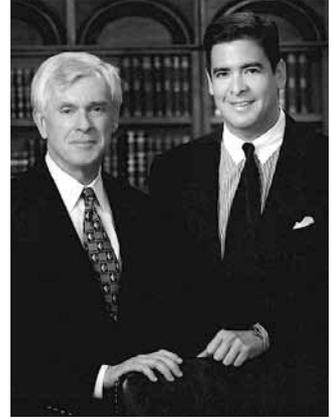


On Your Behalf ...

Legislative and Practice Affairs Division

A California Political Update

By William E. Barnaby, CSA Legislative Counsel, and William E. Barnaby III, CSA Legislative Advocate



The dying days of a two-year session display the legislative process at its worst. Examples include

- ✓ A logjam of bills requiring final action on decisions which have been deferred until the last moment when the sheer volume of information available and decisions required *prevents careful scrutiny.*
- ✓ “Gut and amend” opportunities where bills are stripped of content and new provisions slipped in. Again, the time crunch *prevents detailed analysis.*
- ✓ Threatened gubernatorial vetoes of legislators’ pet proposals are used to force action on other unrelated issues that otherwise have failed to gain traction on their merits.
- ✓ Innumerable campaign fundraisers are held by every incumbent running for re-election and seemingly every other candidate for state office in the upcoming Fall election. Well over 100 campaign “events” will have occurred during the last month of the session. We’ve attended our share and fielded calls about many more.

This has been, and will continue to be, the Capitol backdrop until the 2009-2010 regular session has been concluded on August 31 *AND* a State budget is enacted. Because no 2010-2011 state budget has yet been approved, an *extraordinary* (in the sense this has never happened before, not in the normal usage of the term) special session will be called to finalize an overdue spending plan.

The projected budget gap as this is written (9/12/10), is somewhere between \$19 – 20 billion. The problem that is *extraordinary* (the normal usage of the

term) is that all the accounting and budget gimmicks employed in past years have been exhausted. Whatever is cut now is going to hurt, and hurt badly, and California still requires a two-thirds supermajority of each legislative house to pass a budget vehicle. Because most of the 120 legislative districts (discussed later in this report) have been gerrymandered either solidly Democratic or solidly Republican, persuading any Republican legislator to vote for a budget that includes any tax increase (or allowing a past tax cut to expire) is almost impossible because it is political suicide for any GOP legislator to consider such action. Forging a compromise is not made any easier by the fact that Controller John Chiang publically announced that State revenues have surpassed projections so he will *not* have to issue IOUs until October at the earliest. This takes some of the heat off the politicians for a while.

Legislation of Interest to CSA

SB 726 (Ashburn, R-Bakersfield) – Bar against the corporate practice of medicine. The Senate Rules Committee referred SB 726 to the Senate Business and Professions Committee for a hearing on whether to recommend for or against concurrence in Assembly amendments or to kill it. On August 25, with about one-half hour's notice, we faxed over the CSA opposition letter and, a few minutes later, testified against the bill along with CMA, CAL/ACEP, and several other specialty witnesses. The proponents were there in full force, but our side prevailed. On the motion to recommend in favor of concurrence, the vote was three aye and four no. The bill failed. The author and chief sponsor (American Federation of State, County and Municipal employees) had not intended to take the bill to a hearing at that time; however, Senate Rules informed Senate B&P that the bill had to be heard within 48 hours of referral *or it was dead*. Most likely, the proponents would have preferred to wait until closer to the end of session to have the bill heard, but that was not to be the case. Watch for a return of this bill next year.

SB 1150 (Negrete-McLeod, D-Chino) – Licensing of already accredited outpatient surgery sites. The initial provisions would have expanded Medical Board of California (MBC) oversight of outpatient settings with detailed requirements for cosmetic surgery, use of laser devices and *in vitro* fertility clinics. Included were standards for advertising, physician availability, internet posting of an educational fact sheet about cosmetic surgery and inspections, reporting and processing of deficiency corrections by accrediting agencies. A similar 2009 measure was vetoed for reasons unrelated to substance.

