HEALTH POLICY IN THE COURTS

California Medical Association's participation in *Amicus Curiae* briefs
(other than those filed with the California Dental Association and
California Healthcare Association in professional liability cases)
June 2006

The following summarizes the litigation filed and resolved between 1985 and the present to influence health policy in which the California Medical Association filed *Amicus Curiae* or "friend of the court" briefs. The purpose of these briefs is to bring to the court's attention those issues which transcend the interests of the parties to the case and affect the public generally.

ABANDONMENT/DISCRIMINATION

Raytheon Company v. Fair Employment and Housing Commission — Initial CMA Participation: March 1989
(AIDS is a physical handicap under the FEHA)

Issue: This case dealt with an employee's discharge due to an AIDS diagnosis, resulting in a charge of discrimination based on physical handicap. The Fair Employment and Housing Commission (FEHC) awarded relief to the employee's estate, which had been substituted as party after the employee's death, and the employer filed a petition for writ of mandate. The Superior Court, Santa Barbara County, denied the petition, and the employer appealed. On March 24, 1989, CMA filed an amicus curiae brief with the California Court of Appeal, 2nd Dist., on behalf of the FEHC. CMA's brief asked the court to establish that persons with AIDS are protected by the California Fair Employment and Housing Act (FEHA) and cannot be denied employment and other opportunities.

Outcome: Agreeing with CMA, the Court of Appeal ruled that: 1) AIDS was a physical handicap under the FEHA, and 2) evidence supported the Commission's finding that the employer discriminated against the employee on basis of a handicap in violation of the Act. The court's decision may be found at Raytheon Company v. Fair Employment and Housing Commission (Estate of Chadborne) (1989) 212 Cal.App.3d, 261 Cal.Rptr. 197.

Benitez v. North Coast Women's Care Medical Group — Initial CMA Participation: May 2005
(Liability Under California's Unruh Act)

Issue: The issue in this case involves whether a physician should be liable under a California anti-discrimination law, the Unruh Act, for declining to artificially inseminate an unmarried woman because to do so would violate the physician's religious belief. The Unruh Act currently does not prohibit marital status discrimination. The plaintiff in this case is claiming that the physician defendants in fact discriminated against her because she is a lesbian in violation of the Unruh Act and they do not believe that the jury should hear any evidence of the physicians' religious beliefs.

This is a case that presents a unique circumstance in which the free exercise of religion, as protected by state and federal law, conflicts with civil rights law. While CMA does not believe religious beliefs could ever justify discrimination against a patient on the basis of race, nationality or sexual orientation, under the circumstances of this case we believe the jury should decide if the defendants were discriminating against plaintiff based upon her sexual orientation in violation of the Unruh Act or whether the defendants were abiding by their religious beliefs relative to performing the treatment in question for all unmarried women, whether heterosexual or homosexual.

In May, CMA filed an AC Brief supportive of the physicians presenting evidence of their religious beliefs to a jury, particularly where the physicians are facing extraordinary financial liability as a result of religious beliefs that preclude them from providing assisted reproductive services to unmarried couples.

CMA's brief cites to the AMA CEJA opinions related to a physician's obligation not to discriminate and a physician's right to decline to be involved in treatment based on a religious belief or as a matter of conscience. The brief is intended to be educational in nature, pointing out the other areas of law where conscience or religious beliefs can play a role in a physician's decision to participate in care, like, for example, in end-of-life care. CMA's brief specifically states that CMA does not support discrimination based on sexual orientation. At this time, the California Unruh Act, which is the only statute involved in the case, does not prohibit discrimination based on marital status. The brief also calls to the court's attention Business and Professions Code Section 125.6 which makes discrimination based on marital status, a possible basis for a determination of unprofessional conduct.

Outcome: This case is pending in Division 1 of the 4th Appellate District California Court of Appeal.

ACCESS TO MEDICAL CARE

Caulk v. Superior Court (Silva) Initial CMA Participation: May 1993
(Counties' Obligation to Provide Health
Care to the Poor Cannot be Capped by
Welfare & Institutions Code §17000.5's
Formula to Set General Assistance Grant Levels)

Issue: This case involved Sacramento County's decision to limit total monthly benefits under its general assistance program to no more than $294 per month to cover food, shelter and other basic necessities of life, including medical care. CMA joined this case as an amicus because of the concern that the unfavorable appellate decision, if upheld, would result in counties no longer fulfilling their longstanding statutory obligation to provide basic health care to any indigent person. Consequently, this decision could have precipitated health care crisis affecting millions throughout the state and dramatically degraded the medical and economic conditions under which counties throughout California provide services to the indigent. On May 3, 1993, CMA filed an *amicus curiae* brief with the Court of Appeal (3rd Dist.). On July 27, 1997, the Court of Appeal unfortunately ruled that the statute setting the general assistance standard of aid to the poor encompasses the counties' obligation to provide medical care. On August 22, 1997, CMA filed a letter with the California Supreme Court urging the Court to grant a petition for review or depublication of the appellate decision. On September 24, 1997, the Supreme Court agreed with CMA and ordered the Court of Appeal to vacate its decision to reconsider the case in light of new legislation [SB 391(1997)]. On February 27, 1998, the Court of Appeal again ruled that counties may comply with Welfare and Institutions Code §17000, which obligates counties to provide medical care to the indigent, by complying with §17000.5 formula to set general assistance grant levels. In response, CMA, on April 21, 1998, filed a letter with the California Supreme Court supporting the petition for review.

Outcome: On May 13, 1998, petition for review was granted and the Supreme Court decision is still pending. CMA filed another AC brief before the Supreme Court on September 25, 1998, requesting that the Court reverse the Court of Appeals decision. On November 22, 1999, the California Supreme Court sided with CMA and ruled that Welfare & Institutions Code §17000 imposes upon counties a mandatory duty to relieve and support all indigent people needing medical care and that a county's compliance with Welfare & Institutions Code §17000.5's formula to set general assistance grant levels does not satisfy its Welfare & Institutions Code §17000 obligation.

Doe v. Wilson — Initial CMA Participation: November 1996
(DHS Prohibited from Implementing its Emergency Regulation Terminating Prenatal Care Benefits to Undocumented Women)

Issue: This case, brought by a number of undocumented women and the City and County of San Francisco, challenged the Department of Health Services from implementing its emergency regulations terminating pregnancy related care for "nonqualified" (undocumented) women. On November 19, 1996, CMA filed an *amicus curiae* brief with the Superior Court arguing that no facts existed which warranted the DHS's promulgation of the regulations on an emergency basis. On March 12, 1997, CMA filed an *amicus curiae* brief with the California Court of Appeal (1st Dist.) explaining that the treatment for compromised babies whose mothers did not receive prenatal care exceeds the actual cost of prenatal care by approximately 3 to 1.

Outcome: On August 25, 1997, the California Court of Appeal ruled that DHS did not abuse its discretion in finding that an emergency existed and justified the enactment of emergency regulations to comply with federal law. The appellate decision may be found at Doe v. Wilson (1997) 57 Cal.4th 296, 67 Cal.Rptr.2d 187. However, the coalition with whom CMA worked on this issue filed a series of separate cases in state and federal courts challenging various aspects of the state's efforts to deny non-emergency prenatal care to undocumented women. CMA acted as a party in one of them, Clementina Doe v. Wilson, No. 98-15194, U.S. Court of Appeals (Ninth Circuit). See the discussion of that case for the final, favorable outcome.

Walker v. Superior Court (People of California) — Initial CMA Participation: June 1986
(Spiritual Treatment in Lieu of Medical Care

May Constitute Criminal Negligence)

Issue: This case involved involuntary manslaughter and felony child-endangerment charges against the defendant when her four-year-old daughter died from acute meningitis after defendant provided her with spiritual treatment in lieu of medical care. On June 3, 1986, CMA filed an *amicus curiae* brief with California Supreme Court asking the court to find that children have a right to necessary medical care even when their parents deny consent to the care on religious grounds.

Outcome: Agreeing with CMA, the California Supreme Court ruled that the provision of prayer alone to a seriously ill child may constitute criminal negligence sufficient to support involuntary manslaughter and felony child endangerment prosecutions. The Court's decision may be found at Walker v. Superior Court of Sacramento County (1988) 47 Cal.3d 112, 253 Cal.Rptr. 1.

Kinlaw, et al. v. State of California (Kizer) — Initial
(CMA argued that the counties have responsibility to provide health care for MIAs)

Issue: In this case, medically indigent adults (MIAs) and taxpayers brought action against the State, alleging that the State had shifted its financial responsibility for funding health care for the poor onto counties without providing necessary funding. Therefore, this action would be in violation of the constitutional article prohibiting the State from avoiding its spending limits by shifting programs and their financial burdens to local governments. On December 28, 1988, CMA filed an *amicus curiae* brief with the California Court of Appeals urging the court to rule that MIAs are the State's responsibility and not the counties, as they were illegally transferred from the State to the county in violation of the Gann Amendment. On March 13, 1990, CMA filed a letter with the California Supreme Court requesting denial of DHS's petition for review. Unfortunately, the petition for review was granted. On July 23, 1990, CMA filed an *amicus curiae* brief with the California Supreme Court arguing that the MIA transfer

has jeopardized the health, and in some cases, the lives of California's medically indigent adults. CMA also argued that California law gave the plaintiffs the right to sue.

Outcome: Although the California Court of Appeals ruled, consistent with CMA's position, that the MIA transfer was unconstitutional, and that MIA's are the state's responsibility, the California Supreme Court reversed the appellate decision, ruling that the plaintiffs, in their capacity as taxpayers, did not have a legal right to bring the lawsuit. The Supreme Court's decision may be found at Kinlaw, et al. v. State of California (Kizer) (1991) 54 Cal.3d 326, 285 Cal.Rptr. 66.

Kennedy Wholesale, Inc. v. Board of Equalization Initial CMA Participation: March 1989
(Proposition 99 upheld)

Issue: In this case, the distributor of tobacco products brought an action against the State Board of Equalization for denying its request for a refund of increased taxes paid pursuant to Proposition 99, the Tobacco Tax and Health Protection Act. On March 1, 1989, CMA, along with the other members of the Coalition for a Healthy California, the Coalition which drafted and promoted Proposition 99, filed an AC brief in the trial court opposing the plaintiff's motion for judgment on the pleadings. After filing an AC brief and prevailing at the Court of Appeal, on May 4, 1990, the Coalition filed an *amicus curiae* brief with the California Supreme Court, urging the Court to uphold and implement Proposition 99. The brief explained that Proposition 99 does not overrule or offend Proposition 13 which demands a two-thirds vote of each House to increase taxes, and that Proposition 99 does not violate the single-subject rule in Article 11, §8(d) of the state constitution.

Outcome: The California Supreme Court ruled, consistent with CMA's position, that Proposition 99 did not violate the constitutional single-subject rule and that tax change by voter initiative had to be approved by a simple majority of the Legislature. The Court's decision may be found at Kennedy Wholesale, Inc. v. Board of Equalization (1991) 53 Cal.3d 245, 279 Cal.Rptr. 325.

American Lung Association et al. v. Wilson
(CAM supported Prop. 99 appropriations were lawful)

Issue: This case involved a challenge to a CMA-supported appropriations measure from the tobacco tax (Proposition 99). A trial court concluded that the shift of funds to health care programs for low-income women and children, earmarked in part for tobacco-related research and education violated the intent of Proposition 99—the Tobacco Tax and Health Protection Act of 1988. CMA's AC brief explained, among other things, that the People of California, when enacting Proposition 99, clearly intended that the Legislature appropriate monies consistent with Proposition 99's purposes, one of which included appropriating funds for "medical and hospital care and treatment of patients who cannot afford to pay for those services and for whom payment will not be made through any private coverage or by any program funded in whole or in part by the federal government."

Outcome: On December 13, 1996, a California Court of Appeal ruled that the CMA-supported 1995 appropriation of monies collected under Proposition 99 to pay for health care programs for low-income women and children was lawful. The Court's decision may be found at American Lung Association v. Wilson (1996) 51 Cal.App.4th 74, Cal.Rptr. 428.

Gardner v. Superior Court
(CMA fights for appropriate care for the indigent)

Issue: This case involved an inappropriate application of California Welfare & Institutions Code §17000.5 by Los Angeles County in an attempt to determine its obligation to provide health care to the indigent. The trial court in Gardner ruled that §17000.5 authorized Los Angeles County to provide general assistance recipients with only $285 per month to meet basic subsistence needs, including medical

care. On September 15, 1993, CMA filed an AC brief in the Court of Appeal. The CMA maintained that §17000.5 did not pertain to assistance for health care.

Outcome: The Court of Appeal, agreeing with CMA, granted a preliminary injunction against L.A. County finding that the plaintiffs were likely to prevail on their argument that health care costs could not be subsumed within a minimal general assistance grant. The court's decision may be found at Gardner v. County of Los Angeles (1995) 34 Cal.App.4th 200, 40 Cal.Rptr.2d 271.

People of California v. Shalala
(CMA advocates for children's right to necessary medical care)

Issue: This case involved a suit by the state of California against the United States Department of Health and Human Services (DHHS) concerning DHHS's enforcement of regulations requiring all states to remove religious exemption clauses in their child endangerment and neglect laws or else lose federal child abuse funding. On September 1, 1993, the CMA filed an *amicus curiae* brief with the U.S. Court of Appeals for the Ninth Circuit, arguing that a child's right to necessary medical care is protected by both the state and federal constitutions. CMA also argued that the right to privacy does not authorize parents to subject their children to deleterious health conditions. Finally, the CMA argued that religious exemptions violate the Establishment Clause of the First Amendment of the federal Constitution and that religious exemption clauses deny to children equal protection of laws.

Outcome: On September 30, 1994, the U.S. Court of Appeals granted DHHS' motion for voluntary dismissal of the appeal.

Tailfeather et al. v. Board of Supervisors of Los Angeles County
(CMA urges that a county has a duty to provide meaningful access to health care to indigent people)

Initial CMA Participation: November 1995

Issue: In this case, a group of indigents brought action against a county board of supervisors and the director of the county's health services department requesting injunctive and declaratory relief and writ of mandate to require the county to adopt formal written standards governing waiting times for receipt of medical care. On November 10, 1995, the CMA filed an *amicus curiae* brief with the Court of Appeal, Second Appellate District, asking the Court to consider whether California's Welfare & Institutions Code §17000 requires counties to provide health care to all of the county's medically indigent population, not just to general assistance recipients, and whether the county has to provide timely and meaningful access to health care services. CMA's AC brief urged the court to answer these questions in the affirmative.

Outcome: On September 18, 1996, the Court of Appeal unfortunately disagreed with CMA's interpretation, and chose to uphold the decision of the lower court. The court found that the county was not obligated by the provisions or the Welfare and Institutions Code, or by any other provision, to adopt formal standards specifying maximum waiting times for receipt of medical care by indigents. This decision can be found at Tailfeather v. Board of Supervisors (1996) 48 Cal.App.4th 1223, 56 Cal.Rptr.2d 255.

ADVERTISING

American Academy of Pain Management (AAPM) v. Medical Board of California
(CMA Upholds Board Certification Regulations)

Initial CMA Participation: April 1997

Issue: This case dealt with the MBC's regulations controlling the advertising of "Board Certification." In 1990 the California Legislature passed a statute prohibiting physicians and surgeons from advertising "board certification" unless the certifying board was recognized by the MBC (Business & Professions Code §651(h)(5).) CMA was a principal participant in drafting this statute and an advocate for its passage. In late 1996 AAPM, a multi-disciplinary board not recognized by the American Board of Medical Specialists (ABMS), sued the MBC challenging this statute after the MBC refused to recognize the Board under its rules. On April 14, 1997, CMA submitted a memorandum in opposition to the preliminary injunction sought by AAPM and obtained permission to participate in the oral argument. On April 28, 1997, CMA filed a supplemental memorandum in opposition to the preliminary injunction. On May 14, 1998, CMA filed an *amicus curiae* brief in the Ninth Circuit Court of Appeals.

Outcome: On May 23, 1997, the Court issued its opinion denying the preliminary injunction and the plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed the judgment of the trial court and remanded the matter for trial. In November 1999, the Medical Board filed a motion for summary judgment in the case. On April 17, 2000, the trial court ruled in favor of the Medical Board, stating that AAPM's claim that the statute violates the First Amendment right to free speech fails. As a result of the summary judgment ruling, the sole remaining legal issue before the court is whether Business and Professions Code §651 violates AAPM's right to association under the First Amendment of the U.S. Constitution. The Medical Board filed another motion for summary judgment on this issue and on March 27, 2001, the Court ruled in favor of the Medical Board. The Court ruled that the plaintiffs have no basis upon which to challenge the statute.

On January 2, 2004, the Ninth Circuit U.S. Court of Appeals issued a favorable ruling, upholding the constitutionality of the California statute authorizing the Medical Board to regulate the use of "board certification" by physicians for advertising purposes. The Court found that 1) AAPM's use of the words "board certification" was inherently misleading because it did not meet the statutory requirements for doing so; 2) the Medical Board has a substantial interest in protecting consumers from misleading information; 3) the statute advances the legislative intent of the statute; and 4) the statute does not restrict physicians from advertising that they have special training from a non-qualifying board, but rather restricted the use of the term "board certified".

AIDS/HIV

McNamee v. Kizer
(DHS can not be required to make HIV a reportable communicable disease)

Issue: This case involved a challenge to the Department of Health Service's (DHS) decision not to amend the California Code of Regulations to place HIV infection on the list of reportable communicable and/or venereal diseases. On January 19, 1989, CMA filed an amicus curiae brief on behalf of defendant, DHS, with the Superior Court of Los Angeles. In arguing that DHS did not abuse its discretion, CMA

spoke out against the illusory fears of HIV infection and demonstrated that name reporting would not be an effective means of stemming the epidemic at that time.

Outcome: Plaintiff voluntarily dismissed the case after CMA filed its brief.

Doe v. Attorney General Initial CMA Participation: February 1990
(CMA fights for appropriate protections for HIV infected physicians)

Issues: This case involved an HIV-infected physician who had been providing physical examinations to FBI applicants and employees. Upon receiving information that the physician might have AIDS, the FBI demanded to know whether such information was true. When the hospital where the physician worked refused to disclose the physician's HIV status, the FBI ceased sending applicants and employees to Dr. Doe. Dr. Doe sued under the federal Rehabilitation Act. The trial court ruled that Dr. Doe could not sue a federal agency in federal court under the Rehabilitation Act and that the FBI had not violated Dr. Doe's privacy rights. CMA filed an amicus brief on February 13, 1990, with the U.S. Court of Appeals for the Ninth Circuit, arguing that all the evidence demonstrated that Dr. Doe posed no risk of harm and that the Rehabilitation Act and the 5th Amendment right of privacy prohibit inquiries into, and adverse use of, a disabled person's medical history without justification. The Court of Appeals reversed the trial court and returned the case for a determination as to whether or not the FBI had violated the Rehabilitation Act. The federal trial court ruled that the FBI had not violated the Rehabilitation Act. CMA then filed an amicus brief on June 2, 1993, with the Court of Appeals. CMA argued that the federal government should have known Dr. Doe posed no risk of infection and that the trial court had applied an incorrect legal standard and had distorted the principles of the Rehabilitation Act. Initially, the Ninth Circuit affirmed the trial court's ruling. On rehearing, however, on June 30, 1995, the Ninth Circuit Court of Appeal reversed the earlier opinion. On August 24, 1995, CMA filed a request for publication, emphasizing that allowing the lower court's inaccurate statements about "risk" and "need to know" to stand uncorrected (by failing to publish the Ninth Circuit's opinion) could cause serious misapplication of the law in future cases that would reach well beyond the health care environment. This case is extremely important because the Court applied the appropriate legal standard in a case involving an HIV-infected health care provider and reached the conclusion that, when making its inquiry, the employer must focus solely on the nature of the infection control procedures that the health care provider is using, rather than on the health care provider's HIV status.

Outcome: The case remained unpublished at Doe v. Attorney General (9th Cir. 1995) 62 F.3d 1424 (unpublished). The U.S. Supreme Court then accepted review of the case in 1996 and unfortunately vacated the opinion in light of a recent Supreme Court decision that the federal government could not be sued for damages under the Rehabilitation Act. On September 9, 1996, the Ninth Circuit then affirmed the judgment for the Attorney General and returned the case to the trial court to determine the amount of attorney's fees (if any) that should be awarded. This decision may be found at Doe v. Attorney General (9th Cir. 1996) 95 F.3d 29.

Urbaniak v. Newton
(CMA seeks balanced approach to HIV patients' right to privacy)

Issue: In this case, a patient brought an action against various defendants, including the physician who had examined him as part of a discovery proceeding in worker's compensation case, seeking damages for dissemination of medical report which disclosed that the patient had tested positive for HIV. The Court of Appeal affirmed in part and reversed in part, finding that the statutes governing disclosure of written HIV test results did not apply but finding that, nevertheless, the disclosure of a person's HIV status could be protected by the California constitutional right of privacy. On March 14, 1991, CMA filed a petition for decertification with the California Supreme Court, arguing that the Court of Appeal did not adequately address the issue of confidentiality as related to an individual's HIV status, and the opinion would cause significant confusion to health care providers and result in unnecessary litigation.

Outcome: Unfortunately, the Supreme Court denied CMA's request for decertification. The opinion can be found at Urbaniak v. Newton (1991) 226 Cal.App.3d 1128, 277 Cal.Rptr.354.

ALLIED HEALTH PRACTITIONERS

General Mills v. California Unemployment Insurance Appeals Board
(CMA defends physicians' exclusive scope of practice)

Initial CMA Participation: December 1987

Issue: This case involved a decision made by an Administrative Law Judge to award unemployment compensation disability benefits based on a "disability determination" made by a Marriage, Family and Child Counselor (MFCC). On December 14, 1987, CMA filed an *amicus curiae* brief in the Superior Court of Napa County asking the court to rule that MFFC's are prohibited from making disability determinations for purposes of unemployment insurance.

Outcome: This case was settled out of court and remains unpublished.

PM&R Associates v. Workers' Compensation Appeals Board Initial Participation: March 1999
(challenge to unfavorable interpretation of medical assistants' scope of practice)

Issue: On March 8, 1999, CMA filed an amicus brief in a case in which the WCAB refused reimbursement to two CMA members on the grounds, among other things, that where a licensed physical therapist is absent, the employment of a medical assistant under the supervision of a physician to perform simple and routine physical therapy tasks was illegal per se. CMA argued that the WCAB's ruling is inconsistent with California's Medical Practice Act because it deprives licensed physicians or surgeons of the ability to supervise and utilize appropriately trained staff, such as medical assistants, in the performance of simple, routine medical tasks and procedures, including physical therapy, which may be safely performed. CMA agreed that medical assistants may not perform physical therapy tasks which are unsafe when performed by an unlicensed individual. However, CMA explained that nothing in the law or public policy would support a requirement that simple, routine palliative and rehabilitative services be withheld until the patient is able to schedule an appointment with a physical therapist. CMA urged that in light of a physician's unrestricted license to practice medicine, a physician may lawfully supervise medical assistants providing technical supportive services, including those involving concepts of physical therapy.

Pursuant to the Court's request, on December 9, 1999 CMA filed a supplemental *amicus curiae* brief. In response to the charge that CMA inappropriately expanded the issues in this case by discussing medical assistants and their scope of practice, CMA argued that this issue was entirely germane because the WCAB had found that it was illegal per se for a physician to supervise the performance of physical therapy by unlicensed persons. CMA also explained that not everything within medicine, including physical therapy, requires licensure, and that some procedures, such as application of hot and cold packs, do not require such skill, scientific knowledge and training that licensure is required. In addition, CMA pointed out that had the California Legislature wanted to prohibit physicians from supervising unlicensed persons when performing physical therapy, it would have done so as it had done in other contexts.

Outcome: In a victory for the CMA, the Court of Appeal, Sixth Appellate District settled the longtime debate between physicians and physical therapists on April 27, 2000, by agreeing that a physician may lawfully employ and supervise medical assistants providing technical supportive services, including those involving concepts of physical therapy, so long as these medical assistance otherwise meet the requirements of their employment.

BUSINESS PROHIBITIONS/DISCLOSURE

Affiliated Catholic Healthcare Physicians v. Emergency Physicians Medical Group
(CMA Advocates for the Corporate Practice of Medicine Bar)

Initial CMA Participation: May 2000

Issue: This case involves issues surrounding the legality of a physician management services agreement in the context of laws protecting against the unlawful practice of medicine. It could be the first case in California to opine specifically on the legality of such agreements. It is scheduled for a court trial on December 6 in San Francisco County Superior Court. The case alleges that the activities of Meriten (an MSO formerly owned by EPMG but purchased by Catholic Healthcare West ("CHW") for approximately $38 million) and EPMG violated the corporate practice of medicine bar set forth in Business & Professions Code §2400 and fee-splitting prohibitions set forth in Business & Professions Code §650.

On May 17, 2000, CMA filed an *amicus curiae* brief. Although CMA applauds aspects of the management agreement, CMA's brief notes that a number of structural concerns with the arrangement at issue, particularly when considered as a whole, have the potential for inappropriate lay control over the practice of medicine. The brief explains, in considerable detail, the policy reasons supporting the corporate practice of medicine bar and how it relates to the fee-splitting prohibitions. With respect to the bar in particular, CMA's brief notes that it ensures that those who make decisions which affect, generally or indirectly, the provision of medical services (1) understand the quality of care implications of those decisions; (2) have a professional ethical obligation to place the patient's interest foremost; and (3) are subject to the full panoply of the enforcement powers of the Medical Board of California, the state agency charged with the administration of the Medical Practice Act. Moreover, CMA explains it is difficult if not impossible to isolate purely business decisions from decisions affecting quality care.

Outcome: After CHW voluntarily divested itself of Meritan, a Request for Dismissal of the lawsuit was filed on July 11, 2001.

Bayside Oncology/Hematology Associates v. Fong Initial CMA Participation: August 2000
(Physician's right to inform patients of the fact of departure from a Medical Group)

Issue: This case involves the issue of whether a physician leaving a medical group or other practice affiliation has the right to inform his or her patients of that fact and other objective information, which would enable those patients to decide whether to remain with the medical group or affiliation or follow the treating physician. On August 31, 1000, CMA filed an Amicus Curiae brief in which CMA argued that the law, sound public policy and medical ethics all compel an affirmative response to this question. Professional announcements which impartially convey the facts of the treating physician's departure, how a patient may locate his or her treating physician, and other information regarding treatment options and coverage arrangements are vital to the maintenance of a continuous physician-patient relationship. At least where these announcements contain no "solicitation," such announcements should be encouraged as they both promote patient autonomy and continuity of care. Such announcements also comply with the American Medical Association's ethical standards.

CMA urged the court to issue an opinion which "protect[s] the ability of physicians to communicate with their patients the information those patients need to decide whether to maintain their physician-patient relationships. The rights of patients recognized by California courts, the ethical obligations of the medical profession, and the cumulative benefits showed to flow from an uninterrupted physician-patient relationship compel this result."

Outcome: On April 17, 2001, The Court of Appeal issued an unpublished, split decision. Although it concluded that Dr. Fong had crossed the line from a professional announcement to illegal patient solicitation, the opinion cited with seeming approval the sample "professional announcement" in CMA's *California's Physicians Legal Handbook.* While CMA is disappointed the Court did not provide more guidance to

physicians on this issue, the opinion has no precedential value as it is unpublished. The Court denied Dr. Fong's petition for rehearing of this case.

Conrad v. MBC
(hospital districts may not employ physicians)

Issue: This case arose when Palomar- Pomerado Health Systems entered into employment contracts with nine physicians. When the attorney for the Department of Consumer Affairs opined that the corporate practice of medicine doctrine prohibited hospital districts from employing physicians, the hospital district went to court seeking a declaration that the DCA attorney was incorrect and that district hospitals could indeed employ physicians. On February 3, 1995, CMA filed an AC brief with the Superior Court arguing that the corporate practice of medicine bar prohibited hospital districts from employing physicians. On January 17, 1996, CMA filed an *amicus curiae* brief with the Court of Appeal (4th Dist.) again supporting the Medical Board of California and the DCA attorney's position.

