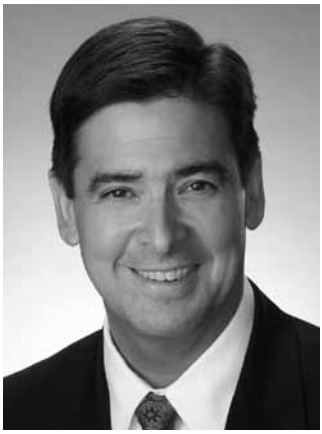
On Your Behalf …
Legislative and Practice Affairs Division

Web Publishing: Legislative Reporting for the 21st Century



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

As Dr. Yost reports below, the **CSA Grassroots Network** went live just prior to the 2011 Annual Meeting and House of Delegates in San Jose last May. This new communications medium—found in the "Advocacy" area of the CSA website—mirrors the technological advances people have become accustomed to and the real-time mode of communication many of us rely upon. Another new feature in the "Advocacy" area of the CSA website is web publishing.

The term "web publishing" refers to a continuously updated status report on all state legislation relevant to the CSA. The impetus behind it came from Dr. Yost's request that legislative information be provided (1) with as much *advance notice* as possible, and (2) in *real time*, if possible. Research led us to the web publishing feature offered by CapitolTrack, the provider of our legislative tracking service. Web publishing can be accessed by clicking on the "State Legislative and Regulatory Issues" tab under the "Advocacy" menu.

The description of each bill (in the "Memo" field) is monitored by our office daily and updated every time (1) a bill is amended, or (2) the CSA's interest in a bill changes. All other information available via the link is updated in real time. Therefore you can connect to all the pertinent information:

1. all versions of a bill, in PDF and html
2. the author of the bill, and links to information about the author
3. the status of the bill
4. the location of the bill in the legislative process
5. all analyses of the bill
6. all votes cast on the bill
7. a calendar of when the bill will be heard in committee or on the floor

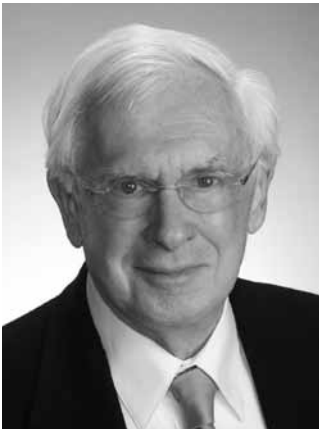
In our view, the synopsis we draft for each bill—that is, the description in the "Memo" field—will be most useful to CSA members. It covers each bill's

provisions with a focus on the CSA's points of interest. It also includes the measure's political context, supporters, opponents, issue history where relevant, and other pertinent factors.

A lot of time and effort on the part of CSA leadership, headquarters, and our office have been invested in both the Grassroots Network and web publishing. These 21st-century, cutting-edge technological tools should make advocacy easier and more effective for the membership at large.

Let's hope that our membership begins to use these valuable advocacy tools effectively, comfortably, and often.

Manipulating Scope-of-Practice Laws



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

The controversy over Chiropractic Manipulation Under Anesthesia (MUA) was in the news again recently. Perhaps noticed only by the most perspicacious health policy wonks, it revived suspicions about other past state regulatory actions that adversely affected anesthesiologists. And it further blemished the legacy of ex-Gov. Arnold Schwarzenegger (GAS, as he was referred to within his administration).

Fired for Helping Law Enforcement

Included in routine announcements of new state laws was a "claims" bill, of which there are a number each year, appropriating $600,000 to pay the stipulated settlement of a lawsuit, *Catherine Hayes v. State Board of Chiropractic Examiners* (BCE). Hayes' cooperation, while she was serving as Executive Officer of the BCE, with a criminal investigation of chiropractors using MUA caused this "wrongful termination of employment" case. A Senate committee staff analysis described the facts of the case:

> Hayes had alleged the board (BCE) retaliated against her, terminating her employment as a result of (1) her testimony and cooperation in criminal investigations and prosecutions of chiropractors in the County of San Joaquin relating to the practice of manipulation under anesthesia; (2) conspiring to affect the outcome of criminal

prosecutions by voting to recognize manipulation under anesthesia as falling within the chiropractic scope of practice; (3) intimidating witnesses called to testify in the criminal proceedings; (4) her reprimand of board members for presumptively violating the Bagley-Keene Open Meetings Act through serial communications outside the board meetings.