During the last few weeks, the Schwarzenegger Administration proposed a “gut and amend” to require Department of Public Health licensure of outpatient surgical settings already accredited under a system overseen by the MBC. The

proposed system of dual regulation would have imposed new license costs, in addition to existing accreditation expenses, and subjected such facilities to state building codes for clinics which are not appropriate to many of these accredited surgical settings that essentially are physician offices. CSA, CMA and several medical specialties raised objections. Thankfully, the bill was held on the Assembly Appropriations Committee suspense file.

AB 542 (Feuer, D-Los Angeles) – Hospital “Never Events.” Consistent with provisions of the new federal health reform, this bill moves Medi-Cal towards withholding payment for specified “hospital acquired conditions,” formerly better known as “never events.” Earlier versions of the bill would have extended the “nonpayment” requirement to services provided to patients of private managed care/insurance plans! The bill now is limited to establishing a technical working group to fashion nonpayment controls for Medi-Cal. Amendments that we and malpractice carriers proposed will prevent documentation of these “never events” from being used as a treasure trove in medical malpractice litigation. The bill passed the Senate and is on its way to the Governor.

AB 583 (Hayashi, D-Hayward) – Informing patients of health care practitioner credentials and capabilities. Interest was expressed to adapting model state legislation drafted by ASA to California law. To put the issue into proper perspective, California started down this path 35 years ago. In 1975, state hospital licensing regulations were promulgated requiring hospital employees “having patient contact, including students, interns and residents, (to) wear an identification tag bearing their name and vocational classification.”

In 1998, this was expanded and elevated into state law. Health care practitioners, when working, are required by this statute to disclose their name and license credential on a name tag in at least 18 point type. The 1975 regulation and 1998 law are the reason practitioner name tags have been commonplace in California hospitals and other facilities for decades.

In early 2009, CMA received an AMA grant to pursue state legislation to enhance transparency in healthcare. Assembly B&P Committee Chair Mary Hayashi, agreed to author a measure, and AB 583 was the result. As introduced, the bill called for practitioner disclosure of their highest academic degree and, for some physicians who supervise offices other than their primary practice location, their regular schedules. Nurses were specifically exempted from disclosure of their highest academic degrees. Also as introduced, written disclosure by physicians was required of their status as “certified” by the ABMS or ACGME. In June 2009, technical objections to the bill were raised by the Administration. As a result, AB 583 was put on hold for a year.

Legislative & Practice Affairs (cont'd)

In June 2010, CSA interest was expressed in having California adopt rules along the lines of AMA/ASA model legislation requiring health professionals to more accurately represent their education, training and license credential to patients. As indicated above, a body of law and regulation to that effect has long existed in this state. At that point, upon closer examination of AB 583, we believed the bill would have undone some of the practitioner identification requirements already in effect.

Our analysis was followed by a series of meetings and discussions with CMA, other specialties and the author's staff. As a result, the bill was re-drafted so as not to weaken existing law and regulations. Still, concerns remained from our office and other medical specialties on items to which CMA and the author remained committed. At that point, suffice it to say, there was no benefit to the "House of Medicine" airing the differences publically, especially in view of the short time remaining in the session.

In its last amended (8/20/10) form, AB 583 leaves existing law in place and adds new requirements of written disclosure at the patient's "initial office visit" of the practitioner's license "type," and "highest level of academic degree." For physicians, the ABMS/ACGME disclosure mandate noted earlier remains in the bill. Still exempted from the degree requirement are nurses. Exempted from the bill's entire provisions, but still subject to the existing name tag law, are any providers of medical services who work for Kaiser Health Foundation; any person who works in a general acute-care hospital or a clinical laboratory; hearing aid dispensers, respiratory therapists, veterinarians, pharmacists, and marriage & family counselors.