Outcome: The Court of Appeal (4th Dist.) affirmed the trial court's decision, and ruled consistent with CMA's *amicus curiae* brief that hospital districts may not employ physicians. The appellate decision may be found at Conrad v. MBC (1996) 48 Cal.4th 1038, 55 Cal.Rptr.2d 901.

Foundation for Better Medicine v. Lasik Vision, Inc. Initial CMA Participation: April 2001
(CMA Advocates for Corporate Practice of Medicine Bar.)

Issue: This lawsuit, which seeks to enforce the corporate practice of medicine ban against a for-profit, publicly traded corporation, which holds itself out to be a provider of laser surgery. In brief, this case challenges and seeks an injunction enjoining Lasik Vision Corporation from, among other things, providing, or engaging physicians to provide, ophthalmological services, refractive eye surgery, or any other medical service in California without proper licensure or organization under the Medical Practice Act. According to the papers submitted to the court, Lasik Vision Corporation is California's largest for-profit operating vision refractive company, which, through its subsidiary, operates various centers throughout the United States, including eight in California. Lasik's stated business strategy was to become the number one provider of laser refractive surgery. However, even though Lasik Vision was not licensed as a professional medical corporation in California, Lasik exercised substantial medical control through, for example, retaining responsibility for overall patient care and requiring physicians to adhere to medical protocols, policies and procedures which concern areas of medical practice, such as medical standards and education.

CMA filed an *amicus curiae* brief in support of the preliminary injunction, explaining the parameters of the corporate practice of medicine bar and how California law, in order to protect patients, condemns arrangements such as the ones utilized by Lasik Vision.

Outcome: On June 11, 2001, the Superior Court in the County of Los Angeles issued a preliminary injunction against Lasik Vision, enjoining them from: 1. Providing, or engaging physicians, optometrists or other health care practitioners to provide, ophthalmological services, refractive eye surgery, laser eye surgery, optometrical services, or any other medical service in California without a license authorizing it to do so; 2. Owning, managing or operating an ophthalmological clinic, refractive eye surgery, laser eye surgery clinic or any other facility that provides medical services in the State of California without a license authorizing it to do so; and 3. Advertising, or holding itself as a provider of, refractive eye surgery, laser eye surgery or any other medical services in California, without a license authorizing it to do so.

CONSENT – INFORMED CONSENT

Ford v. Norton Initial CMA Participation: February 2000
(Only Psychiatrists are authorized to release mental patients before the 72-hour period pursuant to the

Welfare & Institutions Code elapses)

Issue: This case involves the ability of psychologists to authorize the early release of a patient involuntarily hospitalized for 72-hours on the grounds that the patient is dangerous to him/herself or others, pursuant to Welfare & Institutions Code §§5000 et seq., also known as the Lanterman-Petris-Short Act (LPS). On February 22, 2000, CMA filed an *amicus curiae* brief with the California Court of Appeal, Fifth District, explaining that the LPS, consistent with the Act's public safety goals, unequivocally mandates that only psychiatrists be able to authorize release before 72 hours have elapsed. CMA noted that psychologists were once able to make that determination. However, after three individuals were released from short-term holds and subsequently killed themselves, the Legislature recognized the critical importance of early release determinations and amended the LPS to restrict those persons able to make those determinations to psychiatrists. Also, CMA stated that early release determinations are not "discharges" and thus are unaffected by Health & Safety Code §1316.5 (authorizing, at the discretion of a medical facility, clinical psychologists to maintain staff privileges) and the California Supreme Court decision of CAPP v. Rank (authorizing clinical psychologists to take primary responsibility for the admission and diagnosis of their patients). Furthermore regarding CAPP v. Rank, the Court modified its opinion to make it clear that its opinion did not in any way affect the release statutes in the LPS. Finally, we noted that enabling psychologists to make early release determinations concerning patients potentially suffering from organic disorders violates the statutory scheme governing health professionals. While clinical psychologists play an important role with respect to the mental health delivery system, because of the limited nature of their scope of practice, they cannot diagnose organic disorders.

Outcome: On June 7, 2001, the Court of Appeal for the Fifth Appellate District sided fully with CMA's amicus curiae brief and reversed the judgment of the trial court. Restating CMA's arguments concerning the legislative history of the LPS and the role of clinical psychologists, the Court rejected the arguments concerning the impact of Health and Safety Code §1316.5 on the LPS, stating:

"Rather the Legislature, after authorizing psychologists to diagnose and treat their patients in a hospital setting, nevertheless determined that the early release of a dangerous or gravely disabled patient from an involuntary detention required the expertise of a psychiatrist".

The Court also noted that the Legislature's restriction on psychologists' vis-à-vis the LPS was reasonable and understandable in light of the Act's goals. The Supreme Court denied defendants' Petition For Review.

DEATH/ORGAN DONATION

Glor v. Yen Initial CMA Participation: August 1994
(CMA argues against unfair imposition of duty in organ donor cases)

Issues: In this case, a patient sued Doctors Yen and Droubay for their failure to properly diagnosis the cause of death of the patient's organ donor, thus contributing to the plaintiff's sickness, and ultimately, his untimely death. On August 3, 1994, the CMA filed an amicus curiae brief in the Third Appellate District Court in favor of the defendant-physicians, arguing that the court should not impose a duty on these physicians to unknown third party organ donor recipients to warrant that the potential donor's organs are "fit" for transplant, which is effectively what these plaintiffs were demanding.

Outcome: The case settled in the physicians' favor after CMA's brief was filed.

DRUG PRESCRIBING/DISPENSING

Conant v. Walters **Initial CMA Participation: September 2001**
(Recommendation of Marijuana Pursuant to Proposition 215)

Issue:This case involves efforts, since passage of Proposition 215, to get clarification from the government that physician such discussions constitutes "aiding and abetting" a violation of the Controlled Substances Act. CMA attempted to broker a settlement. After settlement fell through, a federal district judge issued a decision on September 7, 2000 fully supporting CMA's position.

Unfortunately, the plaintiffs and the government were not been able to settle the case, which was before the Ninth Circuit Court of Appeal. At the request of both the Liberty Project and the ACLU, CMA joined in the filing of an AC brief in September 2001.

Outcome: On October 29, 2002 the United States Court of Appeal for the Ninth Circuit ruled that the federal government may not take action against physicians for recommending marijuana to sick patients. The Court drew a clear distinction between a doctor legally recommending the use of marijuana and illegally participating in the procurement of marijuana for a patient. The opinion can be found at **309 F.3d 629**.

In October 2003, The U.S. Supreme Court rejected, without comment, the federal government's appeal of the Ninth Circuit Court of Appeal's decision that blocked federal officials from penalizing physicians who recommend marijuana use to sick patients.

Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc.
Initial Participation: November 2001

Issue: At issue in this case is the ability of physicians to dispense prescription medications to their patients for profit. According to the complaint, Park Medical Pharmacy operates a pharmacy in the same building as the medical group. When the medical group's physicians began dispensing prescription medications to their patients, the pharmacy lost a significant amount of business. Distressed at this loss of business, the pharmacy filed a complaint with the state Pharmacy Board, alleging that the medical group was violating the pharmacy law by dispensing medications to its patients for profit.

The Pharmacy Board investigated the matter, and also referred the complaint to the Medical Board of California. Both boards concluded that the medical group was in compliance with the law. Thereafter, Park Medical Pharmacy filed a civil action against the group, alleging four causes of action: (1) violation of Business & Professions Code §§4170 and 17000 et seq. (unfair business practices); (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) declaratory relief. The gist of the complaint was that the medical group was illegally operating a "pharmacy" in violation of pharmacy laws. The trial court ruled in favor of the medical group by concluding that the pharmacy law does not prohibit physicians from dispensing medications for profit. Park Medical Pharmacy filed its notice of appeal in May of 2001. On November 5, 2001, CMA filed an amicus curiae brief on behalf of the medical group. Oral argument has been requested.

Outcome: On June 11, 2002, the California Court of Appeal, 4th Appellate District, Division One ruled in favor of CMA's position. Specifically, it ruled that physicians may dispense and sell drugs to their patients on a for-profit basis for a condition for which the patient has sought treatment without violating the Pharmacy Law. In so ruling, the Court of Appeal fully sided with CMA's amicus curiae brief that explained the practical need for physicians to derive an economic benefit from dispensing medications and the pro-competitive effects of this activity.

People v. Lonergan

(CMA fights to protect physician's from untoward criminal prosecution)

Issue: In this case, the defendant, Dr. Lonergan, was convicted of unlawfully issuing prescriptions for controlled substanc California Supreme Court. The CMA asked the Court to decertify the appellate opinion which approved a jury instruction suggesting a physician can be criminally prosecuted for mere negligence in prescribing pain medication.

Outcome: Unfortunately the Supreme Court denied CMA's request. This case can be found at People v. Lonergan (1990) 219 Cal.App.3d 82, 267 Cal.Rptr. 887.

EMERGENCY TRANSFER

Burditt v. U.S. Department of Health and Human Services (Sullivan)
(any negligent transfer is a violation of EMTALA)

Initial CMA Participation: November 1990

Issue: In this case a physician was sued for improper transfer of a pregnant woman in active labor with high blood pressure. On November 21, 1990, CMA filed an *amicus curiae* brief with the U.S. Fifth Circuit Court of Appeals asking for a fair interpretation of the Emergency Medical Treatment and Active Labor Act. The brief emphasized that the only proper role for the Inspector General in the enforcement of the emergency transfer law is to remedy conscious discrimination against patients for economic reasons.

Outcome: The Fifth Circuit Court of Appeals ruled that transferring a patient to avoid a malpractice suit is an improper transfer for an economic motive and that a negligent transfer, regardless of motive, is a violation of COBRA. The Court's decision may be found at Burditt v. U.S. Department of Health and Human Services (Sullivan) (5th Cir. 1991) 934 F.2d 1362.

Brooker v. Desert Hospital, Inc.
(upheld EMTALA's medical screening requirements)

Issue: In this case, the appellant-patient claimed that the actions of the respondent-hospital and an associated cardiologist and cardiovascular surgeon had violated Federal and California emergency transfer laws, as well as certain provisions of Title 22 of the California Code of Regulations. On March 31, 1992, the CMA entered a brief in support of Desert Hospital, emphasizing that the practical problems faced by hospitals in trying to provide on-call coverage should be addressed on a case by case basis. The CMA further argued that Desert Hospital fully complied with both federal and California emergency transfer laws, in addition to being in full compliance with Title 22 of the Code of California Regulations.

Outcome: The Ninth Circuit Court of Appeals agreed with CMA, finding for the respondent-hospital. This decision may be found at Brooker v. Desert Hospital, Inc. (9th Cir.1991) 974 F.2d 412

EXPERT WITNESS ISSUES

Chien, M.D. v. Superior Court (Interinsur. Exchange of the Automobile Club of Southern Cal.)
(CMA defends a physician's right to receive expert witness fees)

Initial CMA Participation: June 1989

Issue: This case involved expert witness issues. The trial court ruled that a physician's "diagnosis" or "prognosis" of a particular patient was not expert testimony, and hence, a physician was not entitled to be reimbursed as an expert for this testimony. On June 1, 1989, CMA filed a letter requesting the court grant

the requested stay and grant leave to file an *amicus curiae* brief with the California Court of Appeal in support of Dr. Chien. In the letter, CMA asked the court to rule that a treating physician is entitled to obtain an expert witness fee whenever an expert opinion is solicited during a deposition, trial, or other proceeding in a civil action.

Outcome: CMA's petition to file was denied. The writ was also denied and the case was remanded to the trial court. This case is not published.

Gordon, M.D. (real party in interest Romanello) v. California State Automobile Association (CSAA)
(CMA fights for a physician's right to privacy)

Initial CMA Participation: May 1991

Issue: Dr. Gordon had a contract to perform a utilization review of medical expenses paid by CSAA on behalf of the real party, Romanello, to her chiropractor under the medical payments coverage portion of her CSAA automobile insurance policy. The express purpose of the review was to determine if the expenses were reasonable for the condition being treated, and if indeed the treatment was related to the auto accident purportedly responsible for Romanello's injury.

Upon denial of benefits for further treatment, which in part resulted from Dr. Gordon's utilization review of her chiropractic treatments, Romanello filed suit against CSAA. The court granted Romanello's renewed motion to compel CSAA to produce a list of the amounts of each draft it had paid Dr. Gordon for his consultant services to CSAA. Dr. Gordon appealed. On May 21, 1991, CMA filed a letter in support of a hearing on a petition for writ of prohibition/mandate in the California Supreme Court in support of Dr. Gordon. CMA's letter urged the court to grant Dr. Gordon's request for a hearing, arguing that compliance with an obligation to respond to discovery of payments received concerning a "case at hand" does not waive an expert's constitutional right of privacy. Moreover, CMA pointed out, to allow Romanello to discover the details of payments made to Dr. Gordon as a consultant for CSAA would have a profoundly negative effect on physicians' willingness to engage as experts in any kind of health care utilization review.

Outcome: The Supreme Court regrettably denied Dr. Gordon's petition for writ of mandate. Thereafter the case was settled for a *de minimus* payment before Dr. Gordon was required to turn over the requested information. This case is not published.

Alef v. Alta Bates, et al.
(clarification of expert witness qualifications)

Issue: In this case, a minor brought suit against several health care providers for injuries sustained at birth. Although the physician won at trial, the appellate court reversed and sent the case back for a new trial because the testimony of one expert was not presented to the jury. After promising to call the expert, the physician's lawyer did not put him on the stand, and then objected to the plaintiff's request to read a portion of the expert's deposition testimony to the jury. On June 8, 1992, the CMA filed a letter in support of the petition for review or, in the alternative, decertification of the appellate decision with the California Supreme Court. CMA argued that the Court of Appeals erred in requiring Dr. Neff to undergo a second trial. The jury ruled unanimously in Dr. Neff's favor; the failure to read to the jury some lines from a deposition transcript which was clearly cumulative and corroborative of other testimony was not prejudicial. The letter argued that the analysis contained in the opinion was murky at best, and may open the door to qualifying an expert's deposition testimony to be read at trial with very little showing by the litigant.

Outcome: Unfortunately, the California Supreme Court denied the petition for review and the request for depublication. The Court's decision may be found at Alef v. Alta Bates Hosp. (1992) 5 Cal.App.4th 208, 6 Cal.Rptr.2d 900.

Martinez v. Humphrey
(clarification of medical expert qualifications)

Issue: This case involved a physician who was sued for a bad outcome in a surgical procedure. At the trial, the plaintiff's expert was a retired physician who had never performed the procedure, and had testified that the patient's "bad outcome" was the sole criteria for determining whether the standard of care had been breached. On March 12, 1993, CMA submitted an *amicus curiae* brief with the California Court of Appeal arguing for clarification of the qualifications a medical expert must have before qualifying to testify in court. On January 18, 1994, CMA filed a letter supporting the physician's petition for review with the California Supreme Court.

Outcome: In an unpublished opinion, the Court of Appeals affirmed the trial court's ruling and upheld the judgment against the surgeon. The California Supreme Court refused to hear the case.

Brun v. Bailey (Hanley, D.C., movant) In
(Expert witness fees)

Issue: A treating chiropractor gave a deposition in his patient's auto accident lawsuit. After the chiropractor's deposition, the subpoenaing attorney refused to pay him his usual and customary expert fees. That attorney claimed that he asked only "factual" questions about the treatment, and never asked an opinion question which would trigger the expert witness "usual and customary" payments under the law at that time. The chiropractor sued the attorney, lost at the trial court, and appealed. CMA filed a request for *amicus* participation with the appellate court on April 26, 1994. We argued that the legislative history of the relevant statute required the payment of expert fees in this case, and stressed that inadequate compensation for treating health practitioner deponents does a disservice to the search for truth and for the needs of patients involved. The appellate court denied our request for *amicus* status along with similar requests from other associations. After the appellate court opinion was published, CMA filed a letter in support of the chiropractor's Petition for Review to the Supreme Court on October 19, 1994. The Court declined review.

Outcome: The appellate court opinion stated that the state Supreme Court had already recognized that "a physician's testimony regarding past treatment, diagnoses and prognoses rendered is not expert opinion testimony." (Brun v. Bailey (1994) 27 Cal.App.4th, 641, 32 Cal.Rptr. 2d, 624, 630.) The appellate court then expanded the law to preclude expert fees for testimony given regarding past diagnoses and prognoses. (Brun at 631.) This left all health care practitioners with payment of only $35 per entire day of such testimony, plus $.20 per mile round trip, absent some other agreement with the attorney involved. (C.C.P. §2034(i)(2), Government Code §68092.5(a).) The next year (1995), Brun was overturned by CMA sponsored legislation. This legislation assured treating health care practitioners get paid expert fees *for any opinion or factual testimony* regarding past or present diagnosis or prognosis, or the reasons for a particular treatment decision made by the practitioner. (C.C.P. §2034(i)(2).)

FORGOING LIFE-SUSTAINING TREATMENT

Thor v. Superior Court (Andrews)
(CMA advocates for a competent patient's right to refuse medical treatment)

Issue: In this case, the petitioner, Dr. Thor, initiated an ex parte proceeding seeking an order allowing him to use a surgical tube to feed and medicate a quadriplegic prisoner who had refused such medical treatment. CMA filed an *amicus curiae* brief on September 29, 1992, in the California Supreme Court, urging the Court to affirm the well-established principle that a competent person may accept or refuse life-sustaining medical treatment, but asking the Court to recognize that the penal environment creates special concerns that may require judicial intervention in certain types of cases. CMA specifically urged

that special steps may need to be taken to ascertain whether a disabled inmate's decision to refuse treatment is both competent and voluntary.

Outcome: The California Supreme Court agreed with CMA, ruling that a competent, informed adult has a fundamental right to refuse medical treatment. Furthermore, the Court held that, in the absence of evidence demonstrating a threat to institutional security or public safety, prison officials, including medical personnel, have no affirmative duty to administer such treatment, including life-sustaining treatment. That is, a person incarcerated in state prison retains this basic freedom of choice in medical decision-making. This decision can be found at Thor v. Superior Court (Andrews) (1993) 5 Cal.4th 725, 21 Cal.Rptr.2d 357.

Villasenor, Jr. v. Gutman
(CMA supports precedential effect of a court ruling concerning patient's competency to consent to health care)

Issue: In this case, a probate court, acting under Probate Code §3200 *et seq.*, had ruled that a desperately ill patient, who was a Jehovah's Witness, was competent and had consented to a blood transfusion. The patient's physician ordered the transfusion in reliance on the court's ruling. After the patient recovered, he and his wife sued the physician for providing unauthorized medical treatment. The Court of Appeal ruled that the probate court's determinations of consent, and also competency, could not be given preclusive effect in the damage action. On September 16, 1992, the CMA filed a letter in support of petition for review with the California Supreme Court, arguing that, in cases where a patient's decision and/or capacity may be uncertain, and the patient's loved ones and health care providers are not able to agree on a course of action, binding judicial resolution must be available to protect the patient's interests and to permit health care providers to implement a patient's wishes without fear of later liability.

Outcome: Although the California Supreme Court denied review, this case is not published. In 1995

CMA sponsored legislation, the Due Process in Competency Determination Act, which amended Probate Code §3200 *et seq.*, to address the concerns CMA described in its letter in this case.

Wendland v. Wendland Initial Participation: June 1999
(CMA advocates for the decision-making rights on behalf of mentally incapacitated patients)

Issue: This case involved a mentally incapacitated patient (not in a persistent vegetative state (PVS)) and the patient's wife's decision that the feeding tube be withdrawn, based on her understanding of the patient's wishes. In a legal challenge brought by other family members, the trial court judge ruled that although the wife's decision to withdraw life-sustaining treatment was made in her role as conservator pursuant to Probate Code §2355 in good faith and with the advice of physicians, the conservator failed to prove by clear and convincing evidence that under the circumstances, the patient would want to die. On June 15, 1999, CMA filed an *amicus curiae* brief with the California Court of Appeal, arguing that the trial court ruling inappropriately interferes with the rights of mentally incapacitated patients to have proper medical decisions made on their behalf. CMA argued that imposition of the clear and convincing evidence standard is unnecessary because Probate Code §2355 had been carefully crafted to ensure that the most appropriate person would be selected to make medical decisions for the patient. Also, the health care environment already has mechanisms such as input from physicians, other health care providers, and ethics committees that operate effectively to protect mentally incapacitated patients. If left to stand, this ruling would have the legal and practical effect of sentencing many such patients to years of unwanted medical interventions and potential mental and physical suffering.

Outcome: On February 24, 2000, the Court of Appeal upheld the position taken by CMA and the patient's wife, by ruling that the patient's wife has the right to withhold life-sustaining treatment from her disabled husband even though he isn't terminally ill or in a vegetative state. The Court also ruled that the trial court had

erred in requiring the patient's wife to prove by clear and convincing evidence that her husband would have preferred death. Instead, she must meet that standard in proving that she acted in good faith and on valid medical advice in seeking to terminate life support. The case was referred back to the trial court to give the opposing family members an opportunity to prove that the patient's wife had not met her burden.

On June 2, 2000, the California Supreme Court granted review in the case to decide whether Probate Code §2355 authorizes a conservator to withhold life sustaining care from a conservatee who is not in a persistent vegetative state, and, if so, whether the statute is constitutional. On October 10, 2000, CMA, many other health care organizations and ethicists filed an *Amici Curiae* Brief.

On August 9, 2001, the Supreme Court ruled in support of the position taken by Robert Wendland's mother, that Robert's conservator (his wife) did not have the right to withhold life-sustaining treatment. The Court attempted to limit it's ruling to facts surrounding a conservator's decision to terminate nutrition for an incompetent, but conscious conservatee. The Court made the following specific rulings: 1. Probate Code Section 2355, which sets the standards for health care decisions by a conservator, is not unconstitutional on its face; 2. A conservator must demonstrate a conservatee's wish to refuse life-sustaining treatment by a "clear and convincing" standard (as opposed to a "preponderance of the evidence" standard) when "**seeking to withdraw life-sustaining treatment from a conscious, incompetent patient who has not left legally cognizable instructions for health care or appointed an agent or surrogate for health care decisions.";** 3**.** A conservator must demonstrate that termination of life is in "best interests" of a conscious but incompetent conservatee by a "clear and convincing" standard; and 4. The preponderance of the evidence standard will apply for conservators making other types of health care decisions.

This ruling makes the CMA's Kit: "My Health Care Wishes—The California Medical Association's Advance Health Care Directive Kit" even more important for physicians and patients. This kit enables patients to clearly state their health care wishes in order to avoid the very circumstances presented by the Wendland case.

MANAGED CARE

Khajavi v. Feather River Anesthesia Medical Group Initial
(challenge to court's limited application of Business & Professions Code §2056)

Issue: On February 12, 1999, CMA filed an amicus brief to discuss the meaning of Business & Professions Code §2056, the CMA-sponsored law which prohibits retaliation against physicians who advocate for medically appropriate health care. CMA filed the brief in an effort to have the Court of Appeal overturn the trial court's ruling that protection afforded under B&P Code §2056 applies only to retaliatory actions by third party payors and not by medical groups, IPAs, or other entities that employ or contract with physicians to deliver health services. CMA argued that retaliation against a physician for patient advocacy is a matter of grave importance to the public health, welfare and safety. It is critical to the continuation of quality health care that physicians and other health care professionals be permitted and encouraged to raise objections without fear of retaliation, if they reasonably believe treatment practices or facilities are substandard. CMA further explained that this protection from retaliation necessarily extended not just against third party payors, but against any person or entity who has the ability to apply and render a decision to terminate or penalize a physician for advocating for medically appropriate health care.

Outcome: On October 10, 2000, the California Court of Appeal, Third District issued an opinion properly interpreting the scope of Business & Professions code §2056 to prohibit retaliation against physicians "for advocating for medically appropriate health care". The prohibition applies to any "person" who engages in retaliation prohibited by the statute. This ruling is important to physicians since, had the lower court's

ruling been affirmed, Business & Professions Code §2056 would have been interpreted in a fashion which would severely undercut the protection the statute intended to provide to physicians.

Potvin v. Metropolitan Life Insurance Company Initial CMA Participation: April 1997
(whether physicians have a right to fair hearing prior to termination from health plan)

Issue: Dr. Potvin's lawsuit charged that his "without cause" termination from MetLife's managed care networks constituted a violation of his common-law right to fair procedure and a circumvention of the notice and hearing requirements pursuant to Business and Professions Code §§805 *et seq*., because it allegedly was a result of his malpractice history. The trial court issued judgment in favor of MetLife and Dr. Potvin appealed. On April 30, 1997, CMA filed an *amicus curiae* brief with the California Court of Appeals (2nd Dist.) on behalf of itself and the AMA. Consistent with the CMA's position, the California Court of Appeals (2nd Dist.) ruled that physicians have a common-law right to fair procedures, including the right not to be expelled from participation in a health plan, for reasons which are arbitrary, capricious, and/or contrary to public policy, notwithstanding an "at will" termination provision in a health plan contract**.** MetLife filed a petition for review by the Supreme Court which was granted. On March 16, 1998, CMA filed an *amicus curiae* brief with the California Supreme Court on behalf of CMA and AMA, arguing that physicians terminated from managed care plan panels are entitled to fair hearing rights, just like physicians terminated from hospital medical staffs or medical professional societies.

Outcome: In a huge victory for CMA, all physicians and their patients, on May 8, 2000, the California Supreme Court, siding with the Amici Curiae brief filed by the CMA and AMA, concluded that a managed care plan should not be able to arbitrarily and capriciously terminate physicians from provider panels without notice or an opportunity to be heard. In making this ruling, the Supreme Court, consistent with 100+ years of precedent, ruled that managed care plans, like other entities in health care controlling access to patients, such as medical staff and medical societies, must afford fundamental fairness to their contracting physicians. The Defendant sought rehearing by the California Supreme Court which was denied on June 28, 2000.

Vision Service Plan v. Nell Initial Participation: July 2000
(Standard of Judicial Review of Plan Terminations)

Issue: On July 10, 2000 CMA and the California Academy of Ophthalmology filed an *amici curiae* brief in support of a health care provider terminated by Vision Service Plan. At issue in this case is whether a decision by such a plan to terminate a provider from the plan's participating network sufficiently impacts the provider to warrant a full and independent review by the courts. Put another way, the question before the court was whether a court's review of a plan's termination is subject to a "substantial evidence" test (i.e., was the plan's decision supported by "substantial evidence in light of the whole record") or pursuant to the court's independent judgment where the court reviews the entire record to see whether the findings are supported by the weight of the evidence.

CMA's brief concluded that independent review must be afforded in these circumstances. The right of a health care provider to maintain relationships with his or her patients and to continue to practice a profession, such as medicine, comprises both a "fundamental" and "vested" right which is protected by the independent judgment review standard as enunciated by the Supreme Court on previous occasions. Further we noted that apart from being legally mandated, full review by trial courts is in the public interest. The extent of the quality health care depends upon a strong continuous physician/patient relationship. Court review pursuant to the independent judgment test provides an important safeguard to protect those relationships and protect physicians from harassment or inappropriate terminations from managed care plans.

Outcome: In an unpublished opinion, the California Court of Appeal, Sixth District concluded that the trial

court erred in applying the independent judgment standard of review.

Wickline v. State of California
(third-party payors are responsible for medically inappropriate decisions resulting from cost containment mechanisms)

Issue: In this case, the patient brought an action against Medi-Cal, following a leg amputation, as a result of an alleged premature discharge from the hospital. On October 4, 1985, CMA filed an *amicus curiae* brief with the California Court of Appeal (2nd Dist.), urging the Court to rule that neither the state nor any other third party payor of health care services should be permitted to escape legal accountability for injuries resulting from their negligently designed or implemented prospective review programs.