Arnold's Pals Named as Defendants—a Legacy of Ex-GAS Appointees

It should be of interest that two former GAS pals were named as defendants in the lawsuit. A *Sacramento Bee* editorial (7/28/11) noted:

> A former bodybuilder, Schwarzenegger swept into office with an inordinate focus on all things chiropractic. He quickly appointed Franco Columbu, a former Mr. Olympia who starred with Schwarzenegger in the film "Pumping Iron," and Richard Tyler, one of Schwarzenegger's earliest U.S. friends, to this state board (BCE). They quickly made a mess of their perches, running roughshod over open-meeting laws, personnel rules and their obligation to put patients first.

Much of the legacy of any governor is influenced by the competence and bias of his or her appointees. This certainly holds for appointees of GAS.

The CSA Fights Chiropractic Board Legalization of MUA

Shortly after GAS took office in 2003, the BCE tried to give legal blessing to MUA by adopting an administrative rule "interpreting" the underlying scope statute, the Chiropractic Initiative Act approved by state voters in 1922. To say the CSA was in the forefront of fighting the Board's MUA push would be an understatement. The CSA took the lead for reasons of patient safety and legal objections to the BCE's twisting of the scope law to justify its rule change. The California Medical Association (CMA), the Osteopathic Physicians and Surgeons of California, and others also opposed the proposal, but even a quick look at the rule-making record reveals the CSA's forceful and unrelenting opposition during the five-year battle.

The BCE's First MUA Proposed Rule Rejected

With a majority of GAS appointees on the BCE, its initial MUA rule-making proposal was launched in 2004. Through written and verbal testimony, opposition was registered by numerous interested parties, including the CMA, with the CSA's objections at the top of the list. Once approved in final form by the BCE, its MUA proposal was submitted to the final authority, the Office of Administrative Law (OAL), where it was *disapproved* in October 2005.

The BCE Renews MUA Legalization Effort

With GAS's pal Tyler installed as chairman, the BCE restarted its struggle to lift MUA into legal standing. This time, its justification was bulked up with an internal legal opinion of the Department of Consumer Affairs (DCA) Office of Legal Counsel. This internal opinion bore considerable resemblance to an analysis by a private attorney for the California Chiropractic Association (CCA). When presented at a BCE public meeting, the BCE found the CCA opinion just what was needed to revive the MUA initiative. A deputy state attorney general, who was present to maintain legal order, cautioned against the "troubling" appearance of embracing a legal opinion it had only just received. When the DCA opinion later surfaced, it was dated exactly one year and a day later than the CCA document and it massaged the same rationale into the same result. Again, the BCE's protracted rule-making process was played out, but this time *approval* was granted by an OAL executive director appointed by (how did you guess?) GAS.

The CSA Contests the Nursing Board's View of the CRNA Scope of Practice

The CSA also challenged extra-legal "interpretations" of the Certified Registered Nurse Anesthetist (CRNA) scope-of-practice law by the Board of Registered Nursing (BRN). Fact: The BRN never proposed administrative regulations for its interpretations, the course *required* of government agencies to "implement, interpret, or make specific the law" (California Government Code 11342.600) that they are charged with administering. Instead, the BRN issued numerous analyses and advisories to inquiring nurses, physicians and hospital administrators, plus occasional postings on its official website: the message essentially was that physician supervision of CRNAs is *not* required because the word "supervise" is absent from a key provision of the California Nursing Practice Act. Ignored by the BRN were synonyms such as "order" and "direct" in that same statute, as well as court decisions and attorney general opinions to the contrary. Many of the BRN communications were outside of public view and came to the CSA's attention through publication by third parties or by happenstance. Their full volume and intensity only came to light, however, when disclosure was forced by CSA and CMA public-records demands at the time during which the opt-out litigation was initiated. A review of hundreds of documents failed to find a single BRN acknowledgment that physician supervision was required by federal regulation for decades until the GAS opt-out. Again, the public record is replete with the CSA's vigorous objections.