The ABMS/ACGME requirement is the desired goal of the California Plastic Surgery Society (CSPS), a co-sponsor of AB 583. The aim is to discourage physicians having little or no training in aesthetic surgery from providing such services to unwary patients. AB 583 passed the Legislature and is on its way to the Governor.

AB 1503 (Lieu, D-Torrance) – Discounted emergency physician fees for emergency medical services rendered to indigent patients. Throughout the 2009-10 session, advocates for the poor and several labor unions have been seeking a system of discounted physician fees for emergency care rendered to indigents, similar to a 2006 law requiring discounted hospital fees for patients at or below 350% of poverty level. Their argument, in essence, is that only uninsured indigents pay full "rack rate" for medical care, including emergency services, because government programs receive discounts by law, and health insurers and managed care plans negotiate discounts for their subscribers.

The initial version of AB 1503 dealt with payment for emergency services from existing “Maddy” funds maintained at the county level (a source for limited funding for care otherwise not compensated from any other source—amounting to pennies on the dollar – participating counties financing these funds through revenue sources that include penalties on certain criminal and traffic-related violations), and set 350 percent of the poverty level as an eligibility factor for a physician fee discount system. The bill passed the Assembly in 2009 with no opposition. While it was pending before the Senate Health Committee, proponents negotiated the issue with the party most directly affected, the emergency physicians, through their organization, CAL/ACEP. When agreement was reached between CAL/ACEP and the proponents, it would have applied to all physicians who render emergency care in a hospital, including those acting in an “on-call” capacity. As such, it drew objections from CMA and a number of specialties, including CSA. After much discussion and many meetings within medicine and with proponents, a further agreement was reached to limit the discount arrangements in AB 1503 to emergency physicians rendering emergency medical services in a hospital emergency department. This is intended to exclude physicians who render emergency services on an on-call basis. Proponents will try to extend the discount policy to on-call physicians next year. AB 1503 is on its way to the Governor.

Political/Election Update

As touched upon briefly in the section above, the 120 current legislative districts (40 in the Senate and 80 in the Assembly) were gerrymandered either solidly Democratic or Republican during the last reapportionment in 2001. Because politics quite frequently overrules policy considerations in the crafting of laws in California, the elections are very important to everyone who lives or does business in this state.

Special Elections

Concurrent with the June 8 primary election, Assemblyman Bill Emmerson, DDS (R–Hemet) was elected in Senate District (SD) 37. He was supported by CSA in view of his long support for MICRA and other physician issues both as an Assembly Member, a practicing dentist, and earlier as the political action director of the California Dental Association.

Also elected at the same time was Mike Gatto (D-Burbank) in Assembly District (AD) 43 who also expressed support for MICRA and other physician issues during his candidate interviews. He will finish the current term and should be

re-elected for a full term as the Democratic nominee in the November general election.

The run-off in yet another special election took place on August 17 in SD 15 as a result of Able Maldonado becoming Lieutenant Governor. Republican Assemblyman Sam Blakeslee of San Luis Obispo overcame a Democratic voter registration advantage to win over former Democratic Assemblyman John Laird of Santa Cruz. Blakeslee came close to securing the seat in the earlier primary but fell just short of the necessary 50 percent plus one. Holding the seat was particularly important for Senate Republicans because its loss would have put Democrats just one win away from gaining a two-thirds majority with another GOP-held Senate District in jeopardy in November. Without the ability to block budgets, urgency, and tax bills, the Republicans would lose their current leverage on a HUGE range of policy issues.