Outcome: The California Court of Appeal (2nd Dist.) ruled that third-party payers of health care services can be held legally accountable when medically inappropriate decisions result from defects in designs or implementation of cost containment mechanisms. The Supreme Court decision was later dismissed and remanded back to the Court of Appeals. The Appellate decision may be found at Wickline v. State (1986) 183 Cal.App.3d 1175, 228 Cal.Rptr. 661.

Goodrich v. General Telephone Co. of California Initial CMA Participation: May 1988
(CMA advocates for patients' ERISA claims)

Issue: In this case, a disabled employee brought action against an employer and insurer for damages resulting from delays in processing his claim for disability benefits under the employer's long-term disability insurance plan. On May 9, 1988, CMA filed an *amicus curiae* brief with the California Supreme Court in support of the patient, Goodrich. CMA urged the court to construe an ERISA preemption provision narrowly in order to protect the interests of patients.

Outcome: The Supreme Court ultimately did not rule in this case. However, in a companion case, Commercial Life Ins. Co. v. Superior Ct., the Supreme Court ruled that ERISA preempts bad faith suits against ERISA plans. That decision may be found at Commercial Life Ins. Co. v. Superior Court (1998) 47 Cal.3d 473, 253 Cal.Rptr. 682.

Commissioner of Corporations v. Takecare Health Plan, Inc.
(DOC imposes $500,000 penalty against managed care plan for failure to refer to specialist)

Initial CMA Participation: September 1995

Issue: This case involved a nine year old child who was diagnosed and treated for a Wilms' tumor, a rare and life-threatening form of kidney cancer. The medical group referred the child to an adult urologist who had no experience in removing Wilms' tumors from children. Despite urgent requests from the parents, the medical group denied referrals to a pediatric surgeon experienced in removing Wilms' tumors in children. These decisions were ratified by FHP/Takecare. Subsequently, the parents elected to have surgery performed by a qualified pediatric surgeon despite their inability to obtain authorization for FHP/Takecare. The surgery was successful but FHP/Takecare refused to pay for even the hospital expenses associated with the surgery. Consequently, the Department of Corporations filed an accusation against FHP/Takecare for disciplinary action, imposing a $500,000 fine against the HMO. On September 26, 1995, CMA filed an *amicus curiae* brief on behalf of the Department of Corporations before the Administrative Law Judge (ALJ) assigned to hear the HMO's appeal of the case. CMA argued that Knox-Keene plans must be held accountable for their cost-containment programs, which may adversely affect patient care. The ALJ agreed with CMA and recommended upholding the $500,000 fine. In the administrative proceeding, the judge found that Takecare failed to provide a necessary referral to a specialist, and failed to demonstrate to the DOC that it rendered a medical decision unhindered by fiscal

and management considerations. The judge also concluded that Takecare attempted to mislead the DOC in a number of specific instances.

Outcome: On October 29, 1996, in accordance with CMA's brief, the Commissioner of Corporations adopted the decision of the administrative law judge and upheld the penalty of $500,000, the largest fine ever imposed by the DOC on a managed care organization.

Roessert v. Health Net
(medical negligence claims against physicians or HMOs are not preempted by ERISA)

Issue: This case involved plaintiffs who sued Health Net, an HMO, for medical negligence and negligent and intentional infliction of emotional distress. These claims were based on the allegation that Health Net made a particular communication by mistake and asked to have one of the plaintiffs committed to a psychiatric institution. In an unpublished opinion, the U.S. District Court for the Northern District of California decided that a medical malpractice claim against an HMO was not preempted by ERISA law. Even though a lawsuit by a patient against an ERISA plan is often preempted by ERISA, the majority of district courts conclude that the issue of a physician's or plan's medical negligence is not related to ERISA plan administration but rather to medical decisions made by the defendants. On May 31, 1996, the CMA submitted a letter with the U.S. District Court to publish its opinion as it marked the first California federal case on this issue. The CMA noted that this case would be informative to physicians, patients, and managed care entities if it were published.

Outcome: The U.S. District Court for the Northern District of California agreed with the CMA and published its opinion. This decision can be found at Roessert v. Health Net (N.D.Cal. 1996) 929 F.Supp. 343.

Palmer v. FHP, Inc.
(injury due to plan's denial of medically necessary care)

Issue: In this case, the plaintiff sued the FHP Medicare plan and some of its providers for injury allegedly due to negligent denial of medically necessary care. On October 16, 1996, CMA filed an *amicus curiae* brief with the Court of Appeal (2nd. Dist.) on behalf of the plaintiff. The brief argued that managed care plans must be held legally accountable for injuries resulting from plan negligence in the implementation of their utilization review programs or patients will face an unwarranted risk that necessary medical care will be denied.

Outcome: The case settled in favor of the plaintiff.

Jeffrey G. Riopelle, M.D. v. Cigna Health Plan Initial CMA Participation: February 1998
(CMA defend's a physician's right to advocate for patients)

Issue: In this case, a physician was terminated by Cigna Health Plan (an HMO) for writing letters to his patients indicating how to continue their physician-patient relationship with him in case of contract termination, and for suggesting that he was unsatisfied with the quality of one of Cigna's contracting medical groups. On February 10, 1998, CMA filed an *amicus curiae* brief with the Superior Court of Contra Costa County, in support of Dr. Riopelle's request for preliminary injunction (request to stop his contract termination). In the AC brief CMA argued that the physician must act as a patients' advocate, and therefore Cigna could not terminate Dr. Riopelle's contract for discussing continuity of care issues with patients, or questioning quality of care issues without running afoul of California's anti- retaliation laws (Business & Professions Code §§2056 *and 2056.1*) Unfortunately, Dr. Riopelle's request was denied by the court. Encouragingly, however, the court denied the physician's claim for injunction because he suffered no "irreparable harm," as opposed to finding that the anti-retaliatory statutes did not

apply. Dr. Riopelle then took his claim against Cigna to arbitration at which time CMA filed its AC brief again with the arbitrator.

Outcome: The arbitrator held against Dr. Riopelle because it found that Cigna terminated his contract for legitimate business reasons unrelated to his patient communications.

Rozengurt v. Blue Shield — Initial CMA Participation: October 2002
(CMA advocates against automatic de-selection from health plan because of MBC Probation)

Issue:This cases involves whether or not it is appropriate for an insurance carrier to automatically de-select a physician bas Medical Board probation.

Based on the de-selection, Dr. Rozengurt has appealed to the San Francisco Superior Court. Due to the importance of this issue (due process rights in managed care plan actions) and because the case appears to be one of first impression for the court, CMA has requested permission to file an *amicus* curiae brief in support of Dr. Rozengurt's request for a court ruling requiring Blue Shield to provide him with a hearing as required under Business & Professions Code §§805 and 809 *et seq.*
Outcome: On November 20, 2002, the San Francisco County Superior Court heard oral argument and ruled that a physician has no right to an 805 hearing when de-selected under the circumstances presented by this case.

MEDICAL BOARD: DISCIPLINE AND LICENSING

Bearman v. Superior Court — Initial CMA Participation: September 2003
(Medical Board Investigation of Physician Who Recommended Medical Marijuana)

Issue: This case involves a Medical Board investigation of a physician who had recommended medicinal cannabis ("medical marijuana") to a patient for the treatment of migraine, one of the conditions specifically enumerated in Proposition 215 ("The Compassionate Use Act".) While on state park land, the patient had been stopped by a park ranger, who had discovered a small amount of medicinal cannabis belonging to the patient. The patient offered his written recommendation to the park ranger, who returned the cannabis but filed a complaint with the Board, alleging that the physician had acted improperly in issuing the recommendations. Based solely on this complaint, the Board thereupon sought to obtain the patient's medical records. The patient refused to consent to the disclosure. The Board subpoenaed the records and sought a court enforcement of the subpoena. The trial court issued an order enforcing the subpoena, which the physician is currently challenging before the Court of Appeal by petition for writ of mandate.

In the *amicus* brief, CMA argued that the issues in the case strike at the heart of the physician-patient relationship: the privacy of patient medical information and the freedom of a patient and physician to make health care choices free of the threat of excessive governmental scrutiny. CMA expressed its concern that a government agency, mandated to protect the quality of medical care, is instead diverting its precious enforcement resources to a case that the Legislature has not deemed an enforcement priority, over the strong objection of the patient who has suffered no harm.

CMA stressed that the California's constitutional right to privacy ensure that the privacy of personal medical information must be protected and respected in the absence of a "compelling state interest," and unless that disclosure is "necessary to achieve the compelling interest." CMA demonstrated that none of the Board's articulated concerns in the case rose to the level of a compelling interest. Furthermore, The Board had not sought to use a "narrowly tailored" means to address its concerns, such as discussing the matter with the physician, but rather had immediately south to obtain the patient's sensitive medical information using the highly intrusive tool of the investigative subpoena.

CMA also raised objection to the Medical Board's action on Constitutional First Amendment and right to privacy grounds.

Outcome: On April 1, 2004, the California Court of Appeal for the 2nd district ruled in favor of the physician, and stated that the Medical Board must present more than "speculations, unsupported suspicions and conclusory statements" to justify subpoenaing patient records. Citing CMA's AC brief, the court rejected the Medical Board's argument that, by showing the letter to the rangers, the patient had waived his right to privacy and agreed with CMA, that such an argument would defeat the voters' intent to facilitate the medical use of marijuana for the seriously ill.

On April 8, 2004, the Medical Board requested a re-hearing of the case, which the Court of Appeal denied on May 3, 2004. On May 11, 2004, the Medical Board asked the California Supreme Court to review the case. On June 30, 2004, the Supreme Court declined to review the case. The case is now concluded.

CAPLI v. Medical Board of California Initial CMA Participation: February 2002
(Medical Board Release of Confidential Settlement Information)

Issue: This case involves whether or not the Medical Board of California should be forced to release confidential settlement information related to settlements made on behalf of physicians. The California Association of Professional Liability Insurers (CAPLI—Medical Insurance Exchange of California, NORCAL Mutual Insurance Company, and SCPIE Indemnity Company) requested a preliminary injunction enjoining the Medical Board from disclosing to the public information concerning the settlement of a professional negligence claim against a physician.

On February 28, 2002, CMA filed an *amicus curiae* brief in support of CAPLI. The brief explained, among other things, that the Legislature has presumed that the contents of the central file, including settlement information, be confidential and specifically restricted the types of information that the Medical Board may release publicly. Also, CMA noted that the California constitutional right of privacy prohibits the Medical Board from publicly disclosing settlement agreement information.

Outcome: On March 8, 2002, the trial court of the Superior Court in the County of Sacramento issued a preliminary injunction as requested by CAPLI. The case is now pending in that court.

In the Matter of the Accusation Against: Jannie Tang Initial Participation: December 2000
(CMA Advocates Against Inappropriate Medical Board Activity)

Issue: This case involves the Medical Board's decision to impose discipline on a physician after an administrative law judge determined that the physician is competent. CMA filed an *amicus curaie* brief requesting the Medical Board to reconsider its decision to prosecute. Thereafter, in December 2000 the trial court issued an order staying the disciplinary action by the Medical Board. Notwithstanding the stay, the MBC continues to post on its public website that there is "enforcement activity" on Dr. Tang's license. In June 2001,CMA filed an *amicus curaie* brief supporting Dr. Tang's motion for a finding of contempt against the MBC for continuing the posting of enforcement and continuing to distribute its December decision notwithstanding the court's stay.

Outcome: The trial judge has declined to initiate contempt proceedings against the MBC, but ruled in favor of Dr. Tang on the merits and overturned the discipline that has been imposed against her.

Medical Board of Calif. v. Superior Court, Anselm On-Sang Lam, M.D., Real Party in Interest
(Physician discipline for out-of –state medical licensing board actions)

Initial Participation: June 2001

Issue: At issue in this case is the applicability of Business & Professions Code §2035, as amended at the request of CMA in 1995, to the Medical Board. This provision specifically restricts the ability of the MBC to discipline a physician for out-of-state medical licensing board actions to those cases where the out-of-state grounds for discipline would have been grounds for disciplinary action in California. This restriction was specifically inserted into the legislation as a result of CMA's "support if amended" position on the bill, S.B. 609, Stats. 1995, ch. 708 §9.

Briefly stated, this case involves an out-of-state non-CMA member, Anselm On-Sang Lam, M.D., who is also licensed in the state of California. In 1997, Dr. Lam entered into a stipulation with the Wisconsin Medical Board, denying any wrongdoing but stipulating that he not repair or attempt to repair rectovaginal fistulas and refer every patient who presents with a rectovaginal fistula to see a gynecologist for appropriate evaluation and treatment. In 1998, the Medical Board of California filed an accusation seeking Dr. Lam's suspension or revocation of his license based upon that 1997 Wisconsin stipulation restricting his license. The Medical Board ultimately suspended Dr. Lam's license for ninety days based upon the Wisconsin order and ordered him to pay investigative costs of $683.00.

Dr. Lam filed a petition for writ of administrative mandate with the trial court to set aside the Medical Board's decision. The court granted Dr. Lam's petition on the grounds that Business & Professions Code §2305, which specifically relates to the Medical Board's ability to discipline physicians for out-of-state disciplinary actions so long as that action **would have been grounds for discipline in California**, was applicable to Dr. Lam's action, as opposed to Business & Professions Code §141 (which allows any out-of-state discipline to serve as a basis for discipline, regardless of whether California law permits discipline for the objectionable activity). After the trial court issued a writ directing the Medical Board to vacate its decision of discipline, the Court of Appeals reversed, concluding that the Medical Board had the ability to discipline Dr. Lam on the basis of a general statute applicable to all health care licentiates, Business & Professions Code §141.

On June 27, 2001, CMA filed a letter supporting Dr. Anselm On-Sang Lam's Petition for Review

Outcome: The California Supreme Court denied Dr. Lam's Petition for Review.

Mileikowsky, M.D. v. Superior Court — Initial Participation: May 2001
(Summary Suspension of Physician)

Issue: This case involves a physician's efforts to terminate a summary suspension imposed on him by Tarzana Hospital. While there is a dispute as to the underlying facts, the legal question presented is whether a physician can go to court to get an expedited determination of the merits of a summary suspension when the hospital and medical staff fail to provide an expedited hearing on that question. Specifically in this case, the summary suspension was imposed on November 16, 2000. Despite his requests for an expedited hearing, Dr. Mileikowsky did not get the notice of charges until December 22, 2000, which had been expanded from 7 cases Dr. Mileikowsky was made aware of at the MEC meeting following the summary suspension to 37 cases. All of these additional charges essentially restate charges heard by a prior JRC.

Although months have past since the imposition of this extraordinary remedy, the hospital has refused to allow an expedited hearing on whether the physician represents an imminent threat such as to justify a summary suspension. Accordingly, on May 15, 2001, CMA and AMA filed an *amici curiae* brief to explain the important policy reasons underlying the California courts protection of physicians from being arbitrarily excluded from access to facilities which deny them their right to fully exercise their professions. The brief discusses the protections the California courts and legislature have provided to protect against peer review abuse, and why the courts must intervene under appropriate circumstances to ensure that the physician has received a fair process as guaranteed by California law.

Outcome: On July 20, 2001, the Court of Appeal summarily denied Dr. Mileikowsky's Petition for Writ of Mandate on procedural grounds. The Court granted CMA's request to file an *amicus curaie* brief and the Court may ultimately reach the issues in the pending related appeal.

Robert Sinaiko, M.D. v. Medical Board
(Medical Board Opinion Failing to Show Clear and Convincing Evidence)
Initial CMA Participation: September 1998

Issue: This case involves an allergist/immunologist who treated several patients allegedly in an "unorthodox" manner. Despite some support from the medical community that he did not practice below the standard of care, the Medical Board adopted the ALJ's opinion revoking his license. The written opinion failed to show clear and convincing evidence, completely ignored the testimony of ten of Dr. Sinaiko's witnesses, and viewed as "highly credible" the testimony of one of the physician's competitors. There was no documented patient harm, but the ALJ awarded almost $100,000 cost recovery against the physician as "reasonable" without a shred of evidence documented in the opinion to that effect.

Following the receipt of CMA's AC brief before the Medical Board (which did not take a position on the merits of the treatment), the Medical Board reviewed the entire transcript and issued a new decision after reconsideration which placed Dr. Sinaiko on probation for five years with multiple conditions, including nearly $50,000 in cost recovery.

Dr. Sinaiko appealed the final Medical Board decision to the Superior Court where on November 2, 2001, CMA file and AC brief in support of Dr. Sinaiko. CMA explained to the Court that is extremely concerned about the impact of this case upon everyone subject to the jurisdiction of the Medical Board, as the processes that appear to have been used in this case are insufficient to protect against wrongful deprivations of fundamental vested rights—medical licenses. Not only did the Medical Board improperly reject the testimony of Dr. Sinaiko's experts, and improperly fail to understand that competing schools of medical thought exist in this case, it subjects all its licentiates to an unfair and inappropriate fee recovery statute, Business & Professions Code §125.3. Because of the magnitude of the potential penalty they impose, CMA explained that fee recovery statutes chill the exercise of important constitutional rights as physicians and other professionals cannot afford to exercise their constitutional rights for a hearing when charged with wrongdoing. As a result, they may enter into settlements inappropriately, adversely impacting their ability to pursue their livelihood and serve those with whom they have built long standing relationships so critical to quality of care—their patients. The Superior Court agreed that Dr. Sinaiko's experts should not have been disqualified. It then proceeded to weigh the evidence itself (a duty reserved for the agency, not the Superior Court) and upheld the Medical Board discipline against him. Dr. Sinaiko appealed.

Outcome: The appellate court reversed the trial court ruling. The court ruled that the wholesale disqualification of a physician's experts rendered the Medical Board proceedings unfair as a matter of law. The court remanded the case back to the Medical Board to provide petitioner a fair hearing and decide the case on the basis of all of the evidence presented.

MEDICAL RECORDS

Drynan, et al. v. Collagen Corporation, et al.
(CMA fights for the sanctity of the physician-patient relationship)
Initi

Issue: In this case, a court order was issued granting the plaintiff's counsel access to Collagen's patients' files, including the names and addresses of physicians and patients involved in clinical studies or having

reported possible adverse effects of Collagen's products, and permitting the counsel to contact these physicians and patients. On January 20, 1989, CMA filed a memorandum of points and authorities with the San Francisco County Superior Court in support of Collagen Corporation. The memorandum contested the court order and asked the court to rule that the names of patients and physicians in a company's medical files are protected by the physician-patient relationship and thus could not be disclosed.

Outcome: On July 6, 1989, in response to CMA's brief, the court issued a modified order which was more protective of patients' identities but appeared to allow physician names to be disclosed. Subsequently, CMA filed a Motion for Reconsideration. On January 2, 1990, the court ruled that both patient and physician names were protected, thus achieving a wholesale victory. This case remains unpublished.

Doty v. County of Lassen
(confidentiality of inmates' medical records)

Issue: In this case, the lower court issued an order mandating the disclosure of inmates' general medical records and then indicated it might also issue an order requiring the disclosure of their mental health records. On April 3, 1990, CMA filed an *amicus curiae* brief with the federal district court. The brief asked the Court to protect the confidentiality of inmates' general medical and mental health records. CMA argued that wholesale disclosure of such information would deter inmates from seeking necessary medical and mental health care. If an inmate's condition worsens, both the individual and society are harmed.

Outcome: The parties settled in a fashion that would protect confidentiality of inmates' records. There is no court opinion.

The U.D. Registry, Inc., a California Corporation v. The State of California
(CMA seeks to establish that the legislature is the appropriate body to address privacy of information issues)

Initial CMA Participation: June 1995

Issue: In this case, credit reporting agencies brought actions against the state, challenging the validity of a statute which prohibited consumer credit reports from containing information about unlawful detainer actions unless the lessor was the prevailing party. The Superior Court of Los Angeles County found for the U.D. Registry, Inc., declaring the statute unconstitutional. On April 21, 1995, the Court of Appeal affirmed. On June 21, 1995, CMA filed a letter with the California Supreme Court in support of the petition for review in this case, arguing the centralization and computerization of personal information by both private and governmental agencies posed a danger that only the legislature, not the courts, can address.

Outcome: On August 17, 1995, the California Supreme Court unfortunately denied review of this important case. The decision can be found at U.D. Registry, Inc. v. State (1995) 34 Cal.App.4th 107, 40 Cal.Rptr.2d 228.

In the Matter of Edward A. Rocklin, M.D. Initial
(denounced the wholesale seizure and removal of patient medical records from a medical office by the attorney general's office as a serious and unjustifiable risk to patient health)

Issue: This case involved the seizure of medical records, pursuant to a search warrant, by the Office of the Attorney General as part of an investigation for alleged fraudulent Medi-Cal billing practices. The records were taken from the physician's San Francisco-based medical office to Oakland and access through a copy service was afforded to Dr. Rocklin only during normal business hours. Because of the

voluminousness of the records as well as the significant time and expense to copy such records, Dr. Rocklin was effectively barred from accessing his patients' charts. On September 3, 1996, the CMA submitted a letter to the judge who issued the search warrant, stressing that, whatever the merits of the case, in the absence of extraordinary facts, the wholesale seizure and removal of more than 1,000 patient records from the office of a practicing physician poses a serious and unjustifiable risk to the health and safety of the patients. The CMA stated that appropriate medical care required 24-hour, seven-day-a-week access to the medical information. The CMA asked the court to fashion an order that would protect the integrity of the physician-patient relationship and ensure that the best possible care would be provided to the innocent patients affected by this investigation.

Outcome: At a hearing on September 16, 1996, the court refused to return Dr. Rocklin's files. The court, however, did require the Attorney General's office to maintain a 24-hour pager to allow Dr. Rocklin to obtain files needed in cases of emergency.

MEDICAL RECORDS
CONFIDENTIALITY

Holtan v. Bansal, et al. Initial Participation: May, 2000
(Confidentiality of Patient Identification and Records/Class Certification in a Medical Negligence Case)

Issue: This case involves the appropriateness of ordering the release of patient names and information to attorneys for purposes of possible participation in a class action lawsuit. The underlying action is brought on behalf of several former employees of Laservue. The primary defendant, Dr. Bansal, is an opthamologist who is one of the pioneers of LASIK, which is a relatively new laser-assisted vision correction procedure. The plaintiff, Holtan, resigned from Laservue and brought the action on behalf of all Laservue patients, alleging that Laservue's sterilization protocol was inadequate and that it placed patients at risk for contracting HIV, hepatitis and other deadly diseases.

The trial court ordered disclosure of the identity of all 3,000 Laservue patients to plaintiffs' counsel and further ordered that plaintiffs' counsel communicate with these patients to advise them of the lawsuit for purposes of allowing them to join the class. On May 31, 2000, CMA filed an *amicus curiae* brief to stay the court's order. (Prior to CMA's involvement in the case, the patient identities were released to the plaintiff's counsel, but there was no communication with the patients.)

Outcome: Agreeing with CMA, the Court of Appeal granted an emergency stay of the order granting class certification and of the order granting notice to the class. Thereafter, however, the underlying case settled and, accordingly, on December 12, 2000, the Court of Appeal dissolved the stay and dismissed the appeal.

Hurvitz v Hoefflin Initial Participation February 2001
(CMA advocates for Confidentiality of Medical Information)

*Issue:*The relevant aspects of this case involve patients' right to confidential medical information (Civil Code §56 and Arti
for slander, business and other related actions. One physician accused the other of wrongful conduct with patients, many of whom were non-party Hollywood celebrities. In one of the related lawsuits, former employees filed a joint declaration naming patients who had been the subject of one of the physician/defendants alleged wrongdoing. The trial court then acted swiftly to protect the privacy interests of the patients. It sealed the documents, which referred to the patients by name and ordered the parties to devise a system for identifying individuals in neutral terms, so as not to reveal their identities.

The Court of Appeal unsealed the record, stating that the trial court's order constituted an unconstitutional prior restraint of free speech, and that the right to free speech outweighs the right to privacy. The Court of Appeal may have reached its conclusion based on the facts of the case-some of the patients are

celebrities and, perhaps less concerned about their privacy. However, the Court did not limit its decision to the facts of the case and the decision provides a blanket statement that the First Amendment trumps the right to privacy. The Court also did not address the HIPAA confidentiality requirements.

Dr. Heofflin petitioned the California Supreme Court for review, arguing that the Court of Appeal should have more carefully balanced the right to privacy and the right to free speech and fashioned a remedy that accommodated both rights. On February 13, 2001, CMA filed a letter brief with the California Supreme Court, requesting de-publication of the Court of Appeal opinion, or in the alternative, review of the case. The letter brief was written to avoid an undesirable Court of Appeal decision, which misstates the current law on the confidentiality of medical information and ignores the fact that all individuals, including non-physicians who receive medical information such as nurses, are bound by the provisions of the Confidentiality of Medical Information Act (Civil Code ' 56 *et seq.*) The letter brief also emphasizes the trial court's reasonableness in fashioning a ruling that protects patients' rights.

*Outcome:*In March, 2001, the California Supreme Court denied the Petition for Review and the request for de-publication.

Planned Parenthood v. Ashcroft — Initial CMA Participation: March 2004
(CMA Advocates Against the Improper Intrusion Into Physician-Patient Relationship Through the Improper Subpoena of Patient Abortion Records)

Issue: The underlying case involves Planned Parenthood's constitutional challenge to 2003 "Partial-Birth" Abortion law, signed by President George W. Bush in 2003. During the course of this litigation, the Government subpoenaed medical records of patients who underwent abortion procedures at 7 San Francisco Bay Area hospitals and a number of Planned Parenthood affiliates. Because of privacy considerations and the extremely sensitive nature of the documents, productions of these records would have a chilling effect on the communications between physicians and their patients. On March 3, 2004 CMA and the San Francisco Medical Society filed an AC Brief objecting to the production of these records.

Outcome: On March 5, 2004, the U.S. District Court of the Northern District of California ruled against the Government related to its efforts to obtain medical records of patients who had received abortions. In the ruling, the judge cited CMA's AC brief, which urged the court to protect patients' rights to privacy and preserve the sanctity of the physician-patient relationship. The court reiterated that maintaining the confidentiality of medical records is of fundamental importance to a meaningful and effective physician-patient relationship. The Government did not appeal the decision.

U.S. v. Oakland Cannabis Buyers' Cooperative, et al. — Initial Participation: October 1998
(Protective order to prevent disclosure of physician names from the public record)

Issue: On October 5, 1998, CMA filed an *amicus curiae* brief in support of a protective order in a civil action in which the United States sought to close six cannabis cultivator clubs (i.e., medical marijuana clubs). Attorneys for the clubs filed a declaration, which listed dozens of physicians by name who had discussed and/or recommended the use of marijuana to their patients, as well as those patients' diagnoses. In its brief, CMA maintained that it was essential to protect the right of a physician and patient to discuss freely all medical treatment options that may be appropriate to the patient's care. Without a reasonable assurance of confidentiality, patients and physicians cannot candidly exchange information, and as a result, proper medical care cannot take place. CMA stressed that, if physicians and patients believe that the physicians' identities, coupled with the patients' diagnoses, will be publicly revealed, information may be withheld, discussions may be truncated, and even the completeness of medical records may be threatened. In this litigation, no patient had authorized the disclosure of such confidential information, and the defendants who disclosed the information did not require it in order to make their case. Thus, CMA argued that removal of the names of

physicians from the public record would serve the vital service of protecting the trust and rapport between physicians and their patients, while prejudicing no one.

On September 13, 1999, the US Court of Appeals for the Ninth Circuit ruled that there is nothing in the policy underlying the Controlled Substances Act (CSA) that prevents a court from recognizing a medical necessity defense. Furthermore, the court stated that the evidence was sufficient to justify the requested modification, if the trial court had chosen to issue it. OCBC had demonstrated that medical marijuana was a "medical necessity" for a certain group of patients: 1) for whom the use of cannabis is necessary in order to treat or alleviate serious medical conditions or their symptoms; 2) who will suffer serious harm if they are denied cannabis; and 3) for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects. Therefore, the Ninth Circuit ordered the trial court to reconsider OCBC's request for modification.