The BRN Withdraws CRNA Scope Statement

A December 2004 posting on the BRN website entitled "Practice of the Certified Registered Nurse Anesthetist" brought new visibility to the board's

expansive view of the parameters of CRNA lawful practice. Because voluminous correspondence and meetings with officials of the BRN and its parent agency, the DCA, had been tried with little effect, the CSA sued. The lawsuit, *CSA v. BRN*, resulted in the March 2005 BRN removal of the offensive document from its website along with the following statement: *"No reliance should be placed on the December 2004 version of NPR-B-10."*

GAS Opts California Out of Physician Supervision of CRNA Rule

By letter of June 10, 2009, GAS requested that California opt out of the federal Medicare condition of participation that requires physician supervision of CRNAs. While this is a Medicare rule, it applies to all patients in every hospital that accepts Medicare funding. Receipt of the letter by the Centers for Medicare and Medicaid Services (CMS) was acknowledged on July 20, 2009, and the opt-out was effective that date. The CSA and the CMA promptly protested the move as contrary to California law and the preconditions necessary for a state to opt out and formally filed the lawsuit, presently on appeal, *CSA and CMA v. Schwarzenegger.*

Central Role of GAS Staffer in Opt-out

In a formal declaration offered as evidence in the opt-out lawsuit, a GAS deputy legislative secretary, Jennifer Kent, claimed she "collected and analyzed information in order to assist in the determination whether Governor Schwarzenegger should request an exemption from the federal supervision requirement." Before assuming this position in the Schwarzenegger administration, Kent had been a legislative liaison in the Health and Human Services Agency (HHSA) and, earlier, a top government relations officer for the California Optometric Association (COA). At the HHSA, she spearheaded an effort to replace the system of medical board oversight of privately accredited outpatient surgical sites (mainly physician offices) with formal and cumbersome licensure by the Department of Public Health. At the COA, she was heavily involved in optometrists' efforts to expand into the physician scope of ophthalmologists. In short, her negative track record on scope and licensing issues important to medicine was clear. Just before his term ended, GAS nominated Kent to the Medical Board of California (MBC). The nomination was withdrawn by Gov. Jerry Brown shortly after he took office.

Patient Safeguards Through Licensing of Health Professionals

The top priority of California's health professional licensing boards is stated repeatedly in the Business and Professions ("B&P") Code and proclaimed on their websites.

For the MBC, B&P Section 2001.1 states:

> Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

For the BRN, B&P Code Section 2708.1 states:

> Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

For the BCE, there is no comparable provision in the B&P Code because the enabling statute was adopted by a voter initiative in 1922 and can be amended only by another voter-approved ballot measure. Nevertheless, the BCE Mission Statement, presented on its website and in literature, states:

> The Board of Chiropractic Examiners' paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of Chiropractic care.

All these high-minded, well-intentioned statements of law and policy would seem to be more than a rhetorical nod to the taxpaying public. But what is the reality?

Regulators (the BRN and the BCE) Switch Into Advocates

The parallel occurrence of two regulated health professions, chiropractors and nurse anesthetists, expanding their practices *without* changes in their respective scope statutes is disturbing. These two groups seemed to have achieved what they wanted by avoiding the legislative process, which is supposed to control scope-of-practice issues. They likely were quite aware that organized medicine has been largely successful in stopping scope expansions by non-physicians in the Legislature. While some may view health professionals' scope laws as merely protecting turf, these statutory requirements are intended to protect the public from incompetence or unsafe and unproven therapies. Snake oil salesmen were stopped by the regulation of pharmaceutical products. Barbers no longer perform surgery because of the medical practice reforms initiated 100 years ago by Abraham Flexner.

The rule of scope law sometimes has been replaced by favors for friends and expansion into fields where licensees see prospects of more lucrative business. Earning a lawful scope of practice through education in applicable science, objective testing, and proctored training helps assure adequate public safeguards are in place. But when the process is circumvented through political manipulation, basic patient protections are impaired and impeded. Indeed, the BCE and the BRN have seemed more active in finding ways to promote practice horizons for their licensees than in regulating their competence and conduct.

When the BCE's executive director cooperated with a criminal investigation involving chiropractic MUA and insurance claims, she was fired. License fees of chiropractors will be used to pay the resulting $600,000 stipulated settlement. With approximately 15,000 licensees, the settlement's cost per chiropractor is vastly outweighed by the MUA fees collected from patients.

