CMS to seek repayment.

"The President's signing of the bill is good news for the beneficiaries, the Medicare trust, and for businesses large and small," said David Farber, who represents the Medicare Advocacy Recovery Coalition, a group of large retailers, drug companies, insurers, and other stakeholders. The newly signed law was backed by a broad coalition ranging from the Chamber of Commerce to trial lawyers. CAP vigorously advocated for the reforms.

Dr. McPherson is passionate about the power of health education to prevent disease and speaks frequently at schools and in the community. His public education efforts have made him a go-to guy for the news media and he has been interviewed on a wide variety of subjects, including disease prevention, red wine and the heart, the need for defibrillators in schools and offices, and closed heart valve surgery. For him, a highlight has been an NFL Network interview in which he explained the possible effects of strokes on NFL players. Not fazed by his celebrity, Dr. McPherson says it is just another way to teach, as is his service on the board of directors of the Los Angeles American Heart Association.

Dr. McPherson's life revolves around his three daughters, USC football, and jazz and classical music. He also enjoys traveling, playing tennis, and "exploring the murky depths" through scuba diving.

He is driven, compassionate, and curious. "I am always thinking about how I can improve the business of medicine and empower people to go the extra mile by becoming experts of their own health."

In the future, Dr. McPherson would like to teach and is writing a book on the ability of humans to adapt, which he plans to call "No Dolphins on the Moon."

2013 Litigation Education Retreat Schedule

Recognizing the damaging effects a lawsuit can have on a physician's personal and professional well-being, CAP invites its members to attend its daylong Litigation Education Retreat. CAP puts on the free program several times each year.

At the program, a nationally recognized expert in the field of behavioral health provides valuable suggestions on alleviating the stress associated with being named in a lawsuit, while legal and communications experts help physicians develop the skills that will improve their chances for a favorable outcome.

The first Litigation Education Retreat of this year takes place **in Los Angeles on Saturday, April 20**. CAP, a CME-accredited provider, designates this educational activity for a maximum of six AMA PRA Category 1 Credit(s).™

CAP will also offer Litigation Education Retreats **in Northern California on June 22** and in **Orange County on October 12.**

If you are interested in attending one of the retreats, please contact Andrea Crum at 800-252-7706 or at LERinfo@capphysicians.com.

Risk Management & Patient Safety News

Making House Calls? Think About These Risks

by Waldene K. Drake, RN, MBA

More and more physicians are adding, or contemplating adding, home visits to their practice. Their reasons include increased patient satisfaction, potential avoidance of hospitalization and, perhaps, financial gain. CAP Risk Management & Patient Safety recommends physicians also consider some practical issues when contemplating adding this service.

- **Different assessment skills are needed in home care settings.** The physician's scope is expanded; he is responsible for the whole patient. "INHOMESSS" stands for: Immobility, Nutrition, Housing, Others, Medication, Examination, Safety, Spirituality, and Services. It is a mnemonic used by many to provide a framework for the visit and shows the expanse of the physician's role.

- **Even in the home, universal precautions should be observed to the fullest extent possible.** Carry soap, disposable towels, sterilized instruments (if needed), eyewear (if necessary), gloves, disinfectant, and any item needed, depending on the reason for the visit.

- **Evaluation of the whole patient includes both functional status and home environment.** The physician may not ignore other conditions even if not the main reason for the visit. Should the patient later develop a serious complication from the condition, a physician may face allegations of negligent assessment and treatment.

- **Reporting laws do not change.** A health care professional has a responsibility to report unsafe conditions/situations to Child or Adult Protective Services in the applicable county. Conditions may include home fire hazards, lack of access to food or water, domestic, physical, or emotional abuse, or neglect.

- **The physician's employees may perform home care services only if their licensing/regulatory board permits and written protocols define their scope of practice.** For example: Medical Assistants may not perform services solo while NPs and PAS may do so if addressed specifically in written protocols.

- **In addition to the specific medical care rendered, documentation should include comments on the patient's living environment and ability to function in it.** Remember, privacy of patient information laws apply here, too!

- **Check Workers' Compensation insurance to assure coverage for home visits.** A professional may sustain an injury such as a dog bite or a fall through a broken porch step.

- **Consider personal safety when performing home visits.** Depending on the patient's home location:
  - Schedule visits early rather than late in the day and notify patient or caregiver when to expect the visit.
  - Avoid wearing a white coat or carrying a conspicuous doctor's bag that may attract drug-seeking individuals.
  - If entering a never-visited home, consider exit paths for use in an emergency.
  - If a situation or neighborhood feels unsafe, don't take chances - just keep driving.