Primary Election Results

The June 8, 2010, primary election may be best remembered for record high campaign expenditures and record low voter turnout. Negative campaigning, especially via television advertising, long has been believed to repulse voters and depress turnout. The nasty tone of the non-stop, saturation TV spots during the primary campaign may have helped prove the point. That said, existing levels of support for MICRA have been maintained or maybe even strengthened some among lawmakers expected to be in office in 2011. Some highlights:

- ✓ Primary election results take on a greater significance in California than other states because of gerrymandered legislative districts and term limits. Here term limits remove elected officials from office much faster than do the voters. Even without the defeat of a single incumbent's re-election, 39 state legislative seats will change hands this November. Competition for legislative seats, such as it is, occurs more during intra-party primaries rather than in general elections. The gerrymandered reapportionment of 2001 has effectively limited districts from switching from one party to the other. This could change, at least for state legislative districts, as the decennial redistricting for the 2012 elections will be conducted by a new citizen's commission; that is, unless it is reversed by a new initiative (Proposition 27) on the November ballot.

- ✓ Both gubernatorial candidates favor keeping the MICRA non-economic damages cap at \$250,000. Democratic nominee Jerry Brown, the current Attorney General, signed MICRA into law during the first year of his prior tenure as Governor and sees no need to change it. The Republican nominee, Meg Whitman, whose husband (Griffith Harsh, IV, M.D.) is a Stanford Medical Center neurosurgeon, has expressed opposition to raising the cap.
- ✓ In the state Senate, the pro-MICRA forces gained at least two votes. The impact in the Assembly may have been limited to a single pick up, but certainly no worse than staying even. An intriguing development has to do with Assembly Speaker John Perez. He recently suggested that one of his Democratic colleagues should rethink the latter's support for raising the cap. The suggestion was taken to heart. A likely vote for upping the cap has moved away from that position.
- ✓ Without question, the constant scrutiny of any legislation that remotely impacts MICRA, plus the continuing interaction with legislative candidates, has discouraged moves to undermine the gold standard of medical malpractice law.

General Election Prospects

Besides the Legislature, the “constitutional offices” that have decision-making authority over issues directly affecting CSA, are the Governor, the Insurance Commissioner and, possibly, the Attorney General.

Governor Arnold Schwarzenegger (GAS, as he's referenced in Administration circles) will be gone. The heady days of his 2003 election are hard to recall in light of his vows (“blow up the boxes,” “cut up the state's credit card” and “sweep the special interests out of Sacramento”) and today's realities. No happy ending in this docudrama. So, whose turn will it be to “clean up the mess in Sacramento?” From all indications, the race to replace GAS will be heavily financed and close, barring some unforeseen scandal or major event.

Former eBay CEO Meg Whitman spent \$91 million in defeating Insurance Commissioner Steve Poizner to gain the Republican nomination and, since June 8, invested another \$28 million, mostly on TV ads attacking Democrat Jerry Brown. She now holds the all-time national record for personally spending the most (\$119 million) on one's own political campaign. Some feel Brown has allowed himself to be defined by the repetitive attack ads while

sitting on his own campaign fund of \$23 million until Labor Day when he thinks voters begin paying attention. A contrasting view is that despite the nearly three-month TV blitz, Whitman has not closed the gap in public opinion polls and may be reaching the point of diminishing returns in negative, saturation campaigning.

Also noted have been the surprising defeats of two June ballot measures that were backed by big corporate dollars with no counter campaigns or advertising. PG&E pumped \$47 million into Proposition 16, "The Taxpayer Protection Act" to prevent local governments from going into the electric power business. Likewise, Mercury Insurance Company ran a \$16 million effort to pass Proposition 17, its "Fair Auto Rates" proposal. Both were promoted by slickly produced, ubiquitous, and unanswered TV spots. Yet both lost, confounding the experts as well as the campaign consultants who doubtless fretted about it all the way to the bank. Another big bucks loser was Chris Kelly, former Facebook General Counsel, who blew \$12.5 million in failing to gain the Democratic nomination for Attorney General.