On January 11, 2000, CMA filed an *amicus curiae* brief in the Ninth Circuit Court of Appeals opposing the government's request that the case be reheard "en banc," that is, by the full complement of judges on the Ninth Circuit. In that brief, CMA argued that the medical necessity defense, as narrowly defined by the Ninth Circuit Panel, was wholly appropriate and essential to protect the integrity and effectiveness of the physician-patient relationship. While CMA supports the appropriate regulation of the safety and efficiency of drugs by the FDA and DEA, desperate patients, acting with the advice and approval of their physicians, should not be punished for using an unconventional treatment shown to be effective in their cases when standard, lawful treatments have been ineffective. The medical necessity defense strikes a sound balance between the basic integrity of the federal statutory scheme and the compassionate wisdom of the common law.

Outcome: On February 29, 2000, the Ninth Circuit denied the government's request for rehearing and rehearing en banc. The case was remanded to the district court, and on July 17, 2000 the court modified its injunction, allowing OCBC to distribute cannabis to patients meeting the medical necessity criteria. On July 28, the government filed a petition for certiorari to the United States Supreme Court, which was granted on November 27, 2000. CMA filed an *amicus curiae* brief in the U.S. Supreme Court in February, 2001.

On May 14, 2001, in a 8-0 opinion, the U.S. Supreme Court ruled against the Cooperative and CMA's position. The Court ruled that there is no "medical necessity" exception to the Controlled Substances Act's (CSA) prohibition against manufacturing and distributing marijuana. As a result of this ruling, even a seriously ill patient could be prosecuted or enjoined from using marijuana for medical reasons, even if the patient's physician had recommended it and even if no conventional therapy can alleviate the patient's suffering. The Court did not explicitly rule on the validity of California's Proposition 215, nor does its holding implicitly nullify that law. Proposition 215 merely abrogates the state law prohibitions against possession, use and cultivation of marijuana for seriously ill patients (and their primary caregivers) who have the recommendation or approval of their physicians to use marijuana medicinally.

MEDICAL STAFFS

Horsley v. Coast Plaza Medical Center
(hospital's board of trustees cannot determine the professional qualifications of medical staff applicants)

Issue: In this case, a hospital's board of trustees allowed a physician to practice in the hospital in spite of the good faith objections of the medical staff, the body with the necessary expertise and legal obligation to determine the professional qualifications of staff applicants. The central issue in this case is whether a hospital board may assume responsibilities that the law assigns to the medical staff for credentialing those who would provide patient care. On July 23, 1984, the CMA filed an *amicus curiae* brief with the Los

Angeles County Superior Court asking the court to uphold the laws which require medical staff self-governance and prohibit the corporate practice of medicine. In upholding these laws, the hospital's board of trustees would be prohibited from unilaterally rejecting the medical staff determination, following an appropriate credentials review, that a physician is professionally unqualified to practice within the hospital. The brief further argued that neither the members of the medical staff nor their patients should be required to wait until injury occurs before the board's action may be successfully challenged.

Outcome: This case was settled and is not published.

Redding v. St. Francis Medical Center
(CMA seeks to depublish opinion regarding closure of surgery service)

Issue: In this case, St. Francis Hospital (Lynnwood, California) closed its heart surgery program to centralize its administration and assure more consistent and higher quality of care. Surgeons who had performed heart surgery for a number of years at the hospital sued on numerous theories. The appellate court ruled that the hospital's decision to close the heart surgery service did not interfere with the vested rights of staff physicians. On May 11, 1989, CMA filed a letter in the California Supreme Court asking the court to depublish the appellate decision because the test the appellate court used for judging the appropriateness of a hospital department closure did not properly balance the competing interests at stake.

Outcome: Regrettably, the Supreme Court declined to depublish the case. The appellate decision can be found at Redding v. St. Francis Medical Center (1988) 208 Cal.App.3d 98, 255 Cal.Rptr. 806.

Bell v. Sharp Cabrillo Hospital
(reaffirmation of medical staff self-governance)

Issue: In this case, a patient's mother brought a medical malpractice action against the hospital. The plaintiff asserted that the hospital breached its duty to exercise reasonable care in reviewing the physician's competence when he applied for renewal of his staff privileges, ultimately leading to the negligence and death of her son. On July 27, 1989, CMA filed an *amicus curiae* brief with the California Court of Appeal (4th Dist.) asking that the Court modify the lower court's opinion to have it reflect California law regarding medical staff self-governance.

Outcome: The California Court of Appeal (4th Dist.) ruled that a hospital's breach of its duty to exercise reasonable care in selecting and reviewing the competency of its staff physicians is "professional negligence" within the meaning of the statute which limits recovery for non-economic losses to the MICRA cap ($250,000) in any action for injury against a health care provider based on professional negligence. The Court's decision may be found at Bell v. Sharp Cabrillo Hospital (1989) 212 Cal.App.3d 1034, 260 Cal.Rptr. 886.

Eisenhower v. Stoltzman
(medical staffs are separate and self-governing)

Issue: This case involved a decision by Eisenhower Memorial Hospital's Board of Trustees to refuse to recognize the officer chosen by the medical staff to lead the medical staff in the performance of its professional work. The Board's action was based on a bylaw provision which purported to grant the Board unchecked power to decide who can and cannot be chief of staff. On September 6, 1989, the CMA filed an *amicus curiae* brief with the California Court of Appeal (4th Dist.), arguing that medical staffs must be separate and self-governing, and thus must have the right to choose their own representatives, as this issue is at the center of the question of self-governance.

Outcome: This case was settled in favor of the medical staff and is not published.

Hillsman v. Sutter Community Hospitals
(CMA protects physicians from retaliatory terminations)

Issue: In this case, the plaintiff-appellant, Dr. Hillsman, sued Sutter Community Hospitals for an alleged violation of the written agreement under which plaintiff was allegedly employed as a full-time, hospital-based physician. On July 29, 1991, CMA filed an *amicus curiae* brief in the California Court of Appeal, Third Dist., in support of Dr. Hillsman. CMA's brief asked the court to hold that retaliation against physicians and other individuals who advocate appropriate compliance with medical standards and protest deviations from those standards by termination of medical staff privileges is an action that is contrary to both the law and public policy.

Outcome: The Court of Appeal agreed with CMA and reversed the Superior Court's decision, finding for Dr. Hillsman in an unpublished decision.

Shwachman v. Inter-Community Medical Center, Inc., et al.
(contractual nature of medical staff bylaws)

Initial CMA Participation: October 1992

Issue: On October 1, 1992, CMA filed an Informational Memorandum of Points and Authorities. In its memorandum, CMA addressed the legal issue of whether the medical staff bylaws constitute a binding agreement between the medical staff (and its individual members) and the hospital. CMA urged the court to recognize medical staff bylaws, once adopted by the medical staff and approved by the hospital board, as a binding contract between the hospital and the medical staff.

Outcome: This case was settled and is not published.

Merlo v. Cedars-Sinai Medical Center Init
(department closure is not a business decision made solely by the hospital)

Issue: In this case, Dr. Merlo had his privileges terminated after he was fired from a radiology group with which the hospital alleged an exclusive arrangement for the provision of radiology services. On August 25, 1995, CMA filed an *amicus curiae* brief with the Court of Appeal (2nd Dist.) in order to apprise the court of the serious implications of an exclusive contracting decision and to present CMA policy on department closures to the court. The brief argued that in order for all issues implicated by an exclusive contracting decision to be revealed and thoroughly addressed, it is necessary for the hospital to engage in some form of notice-and-comment process, whereby all persons who may be affected by the decision are notified of the proposal and are provided the opportunity to raise concerns and suggestions.

Outcome: On September 20, 1996, the Court of Appeal (2nd Dist.) ruled in an unpublished opinion that Dr. Merlo's medical staff privileges were improperly terminated (in an exclusive contract dispute) and awarded economic damages *only* against the hospital. In accordance with CMA's brief, the Court found that the Department was properly closed only after four medical staff and hospital committees had considered the issue and had recommended closure based on twelve reasons related to quality of care. In no way did the court suggest that closure of a medical staff department is a mere business detail to be decided exclusively by the hospital.

Major, et al. v. Memorial Hospital Association Initial CMA Participation: February 1997
(CMA fights to uphold California's requirement for fair peer review hearings)

Issue: In this case, the respondent-hospital closed its department of anesthesiology. Appellant-anesthesiologists Dr. Major, et al. filed suit alleging, among other charges, breach of contract, defamation, and restraint of trade. On February 18, 1997, CMA filed an *amicus curiae* brief in the Court of Appeal,

Fifth Appellate district, in support of appellants. CMA argued that even when a decision to close a medical staff department is warranted by the facts, the closing process must be done fairly. A decision to close a medical staff department should not be made in lieu of taking appropriate disciplinary action which would be reported to the Medical Board. CMA also argued that because of the critical role medical staff bylaws play in defining the relationship between hospital and medical staff, bylaws should be viewed by both parties as binding.

Outcome: On May 3, 1999, the Fifth District Court of Appeal unfortunately rejected the physicians' claims. The Court ruled that once a lawful decision is made to close a medical staff department, the physicians who had practiced in the department have no vested right to obtain sub-contracts from the exclusive contract holder which are any greater than those of any other licensed physician. Additionally, the Court declined to rule on whether the medical staff bylaws constitute a contract. In an unpublished portion of the decision, however, the Court noted that regardless of the answer, hospitals were required by law to comply with the medical staff bylaws which they adopt. Finally, the Court included some troubling language about the discretion of hospitals to close departments which further emphasizes the importance of CMA's proposed legislation on this topic.

Fenton and Wagner v. Centinela Hospital Medical Center, et al.
(termination without cause)

Initial CMA Participation: July 1997

Issue: This case was brought by emergency physicians working for an exclusive contractor, and who lost their jobs under the contractor when the exclusive contract was canceled. Further, when a new exclusive contractor was obtained, the physicians applied to work under the contract, and were denied by order of the hospital. The physicians sued the hospital based on alleged racial bias as the basis for the contract termination. Included in the facts were the ED physicians' protests to the hospital regarding certain policies imposed on the ED (such as a 15 minute maximum time spent with each patient) that affected quality of care. The physicians lost on summary judgment at the trial court. On July 31, 1997, CMA filed an *amicus curiae* brief with the California Court of Appeal (2nd. Dist.) arguing that it is critical to the continuation of high quality health care that physicians and other health care professionals be permitted, and in fact, encouraged to raise objections if they reasonably believe treatment practices or facilities are substandard, without fear of retaliation.

Outcome: On July 13, 1998, the Court of Appeal ruled, in *an unpublished opinion,* that the case should be remanded for further fact finding on two issues only: (1) to determine employee/independent contractor status of the plaintiffs under the contract, because an employee of an exclusive contractor may sue a hospital under the California Fair Employment and Housing Act (FEHA) if the hospital acted to coerce the contractor to fire the employees for reasons contrary to public policy (in this case, racial prejudice); and (2) to determine if facts warrant that hearing rights accrue to the physicians because they were subsequently denied rehiring by the new exclusive contractor at the hospital. On September 10, 1998, CMA requesting the appellate court publish the opinion, which request was denied by the court on December 16, 1998.

O'Byrne v. Santa Monica Hospital Medical Center Initial Participation: February 2002
(CMA challenges court holding that medical staff bylaws are not a contract)

Issue: December 2001, a California appellate court ruled that hospital medical staff bylaws can not, in and of themselves, constitute a legal contract between a hospital and an individual physician on the medical staff. The ruling in O'Byrne v. Santa Monica Hospital Medical Center closes the door on any legal right of a physician to sue the hospital for money damages arising from failure to properly enforce the medical staff bylaws. The court noted, however, that the law still permits physicians to seek bylaws enforcement through a direct court order in any particular case.

The court based its ruling on California Department of Health Services regulations that create a "preexisting duty" for the medical staff and hospital to adopt and enforce medical staff bylaws. It held that these preexisting duties negate the essential Voluntariness between contracting parties required under the law.

On February 15, 2002, CMA, with AMA support, filed a request with the California Supreme Court that it "depublish" the appellate court ruling, which, if granted, would take the case off the books. CMA argued, among other things, that the regulations permit medical staffs to create bylaws with tailored and voluntarily derived benefits and duties for the medical staff, the hospital, and individual physicians, thus preserving the voluntary element essential for the legal formation of contracts. The Supreme Court typically responds to requests to depublish within ninety (90) days.

Outcome: On June 12, 2002 the California Supreme Court denied the request for depublication.

Siegel v. CHW West Bay — Initial CMA Participation: June 2002
(Physicians' right to advocate for appropriate medical care without fear of retaliation)

Issue: In this case, the trial court ruled that Business & Professions Code §2056, the CMA-sponsored legislation that prohibits retaliation against all physicians for advocating for appropriate medical care, only applied to employed physicians. On June 13, 2002, CMA filed an AC brief in this case, as any limiting of Business & Professions Code §2056's protection to employees, as opposed to independent contractors, greatly reduces the value of the law's critical safeguards.

CMA's AC brief explained that as the administration and delivery of health care in this country has evolved from a patient directed to a managed care system, physicians are often trapped between their ethical and legal duty to remain dedicated to, and vigorously advocate for their patients' health care needs and the practical necessity to protect their relationship with the entities that control their ability to practice medicine, such as hospitals and managed care plans. To ensure that physicians not compromise their obligations to their patients, both the California Supreme Court and the California Legislature in Business & Professions Code §2056 recognize that judicial protection for all physicians victimized by improper exclusions/expulsions from hospitals (and medical staffs), managed care organizations and other organizations must exist. Without such protections, at best physician/patient relationships are needlessly destroyed; at worst, the provision of quality medical care is jeopardized. The law countenances neither result.

The brief further explained that the fundamental societal goal of preserving the proper standards of medical care depend upon a physician's right to seek judicial redress for improper exclusions/expulsions from organizations that, by virtue of their control of important economic interests, are clothed with the public interest. Particularly in this era of cost containment, physicians must be able to speak freely about potentially unsafe conditions or other matters which impact their patients' care. But to be able to speak freely, physicians must also know that their right to do so, and at the same time continue to provide quality medical care is not illusory. Physicians must know these rights will be safeguarded by the courts. Without judicial recourse against wrongful exclusions/expulsions, CMA explained, physicians will never be able to truly and completely fulfill their professional obligations to their patients.
Outcome: On November 20, 2002, the California Court of Appeal, First Appellate District, Division One ruled in favor of CMA's position by properly interpreting Business & Professions Code §2056 to allow independent contractor physicians, as well as employed physicians, to assert its protection against retaliation for advocating for medically appropriate health care. The Court's opinion directly cites and agrees to CMA's requested interpretation of the law, expressly identifying CMA as the sponsor of this legislation and, again at CMA's request, taking judicial notice of the legislative intent of the statute. On

February 19, 2003, the California Supreme Court denied the hospital's petition for review and the case is now concluded.

O'Meara v Palomar Hospital — Initial CMA Participation: October 2002
(Physician's right to fair treatment in medical staff probation process/ Physician's right to advocate for appropriate medical care)

Issue: In O'Meara, a physician was placed on probation unilaterally by the medical staff for alleged "inappropriate comments" made to patients' families and other physicians on staff. There were no expressed concerns regarding the physician's quality of care, however. Dr. O'Meara alleges these comments constituted his advocacy for medically appropriate care.

The terms of probation required that the doctor make no more "inappropriate comments" or be subject to a Medical Executive Committee recommendation of complete termination of privileges and membership. Dr. O'Meara was not permitted formal hearing rights as to the imposition of probation, because the MEC deemed its actions merely "observational," and not affecting the physician's rights or privileges in any way. Dr. O'Meara sued in state court for money damages.

The MEC succeeded in getting the lawsuit dismissed because, it claimed, under California law one cannot sue for damages without first exhausting remedies (i.e., internal hearing rights and all internal appeals). In this case, said the MEC, because it really didn't "do" anything to Dr. O'Meara, there are no hearing rights, and he would have to wait for the MEC to "do" something, such as the threatened recommendation for termination to which would accrue hearing rights. Dr. O'Meara is appealing this ruling

On October 21, CMA filed an amicus curiae brief, in support of Dr. O'Meara in the California Court of Appeal, Fourth Appellate District, Division One. The CMA amicus brief argues (1) that Dr. O'Meara's rights were indeed trampled by the MEC, that his status was changed relative to all other members of the medical staff to "probation," (2) that his rights to advocate for necessary medical care were chilled due to the threat of the MEC to take action against him if it determined he "again" made "inappropriate comments" to anyone in the hospital, and (3) that the MEC suspended application of certain medical staff bylaw provisions as to Dr. O'Meara, specifically those permitting the MEC to take less drastic measures in case of a "repeat" of the alleged offending behavior, such as a formal letter of warning, or informal verbal or written letters of warning, or "other actions as deemed appropriate under the circumstances."

CMA argued that the physician has no internal remedies to exhaust, that the MEC's actions violate the anti-retaliation statute (Business & Professions Code §2056) and other case law requiring a physician's actions to be linked to concerns about his quality of care before a medical staff may taken an action based on his "inability to get along" with others.

Outcome: On December 2, 2002, the California Court of Appeal, Fourth Appellate District, Division One ruled in favor of Dr. O'Meara in an unpublished opinion. The Court stated that, based on the facts as they were plead by Dr. O'Meara, the hospital allegedly did not provide a process for Dr. O'Meara to meaningfully contest the charges, and therefore did not provide a "quasi-judicial process". Accordingly, the Court rejected the hospital's argument that the physician had not exhausted his remedies and was therefore barred from bringing a lawsuit. The case has been returned to the trial court to proceed on the merits.

Blau v. Catholic Healthcare West, Northridge Medical Center Medical Staff — Initial CMA Participation November 2002
(Physician's right to fair treatment in medical staff probation process)

Issue: In this case, a physician on staff was "barred from the premises" by hospital administration due to alleged disruptive conduct. The hospital informed the physician that the action was not based on the medical staff bylaws, was not a medical staff action, had nothing to do with the quality of his medical care, and did not require a report to the Medical Board under Section 805 nor a report to the national Practitioner Data Bank. For those reasons, the hospital offered him a hearing on the "barring from the premises" action it took, a hearing based in common law "fair procedure" rather than the usual hearing process reserved for physicians under the Business & Professions Code. The "fair procedure" hearing has gone on now for two and a half years.

While the physician was defending himself in the fair hearing, he also sued the hospital for money damages, which the court dismissed because he had not finished exhausting the procedures available to him within the hospital as the law usually requires. His lawsuit includes a claim for retaliation for advocating for necessary medical care under B&P Code Section 2056, a CMA-sponsored statute.

In November 2002, CMA filed an *amicus curiae* brief that argues that the physician should be excused from the exhaustion requirement when the remedy provided to him at the hospital level violates due process as a matter of law, and therefore he should be permitted to proceed with his lawsuit.

The brief states that:

(1) The Hospital alleged no rule or regulation by which it measured the physician's conduct for purposes of its action again

(2) The California Supreme Court case of *Miller v. Eisenhower Med. Ctr*. prohibits any allegedly "disruptive physician" fr

(3) The *Miller* case brings the conclusion that the notice and hearing procedures of the Business & Professions Code must

(4) The Hospital does not have the authority to discipline the physician given *Miller* and the Business & Professions Code

Outcome: The California Court of Appeal, 2nd District, Division One, ruled against the physician and in favor of the hospital in an *unpublished* opinion on February 27, 2003. The court noted that any legal requirement that a physician cannot be suspended from the medical staff without a showing of potential danger to patient safety under the Business & Professions Code applies only to the medical staff. Hospitals have a "dual structure," noted the appellate court, and the hospital administration has "separate duties and responsibilities" relative to the medical staff that justify the hospital administration's actions in this case. The court ignored any discussion whether the due process rights of the physician were violated, and whether the hospital administration had any duty to protect those due process rights separate and apart from the medical staff's obligations to do so.

On April 8, 2003, the physician filed a petition for review with the state Supreme Court. On May 21, 2003, the Supreme Court denied review. The physician has completed the hearing process imposed by the hospital. He may continue to pursue his case to the degree he exhausts his judicial remedies at the appellate level during the summer of 2003.

<u>Medical Staff of Ventura Community Memorial Hospital (San Buenaventura) vs. Ventura Community Memorial Hospital</u> (Medical Staff Self-Governance)

Initial CMA Participation: August 2003

Issue: This case involves issues of medical staff self-governance and the appropriate relationship between medical staffs and hospital administration. Weighing in on behalf of physicians, in August 2003, AMA and CMA filed an *amicus* brief backing the medical staff of Community Memorial Hospital in Ventura in its legal fight with the hospital administration. The brief urges the court to recognize a medical staff's legal right to operate as an organized and self-governing entity in the hospital, citing the need to ensure quality of care for patients.

The medical staff is suing the hospital administration for violating state laws requiring medical staff self-governance. The suit alleges that the administration usurped the medical staff's credentialing, standard setting, disciplinary, and quality assurance functions; refuses to recognize duly elected medical staff officers; unilaterally amended the medical staff bylaws; improperly interfered with the medical staff's efforts to review and update its bylaws; and illegally seized the medical staff dues fund totaling $250,000.

The hospital is arguing that the medical staff is not a separate entity under the law. The organized medical staff, it says, is just another department within the hospital, and as such lacks standing to sue the hospital.

CMA's brief, filed with the Superior Court in Ventura, discusses the many state and federal legal precedents that establish and reinforce a medical staff's position as a separate legal entity, and how that status permits it to best assure high-quality patient care. Under California law, medical staffs are responsible for setting patient-care standards, establishing and enforcing medical staff membership standards, and ensuring that patients obtain quality care through continuous peer review and evaluation. The brief argues that "there is no question that, under California law, a hospital medical staff has standing to enforce its legal rights.

Outcome: The trial court has ruled that a hospital medical staff has standing to enforce its legal rights. In October 2003, the board of Community Memorial Hospital in Ventura asked for and accepted the resignation of the hospital's executive director. In September, 2004, a settlement was reached between the medical staff and the hospital, resulting in dismissal of the lawsuit.. The settlement was very favorable to the medical staff, and included the following points:

- The medical staff, hospital administration and board of trustees must comply with the provisions of the medical staff bylaws, including those providing for medical staff elections and leadership; the proper conduct of peer review, credentialing and privileging by the medical staff; and the general rights and responsibilities of the medical staff;
- The hospital governing body may not unreasonably withhold approval of medical staff bylaw amendments adopted by the medical staff;
- The medical staff bylaws may not be changed unilaterally by the hospital administration;
- The medical staff dues fund of $250,000, which was confiscated by the hospital administration prior to the litigation, will be returned to the medical staff for its exclusive use;
- The medical staff has the right to obtain its own independent legal counsel, even to take action against the hospital, paid for by its own dues and assessments;
- Input from the medical staff will be sought prior to the creation, renewal or termination of an exclusive contract within the hospital;
- A conflicts resolution process must be implemented to resolve disputes or controversies arising out of the settlement agreement;
- The medical staff agrees not to become incorporated under IRS regulations as an entity separate from the hospital before two years from the date of the settlement agreement or before any material breach of the settlement agreement by the hospital, whichever occurs first;
- The hospital will dramatically increase its funding to the medical staff budget to pay for leadership development, medical education, and other medical staff expenses including small stipends for administrative work required of medical staff leaders in assuring the quality of care;
- External review will take place by an expert agreeable to both the medical staff and the hospital administration of the hospital's Prostate Institute of America, and the procedures it employs involving freezing of the prostate in prostate cancer cases;

The settlement proposal also provides that the medical staff agrees to add to its medical staff bylaws provisions regarding disclosure of potential conflicts of interest by medical staff members, a "code of

conduct" for medical staff members, and the scope of use of monies contributed to the medical staff fund by the hospital.

Arising from this case, CMA was also successful in passing SB 1325 (Kuehl, Stats. 2004, Ch. 669). This legislation codified six basic elements of medical staff self governance and provided the right of the medical staff to obtain a court order to stop any hospital interference with the self governance rights of the medical staff if other reasonable efforts to resolve the dispute have failed. The six minimum self governance rights include:

1. Creating and amending medical staff bylaws. (Although all bylaw changes are subject to approval by the hospital governing body, the governing body cannot unreasonably withhold its approval.);

2. Establishing and enforcing criteria for medical staff membership and privileges;

3. Establishing and enforcing quality of care and utilization review standards, and overseeing other medical staff activities, such as medical records review and meetings of the medical staff and its committees;

4. Selecting and removing medical staff officers;

5. Collecting and spending medical staff dues;

Hiring independent legal counsel, at the expense of the medical staff.

MEDI-CAL & MEDICARE

Cassim v. Bowen
(suspension from Medicaid program prior to hearing does not deprive physician of due process)

Issue: In this case, a physician brought an action to enjoin his suspension from the Medicare program, prior to being given a full hearing. On September 25, 1986, the CMA filed an *amicus curiae* brief with the U.S. Ninth Circuit Court of Appeals, arguing that federal courts have jurisdiction to determine whether a private company and the federal Department of Health and Human Services Office of the Inspector General violated a physician's rights in excluding him from the Medicare program. CMA further argued that the terms "gross and flagrant" as applied in PRO sanction cases are unconstitutionally vague.

Outcome: Unfortunately, the Ninth Circuit Court of Appeals ruled that the physician did not have a due process right to a predeprivation hearing, and that a postdeprivation hearing to be held some four or five months after the beginning of the suspension would not deprive the physician of due process. The Court's decision may be found at Cassim v. Bowen (9th Cir. 1987) 824 F.2d 791.

Antioch Medical Park v. Department of Health Services Initial CMA Participation: June 1988
(Medi-Cal recoupment activities must ensure a fairly calculated amount)

Issue: This case involved the issue of whether physicians who have continued to provide services in the Medi-Cal program may be subjected to the potential of large recoupments based on a statistical sampling method for which there is no statutory or regulatory authority and which, as applied to physician services, cannot reasonably be expected to be accurate. On June 13, 1988, CMA filed an *amicus curiae* brief with

the Sacramento Superior Court, urging the Court to rule that the Medi-Cal recoupment activities must be authorized by law and must contain sufficient safeguards to ensure that the amount of recoupment is fairly calculated.

Outcome: The case was settled out of court, and in CMA's favor. This case is not published.

Melashenko v. Bowen
(bounty system in place at OIG deprives physicians of due process rights)

Issue: In this case, Dr. Melashenko was excluded from participating in the Medicare program. On September 18, 1989, the CMA filed an *amicus curiae* brief with the U.S. District Court, Eastern District of California, asking the Court to consider the bounty system in place at the OIG when ruling on a physician's challenge to a sanction determination.

Outcome: The U.S. District Court issued a Temporary Restraining Order prohibiting the Department of Health and Human Services from suspending or excluding Melashenko pending administrative review of the decision to exclude him. On June 19, 1990, the U.S. District Court found that the merit pay/bounty system in place at the OIG deprived Melashenko of his due process rights because it created a pecuniary interest in deciding against Melashenko. The Court granted Melashenko's request that his exclusion from the Medicare program be vacated and that the OIG be permanently enjoined from excluding him from the Medicare program based on this matter. Although the court did not accept CMA's AC brief, the court permanently enjoined the OIG from "awarding merit pay to a pre-exclusion due process hearing decision maker if the merit pay was based on the outcome of the decision," based on the evidence of that system discovered by CMA attorneys in Greene v. Bowen. The Court's decision is unpublished.

Grier v. Kizer (DHS)
(statistical extrapolation in Medi-Cal audits illegal in the absence of regulation)

Issue: In this case, Dr. Grier filed a petition for writ of administrative mandamus challenging the DHS's audit of his Medi-Cal reimbursement claims on the grounds that the method utilized violated the Administrative Procedure Act (APA). On November 8, 1989, CMA filed an *amicus curiae* brief with the California Court of Appeal, 2nd Dist. in support of Dr. Grier. In the brief, CMA asked the court to invalidate the DHS's use of statistical extrapolation and sampling for alleged Medi-Cal overpayments without complying with the APA.

Outcome: The Court of Appeal affirmed the lower court's decision in favor of Dr. Grier and agreed with the CMA that the DHS audit method in this case violated the APA. The Court of Appeal's decision in this case can be found at Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, rev. denied June 21, 1990.

