

# On Your Behalf ...

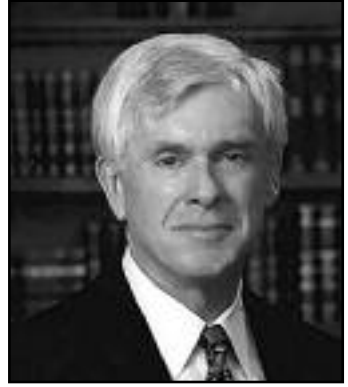
## Legislative and Practice Affairs Division

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### **Benjamin J. Shwachman, M.D., A Most Distinguished Physician**

*By William E. Barnaby, Esq., CSA Legislative Counsel*

Anyone actively involved in California medicine over the past 30 years likely has heard about the 2008 recipient of the CSA Distinguished Service Award, Benjamin J. Shwachman, M.D., J.D., Pharm.D. He is truly an unforgettable character, as well as a caring physician, who has left an indelible imprint on the practice of medicine in our state.



No shrinking violet by any means, “SHWACHMAN, ELL AAY,” as he proudly introduced himself many, many times at the microphone of state and federal medical conferences, Ben has been in the middle of more controversies than many of us care to remember. To say he relishes controversy would be a gross understatement.

His contributions to the CSA have been numerous including serving the longest term of any CSA President due to the untimely death while in office of his predecessor, Patrick Burch, M.D. His passion always has been the betterment of the medical profession, improvement in the quality of patient care, and the importance of active physician participation in political affairs.

There have been times when he has rubbed some folks the wrong way, including yours truly, but no one has ever doubted the sincerity of his convictions. Indeed, our friendship has had its ups and downs over the years. It is remindful of the unique closeness that often develops after two combatants have bloodied each other.

Ben Shwachman has always fought for what he believes. There seldom is any doubt where he stands on any given issue. The CSA Distinguished Service Award is a singular honor that is reserved to those whose contributions to the organization are truly outstanding. Its receipt by Dr. Benjamin Shwachman was well deserved and reflects great credit upon the society.

## Results of the 2008 Primary Election

By *Bill Barnaby Jr., Esq., CSA Lobbyist*



California held its Primary Election on Tuesday, June 3, 2008. In addition to voting for their U.S. House of Representatives, California Assembly Members, California State Senators in the odd numbered districts (except SD 12) and local representatives, Californians voted on two statewide ballot initiatives, both addressing the issue of eminent domain. Proposition 98, which would bar state and local governments from taking or damaging private property for private uses and prohibit rent control, failed passage with 39 percent of voters in favor and 61 percent opposed. Proposition 99, a more narrowed approach that would prohibit state and local governments from using eminent domain to acquire an owner-occupied residence for conveyance to a private person or business entity, passed with 62.5 percent of voters in support. This measure includes exceptions for public work or improvement, public health and safety protection, and crime prevention.

CSA's political action arm, the Greater Anesthesia Service Political Action Committee (GASPAC), contributed \$54,048 from January 1, 2008, up to election day. While the 2008 primary election cycle officially started the day after the November 2006 general election, campaigning and fundraising did not really begin in earnest until January 1.

As the primary results continue to come in, labor interests are claiming victory over the business community in the key, big-spending races. Special interest groups representing corporations, unions, Indian tribes, health care, and other interests reportedly spent more than \$10 million to support legislative candidates. A majority of this money was spent in Democratic primaries where no incumbent—or an endangered incumbent—was on the ballot. The following list contains a few of the highlights of key legislative races. The full report can be viewed on the CSA Web Site at [www.csaqh.org](http://www.csaqh.org).

### Senate

SD 3: Current Assemblyman Mark Leno (D-San Francisco) defeated incumbent Senator Carole Migden (D-San Francisco) and the more moderate Democrat, former Assemblyman Joe Nation. Leno garnered 43.4 percent of the vote to Nation's 28.7 percent. Migden came in last with 27.9 percent.

SD 9: Current Assemblywoman Loni Hancock (D-Berkeley) defeated former Assembly Health Committee Chair Wilma Chan with a vote of 56.5 percent to 43.5 percent. Chan was the moderate Democrat in the race.

SD 12: In the recall election against Senator Jeff Denham (R-Merced), voters overwhelmingly rejected the recall effort. The effort, started by President Pro Tempore Don Perata, was an attempt to take a Republican out of office and fill the spot with Democrat Simon Salinas. Senator Perata, a few weeks before the election, announced he was no longer going to pursue the recall, but it was too late to remove it from the ballot.

### Assembly

AD 10: Businessman and former Mayor of Lodi Jack Sieglock won the primary race to replace Alan Nakanishi, M.D. (R-Lodi), garnering 43.1 percent of the vote. He defeated David Sander and Paul Hegyi.