Insurance Commissioner Steve Poizner lost his bid to head the GOP ticket, leaving the office open for a contest between two terming-out Assembly Members. For the Republican nomination, former Assembly Minority Floor Leader Mike Villines of Clovis narrowly edged a politically unknown Insurance Department lawyer, Brian Fitzgerald. On election night, Villines trailed by 8,000 votes but pulled ahead when absentee ballots were counted later. He ran poorly in Los Angeles and Orange Counties apparently due to unrelenting condemnation, on a popular conservative radio talk show, of his 2009 votes for temporary tax hikes that were part of the Governor-approved budget fix. He supports keeping MICRA just as it is.

The Democratic nominee is Dave Jones of Sacramento. He supports raising the MICRA cap. His failed attempt, as Assembly Health Committee Chair, to intervene in The Doctors Company (TDC) acquisition of Southern California Physicians Insurance Exchange (SCPIE) unnecessarily complicated the deal and could have cost many CSA members insured by TDC and SCPIE a lot of money in diminished stock value and higher med-mal premiums.

Attorney General Jerry Brown's candidacy for Governor has led to two district attorneys vying to become the state's top law enforcement officer. The long time Los Angeles versus San Francisco rivalry will be a backdrop. Los Angeles County District Attorney Steve Cooley will carry the GOP/LA banner while San Francisco D.A. Kamala Harris is the Democratic nominee.

The State Legislature will continue to have strong Democratic majorities in both the Assembly and Senate. Support for MICRA will remain strong as well.

Legislative & Practice Affairs (cont'd)

1. *The Assembly* lineup presently is 50 Democrats, 28 Republicans, one Independent (who votes with the Democrats) and one vacancy (that will be filled by a Republican). The independent is Juan Arambula, a MICRA supporter, who will be replaced by Henry Perea, who also supports MICRA. The vacancy in AD 63 is a safe Republican seat that will be filled by Mike Morrell, also a MICRA supporter.

In jeopardy are two first term Democrats whose victories in traditionally GOP districts were helped by the 2008 Obama turnout.

- ✓ In AD 10, southern Sacramento and northern San Joaquin Counties plus some foothill areas, Alyson Huber eked out a win over former San Joaquin County Supervisor Jack Sieglock only after final absentee ballots were counted three weeks post-election day. Sieglock had to pry his name plate off a Capitol office door, but he has a good chance to reuse it after the upcoming 2010 rematch. Sieglock is a MICRA supporter; Huber is not.
- ✓ In the East SF Bay, AD 15 had been trending away from the GOP for some years and in 2008 finally elected a Democrat, Joan Buchanan. She is a MICRA supporter as is Republican Danville Mayor Abram Wilson, her opponent in another 2010 rematch. He has a solid chance because of her poor showing in a 2009 Congressional special election and his non-stop campaigning over the past two years.

Three physicians ran for the Assembly. Two won their primary races; the other lost.

- ✓ Linda Halderman, M.D., (*Dr. Halderman generously has written articles on her huminatian experiences for previous CSA Bulletins – Editor*) by winning the primary in safe Republican AD 29, will be representing the Fresno/Madera area where her earlier surgical practice was not economically viable due to a heavy Medicare/Medical patient base. She has a Democratic opponent in the general election but the primary victory has locked it up for her.
- ✓ Richard Pan, M.D. (*Dr. Pan, an academic peditrician at U.C. Davis, has served with distinction as the chair of the CMA's Council on Scientific Affairs – Editor*) won the Democratic primary in AD 5, which is located in traditionally Republican parts of suburban Sacramento and Placer Counties. He faces a difficult challenge in moving this district into the Democratic column. His opponent, attorney Andrew Pugno, is a physician's son who supports MICRA. The wild card in this race is Pugno's highly visible role with Proposition 8, the

same-sex marriage ban with which he is often associated. This will be one of the most expensive legislative contests.