Dowling, et al. v. Davis
(provider claims do not need to be paid during budget impasse)

Issue: In this case, plaintiffs charged that defendants' refusal to pay claims by Medi-Cal providers and suppliers, during periods when there was a state budgetary impasse, violates due process and federal statutory provisions governing Medicaid such as those requiring timely payment. On July 19, 1990, a preliminary injunction was issued requiring defendants to pay provider claims during the budget impasse. The plaintiffs sought declaratory judgment and a permanent injunction requiring defendants to pay Medi-Cal claims. On July 25, 1990, CMA filed an *amicus curiae* brief with the Court of Appeals arguing that the lower court properly applied the standards for granting a preliminary injunction against the withholding of payments, and properly prohibited the withholding of payments to providers; and asked for re-establishment of regular Medi-Cal payments. CMA urged that the State's request for a temporary stay of the injunction be denied. On January 24, 1992, CMA filed another amicus curiae brief before the federal District Court, arguing that neither a state's failure to appropriate adequate funds during a budget

year nor the state's failure to adopt a budget may be used as an excuse to alter a change in the operation of the Medi-Cal program and its funding commitments pursuant to federal law. On July 29, 1992, a federal district judge dissolved the injunction, and the dissolution was appealed to the Court of Appeals for the Ninth Circuit. On August 7, 1992, CMA filed an amicus brief with the Court of Appeals, asking the Court to continue the stay (which would have then required the State to continue writing checks to providers).

Outcome: On August 13, 1992, the Court denied the petition for a stay. On March 18, 1994, the Court affirmed the federal district court's order of dissolution. The Court explained that the lower court properly concluded that the state complied with the time constraints of federal Medicaid law, and therefore, properly entered judgment vacating the preliminary injunction. The Court's decision may be found at Dowling, et al. v. Davis (9th Cir.1994) 19 F.3d 445.

Mahnke v. Department of Health Services In
(CMA supports a physician's claim for reimbursement from Medi-Cal)

Issue: This case involved a physician's complaint against the Medi-Cal reimbursement system. On April 5, 1991, CMA filed a declaration of support for Dr. Mahnke. The declaration supports Mahnke in his request for attorney's fees in a small claims appeal of an award of Medi-Cal reimbursement. In the declaration, CMA argued that small claims court often provides the only reasonable avenue for challenging unfair payment denials, an avenue that would become illusory if the DHS is permitted to continue to appeal small claims court judgments without being held accountable for the physician's attorney's fees when it loses.

Outcome: The judge was clearly shocked at hearing the process doctors must go through to obtain reimbursement. "It is my conclusion that the current Medi-Cal system, as it is set up, is designed to frustrate physicians' attempts to obtain reimbursement for their services, to delay that reimbursement for as long as possible, and to create a system where the first error will also be carried through all the appellate processes so that further levels of reviews are a farce and meaningless." On June 21, 1991, the court awarded Dr. Mahnke reimbursement in five cases, and attorney's fees in the amount of $7,000.00. This decision is not published.

Department of Health Services (DHS) v. Physicians and Surgeons Laboratories, Inc.
(CMA seeks to protect physicians from unfair DHS administrative practices)

Initial CMA Participation: July 1992

*Issue:*This case concerns an independent clinical laboratory, Physicians and Surgeons Laboratories, Inc., who petitioned fo
Court requesting depublication. In the letter, the CMA urges the court to depublish the opinion of the lower court, which failed to prevent DHS from improperly interpreting Medi-Cal billing regulations and/or arbitrarily altering current interpretations without complying with the Administrative Procedures Act (APA).

Outcome: The Supreme Court regrettably declined review. The Court of Appeal's decision can be found at Physicians and Surgeons Laboratories, Inc. v. Department of Health Services (1992) 6 Cal.App.4th 968, 8 Cal.Rptr.2d 565.

Frankel v. Kizer Initial CMA Participation: July 1993
(money owed to the DHS under unlawful audit methodology)

Issue: In this case, the defendant physician, a member of the California Medical Association, was forced to pay $173,000 to the Department of Health Services in 1988 based upon the sampling and extrapolation audit methodology utilized by the DHS under the Medi-Cal program, which was determined to be unlawful in the case of Grier v. Kizer (1990) 219 Cal.App.3d 422. On July 1, 1993, CMA filed an amicus

brief with the California Court of Appeal, arguing that the money recouped pursuant to the unlawful statistical extrapolation policy must be repaid to the physician.

Outcome: Regrettably, the Court of Appeal affirmed the DHS' finding that the physician did not file his writ petition within the applicable statute of limitations and thus was barred from recovering any money owed. The Court's decision may be found at Frankel v. Kizer (1993) 21 Cal.App.4th. 743, 26 Cal.Rptr.2d 268.

PEER REVIEW

Garcia v. Truck Insurance Exchange Initial CMA Participation: June 1983
(CMA advocates for broad interpretation of hospital peer review insurance policies)

Issue: In this case, the assignees of a physician's rights under a malpractice policy issued to the hospital association brought an action against the malpractice insurer seeking to satisfy a judgment obtained against physician. CMA filed an *amicus curiae* brief on June 23, 1983, in the California Supreme Court on behalf of the plaintiff-respondent, Garcia. CMA asked the court to recognize that public interest demands that the commendable efforts of hospitals to provide insurance for the uncompensated quality assurance activities performed by the members of the medical staff be supported. Further, the CMA argued that there is a distinct, important difference between those activities and action taken (or not taken) by a physician in the treatment of his/her own patients.

Outcome: Regrettably, the Supreme Court affirmed the appellate court's judgement in favor of the defendant-appellant, stating that the physician was precluded from coverage under an exclusionary provision of the policy. This opinion can be found at Garcia v. Truck Ins. Exchange (1984) 36 Cal.3d 426, 204 Cal.Rptr. 435.

Clarke v. Hoek (Mendocino Community Hospital) Initial CMA Participation: February 1985
(physician proctoring for the purpose of peer review not subject to liability)

Issue: This case involved an action brought by a patient against a physician who proctored two surgical operations performed on the patient by another surgeon. On February 12, 1985, CMA filed an *amicus curiae* brief with the California Court of Appeal, 1st Dist. in which CHA joined. In this brief, CMA asked the Court to rule that a physician who, without compensation, observes a surgical procedure for the sole purpose of assessing a provisional medical staff member's competence cannot be subject to liability for failing to intervene in that surgery.

Outcome: Consistent with CMA's position, the Court of Appeal affirmed the lower court's judgment in favor of the physician. The Court ruled that the physician and patient had no special relationship warranting an imposition of a duty on physician such that the physician could be liable for inaction towards the patient. The Court also ruled that the physician's proctoring of the patient's operation was not a voluntary undertaking which imposed a duty of care upon the physician. Further, the Court stated that imposing a duty of care on the physician would be contrary to the strong public interest in encouraging medical peer review activities. This opinion may be found at Clarke v. Hoek (1985) 174 Cal.App.3d 208, 219 Cal.Rptr. 845.

Gannon v. Santa Ana-Tustin Community Hospital Initial CMA Participation: October 1985
(peer review immunity)

Issue: In this case, an anesthesiologist brought an action against the hospital, its executive director, and physician members of the peer review committee, challenging the alleged de facto suspension, actual suspension, and post-reinstatement based on discrimination. On October 18, 1985, CMA filed an *amicus*

curiae brief with the California Court of Appeal (4th Dist.) arguing that the Hospital, based on the actions of individuals, cannot be liable for punitive damages if the individual defendants are immune from liability under Civil Code §43.7. The purpose of this conditional immunity is to protect those individuals who comply with the law, The brief also argued that a physician who is incompetent shouldn't be able to recover damages resulting from an action adversely affecting that physician's staff privileges. On May 15, 1989, CMA filed a letter with the California Supreme Court requesting a partial depublication of the appellate court opinion involving recoverable damages for the physician's wrongful exclusion from a medical staff.

Outcome: The Court of Appeal ruled that the burden of proof with respect to conditional immunity issue was the responsibility of the anesthesiologist and that the anesthesiologist had to prove that the suspension was without probable cause before she could recover. The case was depublished by the California Supreme Court.

Bonner v. Sisters of Providence Corporation Initial
(upheld the medical staff privileging process)

Issue: This case involved a physician who challenged the decision of hospital-related medical entities to revoke his provisional nephrology privileges at the hospital. The Alameda County Superior Court granted the physician's writ and ordered the reinstatement of provisional nephrology privileges. On December 8, 1996, CMA joined with CHA to file an amicus curiae brief with the California Court of Appeal, 1st Dist. CMA's brief argued that the lower court inappropriately mixed and muddled the evidence adduced through two diverse administrative procedures (hospital peer review and a Medical Board hearing). The lower court ruling thus created serious questions regarding the defined role of the hospital board of directors and the organized medical staff in monitoring medical staff privileges. CMA argued these factors will place a chilling effect upon physicians' willingness to participate in peer review.

Outcome: The Court of Appeal reversed the lower's court decision and denied the physician's petition. The Court ruled that BMQA proceedings were not relevant to the issue of doctor's ability or fitness to comply with or meet hospital-related standards for medical staff privileges, and thus were not admissible in the peer review hearing. This case establishes the precedent that hospital medical staffs may set standards of its own, separate and apart from those utilized by the Medical Board, to assure the maintenance of high quality medical care delivered by its physicians. This appellate decision may be found at Bonner v. Sisters of Providence Corp. (1987) 194 Cal.App.3d 437, 239 Cal.Rptr. 530, review denied Nov. 10, 1987.

Patrick v. Burget, et al.
(CMA defends peer review process)

Issues: In this case, the petitioner, Dr. Patrick, declined an invitation by respondents to join them as a partner in the Astoria Clinic, and instead began an independent practice in competition with the Clinic. Thereafter, petitioner experienced difficulties in his professional dealings with Clinic physicians, culminating in respondents' initiation of, and participation in, peer-review proceedings to terminate the petitioner's privileges at Astoria's only hospital (a majority of whose staff members were employees or partners of the Clinic), on the ground that his care of his patients was below the hospital's standards. Petitioner filed suit, alleging violations of the federal antitrust laws and interference with prospective economic advantage under Oregon law. CMA along with CAHHS and BMQA filed an amicus curiae brief with the U.S. Supreme Court in support of the respondents, arguing that the peer review process is state-mandated and identifying the unique and essential characteristics of that process as it has developed over the last 50 years.

Outcome: On May 16, 1988, the Supreme Court reversed and remanded the Court of Appeals decision, disagreeing with CMA, and finding for the petitioner, Dr. Patrick. The Court's opinion stated that the

state action doctrine did not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees. The opinion in this case can be found at Patrick v. Burget (1988) 486 U.S. 94, 100 L.Ed.2d 83.

Gill v. Mercy Hospital and Sywak v. O'Connor
(CMA advocates for physicians' peer review fair hearing rights)

Initial CMA Participation: April 1988

Issue: These two cases dealt with issues surrounding inappropriate peer review protocols. The Court of Appeal, Fifth Dist., found for the hospitals in both cases, noting that the hospitals provided the physician plaintiffs in both cases with a fair peer review forum. On April 28, 1988, CMA filed briefs in both Gill and Sywak in the California Supreme Court, asking the court to either decertify the opinions in these cases or grant a hearing and rule that for a "fair hearing", all evidence against a physician must be made available to him or her, the physician must have legal counsel, the medical staff has the burden of proving the charges, and a prosecution witness cannot consult with the judicial review committee after the hearing.

Outcome: The Court ordered Sywak not to be published, but the request to decertify Gill was denied. The appellate decision for Gill can be found at Gill v. Mercy Hosp. (1988) 199 Cal.App.3d 889, 245 Cal.Rptr. 304.

Silverman v. St. Rose Hospital
(CMA advocates for fair hearing rights in the medical staff privileging process)

Issue: This case involved a physician's attempt to obtain access to the only hospital in the area in which he could care for Medi-Cal patients. The first issue was whether the hospital could deny access without giving the physician a reasonable opportunity to refute the accusation that he was incapable of providing quality medical care. The second question was whether the physician, after being denied the fundamental requisites of a fair hearing, must nonetheless go though the administrative hearing process before seeking court relief. On January 4, 1988, the CMA filed an *amicus curiae* brief with the Alameda County Superior Court, arguing that it is crucial to the continuing viability of peer review that the process be fundamentally fair and devoted to the promotion of quality patient care. On November 23, 1988, the CMA filed a more detailed brief with the California Court of Appeal, lst Dist. In this brief, the CMA asked the court to rule that a physician must receive a notice of charges, all evidence against the physician must be made available, the burden of proof is on the medical staff to prove the charges, the accused can question the hearing officers, and there is no need to exhaust administrative remedies where the hospital stonewalls.

Outcome: The Court refused to take jurisdiction and render a decision, stating that procedural questions, if any, must be addressed after completion of peer review proceedings.

Austin v. McNamara, et al.
(CMA fights for appropriate peer review)

Issue: In this case, a neurosurgeon brought an antitrust action against a hospital and the physicians who participated in the professional review action against him. On September 10, 1990, CMA filed an *amicus curiae* brief in the 9th Circuit Court of Appeals in support of respondent-hospital McNamara, et al. The CMA's brief stressed the importance of vigorous medical staff peer review, citing numerous relevant federal and state laws mandating peer review and providing immunities for peer reviewers. The CMA further noted that the public's interest in receiving quality care through effective peer review outweighs the interest protected by antitrust laws; without adequate judicial and statutory protection from this type of lawsuit, the peer review process is inevitably weakened.

Outcome: The Court of Appeals agreed with CMA's position and affirmed the lower court's decision in favor of McNamara, et al. This case can be found at Austin v. McNamara (9th Cir. 1992) 979 F.2d 728.

Rosenblit v. Fountain Valley Regional Hospital and Medical Center
(ruled that physician was denied a fair hearing concerning medical staff privileges)

Initial CMA Participation: November 1990

Issue: This case involved a physician who sought to compel a hospital to reinstate his medical staff membership and clinical privileges. On November 6, 1990, the CMA filed an *amicus curiae* brief with the California Court of Appeal Brief to point out how the procedure afforded Dr. Rosenblit violated fair hearing requirements. The CMA also gave reasons why the record in this case did not permit effective judicial review under the substantial evidence test. Finally, the CMA stressed that the ramifications of this case went far beyond the parties and ultimately would have a bearing on the quality of care enjoyed by the people of California. On August 30, 1991, the CMA filed a letter with the California Supreme Court in opposing the hospital's/hospital association's petition for review/request for depublication. This letter stated that the appellate opinion was a correct statement of law and a reminder that gross unfairness in peer review hearings would not be tolerated.

Outcome: The Court of Appeal agreed with CMA and ruled that the physician was denied a fair hearing. The California Supreme Court denied the petition for review. The appellate opinion can be found at Rosenblit v. Superior Court (Fountain Valley Regional Hosp. & Med. Ctr.) (1991) 231 Cal.App.3d 1434, 282 Cal.Rptr. 819, review denied Sept. 19, 1991.

Mir v. Charter Suburban Hospital — Initial CMA Participation: December 1991
(fair peer review hearing)

Issue: In this case, both the trial and appellate courts overturned a hospital's restriction on Dr. Mir's privileges as not supported by substantial evidence. On December 30, 1991, the CMA filed a request for publication of opinion with the California Court of Appeal (2nd Dist.). Also on December 30, 1991, the CMA filed a letter with the California Supreme Court in support of the Dr. Mir's opposition to the hospital's petition for review. The CMA argued that the appellate court's decision promoted fair peer review proceedings to the benefit of patients and physicians. The appellate court had ruled that a board certified thoracic surgeon summarily suspended by the hospital must be reinstated because the disciplinary action taken was not supported by substantial evidence. The California Supreme Court denied the petition for review, but did not publish the decision. Following the resolution of the appeal, Dr. Mir filed a motion in the trial court for an order awarding attorney fees under Business and Professions Code §809.9. On March 18, 1993, the CMA filed an *amicus curiae* brief with the California Court of Appeal (2nd Dist.), arguing in support of Dr. Mir's appellate affirmation of the trial court's awards to him, as well as showing that Business and Professions Code §809.9 provides a necessary deterrent to the abuse of the peer review process by either side. On September 15, 1994, the CMA filed a letter with the California Court of Appeal (2nd Dist.), in support of rehearing/reconsideration. The letter requested that the Court review its interpretation of Business & Professions Code §809.9, and rule that attorney fees be awarded when a trial rules there was no substantial evidence supporting the disciplinary action.

Outcome: Unfortunately, a rehearing was denied, as well as review. The Court's decision ruling that physicians may recover attorneys fees pursuant to Business & Professions Code §809.9 only if physician proves that the hospital action in defending against the petition for writ of mandate was unreasonable or without foundation beyond the lack of substantial evidence to support the discipline, may be found at Mir v. Charter Suburban Hospital (1994) 27 Cal.App.4th 1471, 33 Cal.Rptr.2d 243.

Manion v. Evans, et al.
(HCQIA's immunity extends only to damages liability)

Issue: In this case, physicians brought an antitrust action against members of the hospital's peer review committee. On July 21, 1992, the CMA filed a neutral *amicus curiae* brief with the Sixth Circuit Court of Appeals, pointing out the legislative intent underlying the Health Care Quality Improvement Act and the applicability and history of HCQIA. The brief argued that as HCQIA's immunity provides sweeping protection from almost all federal and state laws, it must be construed carefully, in order to prevent peer review abuse.

Outcome: On February 26, 1993, the Sixth Circuit Court of Appeals became the second U.S. Court of Appeal to rule that the HCQIA's immunity for defendants is not an immunity from being sued, but rather is an immunity from damages only. This ruling comports with CMA's understanding of the law, as set forth in CMA's AC brief, in which the AMA and the Ohio State Medical Association joined. Subsequently, the case was dismissed. The Court of Appeal's decision may be found at Manion v. Evans et al. (6th Cir.1993) 986 F.2d 1036.

Fobbs v. Holy Cross Health System Corporation Initial CMA Participation: September 1992
(statute of limitations is not tolled while Office of Civil Rights investigates race discrimination claim)

Issue: In this case, the physician sued the hospital and members of the peer review committee after his suspension, alleging civil rights violations and violations of the Sherman Antitrust Act. The issue was whether the defendants were protected by the immunity provided for peer reviewers under the Health Care Quality Improvement Act, and if so, how the applicability of that immunity is to be decided. On September 11, 1992, CMA, joined with the AMA, filed a neutral amicus curiae brief with the U.S. Ninth Circuit Court of Appeals urging that there be an immunity provided to physicians who participate in legitimate peer review activities, in order to protect them from the time and expense associated with defending against unfounded lawsuits, particularly those based upon the federal antitrust laws. The brief further explained that there should be safeguards in the statute in order to guard against peer review abuse.

Outcome: The Ninth Circuit Court of Appeals ruled that Dr. Fobbs' antitrust claims were barred by the statute of limitations, thus rendering the HCQIA issues moot. This case may be found at Fobbs v. Holy Cross Health System Corp (9th Cir. 1994) 29 F.3d 1439.

Walter J. Ledergerber, M.D. v. Fountain Valley Regional Hospital and Medical Center
(CMA protects physicians from unfair peer review practices)

Initial CMA Participation: May 1995

Issue: This case involved the summary suspension of Dr. Ledegerber from the staff of Fountain Valley Regional Hospital and Medical Center. The Court of Appeal regrettably upheld Dr. Ledergerber's suspension, but declined to publish the opinion. Subsequently, the Hospital filed a letter with the court requesting publication. On May 2, 1995, CMA filed a letter with the California Supreme Court that strongly urged the court not to certify the opinion for publication. CMA argued that the opinion relied extensively on common-law principles regarding fair hearings which have since been substantially modified by the CMA-sponsored fair hearing legislation, SB1211. Further, CMA pointed out that this opinion relies extensively upon medical staff bylaws provisions which do not conform to the requirements of the new fair hearing statute.

Outcome: On July 28, 1995, the Supreme Court agreed with CMA and denied the Hospital's request for publication. This case remains unpublished.

Oskooi v. Fountain Valley Regional Hospital and Medical Center

(CMA fights to uphold California's requirement for fair peer review hearings)

Initial CMA Participation: April 1996

Issue: In this case the respondent-hospital summarily suspended the appellant, Dr. Oskooi, for omissions from his medical staff application. On April 2, 1996, CMA filed a request with the California Supreme Court to depublish the decision in this case, arguing that the opinion fails to reflect the enactment of CMA-sponsored Senate Bill 1211, Chaptered as California's peer review fair hearing statutes under Business & Professions Code §§809 *et seq.* B&P §§809 requires that hospitals and their medical staffs adopt and incorporate into the medical staff bylaws very specific fair hearing mechanisms. Accordingly, although not yet enacted when the relevant dispute occurred, B&P §§809 *et seq*. is binding to all peer review disputes on or after January 1, 1990, and mandates a result different from that reached in this case.

Outcome: The Supreme Court regrettably denied CMA's request for depublication. This case can be found at Oskooi v. Fountain Valley Regional Hosp. (1996) 42 Cal.App.4th 248, 49 Cal.Rptr.2d 769, rev. denied April 25, 1996.

Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, et al.
(CMA fights to uphold California's requirement for fair peer review hearings)

Initial CMA Participation: May 1997

Issue: In this case the hospital-respondent removed the doctor-appellant from an on-call panel because he allegedly refused to deliver a high-risk pregnant patient in labor. On May 22, 1997, CMA filed an *amicus curiae* brief with the California Court of Appeal, Second Appellate District, in support of the Dr. Hongsathavij, arguing that the hospital ignored the decision of a Judicial Review Committee that had exonerated him. If the Judicial Review Committee's decision was supported by substantial evidence, CMA reasoned, Dr. Hongsathavij should be reinstated. CMA pointed out that if a medical staff refuses to prosecute a physician, a hospital board may not, consistent with fairness, both prosecute the physician and then hear the hospital's own appeal from that prosecution.

Outcome: On March 2, 1998, the Court unfortunately upheld Dr. Hongsathavij's removal. This decision can be found at Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center (1998) 62 Cal.App.4th 1123, 73 Cal.Rptr.2d 695.

Pancoast v. Medical Staff of Sharp Memorial Hospital
(CMA Supports Physician's Rights to Fair Peer Review)

Initial CMA Participation: January 2004

Issue: In this case, a physician was summarily suspended from a hospital medical staff despite the fact that she was on a voluntary leave of absence and was not admitting or treating patients at the hospital. Dr. Pancoast successfully obtained a trial court order that her privileges be restored. The hospital has petitioned the state Court of Appeal to reverse the trial court's ruling.

According to state law, Business & Professions Code §809.5 summary suspension—the abrupt suspension of a physician's hospital privileges without first providing a fair hearing—should only be imposed when a physician poses an "imminent danger" to patient's health and safety. In the *amicus curiae* brief filed CMA, it argued that hospitals must not be allowed to deny physicians their legal right to due process by ignoring the legal standard, and summarily suspending physicians whose conduct does not pose an imminent danger to patients. Instead, the hospital and medical staff should be required to provide a notice of charges and opportunity for a hearing as required by the law, and the physician's privileges and membership should be unaffected during that process.

On January 6, 2004, CMA filed an *amicus curiae* brief in the Court of Appeal in support of the physicians' fundamental rights to fair peer review hearings and procedures.

Outcome: On July 30, 2004, the appellate court ruled in favor of the medical staff. It ruled that the grounds for summary suspension contained in the statute, "imminent danger to the health of any individual," does not require imminent danger to identifiable or current patients of a physician. Rather, the statute authorizing summary suspension protects *prospective* as well as current/identified patients. The court stated that public safety would not be served if the peer review body were required to name specific threatened patients before it could take action to summarily suspend a physician. In this case, the court stated that the facts showed the physician's administrative leave was ending and that the medical staff reasonably believed she intended to see patients again. Therefore, the court stated that the medical staff couldn't be faulted for resolving all doubt as to the physician's mental condition in favor of patient safety by summarily suspending her.

Weinberg v. Cedars-Sinai Medical Center
(Level of Deference Governing Bodies Must Afford to Medical Staff Peer Review Determinations Upon Internal Review)

Initial CMA Participation: April 2004

Issue: In this case, Dr. Weinberg was brought up on peer review charges for both quality and behavioral issues. After many hours of testimony and many days of hearing, the hearing panel voted 4-2 that he should be referred to the Well-being Committee for evaluation and accept whatever recommendations the Committee decides. Ultimately, the governing body disagreed, however, and terminated Dr. Weinberg's membership and privileges. The question this case raises is: what kind of deference must the governing body give to the medical staff's *recommendation* for discipline in peer review cases?

In this case, the Cedars' Medical Staff Executive Committee reviewed the hearing panel's decision and agreed to referral to the Well-being Committee.

Dr. Weinberg also agreed to the referral to the Well-being Committee, and did not appeal. Upon review by the governing body, however, it sent the case back to the MEC for "re-review" due to concerns the MEC had not looked at the case correctly. The MEC reconfirmed its position that the referral to the Well-Being Committee was appropriate. The governing body disagreed, voted in line with the "minority" of the hearing panel's members to terminate Dr. Weinberg's privileges. Dr. Weinberg took his case to court.

In this case, the governing body did not dispute the *factual findings* of the medical staff after a hearing, i.e., that Dr. Weinberg had both quality and behavioral problems that need to be addressed. Instead, the governing body disagreed with the peer review body's *recommendation* to send him to the Well-being Committee.

The Business & Professions Code requires that the governing body must give "great weight" to the actions, i.e., recommendations, of the peer review body. (Business & Professions Code §809.05(a).) Cedars and the California Healthcare Association (as amicus) argued that this standard merely requires the governing body to provide "serious and thoughtful consideration" to the action of the peer review body before deciding what it wants to do with the peer review disciplinary recommendation. In its amicus brief, CMA argues that the term "great weight" requires the governing body to accept the recommended discipline of the medical staff unless the recommended discipline is "clearly erroneous," in other words "evinces a manifest abuse of discretion" on the part of the medical staff.

Both the hospital and CHA argued extensively that the corporate liability theory of *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 183 Cal.Rptr. 156, is grounds for hospitals to be given great leeway to modify medical staff disciplinary recommendations. The *Elam* case determined that if the *hospital corporate body* is negligent in assuring that its medical staff quality processes operate correctly, and a patient is later harmed by a physician as a result of the corporate body's negligence in this regard, then the

hospital may be liable in its own right for negligence in overseeing the medical staff. In this case, Cedars argued that retaining Dr. Weinberg on staff in light of the quality and behavioral concerns found to be true after hearing could result in a potential future *Elam* liability for the hospital. Therefore, Cedars argued, it should be given great leeway to reverse a peer review determination of the medical staff. CHA further argued further that the already ailing hospital industry in California could be further devastated by an increased number of *Elam* cases if the court in this case did not grant the governing body such leeway.

CMA argued in its amicus brief that the *Elam* considerations in cases such as this one are bogus. First, *Elam* cases arise only when the medical staff *fails* to do its duty, not when the medical staff actually performs its obligations. Secondly, CMA argued that, while the physician is given the right to defend against charges in a peer review matter, it is *impossible* for the physician in that same hearing to defend against governing body fears of possible corporate liability in some potential future malpractice case.

Outcome: On May 28, 2004, the appellate court ruled in favor of Cedars. Specifically, the hospital governing body is required to give "due weight" to the hearing committee's evidentiary findings involving medical expertise, but is properly entitled to exercise its own judgment *about* the evidence, i.e., about what actions should be taken based on the evidence. Thus, the governing body may reject the inferences that the hearing committee draws from its findings and which support its recommendations to the governing body, and instead the governing body may substitute its own inferences and derive a completely different final decision of the fate of the physician.

La Follette v Main General Hospital/ Sutter Health
(Failure to Provide Requested Peer Review Hearing After Summary Restriction of Privileges)

Initial CMA Participation March 2005

Issue: This case involves the appropriate consequences to a hospital for its failure to adhere to the peer review process rules and deadlines set by statute and by medical staff bylaws.