At the same time that GAS was seeking to opt California out of the federal requirement of physician supervision of CRNAs, the *Los Angeles Times* published a series of investigative articles documenting lax BRN regulation that failed to discipline misbehaving and incompetent nurses for serious patient harm, even deaths. In fact, while the GAS letter was sitting in a CMS in-basket, the *Times* declared:

> It is no secret that nurses played a central role in the collapse of Martin Luther King Jr./Drew Medical Center. At the troubled hospital near Watts, registered nurses gave the wrong medications, ignored patients in distress, falsified records, slept on the job and turned down alarms on critically ill patients' vital sign monitors.

The piece went on to note that Los Angeles County suspended or fired many of those involved:

> Yet, in some cases, California's Board of Registered Nursing has taken no action, leaving the nurses free to work elsewhere.
>
> (Tracy Weber and Charles Orenstein, *Los Angeles Times*, July 12, 2009)

The BRN Remiss Again With Epileptic Schoolchildren

For the BRN, public protection again took a back seat to nursing turf in recent days. This time, it was epileptic schoolchildren who suffer from life-threatening seizures and are at risk due to the BRN insistence that only nurses can legally administer the drug Diastat (a rectal gel form of diazepam). Moreover, the BRN maintains that a nurse who teaches someone else how to give the drug may be subject "to discipline for aiding and abetting the unlicensed practice of nursing."

The issue surfaced in SB 161, authored by Sen. Bob Huff (R-Diamond Bar), to allow non-nursing school personnel to volunteer for training in the use of Diastat and to administer it in emergency situations to children whose parents have consented to the practice. The measure would recognize a voluntary approach that has worked in some communities and encourage its wider use. For backers of the bill, it is necessary to allow an epileptic student in the grip of a potentially fatal seizure to get the medicine within five minutes. To the CMA, the nonprofit organizations Disability Rights California and Epilepsy California, and a number of elected school boards, the basic issue is the life-or-death possibility for a child. For the BRN, the California Nurses Association and a bunch of labor unions, it seemingly is more about job protection. Last year, a similar bill was defeated due to the unyielding opposition of nursing and labor. This year, concerns about children thankfully became paramount and SB 161 has passed and been sent to the governor.

The Medical Board of California

In contrast, the MBC generally adheres to its task of regulating medical doctors. It often has been reluctant to engage in politically defending the physician scope from inroads by ancillary health practitioners. When CSA representatives appeared before the MBC to seek more assertive advocacy for physician supervision in response to the CRNA opt-out, the MBC President, Barbara Yaroslavsky, was quick to stamp her perspective on the issue. "Remember who appointed you," she admonished her fellow board members, all of whom were, you guessed it once again, GAS appointees!

Report from the Legislative and Practice Affairs Division (LPAD)

By Paul Yost, M.D., Chair, Legislative and Practice Affairs Division

California Issues

The state of California is mired in yet another budget crisis. In early August, State Controller John Chiang reported that California missed its budget target by $539 million (roughly 10 percent). This shortfall raises the concern that even deeper cuts will be on the agenda for health care services in California. It appears that the state budget, passed only two months ago, is based on what re-run Gov. Jerry Brown said he would not do: balance

the budget on gimmicks, smoke and mirrors. It took less than 60 days for the gimmicks to fall apart.

In a related matter, the U.S. Supreme Court will be taking up the question of whether or not Californians can sue the state of California in federal court over Medi-Cal cuts. The federal government has a law requiring states to provide their residents with adequate access to health care. The last time California tried to slash Medi-Cal payments to doctors, the CMA and others successfully sued the state in federal court on the basis that cutting Medi-Cal rates would harm access to care. The Schwarzenegger administration appealed, challenging the right of state residents, Medi-Cal patients and providers to sue in federal court. This issue should be heard by the U.S. Supreme Court in the fall. Of note to CSA members: several U.S. congressmen—including Henry Waxman of California, a Grassroots contact of LPAD Vice Chair Dr. Mark Zakowski, President-elect Dr. Johnathan Pregler, and longtime CSA leader Dr. Norm Levin—filed an amicus brief supporting the CMA position.