- ✓ Donald Kurth, M.D., lost in the Republican primary in AD 63 which is located in the San Bernardino/Riverside area. The victor, Mike Morrell, is a MICRA supporter. This is another safe Republican seat, and Morrell should win easily in November. Kurth's campaign was hurt by a late negative attack funded by independent expenditures of \$150,000 from Blue Cross, Blue Shield, Health Net and the California Association of Health Plans. He had been critical of managed care interference in the physician-patient relationship.

2. *The Senate* lineup presently is 25 Democrats, 14 Republicans and one vacancy. The vacancy is in SD 1, where Sen. Dave Cox (R-Fair Oaks) passed away in July. It will be filled by a special election that will have its first race (primary) concurrent with the November 2 general election. If a candidate fails to receive a majority (which will most likely happen), then a runoff (general) election will take place between the candidates with the most votes in each of the recognized parties. Because this is a solid GOP district, this race will be decided on November 2. In other primary races:

- ✓ Juan Vargas, former Assembly Insurance Committee Chair and a MICRA supporter, will return to the Legislature after edging Assembly Member Mary Salas (D-Chula Vista) in SD 40 by just 22 votes out of 48,000 cast. The morning after the election, Salas led by 295 votes and declared victory. Her lead disappeared when absentee and provisional ballots were counted over the following three weeks. She ended a recount after several precincts did not alter the Vargas margin. He will replace Senate Budget Chair Denise Ducheny, who was not considered a MICRA supporter. Add one to the pro-MICRA ranks. The GOP nominee, Brian Hendry, a Chula Vista educator, has little chance.
- ✓ Assemblyman Ed Hernandez, O.D, of Baldwin Park, a practicing optometrist and MICRA supporter, will succeed Senator Gloria Romero, who was not, in SD 24. Termed out, she lost a bid for State Superintendent of Public Instruction. Another plus for the pro-MICRA forces.
- ✓ Assembly Member Noreen Evans of the Napa/Santa Rosa area will move to SD 2 to replace retiring Senator Pat Wiggins. Evans has stressed that patient access considerations would be key to her view on MICRA related legislation. Wiggins was considered leaning against our side. The heavy Democratic majority should enable

Evans to easily outdistance the GOP candidate, Santa Rosa CPA Lawrence Wiener.

- ✓ Assembly Member Anna Caballero (D-Salinas) will face Ceres Mayor Anthony Cannella (son of former Assemblyman Sal Cannella, a Democrat), the Republican candidate, in SD 12. This promises to be one of the more competitive and expensive races on the November ballot. Both are considered to be MICRA supporters. The Democrats would love to pick up this seat which is being vacated by Republican Jeff Denham (who's moving on to Congress) in order to get closer to a veto-proof 27 vote majority.

Senator Lou Correa (D-San Ana), a MICRA supporter, will be opposed in SD 34 by Anaheim City Councilwoman Lucille Kring, who has been active in Orange County politics for years. The narrow Democratic registration advantage could pose a problem for Correa if there is a strong Republican tide. Campaigns for this relatively competitive seat are always expensive.

Ballot Measures

As if voters won't have enough to deal with a full slate of state constitutional offices, one U.S. Senate race, 53 seats in the U.S. House of Representatives, 80 state Assembly districts, 21 state Senate districts and four state Board of Equalization posts, the November ballot will contain at least nine propositions. Highlights include:

- ✓ Prop. 19: legalizes recreational marijuana.
- ✓ Prop. 20: adds Congressional reapportionment to the authority of the citizens' redistricting commission created by Prop. 11, 2008.
- ✓ Prop. 23: rolls back AB 32, the state's landmark greenhouse gas emissions law.
- ✓ Prop. 24: repeals 2009 enacted corporate tax breaks.
- ✓ Prop. 25: reduces legislative vote requirement to pass a budget from two-thirds to a simple majority.
- ✓ Prop. 26: increases legislative vote requirement to impose state levies and charges (fees) from a simple majority to two-thirds.
- ✓ Prop. 27: eliminates citizens' redistricting commission created by Prop. 11 of 2008.