AD 15: In the Democratic primary, San Ramon Valley School Board member Joan Buchanan defeated Theodore Ford by a vote of 66.6 percent to 33.4 percent. In the Republican primary, Abram Wilson defeated three other candidates to replace Guy Houston (R-San Ramon). This was a very close race, with Wilson getting 30.6 percent of the vote and one of his opponents Robert Rao getting 29.2 percent. The ophthalmologist-sponsored candidate, Judy Lloyd, finished a poor third.

AD 40: Bob Blumenfield defeated Laurette Healey and the more moderate Stuart Waldman to be the Democratic challenger in the race to replace Assemblyman Lloyd Levine (D-Van Nuys).

AD 46: Labor union representative John A. Perez won a decisive primary victory to become the Democratic candidate in the race to replace former Speaker of the Assembly Fabian Nunez.

**Dancing with the Department of  
Managed Health Care:  
Balance Billing and Déjà Vu  
at the "Department"**



*By David E. Willett, Esq., CSA Legal Counsel*

**A**nesthesiologists are questioning why they and other physicians are being asked to attend repetitive hearings convened by the Department of Managed Health Care to consider whether it is “unfair” for physicians who have no contract with a health plan to bill health plan patients for emergency care, when the health plan or its subcontractor medical group or IPA stiffes the treating physician. DMHC three times now has proposed regulations labeling physicians sending these bills as guilty of “unfair billing practices.” After retreating from earlier versions, DMHC sallied forth once again late in March, with hearings continuing until late May. Each time DMHC did this, CMA, CSA, and other organizations composed of hospital-based physicians targeted by DMHC submitted extensive written comments. More to the point, practicing physicians each time gave up a day of practice to journey to a hearing site in order to testify in opposition. Physicians are asking, “Why this game of ‘Whack-A-Mole?’”

In trying to impose a new rule on physicians—or anyone else—DMHC must comply with California’s Administrative Procedure Act. The APA requires public notice of a proposed regulation, and an opportunity to comment, and even to testify at a public hearing if it is requested. A regulation is any “rule or standard of general application.” Rules that have not been adopted under APA requirements are “underground regulations” and may be struck down by the courts.

A proposed regulation must meet numerous APA requirements, such as those for clarity and consistency. The most important requirement is the one which states that a regulation must be founded on statutory authority. Only the Legislature can make laws. When an administrative agency makes rules, it must show that the Legislature gave it authority to adopt the specific requirement, either as a matter of discretion or by specific direction. Unless the agency can show that the Legislature intended it to adopt a rule, the rule cannot survive challenge.

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The first challenge to rulemaking occurs when public comments and testimony are submitted. The administrative agency, before it enacts a regulation it has proposed, is supposed to respond to each public comment. Usually, these responses are compiled into a single document, which then becomes available for review if the agency proceeds and actually adopts a rule.

So far, DMHC has not adopted the “balance billing” prohibition in successive iterations of proposed regulations. CSA, CMA, and other physician organizations have submitted written and oral comments each time, pointing out that the Legislature has never given DMHC authority to regulate physicians, except to the extent that they contract with health plans. These comments do not appear to have deterred DMHC. Abandonment of previous efforts is more likely attributable to the complaints of health plans and their allies, including the California Association of Physician Groups (CAPG) and other financially interested players, about other provisions in prior promulgations.

By withdrawing the regulations proposed previously, DMHC each time avoided the first opportunity for external scrutiny. An administrative agency must file a proposed regulation and the entire record of comments, testimony, and responses with the Office of Administrative Law before it can become effective. OAL reviews the record and the law to see if APA requirements are met. Sometimes proposed regulations are rejected for failure to meet APA notice and hearing rules. If the procedure stands scrutiny, OAL must still determine whether substantive requirements, particularly the requirement for statutory foundation, are satisfied. OAL can invalidate the proposed regulation if it cannot find statutes authorizing the regulation. Furthermore, if the Legislature has provided that “unfair billing practice” must be defined by statute, which we believe is the case, OAL can knock down attempts to do so through regulations.

Even if OAL does not veto a proposed regulation, the courts always have authority to review the entire regulation and the entire body of law, to decide whether an administrative agency has the power to enact a rule binding upon the public. Regulations, of course, may result in administrative actions, affect civil liabilities, and even result in criminal penalties if violated. Courts can stay the effectiveness of a proposed regulation during judicial review, and they usually do.

DMHC’s attempt to prohibit balance billing of patients by noncontracting physicians seems particularly far-fetched, measured against the authority the Legislature has given DMHC. DMHC authority is over *health plans*, and arrangements made by health plans, period. By definition, noncontracting physicians do not fall within those arrangements. DMHC’s failure to require

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health plans to contract with physicians likely to treat their enrollees is much of the reason balance billing occurs. DMHC has chosen to ignore comments from the medical community and run for the goal line, intent on outlawing balance billing.