Drs. Zakowski and Pregler with Congressman Waxman

Federal Issues

Speaking of budget issues, we all witnessed the surrealistic Roman circus that was the congressional debate over the debt limit, tax revenues, and our level of spending. With an economy that is sputtering along, a Wall Street that resembles a roller coaster ride, and a European Union that is plugging holes in bankrupt economies, it is no wonder the American public is getting a little anxious. The end result of the latest debate is the creation of a 12-person "super committee" to identify a little over $2 trillion in cuts. One member is California's own Xavier Becerra, a key contact of CSA Secretary Earl Strum. Earlier this year, at the legislative conference in Washington, D.C., Dr. Strum introduced Congressman Becerra to the ASA legislative conference, where the congressman gave a very informative and entertaining speech. If this super committee is unable to come up with $2 trillion or so in budget savings, and/or Congress is

unable to pass the budget savings, cuts to defense and domestic spending will be automatic. Medicare cuts undoubtedly would be near the top of the list.

Legislative Advocacy

The CSA has gone live with our **CSA Grassroots Network**. Through this site any member can easily identify and contact his/her elected California state assemblyperson or senator. When legislative issues of concern to anesthesiologists arise, we can issue action alerts to the entire CSA membership. An action alert allows our members to easily contact their legislators and discuss the CSA's position on the issue. The CSA Grassroots Network supplies talking points on the issues and makes it incredibly easy for members to be a part of the political process. So far we have issued two action alerts.

The site also allows us at the CSA to support and assist CSA members who want to become *key contacts* to legislators. We encourage all of our members to get to know their legislators. It is much easier to establish a relationship when you do not need to ask them to support or oppose a piece of legislation. Ideally, we would like our members to establish a relationship of trust with their legislators so that when issues of concern arise, it is easier to educate them as to why a piece of legislation is good or bad for our patients and our specialty.

In August we activated web publishing, a new section of the CSA Grassroots Network that allows our members to follow legislation of interest to the CSA in real time (see preceding report). Many thanks to our lobbyists, the father-and-son team of Bill and Bill Barnaby, and CSA staffer Merrin McGregor, for making the CSA Grassroots Network a success. Issues come up quickly in Sacramento, and our Grassroots Network gives us our best chance to represent the interests of our patients and our specialty—the greatest medical specialty, anesthesiology.

Messaging and Marketing

Much of politics is messaging and marketing. The Legislative and Practice Affairs Committee and the Committee on Professional and Public Communications have teamed up to work on marketing and messaging for the CSA. A recent survey by the American Medical Association revealed that over 20 percent of patients do not think (or are unsure) that an anesthesiologist is a medical doctor! According to the same survey, 38 percent of patients think that a "doctor of nursing" is a medical doctor, while 25 are unsure! These amazing statistics tell us that we need to do a better job of educating the public about who we are: medical doctors—that is, physicians, doctors of medicine. And we need to do a better job telling people what we do: keep sick patients alive, safe and comfortable before, during and after surgery. The ASA and the CSA are committed to doing this in several ways: with marketing, with public relations, and legislatively.

It is clear that patients lack information about the training and credentials of people who work in health care. The ASA authored HR 451, the "Healthcare Truth and Transparency Act of 2011," a bill in the House of Representatives that requires health care practitioners to clearly state on their badge whether they are medical doctors (physicians), nurses, physician assistants, or some other category of health care practitioner. Forty-five members of Congress—an ASA record—have signed on as co-sponsors of this legislation. Please visit the ASA Grassroots Network advocacy site for updates and more information about this important bill. Note that at this time the ASA and CSA Grassroots Networks are independent of each other and *not* linked, so if you seek national information or want to contact your congressperson or Senators Feinstein or Boxer, then it is the ASA Grassroots Network that must be deployed.

The ASA has improved its public outreach campaign with the launch and support of the "LifelineToModernMedicine.com" website, which has the express purpose of educating the public and our colleagues about what we do. If you have not been to the site, please take a look. There are links on the front page to information about the training and expertise of different types of anesthesia providers, as well as extremely well written sections on types of anesthesia, what patients should expect, and patient stories about their anesthetic experience. When your patients have questions about anesthesia, the LifelineToModernMedicine is a wonderful resource.

The CSA also has updated its website, and we are embarking on a marketing and public relations campaign to let the people of California know who we are and what we do. Stay tuned to Gasline and the CSA website. However, our best marketing tool is you, the physician anesthesiologist. Please get involved in your medical staff activities, surgery center administration, and medical society. Share your experience and expertise with your colleagues and represent your profession. In some ways, we are victims of our own success. We like to make the most difficult, challenging, stressful case look easy and smooth. We are so good at what we do that sometimes it is difficult to let our colleagues and the public know just how important it is to have a physician at the head of table when their loved one is under the knife.