- **Require current driver's license and a standard level of auto insurance for each professional making home visits.**

- **Notify CAP Membership Services Department if you are expanding your practice to include home visits.**

"Medical Management of the Home Care Patient – Guidelines for Physicians" is jointly-produced by the American Medical Association and the American Academy of Home Care Physicians. It is available for purchase.

Waldene Drake is Vice President Risk Management & Patient Safety for the Cooperative of American Physicians, Inc. Comments on this article may be directed to wdrake@CAPphysicians.com

February 2013

Case of the Month

by Gordon Ownby

Another Reason to Be More Than Just 'Ordinary'

A new appellate decision provides a cautionary tale on how the courts may view a physician's actions as self-serving -- and thus not deserving the legal protections afforded to actual health care.

Plaintiff Yun Hee So underwent a dilation and curettage following a miscarriage. In her lawsuit, she alleged that she awoke during the procedure and that she later spoke to Dr. Sook Ja Shin, her anesthesiologist, in the recovery room. When Ms. So asked Dr. Shin why she woke up during the procedure, she alleged that Dr. Shin became visibly upset and raised her voice.

(As with many appellate decisions, the scenario under review uses *allegations* made by the plaintiff at the initial pleading stage. They have not been proven nor has the defendant physician yet given her side of the story.)

The plaintiff alleged that Dr. Shin showed her a container and, still visibly angry and in a loud voice, "stated words to the effect that plaintiff could see that it was only blood which was suctioned therefore, there could not have been any pain." The plaintiff claimed that Dr. Shin came within a few inches of her and motioned as though she would drop the container in plaintiff's lap. Plaintiff then realized that the contents of the container were her own blood and possible body parts of the fetus.

The plaintiff also claimed that despite her screams for the doctor to leave, Dr. Shin touched her and asked her "to keep quiet about what had just happened and not to discuss the situation with the hospital."

Just short of two years later, Ms. So filed a lawsuit against Dr. Shin for negligence, intentional infliction of emotional distress, and assault and battery. The focus of the appellate opinion was on plaintiff's decision to allege *ordinary* negligence, rather than *medical professional* negligence.

Under the Medical Injury Compensation Reform Act (MICRA), a medical liability suit must be brought within one year of a plaintiff's knowledge of an injury. Here, plaintiff's suit was long past the *one-year* statute of limitations for medical professional negligence, but within the *two-year* window for an ordinary negligence claim.

In seeking to have the case shut down, Dr. Shin's counsel argued that all of the alleged activity occurred during the performance of professional services and that the lawsuit was thus time-barred. Defense counsel also pointed out that even if the allegations were true, Dr. Shin was simply trying to soothe the patient's pain, not to inflict emotional distress or commit an assault. The trial court judge accepted the defense arguments and dismissed the case, prompting a review by the Los Angeles-based Second District Court of Appeal in *Yun Hee So v. Sook Ja Shin, et al.*

Key to the appellate court's decision to revive the case was plaintiff's claim that Dr. Shin's purpose was to persuade the plaintiff not to report to the hospital or to the medical group that she woke up during surgery. Thus, she claimed, Dr. Shin acted for a personal benefit of avoiding discipline, not for her wellbeing as the patient.

The Court of Appeal noted that a provider may engage in a range of activities while delivering medical care and gave the example of an X-ray technician's manipulating a table, activating the X-ray machine, removing photographic plates, and assisting the patient from the table. "Some of those tasks may require a high degree of skill and judgment," the court said, quoting from previous cases. "But others do not. Each, however, is an integral part of the professional services being rendered."

But the Court of Appeal said that it could not characterize all of Dr. Shin's actions as medical care simply because they would not have taken place but for the surgical procedure. "If that were the test, almost any interaction between doctor and patient – even such actions as placing threatening phone calls to a patient about unpaid medical bills, or a sexual assault – could be classified as professional negligence. We do not so conclude."

Absent intervention by the state Supreme Court, the Court of Appeal's decision to allow the lawsuit to go forward gives the plaintiff the chance to convince a jury that the events really occurred as she claimed.

That would be no ordinary trial.

Gordon Ownby is CAP's General Counsel. Comments on Case of the Month may be directed to gownby@CAPphysicians.com.

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