In this case, the physician involved in the case has practiced over a decade in Marin County, delivering over 1500 babies to that community. In mid-2004, the medical staff summarily imposed a proctoring requirement on the physician's privileges in which she was required to have another physician present for all deliveries for a six-month period. The medical staff reported the restriction to the Medical Board and the National Practitioner Data Bank. It also failed to provide her with a hearing as requested. The physician successfully completed her proctoring period and she now sues to have the discipline voided in every way, including expunction of the MBC and Data Bank reports, prohibiting against any further discipline based on any alleged evidence related to the proctoring restriction, and for monetary damages incurred.

On March 16, 2005, CMA filed an AC Brief is support of the physician. CMA brief argues that hospitals bear the burden of proof in disciplinary cases such as this case and if the hospital fails to come forth with charges and proof within the time prescribed, it is reasonable to presume as a matter of law that any charges the hospital might have brought are without merit so that the discipline should be voided. CMA's position is based on the legislative history, statutory language and due process rights.

Outcome: In May 2005, the Marin County Superior Court agreed with CMA and ordered Marin General Hospital to expunge all charges and records in a physician disciplinary case because the hospital failed to provide the physician with a peer review hearing. In its ruling, the court stated: "The ongoing requirement that the plaintiff forever report this discipline that she could not contest is a real injury which injunction can remedy."

Payne v Anaheim Memorial Medical Center **Initial CMA Participation: June 2005**

(Application of Unruh Anti-Discrimination law to medical staff physicians; application of exhaustion of remedies requirements.

Issue: In this case, Dr. Payne sued the hospital for money damages for racial discrimination prohibited by the state's Unruh Act, and for emotional distress. The hospital sought dismissal based on the physician's failure to exhaust internal remedies. (Because the court had to determine if the exhaustion requirement applied to bar the suit, the appellate court analyzed the question based solely on the facts *alleged by the physician in the civil complaint*.) The court found no exhaustion requirement exists because the hospital did not offer any internal remedy for the nature of the wrongdoings alleged in the complaint. Therefore, the lawsuit was not dismissed. Further, the court ruled *for the first time* that the Unruh Act's anti-discrimination provisions apply to protect independent contractors such as physicians on a medical staff.

On June 14, CMA filed a letter brief in the case, asking that the case be published. In CMA's view, the principles and reasoning underlying the court's opinion would benefit the medical profession in California if the case was citable in future cases.

Outcome: On June 27, 2005, the Court of Appeal granted CMA's request for publication. On August 8, 2005, the hospital asked the California Supreme Court to review the lower court's ruling. On October 21, 2005, the Supreme Court denied this request and the case is now final.

PEER REVIEW—CONFIDENTIALITY

Fox v. Kramer Initial CMA Participation: October 1999
(Confidentiality of Medical Staff Peer Review Records)

Issue: This case involves issues surrounding the confidentiality of peer review records and discussion at peer review committee meetings (Evidence Code §1157). On October 21, 1999, CMA filed an *amicus curiae* brief on behalf of the California Medical Association and California Healthcare Association to address two issues: 1) Can a state agency investigator can be compelled to disclose medical staff peer review information which is insulated from discovery and compelled testimony by Evidence Code Section 1157; and 2) can a person who is not a member of the medical staff peer review committee volunteer to testify as to the committee's deliberations, even when that person's participation in those proceedings is predicated on that person's prior agreement not to do so.

In this case, the plaintiff's husband was on the medical staff of the hospital where the procedure at issue was performed. The medical staff invited this physician to participate in the peer review of his wife's case. The plaintiff also requested an investigation by the Department of Health Services. A DHS reviewer conducted an investigation which largely involved review of the medical staff peer review committee minutes. Although the hospital was not cited for any deficiencies, and indeed no final investigative report was issued, the plaintiffs sought to compel the testimony in the plaintiff's professional liability case of the DHS investigator as to his conclusions. The trial court excluded both the husband's and the DHS reviewer's testimony. The Court of appeal upheld the trial court, finding that peer review is a necessary predicate of any subsequent remedial measure and that therefore, the peer investigation, as well as the result of the peer review committee deliberations, must be made inadmissible pursuant to Evidence Code § 1151. (exclusion of evidence of subsequent remedial measures to establish negligence). The CMA brief concurs with the lower courts, but adds that the evidence in question should also be excluded under Evidence Code §§ 1157 and 1156.

Outcome: The California Supreme Court heard oral argument in this case on January 7, 2000, and in late March, issued a ruling consistent with CMA's position that the subject evidence should be excluded

under Evidence Code § 1157. It also ruled that the use of the 1157 evidence at trial was equally inappropriate to obtaining it in discovery. Under the facts of the case, the Court also ruled that Evidence Code § 1151 did not apply to the evidence at issue. The decision can be found at Fox v. Kramer (2000) 22 Cal.4th 531, 93 Cal.Rptr.2d 497.

Santa Rosa Memorial Hospital v. Superior Court (Leary)
(CMA fights to protect hospital medical staff records from discovery)

Initial CMA Participation: February 1985

Issue: In a malpractice case, the superior court ordered Santa Rosa Hospital to provide the plaintiff deposition answers pe
Third Dist., in support of Santa Rosa Memorial Hospital, arguing that information sought was obtained by the deponent nurse as part of her medical staff Infection Control Committee participation, and therefore was properly protected from disclosure under Evidence Code §1157.

Outcome: The court agreed with CMA and vacated the lower court's order to disclose. The decision can be found at Santa Rosa Memorial Hosp. v. Superior Court (Leary) (1985) 174 Cal.App.3d 711, 220 Cal.Rptr. 236.

West Covina Hospital v. Superior Court (Tyus) Initial CMA Participation: September 1985
(medical staff committee member not precluded from voluntarily testifying about proceedings of the committee)

Issue: In this case, a malpractice action was brought against a hospital for granting surgical privileges and retaining a surgeon on its medical staff. A member of the medical staff committee that evaluated the surgeon agreed to testify on behalf of the plaintiff concerning the committee's evaluation. On September 27, 1985, the CMA filed an *amicus curiae* brief with the California Supreme Court, arguing that the legislative intent and language of Evidence Code §1157 prohibited voluntary testimony of hospital medical staff committee members in malpractice cases.

Outcome: The California Supreme Court ruled that the hospital medical staff committee member was not precluded from voluntarily testifying about proceedings of the committee. The Court's analysis rested on a literal interpretation of the language of Evidence Code §1157(b) stating that no person in attendance "shall be required to testify." The Supreme Court stated that the statutory language was clear and unambiguous and there was no need for construction. Therefore, contrary to the CMA's view, the language did not prohibit voluntary testimony but only prohibited involuntary testimony. The Court's decision may be found at West Covina Hosp. v. Superior Court (Tyus) (1986) 41 Cal.3d 846, 226 Cal.Rptr. 132.

Ferraro v. Municipal Court
(Evidence Code §1157 applies to criminal as well as civil cases)

Issue: In this case, the San Diego District Attorney appealed the Superior Court's decision to deny their request for disclosure of confidential peer review records. On November 2, 1985, CMA filed an *amicus curiae* brief in which CHA joined with the California Court of Appeal asking the Court to affirm the lower court's ruling that Evidence Code §1157 applied in criminal proceedings to protect medical staff records, regardless of Proposition 8. CMA further argued that failure to disclose protected medical staff records did not violate the California Constitution.

Outcome: The Court concluded that the protections of Evidence Code §1157 applied to criminal as well as civil cases, thus protecting the peer review records from disclosure. This case is not published.

Mt. Diablo Hospital v. Superior Court (Stella) Initial C
(minutes of a medical staff committee meetings protected under Evidence Code §1157)

Issue: In this case, the hospital petitioned for a writ of mandate that would require the Contra Costa County Superior Court to set aside a grant of a motion to compel the production of documents and deposition. On June 10, 1986, CMA filed an *amicus curiae* brief with the California Court of Appeal (1st Dist.), arguing that all the requested records were protected under Evidence Code §1157. Both the hospital and the CMA filed briefs asking the court to reverse the trial court opinion, which ordered the production of minutes of various medical staff committees and surgery departments.

Outcome: The California Court of Appeal (1st Dist.) ruled that the minutes of a medical staff committee meetings were protected under Evidence Code §1157 which provides that neither proceedings nor records of organized medical staff committees in the hospital, that have a responsibility of evaluation and improvement of quality of care rendered in the hospital, shall be subject to discovery. Further, the appellate court ruled that the minutes of protected committees were information so clearly protected that an in-camera trial court hearing to determine whether documents sought were in fact protected should not be required. The Court's decision may be found at Mt. Diablo Hosp. Dist. v. Superior Court (Stella) (1986) 183 Cal.App.3d 30, 227 Cal.Rptr. 790.

Nosworthy v. Paracelsus Health Care Corporation Initial CMA Participation: December 1987
(CMA advocates for the confidentiality of peer review records and proceedings)

Issue: This case involved a suit for wrongful termination against a hospital in which nurses moved to compel a hospital administrator to answer questions in a deposition concerning medical staff committee affairs, including a question about the names of protected medical staff committee members. On December 14, 1987, the CMA requested permission to file an *amicus curiae* brief with the Los Angeles County Superior Court in support of defendant Paracelsus Health Care Corporation's motion for protective order or, in the alternative, for reconsideration. The CMA argued in favor of confidentiality to be afforded members of medical staff quality assurance and peer review committees as a crucial part of a comprehensive statutory scheme designed to ensure quality patient care.

Outcome: In an unpublished opinion, the Superior Court denied both motions. In so doing, however, the court found that the original order made it clear that "no records or proceedings of the peer review committee would be discoverable . . . [and that if the administrator] cannot answer without reference to the records or proceedings of such a medical care evaluation committee, he need only claim the privilege." On the basis of this statement, the hospital decided not to pursue the matter further.

California Eye Institute v. Superior Court (Kaye) Initial CMA Participation: February 1990
(CMA advocates for access to peer review records by those subject to review)

Issue: This case involved a physician whose hospital staff privileges were restricted but subsequently reinstated in full. In a suit against the hospital and others, the physician sought discovery of certain documents relating to the restriction of his privileges. The Fresno County Superior Court granted the physician's motion to compel production of the documents, and the defendants petitioned for writ of mandate and a request for a temporary stay of this order. The Court of Appeal issued the defendants' writ, holding that the physician was not a person "requesting hospital staff privileges" within the meaning of the exception to the bar on discovery of hospital staff committee records under Evidence Code §1157(b). The Court felt that §1157(b) does not allow access in a suit for damages, but rather applies only in writ of mandate proceedings. On February 6, 1990, the CMA filed an *amicus curiae* letter with the California Supreme Court, asking the Court to decertify the appellate opinion which unfairly restricts access to peer review records by those subject to review.

Outcome: The California Supreme Court regrettably declined the CMA's request for decertification. The appellate decision may be found at California Eye Institute v. Superior Court (Kaye) (1989) 215 Cal.App.3d 1477, 264 Cal.Rptr. 83, review denied Feb. 21, 1990.

Valley Presbyterian Hospital v. Superior Court (Mayes)

Initial CMA Participation: February 1990

Issue: This case dealt with issues surrounding California Evidence Code §1157, which protects peer review proceedings from discovery. At the trial level, the court ordered the production of medical staff applications. On February 15, 1990, CMA filed an *amicus curiae* brief in support of Valley Presbyterian. CMA argued that the peer review proceedings in this case should remain confidential.

Outcome: The appellate court dismissed the action as moot, given that the hospital had been dismissed as a party from the underlying action and that the plaintiff no longer sought production of medical staff records. This case remains unpublished. *But see* entry below for CMA *amicus* participation in Alexander v. Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Hinson v. Clairemont Community Hospital Ini
(CMA sought to extend Evidence Code §1157 protections to medical staff applications)

Issue: This case involved a medical malpractice action against a physician and hospital. On March 29, 1990, the CMA filed a letter with the Court of Appeal, 4th Dist., requesting modification of its opinion to clarify that Evidence Code §1157, which generally protects peer review records from discovery, applies to medical staff application forms. On April 11, 1990, the Court of Appeal modified its opinion to state that medical staff applications were not "necessarily" protected medical staff records or proceedings, but did not entirely resolve our concern. On April 27, 1990, the CMA filed a letter with the California Supreme Court, requesting the Court to either modify the appellate opinion or to decertify the disputed portion.

Outcome: After deliberating for a couple of months, the California Supreme Court unfortunately denied the petition for decertification. The appellate decision, as modified, can be found at Hinson v. Clairemont Community Hospital (1990) 218 Cal.App.3d 1110, 267 Cal.Rptr. 503, opinion modified April 11, 1990. *But see* entry below for CMA *amicus* participation in Alexander v. Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Queen of Angels/Hollywood Presbyterian Hospital v. Superior Court (Malabute)
(CMA advocates for Evidence §1157 protection of peer review records)

Initial CMA Participation: February 1991

Issue: This case involved a malpractice suit against a hospital for negligent credentialing in which the plaintiff sought discovery of medical staff applications. The trial court ordered production of the applications. On February 14, 1991, the CMA filed an *amicus curiae* brief and a letter in support of the hospital's request for review in the Court of Appeal. The appellate court, however, denied the writ. On May 24, 1991, the CMA filed a letter in support of request for review in the California Supreme Court. CMA requested that the court re-establish the modicum of protection for medical staff peer review as provided by Evidence Code §1157. *But see* entry below for CMA *amicus* participation in Alexander v. Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Outcome: On June 26, 1991, the Supreme Court denied the petition for review and vacated the stay of the order of production. Thus the medical staff was compelled to produce the applications. This case remains unpublished. *But see* entry below for CMA *amicus* participation in Alexander v.Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Hillside Hospital v. Superior Court (Flippen)
(CMA advocates for Evidence §1157 protection of peer review records)

Issue: This case involved a malpractice suit against hospital for negligent credentialing in which the plaintiff sought discovery of medical staff applications. This case presented the same question raised in Queen of Angels/Hollywood Presbyterian, Hinson and Valley Presbyterian (i.e., the scope of protection afforded by Evidence Code §1157). In this case, the trial court ordered the production of medical staff applications. That court also ruled that Evidence Code §1157 protected only those reports generated by the committee, and not the information provided to the committee. On appeal, the Court of Appeal denied the writ and vacated the stay against production. On May 21, 1991, the CMA filed a letter with the California Supreme Court in support of the petition for review, requesting that the Court re-establish the modicum of protection for medical staff peer review as provided by Evidence Code §1157.

Outcome: The case was settled, but attorneys for the hospital urged the California Supreme Court to grant review so as to resolve the legal issue presented. The Court, however, denied review. This case remains unpublished. *But see* entry below for CMA *amicus* participation in Alexander v. Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Granada Hills Community Hospital v. Superior Court (Perez)
(CMA advocates for Evidence Code §1157 protection of peer review records)

Initial CMA Participation: October 1991

Issue: This case involved a malpractice plaintiff who sought discovery of medical staff applications

in a suit against the hospital for negligent credentialing. The trial court ordered production and the hospital appealed. On October 24, 1991, the CMA filed an *amicus curiae* brief with the California Court of Appeal, arguing that the trial court improperly ordered production of medical staff applications because Evidence Code §1157 protects the confidentiality of those quality assurance records.

Outcome: While a ruling by the Court of Appeals was pending, the plaintiff withdrew its discovery request. Following a request by the hospital, the Court dismissed the petition as moot on February 13, 1992. This case remains unpublished. *But see* entry below for CMA *amicus* participation in Alexander v. Superior Ct. (Saheb), (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

People v. Superior Court (Memorial Medical Center of Long Beach)
(CMA fights to protect peer review records from disclosure)

Initial CMA Participation: December 1991

Issue:In this case, the Los Angeles District Attorney sought a search warrant for hospital peer review documents which disclosure of peer review records in criminal matters. The hospital petitioned the Supreme Court to review the case. In support of that petition, CMA lodged a letter in the California Supreme Court on December 9, 1991. In the letter, CMA voiced agreement with one appellate court justice's concurrence-in-part to the degree it stated his "fear" that the lead opinion's holding making Evidence Code §1157's protections inapplicable in criminal actions "will have a deep 'chilling effect' on peer review and thus weaken the system."

Outcome: Regrettably, the Supreme Court denied the petition for review. The appellate decision can be found at People v. Superior Court (Memorial Medical Center of Long Beach), 234 Cal.App.3d 363, 286 Cal.Rptr. 478. *But see* CMA *amicus* participation above in a case by a sister appellate court holding precisely the opposite in Scripps Memorial Hospital v. Superior Court (1995) 37 Cal.4th 1720, 44 Cal.Rptr.2d 725, review denied.

Alexander v. Superior Court (Saheb)
(Evidence §1157 protects medical staff applications.)

Issue: This case involved a medical malpractice action in which the Los Angeles County Superior Court declined to order discovery of applications for medical staff privileges at a hospital. On February 4, 1992, the CMA filed an *amicus curiae* brief with the California Court of Appeal, seeking to ensure that medical staff applications are protected from discovery by Evidence Code §1157. The Court of Appeal, however, disagreed. The California Supreme Court then granted a petition for review. On August 28, 1992, the CMA filed an *amicus curiae* brief with the Supreme Court, arguing that §1157 was expressly enacted to promote patient safety by protecting the confidentiality of medical staff peer review records and proceedings. This protection extended to medical staff applications, developed and maintained by a medical staff committee responsible for evaluation and improvement of the quality of care rendered in the hospital, as "records" of that committee within the meaning of Evidence Code §1157. Further, the CMA argued that the legislature had concluded that quality patient care can be guaranteed by a robust system of peer review and that to allow disclosure of medical staff applications would significantly "chill" the peer review process and will result in serious patient detriment.

Outcome: In a sweeping pronouncement on this issue, the California Supreme Court adopted CMA's position, finding that medical staff applications, as well as all other medical staff peer review documents, are protected under Evidence Code §1157 whether they are submitted to or generated by a protected medical staff committee. This opinion may be found at Alexander v. Superior Ct. (Saheb) (1993) 5 Cal.4th 1218, 23 Cal.Rptr.2d 37.

Coleman v. Wilson
(CMA fights to protect peer review records)

*Issue:*This case was a class action brought on behalf of California prison inmates against Governor Wilson, alleging that th
amicus curiae brief with the U.S. District Court, Eastern Dist. In the brief, CMA focused solely on the issue of discoverability of peer review records. CMA argued that rigorous medical staff quality assessment and peer review are essential to the promotion of quality care; maintenance of confidentiality is essential in order to preserve the rigorous peer review process; allowing disclosure of medical staff records would significantly "chill" the peer review process; state and federal lawmakers have concluded that quality care can be more effectively guaranteed by encouragement of the peer review process; and custodial setting presents even more compelling reasons for protecting confidentiality.

Outcome: On March 23, 1992, the U.S. Magistrate Judge ordered the production of medical staff records. The court found that the principles enunciated in University of Pennsylvania v. E.E.O.C., (1990) 493 U.S. 182 and Teasdale v. Marin General Hospital, 138 F.R.D. 691 (N.D. Cal. 1991) were dispositive. This case remains unpublished.

Cedars-Sinai Medical Center v. Superior Court (Schwartz)
(Evidence §1157 protects identities of peer reviewers)

Initial CMA Participation: June 1992

Issue: This case involved a medical malpractice action against physicians and a hospital in which the plaintiff patients sought to discover the identities of members of the medical peer review committee. The Superior Court allowed discovery and the hospital sought a writ of mandate directing the trial court to vacate order. On June 8, 1992, the CMA filed an *amicus curiae* brief with the California Court of Appeal, arguing that Evidence Code §1157 was enacted to protect patient safety by protecting the confidentiality of medical staff peer review records and proceedings. The CMA noted that the identities of medical staff committee members who review the competence of physicians are part of the records and proceedings of medical staff peer review committees, and, as such are protected from discovery by §1157. To disclose the medical staff committee members' identities would seriously undermine the peer review process.

Outcome: Consistent with the CMA's view, the Court of Appeal ruled that the public's interest in quality medical care did not outweigh its interest in keeping the hospital's peer review committee confidential, even if keeping these identities secret might limit the ability of a plaintiff to discover relevant and admissible information. Thus the appellate court ruled that Evidence Code §1157 applied to protect the names of the members of peer review committees against discovery by plaintiffs' malpractice attorneys. This case can be found at Cedars-Sinai Medical Center v. Superior Court (Schwartz) (1993) 12 Cal.App.4th 579, 16 Cal.Rptr.2d 253, opinion modified Feb. 10, 1993.

Arnett v. Dal Cielo
(Evidence Code §1157 does not protect against administrative subpoenas)

Issue: This case involved the Medical Board of California (MBC) investigation of a physician at Alameda Hospital suspected of a substance abuse problem. By the time of the MBC's first subpoena for the peer review records at issue in this case, the medical staff of the institution had already acted to investigate and appropriately address the physician's impairment problem. The MBC persisted in seeking records protected by Evidence Code §1157 (prohibiting discovery of peer review-protected documents in civil litigation) claiming §1157 did not apply to the MBC's investigative subpoenas or investigative activities. The CMA filed three amici curiae briefs on behalf of the Hospital (Mr. Dal Cielo was the Hospital Administrator) before the Superior Court, the Court of Appeal, and the California Supreme Court, arguing that §1157 generally barred access by anyone to peer review records, except under narrow circumstances.

Outcome: Unfortunately, on October 3, 1996, the California Supreme Court found for the MBC, ruling that an investigative subpoena by the MBC is not "discovery within the meaning of §1157." Thus, the MBC is entitled to access to the peer review records pursuant to an investigative subpoena. This decision may be found at Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 42 Cal.Rptr.2d 706.

Scripps Memorial Hosp. v. Superior Ct. (People of Calif.)
(Proposition 8 does not eliminate privilege against discovery of hospital staff records in criminal proceedings)

Initial CMA Participation: April 1995

Issue: This case involved the pursuit by a district attorney to obtain confidential peer review records for the purpose of impeaching an expert witness in a criminal trial. On April 19, 1995, the CMA and CHA filed a letter in support of the petition for review with the California Court of Appeal (4th Dist.) arguing that the legislative history of Evidence Code §1157 showed that it was intended to prohibit discovery in all matters, not just civil matters. In particular, the brief explained that 1982's Proposition 8 (the "Victim's Bill of Rights") did not require disclosure of peer review records in discovery in criminal actions. It also argues that subdivision (e) of Evidence Code §1157 clearly carved out those areas of that sections application which do not act to limit criminal discovery. Although this subdivision opened the door to discovery in a criminal action, it permits discovery of records of *certain classes* of care givers added to the statute after 1983, and physicians are not included in that list.

Outcome: The California Court of Appeal (4th Dist.) ruled that Evidence Code §1157 precludes discovery in criminal proceedings with respect to all health care providers included within the scope of protection of §1157 prior to 1983. The Court's decision may be found at Scripps Memorial Hospital v. Superior Court (1995) 37 Cal.4th 1720, 44 Cal.Rptr.2d 725, review denied.

Redbud Community Hospital v. Burrows **Initial**

(Confidentiality of Peer Review Records)

Issue: This case involved both a state criminal prosecution of Dr. Wolfgang Schug by the State Attorney General and a federal civil damages action alleging violations of EMTALA arising from the death of a

child following the treatment and transfer of the child by Dr. Schug and Redbud Community Hospital. During the criminal investigation, the Attorney General obtained from the Lake County Superior Court a search warrant for the peer review records at Redbud Community Hospital, on grounds that Evidence Code §1157 did not apply in criminal cases. CMA and CHA filed a joint letter on January 15, 1998, supporting Redbud's petition for writ of mandate to the appellate court. The Court of Appeal upheld the search warrant. The peer review records were turned over to the Attorney General's office with a protective order against further dissemination, though they were never used in the criminal trial (which was dismissed in Dr. Schug's favor at the close of the prosecution's case).

In the parallel federal EMTALA case, the District Court in San Francisco, Judge Illston, ordered Redbud Community Hospital to turn over peer review records to plaintiffs on grounds that Evidence Code §1157 does not apply in federal cases. On February 3, 1998, CMA filed a letter with the District Court supporting Redbud's request for reconsideration, which request was granted. Judge Illston then reaffirmed her previous ruling. On June 4, 1998, CMA submitted a letter in support of Redbud's Petition for Writ of Mandamus and Emergency Stay Motion to the U.S. Ninth Circuit Court of Appeals. On June 29, 1998, the Ninth Circuit Court of Appeals accepted the CMA/CHA letter in support of the request for the Writ of Mandamus. The case was shortly thereafter assigned to a merits panel, and then for oral argument on October 9, 1998. On November 16, 1998, the Ninth Circuit dismissed the appeal for lack of jurisdiction, and denied the consolidated petitions for writs of mandamus. In mid-December, CMA and CHA filed a letter with the Ninth Circuit supporting the parties' request for rehearing and rehearing *en banc*. On December 31, 1998, the Ninth Circuit denied the petition for rehearing, *en banc* or otherwise. On January 21, 1999, Dr. Schug's petition for a stay of the mandate to disclose the records was granted for 60 days to enable him to file a petition for writ of certiorari with the U.S. Supreme Court. On May 5, 1999, the CMA, along with numerous other associations, filed an *amici curiae* brief in the U.S. Supreme Court supporting the petitions for writ of certiorari filed by Dr. Schug, Redbud Hospital and Adventist Healthcare. All the above letters and briefs argued that the strong public policy considerations favoring an open and candid peer review process would be severely frustrated if the records were not barred from compelled disclosure under Evidence Code §1157 and returned to Redbud Hospital. Such disclosure would have a chilling effect on physicians' willingness to participate in peer review.

Outcome: On June 7, 1999, the U.S. Supreme Court denied the petitions for writ of certiorari, thus refusing to intervene in this case. This decision clears the way for the plaintiffs' lawyers to gain access to peer review records in a federal case alleging violations of EMTALA. This decision does not set any legal precedent, is not binding on future cases, and may not be the Supreme Court's final word on this matter.

Kaweah Delta Health Care District v. Moza **Initial CMA Participation: July 1999**

(Peer review concerns with IMQ and JCAHO)

Issue: This case arose when a physician communicated his concerns with the peer review process at the hospital to the IMQ and JCAHO in conjunction with the CALS Survey of the hospital. In response to these communications, the hospital district sued the physician for breach of contract, libel, misappropriation of trade secrets and unfair competition. Both CMA and IMQ filed declarations supporting the physician's right to communicate his concerns to those officially sanctioned accrediting organizations. While neither organization took any position on the merits of the hospital's peer review process or the physician's practice, these declarations describe the CALS Survey process, IMQ's and JCAHO's official roles in that process, the fact that the hospital's peer review process is examined as a part of the Survey, and the importance of candor to the Survey process. They also pointed out that it is not unethical for a physician to communicate concerns to a licensing or accrediting organization, and that the CMA Model Medical Staff Bylaws specifically authorize medical staff members to communicate with "other hospital, professional society or licensing authority" notwithstanding their general commitment to maintain the confidentiality of peer review information. Finally, they pointed out that physicians and

others must be free to communicate concerns to IMQ and JCAHO without fear of reprisal if these organizations are to properly fulfill their responsibilities for the ultimate benefit of hospitalized patients.

Outcome: Thankfully, the hospital dropped its lawsuit without filing opposition to the physician's motion to strike the complaint. The balance of the action appears to be near settlement.

PRACTICE ARRANGEMENTS

Jennings v. Marralle

(Age discrimination claims may not be made against employers of fewer than 5 employees)

Issue: In this case, a former employee sought to amend a complaint against his employer to add a cause of action for tortious wrongful discharge based on public policy. This case raised the question of whether a physician with five or fewer employees may be subject to a tort action for wrongful discharge if an employee's termination allegedly violated the Fair Employment and Housing Act (FEHA), an act which applies only to employers with more than five employees. On May 4, 1990, CMA, along with the California Dental Association, filed a letter with the California Supreme Court supporting a petition for review or, in the alternative, request for decertification.

Outcome: The California Supreme Court granted review and ruled that the right to be free of age discrimination by an employer of fewer than five people is not a fundamental right giving rise to an action for tortious discharge in violation of public policy. The Court's decision may be found at Jennings v. Marralle (1993) 8 Cal.4th 121, 32 Cal.Rptr.2d 275.

