

# On Your Behalf ...

## Legislative and Practice Affairs Division

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### Anesthesiologists and the Workers' Compensation Official Medical Fee Schedule

By *Phillip Goldberg, Esq., CSA Legal Counsel*

**S**kyrocketing Workers' Compensation (WC) insurance premiums blamed on abuses in the system prompted significant legislative changes in the California Workers' Compensation Program in 2003 and 2004. One consequence of this legislation was a reduction in the amounts paid to treating physicians under the Official Medical Fee Schedule (OMFS).

Although premiums for WC insurance have been reduced and stabilized in recent years, further reductions in payment for anesthesiology services relative to other specialties have been threatened, and there is little opportunity for an anesthesiologist to avoid OMFS limits. Although there are supposed to be opportunities to negotiate alternative rates, including rates higher than the OMFS, those opportunities are extremely limited. It is possible to contract with WC insurance carriers or their medical provider networks to receive payments in excess of that provided for under the OMFS. Because the responsible payers are under no obligation to pay rates in excess of the OMFS, there seems little opportunity for any real negotiation.

In brief, as regards WC patients, a "balance billing prohibition" is in effect, which is even more comprehensive than the limitations that apply for emergency services for health care service plan patients or for Medicare patients. An action by the United States Justice Department against orthopedists in the State of Idaho allegedly colluding to refuse to accept WC fee schedule payments was recently settled. The settlement makes clear that the federal government takes the position that antitrust laws apply to boycotts of governmental programs and fee schedule amounts every bit as much as they apply to private commercial enterprises.

Although California anesthesiologists cannot collectively threaten boycotts in response to WC payment rates for anesthesiology services, there are some things they can do. The OMFS is adopted by the Director of the Division of Workers' Compensation and is supposed to be adjusted at least every two years "after public hearings." CSA and individual anesthesiologists have the right to



participate in this process. Indeed, the Department of Industrial Relations Website invites questions from interested persons regarding the OMFS ([www.dir.ca.gov/dwc/omfs9904.htm](http://www.dir.ca.gov/dwc/omfs9904.htm)). Anesthesiologists unhappy with the level of payment for their services under the OMFS are free to register their dissatisfaction. They are also encouraged to support CSA's efforts on their behalf, which will emphasize the access concerns relating to unreasonably low payment rates for anesthesiology services.

### **Additional Remarks on Workers' Compensation**

*By William Barnaby, Esq. and William Barnaby III, Esq.*

WC programs are in place in virtually all states. In effect, industrial accidents—"on-the-job" injuries—are exempt from the usual tort system. Employers are required by state law to maintain coverage against such employee injuries, and claims are processed on a "no fault" basis. The Division of WC (DWC) is part of the California state government executive branch. It is within the Department of Industrial Relations (DIR), the director of which, as well as the administrative director of the DWC, are gubernatorial appointees subject to Senate confirmation. A good summary of the California WC system can be found on the Department of Industrial Relations Website ([www.dir.ca.gov/DWC/basics.htm](http://www.dir.ca.gov/DWC/basics.htm)). Be aware that the Governor is trying to preserve his "legacy" of reforming WC, perhaps his most praised accomplishment, at least in the eyes of the business community. The Governor and his business allies are fearful that WC reform will be undone if a new Democratic governor is elected. Labor has been increasingly vocal about allegedly low disability payments. Indeed, there is a strong suspicion that both the Governor and Labor want to fund higher WC disability payments by further reducing medical treatment payments.

### **And Some Supplemental Perspective**

*By Kenneth Y. Pauker, M.D., Associate Editor, President-Elect, and former Chair of the Legislative and Practice Affairs Division*

It should be noted that WC premiums are paid by employers, then managed and administered, and ultimately paid out for claims (disability payments to injured workers, medical payments to facilities and medical practitioners) by an entity which has partial autonomy from the state government. Private WC insurance is administered by insurance companies. In the vast majority of states, workers' compensation is provided solely by private insurance companies. Twelve states operate a state fund, and the California State Compensation Insurance Fund is the largest, with over \$22 billion in assets, 7,500 employees (of which 500 are attorneys), and an average market share of 23 percent historically since it

was created by the California legislature in 1913. The fee schedule (OMFS) is determined by a branch of the government, subject to the regulatory approval process defined by the Administrative Procedure Act, and thereby conditional upon filings and testimony and public hearings, culminating ultimately in a decision by the California Office of Administrative Law. The government itself is not using tax dollars to pay claims (except for premiums paid on behalf of state employees), but it does set the fees.

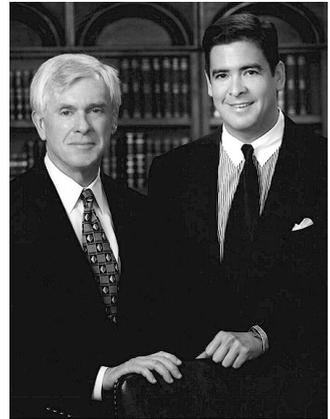
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### 2010 Primary Election Results— Positive Outcomes for CSA

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

#### Importance for CSA

“All politics is local” was the mantra of the late U.S. House Speaker Thomas P. “Tip” O’Neil. For CSA members and other California physicians, local matters provided some positive results from the June 2010 primary election. Two of the three state legislative physician candidates won their primary races and will be their party’s nominee in the November general election. Another physician won an uncontested primary and will mount a well financed challenge against a long-serving Congressional and Statewide politician. A Fresno area Congressional seat seems assured for a candidate who received ASAPAC help urged by CSA sources. A central valley Assembly seat was won by a candidate who was singled out by a politically active CSA member.