Practice Affairs

In keeping with our efforts to make the lives of California anesthesiologists easier, we are expanding the resources in the Practice Resources portion of the CSA website. Dr. Mark Zakowski and Dr. Linda Hertzberg, along with Merrin McGregor, have been organizing standards, guidelines and statements from various organizations along with significant points for members. Currently there are several pediatric and obstetric anesthesia summaries and documents

available. Dr. Zakowski obtained permission from American College of Obstetrics and Gynecology (ACOG) to make available to our members a couple of the most important ACOG documents that normally are available only to members. It is of great benefit to CSA members to have original documents organized on the CSA website, as well as analyses and summaries. There are also open groups on the membership site with discussion threads on issues important to members, including recent queries pertaining to The Joint Commission. Please join these open groups to help facilitate and disseminate discussions of regulatory and practice issues.

Update on the CSA's Opt-out Litigation

By Kenneth Y. Pauker, M.D., President

This is an update as of Aug. 25, 2011, on our opt-out litigation, *CSA and CMA v. Schwarzenegger*, filed Feb. 1, 2011. You can always find up-to-date information on the CSA website under "Publications and News."

In response to our initial brief filed on April 8, both the governor and the California Association of Nurse Anesthestists (CANA) filed their briefs on July 28, 20 days after their deadline of July 8, with the court's permission.

I have looked over their briefs, and they appear to me to be without apparent new arguments, a conclusion with which Curtis Cole, our lead attorney, agrees after studying them in detail. They did also request to make certain documents part of their case, in response to the new argument we made about trauma regulations requiring supervision. These requests are tangential and related to nursing regulations and scope of practice. To me they appear to be intended to promote "independent" nursing practice without actually using that word. Mr. Cole advises that we not spend a lot of time on these requests but rather wait for his appellate reply brief, which he is drafting with the help of Long Do (CMA), Francisco Silva (CMA), and Tom French (Hassard Bonnington, CSA). When completed, this brief will be circulated to senior CSA leaders for review and comments.

Because the other side employed what seems to be a tactical delay to push our filing deadline back and well into the summer vacation season, it's been somewhat problematic scheduling conferences with the rest of our legal team and those filing amici briefs. Therefore, we requested and were granted an extension to file our own reply brief until Sept. 16, 2011. Amici briefs must be filed within 30 days of that date. After amici file their briefs, the opposing parties have 30 days to file answers to the amici briefs. It is likely that the other side will again delay beyond that time frame.

At present, our amici are the AMA and the ASA combined; their brief is being written by Greg Abrams (AMA) and Brian Jiang, a lawyer/anesthesiologist/professor from San Diego. There remains a small chance that a very well known plaintiff attorney might write an amicus brief, to dispute CANA assertions of equivalence of care. True to its history, the California Hospital Association (CHA) disappointingly was an amicus for the other side in Superior Court, but so far has not filed an amicus brief in the appellate case. If the CHA does not, one might speculate as to why. One notion is that the CHA, upon reflection, could be concerned about their "deep pocket" liability exposure if nurse anesthetists pursue independent practice in large numbers.

Our case has been assigned to Division 4 of the 4th Appellate Court. Sixty days after our response brief is filed (therefore, around Nov. 16), and after amici briefs and answers to amici are filed, Court of Appeal staff attorneys will work up the case, and their tentative decision will be given to a panel consisting of three of the four judges in that appellate division. This staff process in years past took up to a year, but the Court of Appeal addressed this issue to such a point that this should take only a few months. Next, the judges will confer amongst themselves, and then set a date for oral argument (one day, for an hour or two, in San Francisco). Unfortunately, the state budget issues have resulted in a second "furlough day" each month for state employees, and this is beginning to produce some judicial delays. Not to mention the other side's proclivity to seek delays; they may even ask to push back the date for oral arguments. Mr. Cole now estimates that oral arguments may actually take place in late spring 2012. We will get approximately 60 days' notice of the date, and interested parties can attend. The court will announce a decision within 90 days thereafter, so it may not be until summer 2012 that there is a decision.

Thus, we need to be patient. The appellate process is long and at times tedious. I am confident in the skills and judgment of our legal team. We hope that at the end of this long road we will have a victory that, as an appellate decision, sets a judicial precedent.