Sistare-Meyer v.YMCA of Metropolitan Los Angeles
(CMA argues against racial discrimination towards workers)

Initial CMA Participation: December 1997

Issue: In this case, an independent contractor brought a claim against the hiring party alleging that she had been wrongfully terminated because of her race. The Court of Appeal found that the plaintiff-appellant, Sistare-Meyer, could not state a claim for wrongful discharge in violation of public policy against racial discrimination because she was an independent contractor and not an employee. On December 18, 1997, CMA wrote a letter to the California Supreme Court supporting the request for depublication of this case, arguing that the Court of Appeal's decision implicitly supported the idea that California employers are immune from challenge for acts of racial discrimination against workers engaged as independent contractors.

Outcome: Regrettably, on January 21, 1998, the Court denied review. This decision can be found at Sistare-Meyer v. YMCA (1997) 58 Cal.App.4th 10, 67 Cal.Rptr.2d 840.

PROFESSIONAL LIABILITY

Murphy v. E.R. Squibb & Sons
(doctrine of strict liability does not extend to the sale of prescription drugs)

Issue: In this case, a strict liability action was brought by a patient against the manufacturer which produced DES and the pharmacy which sold DES to her mother. On March 21, 1985, the CMA filed an *amicus curiae* brief with the California Supreme Court, asking the court to affirm the finding of the Court of Appeal (2nd Dist.), which had ruled that the doctrine of strict liability does not extend to the sale of prescription drugs.

Outcome: The California Supreme Court ruled that the pharmacy could not be held strictly liable in tort for injuries caused by the defective drug, and that the manufacturer with only a 10% share of the market did not have a substantial share of the market such that the market share theory was applicable. The Court's decision may be found at Murphy v. E.R. Squibb & Sons (1985) 40 Cal.3d 672, 221 Cal.Rptr. 447.

People v. Superior Court of California (Holvey) Initial C
(CMA fights for clarification of Penal Code §386(a), criminalizing abuse of dependent adults)

Issue: In this case, two physicians were charged with endangering the person or health of a dependent adult in their care and custody. The Superior Court, Fresno County, granted the physicians' petition for writ of prohibition/mandate and request for stay of the preliminary hearing, finding that the statute allegedly violated was unconstitutionally vague and uncertain. The People appealed. On June 17, 1988, CMA filed an *amicus curiae* brief with the California Court of Appeal, 5th Dist., in support of the physicians, asking the appellate court to rule that Penal Code §386(a), which makes it a crime to "willfully cause or permit" "pain, suffering, or injury" of a dependent elder adult, is unconstitutionally vague with respect to health care providers.

Outcome: The appellate court unfortunately granted the petition, ruling that the statute was not unconstitutionally vague in general, or as applied to medical practitioners. However, the Court ruled that conviction pursuant to Penal Code §386 requires proof of criminal negligence. This case can be found at People v. Superior Court (Holvey) (1988) 205 Cal.App.3d 51, 252 Cal.Rptr. 335.

Southern California Physicians' Insurance Exchange v. Deukmejian
(struck down the roll-back provisions of Proposition 103 regarding medical malpractice insurance)

Initial CMA Participation: November 1988

Issue: This case involved the roll-back provisions of Insurance Code §1861.01 as added by Proposition 103 and whether those provisions would critically impair the ability of existing insurers of both physicians and hospitals to provide continued liability coverage for the health care providers of California. On November 14, 1988, the CMA filed an *amicus curiae* brief with the California Supreme Court, asking the court to maintain the stay of Proposition 103 until the Court could determine whether Prop. 103 was unconstitutional.

Outcome: The Court ultimately upheld the constitutionality of most of Proposition 103, though it did strike down the roll-back provisions which were the primary subject of our letter. This opinion may be found at Calfarm Insurance Co. v. Deukmejian (1989) 48 Cal.3d 805, 258 Cal.Rptr. 161.

Simmons v. West Covina Medical Clinic Ini
(limited the applicability of the last chance doctrine)

Issue: This case involved an action brought by a mother against a physician and medical clinic for the wrongful birth of a child suffering from Down's Syndrome and an action brought by the child for wrongful life. The Los Angeles County Superior Court granted the physician's and clinic's motion for summary judgment, and the mother and child appealed. On March 27, 1989, the CMA filed an *amicus curiae* brief with the California Court of Appeal, 2nd Dist., asking the Court to rule that a defendant is answerable in damages only if there is a "reasonable medical probability" that the defendant's acts caused the damage in question. The CMA argued against changing the rule to one that would impose liability where there is a mere possibility that the defendant's conduct caused the damage or the defendant had an opportunity to mitigate or avert damage caused by another party.

Outcome: The Court of Appeal agreed with the CMA and affirmed the lower court's decision. The Court ruled that a mere 20% chance that Down's Syndrome would have been detected if the mother had taken a

maternal serum-alpha fetoprotein test did not establish a reasonably probable causal connection between the physician's failure to offer the test and the mother's failure to terminate pregnancy due to lack of knowledge of Down's Syndrome. Further, the physician's alleged violation of state law requiring the physician to advise expectant mothers of the availability of the alpha fetoprotein test did not shift the burden of proof to the physician to prove that Down's Syndrome would not have been detected even if the test had been provided. The Court also ruled that the lost chance theory of recovery was inapplicable to allow a mother to recover damages for the lost chance of terminating pregnancy. This opinion can be found at Simmons v. West Covina Medical Clinic (1989) 212 Cal.App.3d 696, 260 Cal.Rptr. 772, review denied Nov. 16, 1989.

Fisher v. San Pedro Peninsula Hospital Initial
(witness of sexual harassment is victim of "environmental sexual harassment")

Issue: In this case, a dentist who had hospital privileges and his wife, a nurse at that hospital, brought an action against the hospital, alleging sexual discrimination under the Federal Employment and Housing Act, retaliation in employment, intentional infliction of emotional

distress, and interference with business relations. The Court of Appeal (2nd Dist.) had ruled that someone who witnessed sexual harassment, other than the harassee, could sue for "environmental sexual harassment." On December 20, 1989, the CMA filed a letter with the California Supreme Court, asking the Court to grant review or to depublish the case.

Outcome: Regrettably, the California Supreme Court denied review. The Appellate decision may be found at Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 262 Cal.Rptr. 842.

Christofferson v. Michelin Tire Corporation Init
(judgment reversed after disclosure of "Mary Carter" agreement)

Issue: In this case, a former highway patrolman, who was injured in a motorcycle accident, brought a products liability suit against the manufacturers of the motorcycle and of the motorcycle's tires. The motorcycle manufacturer settled with the plaintiff prior to trial. On March 15, 1990, the CMA and CAHHS filed an *amicus curiae* brief with the California Court of Appeal (2nd Dist.), asking the court to reverse the judgment below and require that the jury be instructed concerning the existence of a "Mary Carter" agreement. This type of agreement is between the plaintiff and some (but less than all) defendants, whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the nonagreeing defendant(s).

Outcome: The Court of Appeal (2nd Dist.) ruled, consistent with CMA's position, that the trial court erred in refusing to disclose to the jury the "Mary Carter" sliding-scale settlement agreement entered into between the plaintiff and the motorcycle manufacturer. In this agreement, disclosure was sought pursuant to the statute to establish a possible bias of the plaintiff's expert witnesses who had previously been retained by the manufacturer to study the cause of accidents. In denying review, the California Supreme Court ordered that the opinion not be officially published.

Kahn v. Shiley Incorporated, et al.
(plaintiffs can sue for anxiety based on possible failure of life-saving medical product)

Issue: In this case, the Court of Appeal ruled that plaintiffs, by alleging fraud, could sue the manufacturer of a properly working life-saving medical product to recover damages for anxiety, based on concern that the product might fail at some indefinite time in the future. On April 2, 1990, the CMA filed a letter with the California Supreme Court in which AMA joined, asking the Court to review the case, or the alternative, to depublish the Appellate opinion.

Outcome: Although the California Supreme Court denied the request for review, it did depublish the opinion.

Pilson v. Friedman
(ancillary proceedings may qualify to support a cause of action for malicious prosecution)

Issue: This case addressed the issue of when an ancillary proceeding (i.e., a motion to vacate summary judgment) may qualify to support a cause of action for malicious prosecution. On May 10, 1991, the CMA filed a letter with the California Court of Appeal, asking the Court to declare a motion to vacate a "prior action" for purposes of a later malicious prosecution action. On July 10, 1991, the CMA filed a letter with the California Court of Appeal, asking that the opinion be published.

Outcome: The California Court of Appeal agreed with the CMA in an unpublished opinion.

Rha, M.D. v. Superior Court (People of California) Initial CMA Participation: April 1993
(CMA argues for an appropriate definition of the physician-patient relationship)

Issue: This case involved a Southern California physician accused of violating Penal Code §289 (i.e., anal or genital penetration by a foreign object using duress). The physician's attorney moved for dismissal on grounds there was no evidence to support the claim of duress. The court denied the motion, opining that duress could be presumed merely from the fact of a physician-patient relationship. On April 23, 1993, CMA filed a letter with the Court of Appeal requesting that the court accept Dr. Rha's Petition for Writ of Prohibition and/or Mandate. On June 16, 1993, CMA filed a letter with the California Supreme Court requesting that the court accept Dr. Rha's Petition for Writ of Prohibition and/or Mandate. CMA argued that the mere existence of the physician-patient relationship should not lead to criminal liability and that such a relationship brings with it of necessity the understanding that a physician may do or direct the performance of procedures upon patients which involve touching, including penetration. Assuming these acts are medically appropriate, they are themselves privileged and fall within the contemplated realm of the physician-patient relationship.

Outcome: Both the Court of Appeal and the Supreme Court denied the writ petition**.** This case remains unpublished.

Gami v. Mullikin Medical Center
(wrongful life suit questioned ethically)

Issue: In this case, the parents brought a medical malpractice action alleging damages for negligence and for wrongful life arising from the birth of a child with spina bifida. The Court of Appeal (2nd Dist.), ruled that the parents' action was barred by a limitations period, but the child could maintain an action for wrongful life for injuries caused by postconception negligence. On October 26, 1993, the CMA filed a letter with the California Supreme Court in which AMA joined, asking the Court to review this case, and rule on of whether California should allow wrongful life suits. The CMA argued that such causes of action were contrary to the fundamental value society places on human life and were also contrary to the role the courts should play with respect to such value judgments. The CMA also urged the Court to address the crucial public policy question of whether the entire burden of paying the health care costs of children born with birth defects should be borne by health care providers.

Outcome: Regrettably, the California Supreme Court denied the petition for review. The decision may be found at Gami v. Mullikin Medical Center (1993) 18 Cal.App.4th 870, 22 Cal.Rptr.2d 819.

Carlin v. Superior Court (Upjohn Co.) Initi
(Upheld strict liability as a determinant of pharmaceutical product liability)

Issues: In this case, the appellant, a prescription drug user, brought a products liability action against the Upjohn Company, claiming that Upjohn failed to issue a warning about known or reasonably known dangerous propensities of a drug she was taking. On October 11, 1995, the CMA filed an *amicus curiae* brief with the California Supreme Court in support of the respondent. In its brief, CMA asked the Court to reaffirm its 1988 decision in Brown v. Superior Court that pharmaceutical companies face liability for prescription drugs only if they are shown to have been negligent. Otherwise, the CMA pointed out, the impact of pharmaceutical product liability litigation will be the availability of fewer drugs and at higher prices.

Outcome: Unfortunately, the California Supreme Court ruled that manufacturers of prescription drugs may be held strictly liable for failure to warn of known or reasonably scientifically knowable risks. This case can be found at Carlin v. Superior Court (Upjohn Co.) (1996) 13 Cal.4th 1104, 56 Cal.Rptr.2d 162.

PUBLIC HEALTH

Committee to Defend Reproductive Rights v. Kizer — Initial CMA Participation: April 1988
(enjoined elimination of Medi-Cal funding for abortions)

*Issue:*This case involved an attempt by the legislature to eliminate Medi-Cal funding for abortion services. The Court of A
halted.

*Outcome:*The California Supreme Court agreed with CMA and denied the petition for review, thereby upholding the unpub

Lickness v. Kizer
(prevented reduction of Medi-Cal funding for family planning services)

*Issue:*This case involved Department of Health Services' (DHS) reduction from current levels of the funding for family p
court to maintain the current level

of funding for state family planning services. On December 22, 1989, CMA filed a letter with the California Court of Appeal, 2d Dist., asking the Court to deny DHS' request for stay of the order which prevented DHS from reducing these funds. On January 5, 1990, CMA filed an amicus letter brief with the California Supreme Court, asking the Court to deny DHS' request for stay of the order.

*Outcome:*The California Supreme Court granted the Department of Health Service's (DHS) request for temporary stay of t

Consumers Union & American Public Health Assoc. v. Alta-Dena
(upheld court-imposed advertising restrictions on raw milk)

Initial CMA Participation: February 1991

*Issue:*This case dealt with the significant public health risks posed by consumption of raw milk. On February 8, 1991, CM
that there is a broad consensus among physicians, supported by scientific evidence, that raw milk has no proven health benefits and is potentially hazardous, especially to certain susceptible groups. These include infants, the elderly, and those with compromised immune systems. Based on this argument, CMA fully endorsed advertising restrictions and disclosure of risks ordered by the Superior Court.

*Outcome:*On March 18, 1992, the California Court of Appeal ruled, consistent with CMA's position, that the trial court ha
v. Alta-Dena Certified Dairy (1992) 4 Cal.App.4th 965, 6 Cal.Rptr.2d 193.

People v. Jones Initial CMA Participation: July 1993
(criminal homicide charges dismissed for drug-addicted pregnant woman)

Issue: In this case, the trial court in Stanislaus County dismissed the criminal homicide prosecution of a woman who had used drugs while pregnant and had prematurely given birth to an apparently stillborn infant. The state appealed. On July 8, 1993, the CMA and the AMA jointly filed an *amicus curiae* brief with the Siskiyou County Justice Court, arguing that drug addiction is a disease, rather than a matter of choice, and that imposing criminal sanctions on drug-addicted pregnant women would deter them from seeking proper pre-natal care, thereby worsening the plight of both the women and their infants.

Outcome: Agreeing with CMA, on August 3, 1993, the Court sustained the lower court's dismissal of the case. This case is not published.

Planned Parenthood v. Williams
(restricted overly disruptive activities of anti-abortion protesters)

*Issue:*This case involved the protest activities of anti-abortion activists. On January 7, 1994, CMA filed an amicus curiae l tactics of harassment and intimidation cannot be conducted in immediate proximity to the provision of abortion and other health care services without jeopardizing women's access to those services.

*Outcome:*Following the United States Supreme Court decision in Madsen v. Women's Health Center, Inc. (1994) 512 U.S Planned Parenthood, Shasta-Diablo, Inc. The Court stated that the injunction was content neutral with respect to First Amendment rights, served a significant state interest, and burdened the protesters' First Amendment rights no more than was necessary to serve the state interest. The Court's decision may be found at Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal.4th 1009, 43 Cal.Rptr.2d 88.

Mangini v. R.J. Reynolds Tobacco Co. Ini
(termination of the Joe Camel Campaign)

Issue: In this case, anti-smoking activist Mangini sued under the California consumer protection statutes, Business and Professions Code §§17200 *et seq.*, claiming that the Joe Camel campaign illegally targeted minors. CMA joined several public health advocacy organizations in an *amicus curiae* brief filed on March 31, 1994, with the California Supreme Court. The brief explained the profound public health problems resulting from minors' smoking.

Outcome: On June 30, 1994, the California Supreme Court ruled that this lawsuit was not preempted by federal law. The case was then settled in favor of the plaintiffs. The Company paid ten million dollars, nine million for anti-smoking education and one million to reimburse public treasuries for the costs of the suit. This settlement is the first monetary recovery by a local government against a tobacco company. The Court's decision may be found at Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 31 Cal.Rptr.2d 358.

Madsen v. Women's Health Center, Inc. In
(established the right of women to seek an abortion without harassment)

Issues: In this case, anti-abortion protestors appealed a permanent injunction issued by the Florida Supreme Court prohibiting Operation Rescue and associated individuals from picketing within a certain distance of a health care clinic and of the residences of any of the clinic's employees and staff. On April 1, 1994, CMA, in conjunction with ACOG, the American Medical Women's Association, and the American Psychiatric Association, filed an amicus curiae brief in support of the respondent, Women's Health Center, Inc., in the U.S. Supreme Court, arguing that certain anti-abortion activities are inconsistent with the services that are offered within reproductive health care facilities, cause patients serious harm, and may therefore be prohibited notwithstanding the free speech claims of abortion protesters.

Outcome: On June 30, 1994, the U.S. Supreme Court agreed with CMA, and found against the petitioner-Madsen, emphasizing that the restrictions imposed by the state court were not directed at the contents of the petitioners' message. In addition, the protestors had adequate alternative channels of communication and most of the restrictions were no broader than necessary to serve an important goal. Therefore the bulk of the injunction was constitutionally valid. This decision may be found at Madsen v. Women's Health Center (1994) 512 US 753, 129 L.Ed.2d 593.

Wooden v. County of Shasta et al.
(jail health standards)

Issue: In this case, jail inmates brought an action against the County of Shasta for its alleged failure to provide a minimum level of health care. On July 29, 1994, the CMA filed an *amicus curiae* brief with the Ninth Circuit Court of Appeals in support of defendant, County of Shasta, showing that the facilities in question provided more than a minimum level of health care, as evidenced by their receipt of accreditation from the National Commission on Correctional Health Care, through CMA's Corrections and Detentions Survey Program. The brief discussed the purpose of CMA's program and the survey process.

Outcome: The Ninth Circuit Court of Appeals ruled that the District Court needed to address the claims of overcrowding and inadequate staffing separately after notifying plaintiffs that they were going to be considered, and giving them an opportunity to present facts and legal argument in support of their position. Thus, the appellate court vacated the district court's grant of summary judgment, and remanded the case to the district court for further consideration. This opinion is not published.

City of San Jose v. Superior Court (Thompson) Initial CMA Participation: October 1994
(constitutionality of city ordinance targeting picketers)

Issue: This case involved a criminal prosecution against demonstrators who had violated a San Jose City ordinance by picketing within the proscribed distance of the homes of staff members of a clinic where abortions are performed. The trial court found the ordinance to be unconstitutionally broad. On October 25, 1994, CMA filed an *amicus curiae* brief with California Court of Appeal (6th Dist.) in support of the City.

Outcome: The Court of Appeal concluded that the standard to assess the constitutionality of such an ordinance is whether its time, place, and manner regulations are narrowly tailored to serve a significant governmental interest and whether the ordinance leaves open alternative channels of communication. The Court found that these criteria were met. On May 25, 1995, the California Supreme Court refused to grant review of the Court of Appeal's decision, thus upholding the ordinance that outlawed targeted picketing within three hundred feet of a targeted residence. The Court of Appeal's decision may be found at City of San Jose v. Superior Court (1995) 32 Cal.App.4th 330, 38 Cal.Rptr.2d 205.

San Diego Gas & Electric Co. v. Superior Court (Covalt, et al.)
(CMA advocates for the appropriate scientific and medical research)

Initial CMA Participation: September 1995

Issue: In this case, the San Diego Gas & Electric Company(SDG&E) requested that all cases challenging SDG&E's placement of high tension wires and the potentially harmful effects of electromagnetic fields (EMFs) be heard before the Public Utilities Commission (PUC) rather than in the courts. On September 20, 1995, CMA filed an *amicus curiae* brief with the California Supreme Court in support of SDG&E's claim, arguing that no scientifically documented health risk had been associated with normal levels of EMFs. Therefore, the likely courtroom scenario of an award of damages based solely on public fear of

EMFs, rather than sound scientific and medical research, could effectively create a public health policy driven more by the threat of litigation than by documented evaluation of public health risks.

Outcome: On August 22, 1996, the Supreme Court agreed with CMA and affirmed that the appropriate forum to hear these cases was the PUC. The decision can be found at San Diego Gas & Elec. Co. v. Superior Ct. (1996) 13 Cal.4th 893, 55 Cal.Rptr.2d 724.

Easyriders Freedom F.I.G.H.T. v. Hannigan, et al.
(upholding constitutionality of the California Mandatory Motorcycle Helmet Law)

Initial CMA Participation: October 1995

Issue: This case involved a challenge to the constitutionality of the CMA-sponsored mandatory motorcycle helmet law. The California Highway Patrol was found to have violated the Fourth Amendment rights of riders when it stopped a motorcycle rider with a substandard helmet without a suspicion that the rider had "knowledge" that the helmet failed to meet federal safety standards. On October 30, 1995, CMA filed an *amicus curiae* brief urging the Ninth Circuit Court of Appeals to overturn the district court's permanent injunction preventing the effective enforcement of the California Mandatory Helmet Law. The brief argued that under established legal principles, the California Highway Patrol may stop a motorcycle rider wearing what appears to be a substandard helmet without infringing on the rider's Fourth Amendment rights.

Outcome: On August 16, 1996, the Court of Appeal upheld the constitutionality of the California Mandatory Motorcycle Helmet Law. The Court concluded that the constitutional requirement for "reasonable suspicion" that the motorcyclist was violating the helmet law was met if objective evidence, such as the helmet's appearance, gave rise to a reasonable suspicion of law-breaking. However, the Court concluded that a motorcyclist must have actual knowledge of a helmet's noncompliance in order to violate the law and be issued a citation. This decision may be found at Easyriders Freedom F.I.G.H.T. v. Hannigan (9th Cir. 1996) 92 F.3d 1486.

Sinclair Paint Company v. Board of Equalization Initial CMA Participation: October 1995
(upholding constitutionality of the Childhood Lead Poisoning Prevention Act of 1991)

Issue: This case involved a paint company's opposition to fees imposed on the paint and petroleum industries for the cost to society of lead poisoning. Plaintiff claimed that fees assessed against industries under the Act are not regulatory fees, but unconstitutional taxation. On October 6, 1995, CMA filed an *amicus curiae* brief on behalf of itself and the California Academy of Family Physicians urging the California Court of Appeal (3rd. Dist.) to overturn the trial court's ruling that the Childhood Lead Poisoning Prevention Act of 1991 is unconstitutional. CMA argued that the Act properly imposed a user fee on industries principally responsible for lead poisoning to fund the screening, treatment, medical case management, education and preventive services necessary for ameliorating and preventing lead poisoning. The Court of Appeal affirmed the trial court's ruling. On June 6, 1996, CMA and CAFP filed a letter with the Supreme Court supporting the petition for review. On November 26, 1996, CMA and CAFP filed an *amicus curiae* brief with the California Supreme Court.

Outcome: On June 26, 1997, in an opinion which closely mirrored the arguments in CMA's *amicus curiae* brief, the California Supreme Court ruled that the fees imposed on the lead industry to fund the Act were indeed regulatory and not a tax. The Court also held that this type of fee regulates future conduct by providing a disincentive for companies to produce new, dangerous products and instead will encourage research into new, safer products. The Court's decision may be found at Sinclair Paint Company v. State Board of Equalization (1997) 15 Cal.4th 866, 64 Cal.Rptr.2d 447.

County of San Bernadino v. City of San Bernadino Initial CMA Participation: May 1996
(local EMS agencies will control entire EMS system)

Issue: This case involved an effort by the City of San Bernadino to expand the paramedic activities it had traditionally provided, to include a new ambulance service which would have replaced that provided by the county EMS agency's exclusive ambulance service. On May 20, 1996, an *amicus curiae* brief was filed with the California Supreme Court on behalf of CMA and numerous other parties vitally interested in an effective EMS system.

Outcome: Consistent with CMA's *amicus curiae* brief, the California Supreme Court ruled that the local EMS agencies have authority to maintain medical control over the entire EMS system, including those portions of the system under administrative control of cities grandfathered in by the EMS Act. The Court's decision may be found at County of San Bernadino v. City of San Bernadino (1997) 15 Cal.4th 909, 64 Cal.Rptr.2d 814.

Edwards v. City of Santa Barbara — Initial CMA Participation: December 1996
(ordinance restricting anti-abortion protesters enjoined)

Issue: In this case, an ordinance was challenged which required protesters to stay eight feet away from patients and clinic staff within a 100-foot zone around reproductive health care clinics and places of worship (a "floating" bubble or buffer zone), as well as prohibited demonstrations within eight feet of entrances to such structures. The federal trial court struck down the ordinance in its entirety. On December 2, 1996, CMA filed an *amicus curiae* brief with the United States Court of Appeals for the Ninth Circuit, arguing that anti-choice harassment and intimidation is reducing the availability of abortion services by deterring physicians from providing such services. The brief also showed that face-to-face protest activities adversely affect patients' health and safety and prevent many women from obtaining a wide panoply of basic health care services.

Outcome: After a series of appeals and remands in the face of intervening precedential decisions by the U.S. Supreme Court and the Ninth Circuit, the Ninth Circuit, on August 11, 1998, agreeing in large part with CMA, ruled that the fixed buffer zones were valid, invalidating only the floating bubble zone as overbroad. The opinion can be found at Edwards v. City of Santa Barbara (9th Cir. 1998) 150 F.3d 1213.

League of United Latin American Citizens, et al. v. Wilson
(Prop. 187 Challenge)

Initial CMA Participation: February 1997

Issue: Proposition 187, if not enjoind by the court, would have made undocumented immigrants ineligible for health care services from "publicly funded health facilities" which potentially include physician offices that accept Medi-Cal or other public money. The initiative could have been interpreted to require physicians to verify citizenship before providing health care services and to report persons suspected to be illegal aliens to the government. On November 20, 1995, the court enjoined the health-related provisions of Proposition 187. League of United Latin American Citizens v. Wilson (CD Cal. 1995) 980 F.Supp. 755. The Wilson administration sought reconsideration of that order after President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act and the Illegal Immigration Reform and Immigrant Responsibility Act in 1996. On February 10, 1997, CMA filed an *amicus curiae* brief with the U.S. District Court (Central Dist.) in opposition to the Motion for Reconsideration of the court's November 20, 1995 opinion, arguing that unless the injunction remained in place, Proposition 187 would force physicians to engage in INS screening and reporting activity. Such activity, for which there is no federal authority, imposes a tremendous administrative burden, violates the trust and confidentiality of the physician-patient relationship, and is contrary to the AMA Principles of Medical Ethics. CMA explained that the Proposition would create a significant public health threat, as the threat of being reported to the INS would keep patients from obtaining appropriate care, thereby waiting until the condition worsened and filling the already overflowing emergency rooms.

Outcome: The court denied the Motion for Reconsideration on March 3, 1997. On March 13, 1998, the U.S. District Court for the Central District (Los Angeles) issued a judgment and permanent injunction prohibiting implementation and enforcement of, among others, the health care related provision of Proposition 187. The court's decision is unpublished, but may be read at 1998 WL 141325 (CD Cal.)

Stop Youth Addiction v. Lucky Stores In
(private attorneys general may sue retailers who sell cigarettes to minors)

Issue: This case involves California Business & Professions Code §§17200 *et seq*., California's "Unfair Competition Act," and whether the Act authorizes a private party to sue a retailer who sells cigarettes to minors in violation of a criminal statute. On April 30, 1997, CMA joined an *amicus curiae* brief before the California Supreme Court in support of Stop Youth Addiction. In the brief, CMA argued that B&P Code §§17200 *et seq*. provides an important enforcement tool for both public prosecutors and private attorney generals and must not be interpreted so narrowly as to undermine the Act's important protection purposes. The narrow position argued by the defendant in this case would eliminate a large category of meritorious suits brought by private attorney generals, such as the CMA.

Outcome: Consistent with the position taken in CMA's brief, the Supreme Court ruled that private parties may sue retailers who sell cigarettes to minors in violation of Penal Code §308. This decision may be found at Stop Youth Addition v. Lucky Stores (1998) 17 Cal. 4th 553, 71 Cal.Rptr.2d 731.