- Linda Halderman, M.D., will be representing the Fresno area where a heavy Medicare/Medi-Cal caseload forced her to close a financially unsustainable general surgery practice. She won the Republican primary in safe GOP Assembly District 29. CSA members individually (especially Past Presidents Linda Hertzberg, M.D., and Virgil Airola, M.D.) and through GASPAC were among her earliest and strongest supporters.
- Richard Pan, M.D., won the Democratic nomination in suburban Sacramento Assembly District 5 that has elected Republicans for the past 20 years. A wild card is how the race will be affected by the highly visible and leading role played by his GOP opponent, attorney Andrew

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Pugno, in Proposition 8 which banned same sex marriage. GASPAC supported Dr. Pan, as it supports virtually all physician candidates.

- Don Kurth, M.D., lost the Republican nomination for Assembly District 63 (San Bernardino) after facing a negative campaign financed by Blue Cross, Blue Shield and the California Association of Health Plans. Dr. Kurth stressed his concerns over interference by managed care in patient treatment decisions. While the loss was an adverse result for CSA, it is also a lesson to be learned. When HMOs mouth concerns for practicing physicians, keep in mind where they put their money in this race. GASPAC supported Dr. Kurth.
- Ami Bera, M.D., Assembly District 3, won the uncontested Democratic nomination to challenge incumbent GOP Congressman Dan Lungren, a career politician who has sandwiched two terms as California Attorney General and a losing bid for Governor (to Gray Davis) between 18 years in Congress. Bera has raised a large war chest and is supported by ASAPAC. Because of his robust campaign, the seat no longer is considered “safe” for Lungren.
- State Senator Jeff Denham (R-Atwater) outpolled a former Congressman and a former Fresno Mayor in the GOP dominated 19th Congressional District. ASAPAC supported Denham upon favorable urging by GASPAC/ASAPAC member Paul Coleman, D.O., of Modesto and the CSA lobbying team. Denham has been accessible and supportive of CSA during his eight years in the Senate.
- Kristin Olsen, a Modesto City Councilmember, was identified by Dr. Coleman as the best candidate in a six-way race for the Republican nomination in Assembly District 25. She won the nomination and the election because no Democrat or minor party candidates filed for the seat. GASPAC translated Dr. Coleman’s recommendation into tangible help.

### CSA’s Involvement

The above are indicative, though not all inclusive, of CSA’s active involvement in the electoral process. While CSA’s political action committee (GASPAC, the Greater Anesthesia Service Political Action Committee) is small by comparison with CMA’s CALPAC and the PACs of almost every friend and foe, effective partnering and timing keep GASPAC visible and appreciated. Legislative incumbents and candidates know who GASPAC represents—CSA members, in other words, anesthesiologists. And they know CSA members are not content to sit on the sidelines but are active in the political process.

Partnering with CALPAC has helped to expand the impact of medicine in key campaigns and to assure a consistent message on key issues. Similarly, participating in the CAPP (Californians Allied for Patient Protection) coalition has helped safeguard MICRA from attacks by the personal injury lawyers.

Promoting active involvement of CSA members in the political process is high among the goals of the CSA leadership. It will be a prominent CSA theme going forward.

### **The Big Picture**

Voters are angry and ready “to throw the bums out,” warns the news media. In California, elected officials are churned through the political system without regard to need, necessity or even voter anger. Here, term limits force elected officials out of office much faster than do the voters. “Electeds” cycle through city, county and state offices and back again with barely time for on-the-job training. Even without the defeat of a single incumbent’s re-election bid, 39 state legislative seats will change hands this November.

Also, the gerrymandered reapportionment of 2001 has effectively prevented districts from switching political parties. 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 November ballot proposition.

Besides angry, California’s voters may also be more disgusted or fatigued. Campaign spending in the just concluded June primary election was at a record high, and voter turnout was at a record low. Negative campaigning, especially via television advertising, long has been believed to repulse voters and depress turnout. The nasty tone of recent non-stop, saturation TV spots may have helped prove the point.

### **Can Money Buy Elections?**

There may be no definitive answer. Wealthy candidates continue to invest their own fortunes to win high public office even though few have been successful. Michael Huffington spent \$28 million in a 1994 losing bid for U.S. Senate. Al Checchi dropped \$40 million in losing the Democratic gubernatorial nomination in 1998. He ran ahead of Jane Harman who only chipped in \$12 million, but both lost to the ultimate winner, Gray Davis. In 2006, Steve Westly splurged about \$40 million in losing the Democratic gubernatorial nod to Phil Angelides whose \$30 million effort was only partly self-funded. Of course, Angelides then lost to Arnold Schwarzenegger whose \$30 million campaign was mostly financed by outside contributors.

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For the June primary, former eBay CEO Meg Whitman put \$81 million of her own wealth in trouncing Steve Poizner who bankrolled his campaign to the tune of (only?) \$21 million. Once nominated, Whitman gave her campaign another \$10 million and has vowed to dedicate upwards of \$150 million to gain the Capitol's "corner office."

Still, voters may have sent a pertinent message. Two ballot measures, backed by big corporate dollars with no counter campaigns or advertising, were shockingly rejected. 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, the "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, Facebook General Counsel, who blew \$12.5 million failing to gain the Democratic nomination for Attorney General.

Does the law of diminishing returns apply to election campaigns? An answer may be tallied on November 2, 2010.

Massive spending by wealthy individuals and corporate interests, particularly in statewide campaigns, has the effect of crowding out smaller forces that have legitimate concerns to voice. Even if GASPAC, for example, were to plunge its entire treasury into a single candidate for Governor, it would be too little to be noticed or have an impact. That's the rationale for concentrating GASPAC funds on legislative races where they can make a difference.

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