DMHC's blind eye to the reasons balance billing occurs is difficult to understand when it is apparent that contracting is commonplace and not the exception. Balance billing occurs when a health plan (or perhaps more often, a subcontractor) attempts to steal an advantage over the competition by paying below-market rates, instead of contracting. When CSA told DMHC this, in CSA comments on proposed requirements for health plans assuring access to care, DMHC refused to respond despite the APA obligation to do so.

By enacting a regulation which says only that balance billing is an "unfair billing practice," DMHC apparently hopes to evade further responsibility to patients and satisfy the health plans, even if it sets up a short-term profit center for plaintiffs' lawyers. DMHC is aware that the law provides no authority for DMHC action against noncontracting physicians, but no doubt will loudly proclaim to be protecting patients. Health plans will tell enrollees that bills from unpaid treating physicians are illegal, and that they don't need to pay the bills. Plaintiffs' lawyers will equate "unfair billing practices" with "unfair business practices" described in Business & Professions Code Section 17200, which provides a basis for monetary judgments and even attorneys' fees, suing physicians if they can sign up patients billed when their health plans did not pay.

It is a short step for an extension of a regulation addressing emergency care to all billings by noncontracting physicians to health plan enrollees. DMHC seeks to lay a claim to czar status over the entire provision of health care in California, although the Legislature has never assigned it this role. In preparing comments for the latest proposed regulations, we asked DMHC, under the Public Records Act, to provide the documents that would have been prepared if DMHC had complied with the Legislature's direction to report to the Legislature and the Governor on complaints of balance billing, efforts made with other state agencies to address balance billing concerns, and DMHC efforts to draft solutions or a workable definition. The fact that the Legislature's directive to DMHC included a requirement that DMHC propose legislation to the Governor and the Legislature is being ignored by DMHC, in favor of self-initiated regulations. CSA asserts that the Legislature withheld authority for regulation of balance billings by DMHC, leaving the subject to the Legislature.

Like Charlie Brown kicking at Lucy's football, DMHC continues to kick at the balance billing prohibition. DMHC staff have long professed their attachment to the rule, even though their contention was rejected in court the only time

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the Department's view was expressed.\* Health plans and their adherents goad DMHC on. If DMHC this time actually submits its regulation to OAL, there will be good reason for OAL to strike it down, and compelling reason for CMA, CSA, and the other organizations actually representing physicians to ensure that the regulation is challenged in court, if necessary.

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\* *In Prospect Medical Group Inc. vs. Northridge Medical Group*, the California Court of Appeal gave short shrift to a letter from DMHC staff stating that balance billing by noncontracting physicians in such situations is unlawful, saying that "This letter provides no guidance because it is not based upon controlling California statutes or case law." The *Prospect* case, which centers upon balance billing rights, remains before the California Supreme Court, which had not scheduled oral argument when this article was prepared.

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### 2007-2008 GASPAC Honor Roll

By *Kenneth Y. Pauker, M.D., Chair,*  
*Division of Legislative & Practice Affairs*

The Greater Anesthesia Service and Political Action Committee (GASPAC) is the CSA's longstanding political arm. GASPAC is charged with raising funds and disbursing them to promote improvement in the practice of anesthesiology, quality patient care, and public health. GASPAC also encourages anesthesiologists and others to take a more active and effective role in government affairs.



Representing CSA's interests before the legislature requires electing lawmakers attuned to healthcare issues, and this requires money, pure and simple. GASPAC is our vehicle to get this done. Donations to GASPAC can be accepted from most any individual or entity in California, personal or business, and are distributed as contributions to candidates for state or local public office, without regard to party affiliation, who are felt to be supportive of GASPAC's objectives.

The 2008 election will produce at least 34 new state legislators to fill seats being vacated by term limits. GASPAC will help, to the extent that its funds are available, the campaigns of those candidates and incumbents who demonstrate an understanding of issues important to anesthesiologists. Interest groups that advance causes harmful to anesthesiologists—such as health insurers, personal injury lawyers, and some allied health practitioners who seek to upgrade their status to "doctors"—will be making their own

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donations. GASPAC is CSA's voice to make its concerns and positions known to policy makers.

GASPAC has, in response to CSA solicitations in *Gasline*, seen an increase in Gold Contributors (\$500 annual donation), who are marked with an asterisk. The CSA is pleased with each contribution but is especially appreciative of those who have stepped up to lead in our efforts to strengthen GASPAC. The 2007-2008 GASPAC Honor Roll is:

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