Bay Area Addiction Research Treatment, Inc. v. City of Antioch
(CMA supports patient access to methadone clinics)

Initial CMA Participation: August 1999

Issue: This case involves a City of Antioch ordinance, which increased zoning restrictions for state-certified methadone providers. On August 13, 1999, CMA and other healthcare associations filed an *amicus curiae* brief in the U.S. District Court in Northern California, supporting the effort by a methadone clinic to have a City of Antioch ordinance banning the clinic struck down. The AC brief concurred with the plaintiff that the ordinance violates the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The brief discussed the efficacy of methadone treatment, the effects of methadone treatment on the body, and studies, which demonstrate that methadone treatment reduces criminal behavior and helps prevent the spread of bloodborne diseases including AIDS. The brief urged the Court to reject the City of Antioch's attempt to distinguish methadone from other medications and impose greater obstacles upon methadone clinics than on other licensed medical providers. Discrimination against methadone, its providers and the patients who need it should not be countenanced absent proof that such treatment presents a direct threat to the health and well being of the community.

Outcome: On March 15, 2000, the U.S. District Court in Northern California found in favor of the clinic and CMA's position and issued a preliminary injunction enjoining enforcement of the Antioch city ordinance, thereby permitting the clinic to open its doors to patients. Specifically, the court ruled that methadone patients qualify for protection under the ADA and that the methadone clinic does not pose a significant risk to the health or safety of the community. The city of Antioch is therefore prohibited from enforcing the ordinance until there is a trial on the merits of the case.

Ferguson v. The City of Charleston, South Carolina Initial CMA Participation: January 2000
(CMA opposes non-consensual drug testing of pregnant women)

Issue: This case involves a challenge to a city's policy of non-consensual drug testing of pregnant indigent and Medicaid patients who sought obstetrical care at the Medical University of South Carolina. On January 3, 2000, CMA joined in an *amicus curiae* brief filed in the United States Supreme Court

supporting a petition for certiorari (hearing) in this case. The brief stresses the importance of privacy to the physician-patient relationship, and the profound damage to that relationship which would result if physicians and other health professionals may perform tests for prosecutorial purposes without patient consent. It also cites to research supporting the conclusion that a treatment model, rather than a punitive model, is far more likely to result in optimal outcomes for drug-addicted women and their babies.

Outcome: The United States Supreme Court granted review. On June 2, 2000, CMA, along with numerous other medical and public health organizations, filed an *amici curiae* brief reiterating the points made in the brief supporting the petition for hearing.

On March 21, 2001, The United States Supreme Court ruled in favor of CMA's position, stating that the subject non-consensual drug testing was an unreasonable search under the 4th Amendment of the United States Constitution because the purpose of the search was to obtain evidence of criminal conduct by the tested patients. The Court analyzed the hospital's program for testing and stated that while the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes. Accordingly, the Court ruled that a non-consensual search was improper.

Scheidler v. National Organization of Women (CMA advocates for access to appropriate contraception and property rights of medical professionals)

Initial CMA Participation: September 2002

Issue: At issue in this case is whether the property of medical professionals, including the right to conduct their business free from coercive force and threats, is property for purposes of the Hobbs Act, 18 U.S.C. §1951.

In 1986, the National Organization for Women sued Scheidler and his associates for his anti-abortion protests. That case was venued in the United States District Court for the Northern District of Illinois in Chicago. NOW alleged that the defendants were violating RICO through acts of intimidation and violence. In 1994, the Supreme Court held that RICO did, indeed, provide a remedy for this behavior. Subsequently, the case was tried, and the Seventh Circuit held in favor of NOW.

The case is now back before the Supreme Court of the United States on the rather narrow legal issue of whether or not the Hobbs Act, which is the federal extortion statute, supplied the predicate RICO offenses under the facts of this case.

On September 17, 2002, CMA joined with the American Medical Association, the American College of Obstetricians and Gynecologists and other professional organizations in an *amicus curiae* brief in the Supreme Court of the United States. The amici brief argues that medical professionals have a vital interest in insuring that physicians and medical researchers, and the facilities in which they practice medicine and conduct research, receive effective legal protection from the disruptions and injuries that follow from criminal conduct, and threats faced by the medical community in the area of abortion protests, animal rights activists, environmentalists and opposition to biotechnology, to name only a few. The brief argues that this interest encompasses the protection of not only the lives and livelihoods of physicians and researches, but also of the health and safety of patients and the substantial public interest in the advancement of medical science.

Outcome: On February 26, 2003, the U.S. Supreme Court ruled that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, organizers of anti-abortion protests did not "obtain" or attempt to obtain property from women's rights organizations or abortion clinics, and so did not commit "extortion" under the Hobbs Act. Accordingly, the Supreme Court also ruled that the

lawsuit did not meet the requirements of the RICO statutes and overruled the Seventh Circuit's ruling in favor NOW.

Catholic Charities of Sacramento v. State of California
(CMA Advocates for Access to Appropriate Contraception)
Initial CMA Participation: January 2001

Issue: As authorized by the Executive Committee and in partial response to House of Delegates Resolution 617a, "Women's Access to Comprehensive Health Care," CMA joined in an *amicus curiae* Brief filed by the California Planned Parenthood Fund supporting the constitutionality of the Women's Contraception Equality Act, the law passed in 1999 which requires health plans that offer prescription drug coverage to include prescription contraceptives. CMA joined in the brief to stress the importance of access to appropriate contraception in protecting the health and well being of women and their families.

On July 2, 2001, the California Court of Appeal upheld the constitutionality of the Women's Contraception Equality Act. Catholic Charities of Sacramento's petition to the California Supreme Court for review of the case was granted. On March 11, 2002, CMA and the American College of Obstetricians and Gynecologists filed an *amicus curiae* Brief in the California Supreme court in support access to appropriate contraception.

Outcome: On March 1, 2004, The California Supreme Court ruled that Catholic Charities must include birth control coverage in its employees' health plan. In a 6-1 decision, the Court rejected the constitutional challenge and ruled that the charity does not meet the law's definition of "religious employer" because it provides secular services without preaching Catholic beliefs, and employs workers of many different faiths. On May 28, 2004, Catholic Charities requested that the U.S. Supreme Court accept the case for review. On October 4, 2004, the U.S. Supreme Court denied review of the case and the case is now final.

People v. R.J. Reynolds Tobacco Company
Initial CMA Participation: June 2004

(Enforcement of Health and Safety Code§118950—CMA Sponsored Law Prohibiting Cigarette Sampling)

Issue: This case involves the interpretation and enforcement of CMA-sponsored Health & Safety Code §118950. This law declares smoking cessation among the highest priorities in disease prevention and is intended to keep children from beginning to use tobacco products, as well as to encourage all persons to quit tobacco use.

The underlying case involves six major public events attended by families and people of all ages during which R.J. Reynolds set up tents and distributed 108,155 packs of free cigarettes. While R.J. Reynolds surrounded their tents with security guards to make sure that these cigarettes were distributed to adults, R.J. Reynolds knew full well that these free cigarettes would inevitably end up in the hands of their intended targets, minors, a distribution that is prohibited by California Health and Safety Code §118950.

As a result of this activity, the State of California brought an action against R. J. Reynolds and a California Court of Appeal eventually heard the case. On October 30, 2003, the California Court of Appeals, 2d District, ruled in favor of the State of California. In this favorable decision, the Court of Appeals decided that 1) California law restricting distribution of cigarettes was not preempted by the Federal Cigarette Labeling and Advertising Act; 2) distribution of free cigarettes violated California law even if the distribution was confined to an adult only area inside a private function; and 3) the State's fine against R.J. Reynolds of $14.8 million was not excessive.

R.J. Reynolds appealed the Court of Appeal's decision and the California Supreme Court agreed to review the case.

On June 14, 2004, CMA filed an *amicus curiae* brief in the California Supreme Court in support of the State of California and its enforcement of Health and Safety Code §11890.

CMA's brief explains how tobacco use, particularly among youths, is a serious public health crisis. The brief sets forth the legislative history and intent behind Health & Safety §118950, the law that was sponsored by CMA (SB 1100, Bergeson 1991) to eliminate tobacco "sampling," the tobacco industry strategy of giving away free cigarettes with the implicit knowledge that many will be passed along and inevitably fall into the hands of minors. In true keeping with the legislative intent, CMA argued that R.J. Reynolds' tents set up inside the public fairgrounds did not meet the very limited exception to section 118950 that allows distribution on "public grounds open to the general public and leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises." Moreover, *amici* argued that in addition to running afoul of the legislative purpose of keeping children safe from smoking, Reynolds failed to appreciate the second purpose of section 118950 to encourage all people to quit tobacco use.

Outcome: On December 22, the California Supreme Court upheld 2 out of the 3 of the Court of Appeal's rulings. The rulings are summarized as follows:

1. The Court affirmed the Court of Appeal's ruling that federal law does not preempt the California law;

2. "In accordance with the Legislature's expressed declarations and purpose, we construe section 118950 as banning non-sale distribution of cigarettes at events held on public property where adults and minors are present"; and

With regard to whether or not the fine imposed was excessive, the Supreme Court returned to case to the trial court to determine, from a factual perspective, whether the fine imposed violated federal and state constitutional prohibitions.

REIMBURSEMENT: FROM HMOS AND OTHER PRIVATE PAYORS

Security Life Insurance Co. v. Meyling Initial CMA Participation: September 1997
(insurer cannot rescind coverage due to misrepresentations of patient's history on insurance application)

Issue: In this case, an insurer rescinded coverage after the policy was issued and treatment was given to an otherwise eligible employee because of material misrepresentations of the person's health history in an application for insurance. On September 25, 1997, CMA submitted an *amicus curiae* brief with the Ninth Circuit Court of Appeals asking the question, "Who bears the risk of loss when health care services are provided after the third-party payor authorizes the services for reimbursement, but before it rescinds health coverage?" The brief explained why public policy, as well as statutory and judicial law, compel the conclusion that it is the third-party payor, not the physician or other provider, that should bear the risk under these circumstances.

Outcome: Though the Ninth Circuit Court of Appeals did not follow CMA's analysis, the Court ruled in favor of the insured, holding that Security Life Insurance Company was not entitled to rescission because the insured's misstatements were not material. Thus, the end result is the same. The Court's decision may be found at Security Life Insurance Co. v. Meyling (9th Cir. 1998) 146 F.3d 1184.

Lauderdale Associates d.b.a. Alhambra Convalescent Hosp. v. California Dept. of Health Services
(CMA advocates for physician reimbursement for medically necessary services provided in good faith)
Initial CMA Participation: February 1998

Issue: This case involves a challenge to established California law, specifically the Valley View Home of Beaumont v. Department of Health Services (1983) 146 Cal.App.3d 161, 194 Cal.Rptr. 56 decision,

which states that a health care payor cannot use technical billing failures as a reason to exact a forfeiture on a provider who provides medically necessary services in good faith. On February 12, 1998, CMA filed an *amicus curiae* brief with the California Court of Appeal (1st Dist.), arguing that the provision of continuous quality health care in California depends on physicians and other providers receiving payment for medically necessary services provided to patients. A rejection of these equitable principles would have profound implications on a physician's or other provider's ability to provide medically necessary care to patients. This is especially apparent with the proliferation of managed care in California and physicians contracting with an average of 15 different health plans, all with different procedures and requirements, thereby causing billing for medical services to become cumbersome, complex, and confusing. Physicians and other health care providers are increasingly shouldering the indigent care burden, but cannot provide endless charity care.

Outcome: On October 7, 1998, the Court of Appeals issued its opinion agreeing with CMA and reaffirming the important equitable principle mandating fair payment in appropriate circumstances. The Court's decision may be found at Lauderdale Associates d.b.a. Alhambra Convalescent Hospital v. California Department of Health Services (1998) 67 CalApp, 4th 117, 78 CalRptr. 2d 802.

Commissioner of Corporations of the State of California v. MedPartners Provider Network, Inc.
(CMA seeks payment of services provided by physicians)

Initial CMA Participation: April 1999

Issue: This case involves the financial solvency of MedPartners Provider Network, Inc.(MPN), a physician practice management company, and whether physicians could keep their patients and expect to be reimbursed for medical services provided to these patients. On March 11, 1999, the state seized control of MPN and placed it in bankruptcy. This bankruptcy filing froze MPN=s assets for a short term, enabling the state=s conservator to operate the company. On April 1, 1999, CMA filed an *amicus curiae* memorandum with the Superior Court (Los Angeles) opposing MPN=s motions to terminate the state=s takeover and forced bankruptcy filing. CMA supported the urgency of the California Department of Corporation=s (DOC) actions and the reasons why it would have been disastrous for DOC to have delayed its seizure. CMA stressed that the health care system generally, and limited Knox-Keene licensees in particular, is experiencing a severe financial crisis. Emphasizing the strong legislative policy that plans be financially sound and that the interests of the enrollees are paramount, CMA argued that all the statutory protections for enrollees are meaningless if there is not a financially stable system. CMA=s brief and supporting declarations discussed at length the fiasco which ensued after the FPA Medical Management bankruptcy in the summer of 1998, including the disruptions in patient care and the millions of dollars owed to California physicians. The brief discussed the link between assurance of reimbursement and continuity of care, and its effect on patient well being.

On May 27, 1999, CMA filed an *amicus curiae* brief with the U.S. Bankruptcy Court for the Central District of California, opposing a broadly written injunction request from MPN. The proposed injunction would prohibit providers to MPN and MPN=s affiliated professional corporations from pursuing Health & Safety Code '1371 claims for untimely payment against health plans while two interim payment stipulations remain in effect. These stipulations, negotiated early in the case, were designed to ensure the continued flow of capitation payments from the health plans to MPN, and from MPN to the providers contracting with MPN. Conspicuously absent from these stipulations were any assurance that funds would flow to the affiliated professional corporations and from them to the thousands of physicians and other providers contracting with the PC=s. In its brief, CMA vigorously argued that the court cannot and should not extend the injunction to reach these non-MPN providers. In particular, those who are Astrangers@ to MPN, such as emergency room physicians, should not be enjoined.

On June 9, 1999, the State signed an agreement with MedPartners in an attempt to achieve a timely solution to the MedPartners bankruptcy rather than force physician creditors of MedPartners to undergo a

lengthy bankruptcy battle. While far from perfect, the Agreement represents a compromise between the State, MedPartners, health plans and physicians. CMA believes there are protections in the Agreement to help physicians get paid and protect continuity of care. CMA counsels physicians to accept the terms of the agreement and sign the Release. If physicians are not paid at least 75% of the amounts owed, and MedPartners defaults on the Agreement, CMA will pursue litigation against the health plans to obtain full payment for CMA members.

Throughout this proceeding, CMA has continuously worked with state officials and participated as an *ex officio* member of the MPN Official Creditors Committee to ensure that physicians= concerns are considered.

Outcome: In late December, 1999, long delayed final agreements were reached and payments to physicians began to flow. CMA continues to carefully monitor the situation and meets regularly with concerned parties to ensure that MedPartners complies with the settlement agreement.

California Emergency Physicians Medical Group v. Pacific Care
(Health Plan Duty to Pay for Emergency Services)

Initial CMA Participation: October 2002

Issue: This case involves the responsibility of health plans to pay claims for emergency medical services as mandated by the Knox-Keene Act. California Emergency Physicians Medical Group (CEPMG) brought an action against PacificCare related to the payment of emergency services by the health plan. The trial court dismissed the case and CEPMG has appealed from this ruling.

On October 22, 2002, CMA filed an *amicus curiae* brief in support of CEPMG concerning the plan's responsibility to pay for this care. Although CMA disagrees with those opinions, CMA's brief explained why the trial court improperly relied upon *California Medical Association, Inc. v. Aetna* (2001) 94 Cal.App.4th 151 and *Desert Healthcare Dist. v. PacifiCare* (2001) 94 Cal.App.4th 781 when dismissing the case. As is discussed in CMA's AC brief before the Court of Appeal, those cases did not involve the specific body of law at issue in this case—the Knox-Keene provisions that specifically mandate health plan accountability for the payment of emergency services. *See* Health & Safety Code §§1371.4 and 1371.35.[1]

CMA was the sponsor of Health & Safety Code §1371.4 and supported Health & Safety Code §1371.35-provisions that unequivocally mandate that health plans pay for emergency medical services and reimburse all those who provided such care, regardless of the existence of a plan's contracting intermediary. As the statutes themselves and their legislative history reveal, the Legislature intentionally enacted provisions with the broadest application to require reimbursement, regardless of traditional rules of managed care and regardless of any contracts that depart from the statutory scheme.

[1]These provisions insure payment for all those providing emergency medical services, including emergency physicians, on-call specialists, and hospitals.

CMA explained that emergency medical services deserve and thus have been accorded a special status pursuant to California law. Both literally and figuratively, emergency services provide the lifeline for all Californians. Not only do emergency departments evaluate, stabilize and treat illnesses and injuries that need immediate attention, such as cardiac arrest, but they are increasingly providing care for many Californians for conditions which should have been treated elsewhere.

Further, all persons in this country have a right to emergency medical care, and emergency departments must provide care to all those who come through their doors. By law, CMA explained that hospitals that maintain an emergency department must provide emergency medical services to all those that need them, regardless of the ability to pay. (Health & Safety Code §1317; 42 U.S.C. §1395dd.)

Under these circumstances, CMA reasoned the California Legislature understood that physicians providing emergency medical services must be paid reasonably for their services and that health plans, in particular, must bear responsibility for the payment of claims for their enrollees, regardless of the existence of any contracting intermediaries. Emergency departments are not able to survive and provide the critical public health function that they serve in this state if health plans fail to pay them for their services.

Outcome: On September 5, 2003, the California Court of Appeal, Fourth Appellate District, Division One ruled in favor of PacifiCare and upheld the trial court's dismissal of CEPMG's case. Unfortunately, the Court of Appeal found that, while health care service plans have a mandatory duty to pay for emergency services pursuant to the Knox-Keene Act, the Act also allows health care service plans to delegate that responsibility. Thus, the Court ruled that PacifiCare did not have to pay emergency department physicians for the treatment of enrollees who chose an intermediary as their "medical provider" with whom PacifiCare contracted, even if that provider became insolvent and failed to pay for those services.

CEPMG has asked the California Supreme Court to review this case and on October 20, 2003, CMA filed a *amicus curiae* letter in support of CEPMG. In early 2004, the Supreme Court declined to review the case.

Chase Dennis Emergency Medical Group, Inc.v. Aetna U.S. Healthcare of California
(Health Plan Duty to Pay for Emergency Services)

Initial CMA Participation: November 2003

Issue: This case involves very similar issues to the *California Emergency Physician Medical Group v. PacificCare* case discussed above. In this case, the Court of Appeal ruled that, notwithstanding a statute that expressly required that HMOs reimburse emergency providers for their services (Health & Safety Code §1371.4), unpaid providers had no right to recover payment from those HMOs since neither the language or the statute, nor its legislative history "clearly indicates the legislature intended to create such a right to sue for damages."

On November 7, 2003, CMA filed a *amicus curiae* letter urging the Supreme Court to accept review of this case as there are at least three reported decisions that have allowed HMOs to absolve themselves of the very function for which licensure is required under the Knox-Keene Act—to reimburse providers so long as they contract away that responsibility to failing third parties that are generally unlicensed and are not subject to regulatory control. In its brief, CMA explained that there has not been a single enforcement action brought by the Department of Managed Health Care (DMHC) the HMO regulator, requiring that these HMOs pay physicians for the literally millions of dollars of claims that have not been reimbursed.

CMA urged that a private right of action must exist if section 1371.4 is to be enforced, as there is absolutely no statutory or regulatory authority authorizing, let alone mandating, that the DMHC direct HMOs to provide payments to providers.

Outcome: In early 2004, the California Supreme Court declined to review the case.

Ochs v. PacifiCare Initial CMA Participation: March 5, 2003
(Urging Direct Health Plan Liability for Payment for ER Services Provided by *Non-Contracted* Physicians)

Issue: Whether an emergency physician who has no contract with a health plan that covers an emergency patient can impose financial responsibility *directly upon the plan* to pay the claim for emergency medical services provided to their enrollee by that physician. This case differs from the *California Emergency Physicians Medical Group v. PacificCare* case, above, as that case involved unpaid health care providers *that entered into express contracts with plan intermediaries* demanding that they "look solely" to those intermediaries for payment. Where no such contract exists, as in this *Ochs* case, CMA's brief explains that other courts have concluded that health care providers have a right to seek reimbursement directly from a health plan and that the Knox-Keene Act does not preclude lawsuits seeking reimbursement based on contract theory or the Unfair Competition Law (UCL), Business & Professions Code §17200.

CMA's brief also emphasizes the fact that emergency medical services deserve and thus have been accorded a special status pursuant to California law. Both literally and figuratively, emergency services provide the lifeline for all Californians. It is well recognized that emergency departments act as a safety net for the uninsured—they provide routine care to those individuals who lack access to regular sources of care. Increasingly, however, emergency departments also provide care to the insured – those who have paid for full health care coverage but have lost access to their physician due to the insolvencies of their medical groups. Without doubt, the financial stability of emergency departments and the physicians who provide emergency services is vital to us all. All Californians depend upon these hospitals and physicians to provide life-saving services in cases of emergency, but also urgent care in cases where patients have nowhere else to go.

Under these circumstances, the CMA brief explains, the Legislature understood that physicians providing emergency medical services must be paid reasonably for their services and that health plans, in particular, must bear responsibility for the payment of claims for their enrollees, regardless of the existence of any contracting intermediaries. Neither hospital emergency departments nor the physicians who provide emergency medical care can survive and continue to provide the critical public health function that they serve in this state if health plans fail to pay them for their services. Health plans must not be allowed to absolve themselves from responsibility to their enrollees and to physicians by attempting to contract away their responsibilities mandated by law, particularly where the unpaid health care professional has no contract whatsoever with the health plan or any of its intermediaries.

Outcome: On February 15, 2004, the Second Appellate District Court of Appeal (Los Angeles) ruled that a health plan may be liable to pay for emergency services rendered when it acted negligently in delegating it's payment responsibilities to a contracting intermediary that subsequently became insolvent. While the Court also ruled, consistent with prior appellate decisions, that under the Knox-Keene Act health plans are not statutorily obligated to pay for medical services, the Court's ruling nonetheless provides a significant basis to address non-payment where intermediaries become insolvent and thus unable to pay physicians. In addition, the Court expressed the unfairness of the Knox-Keene Act to these situations and suggested that the Legislature come up with a solution to rectify it. On May 12, 2004, the California Supreme Court denied the health plans' requests for de-publication (CMA filed a letter brief against de-publication on April 14, 2004) and the case is now a final, published opinion.

Bell v. Blue Cross of California Initial CMA Participation March 2005

(Physician's Right to Payment for Providing Emergency Care and Services)

Issue: This case involves a trial court's endorsement of Blue Cross's activity through its ruling that physicians providing emergency care and services could not go to court to seek from the plan the reasonable value of payment for those services. On appeal, Blue Cross claimed it has no responsibility to pay the reasonable value of emergency medical services provided to its enrollees because the Knox-Keene Act does not require that the patient to be made whole in emergency cases. Blue Cross further claimed that neither patients nor physicians acting on their behalf, but only its regulator, the Department of Managed Health Care (DMHC) has the ability to enforce the Act's non-discretionary requirement that plans "reimburse providers for emergency services and care." *See* Health & Safety Code §1371.4. CMA explained that Blue Cross' contentions are disingenuous at best. The law leaves no room for debate that plans must pay reasonably for emergency services provided to their enrollees by non-contracting physicians. Further, Health & Safety Code §1371.4, far from being "so quintessentially regulatory in nature" that only the DMHC can enforce it, is the very type of provision that can and should be enforced privately through the courts. The provision contains no guidelines governing the exercise of regulatory powers. Nor does Health & Safety Code §1371.4 provide any mechanism for the DMHC to enforce the reimbursement mandate. In fact, the DMHC by law cannot be the adjudicator of what constitutes a reasonable payment in a specific case. For it to do so would be violative of the long-standing prohibition against that agency setting rates. See Health & Safety Code §1367.

CMA urged that the appellate court overturn the trial court's decision, noting that plans must ensure that those who provide emergency services to their enrollees are paid, as a matter of public policy and law. HMOs are not free of judicial scrutiny and should not absolve themselves of this responsibility.

Outcome: On July 21, 2005, the Court confirmed the view expressed in CMA's amicus brief that non contracted physicians providing medical services to health plan enrollees are entitled to 1) receive a reasonable fee for those services; 2) enforce their rights to collect that fee in court to recover the reasonable value of their services; and 3) enforce their rights to collect that fee in court. Among the helpful statements the court makes are: "However concerned we may be bout spiraling costs for health care service plans and their enrollees, those concerns cannot justify a rule that would single out emergency care physicians and force them to work for something other than a reasonable fee". Blue Cross has requested the California Supreme Court to review this ruling or de-publish the court's ruling. On September 27, 2005, CMA filed a letter brief opposing Blue Cross' request for de-publication of the opinion and petition for review.

On October 26, 2005, the California Supreme Court denied both Blue Cross' request for de-publication and petition for review and the case is now final.

Cohen v. Health Net of California Initial CMA Participation June 2005
(Ability of Non-ContractingPhysicians to Bill Their Patients)

Issue: This case involves whether there can be balance billing for HMO non-contracted emergency claims and whether claims for violations of the Knox-Keene Act fall exclusively within the jurisdiction of the Department of Managed Health Care. A California Court of Appeal ruled that there can be no such balance billing and that such claims are in the exclusive jurisdiction of the DMHC. In June 2005, CMA filed a letter brief, requesting that this published decision be de-published so that the decision cannot be cited as precedent.

The Plaintiff's son in this case had received emergency medical services on three occasions at Los Alamitos Medical Center and as a result received a series of billing statements totaling $744.00 from the emergency medical group (CA-EM-1). The patient's father did not pay those claims and thereafter received dunning notices from the emergency medical group or its collection agent. After the Plaintiff filed suit, the emergency group submitted the bills to Health Net, which paid them. Notwithstanding the

fact that Health Net, in fact, made the plaintiff whole in this case, the Plaintiff proceeded with a variety of causes of action against Health Net, the hospital, the emergency group, and its billing service for, among other things, unfair business practices under the California unfair competition law and insurance bad faith.

In sum, the Court makes broad brush statements concerning the ability to bring claims under the Knox-Keene Act and suggests that balance billing is not appropriate with respect to non-contracted emergency care and services in the absence of any real analysis of the facts and law. Now that this opinion has been published, CMA is concerned that it will have negative implications for future cases, and that health plans will use it as a mechanism to strengthen their arguments against balance billing and deprive physicians of their rights to go to court for violations of the Knox-Keene Act.

Outcome: For procedural reasons, this case is no longer citable, as the court is holding the case in abeyance pending review of other unrelated cases.

REIMBURSEMENT: OTHER ISSUES

Rutberg v. Lovett
("common fund doctrine" not applicable to medical lienholders)

Issue: In this case, the plaintiff, Dr. Rutberg, accepted a medical lien to secure payment for medical services. However, after receiving substantial money in his personal injury case, the patient refused to pay Dr. Rutberg in full, citing the "common fund doctrine." This doctrine states that attorneys' fees for litigation undertaken to benefit people with a common interest must be paid by all those who benefit (in this case, allegedly, the physician). On June 11, 1996, CMA filed an *amicus curiae* brief with the Court of Appeals (4th Dist.), arguing that the "common fund doctrine" cannot be applied to apportion a plaintiff's attorney fees among medical lienholders.

Outcome: The appellate court agreed with CMA, ruling that Dr. Rutberg's lien expressly provided that the patient's obligation to pay the physician was independent of any settlement the patient might obtain in his personal injury action. Thus the patient was not allowed to deduct a portion of the physician's payment to offset his cost of attorney fees under the "common fund doctrine." This opinion may be found at (1998) 63 Cal.App.4th 48, 73 Cal.Rptr.2d 496.

Zuckerman v. Board of Chiropractic Examiners Initial CMA Participation: October 2001
(Lawsuit challenging Constitutionality of Cost Recovery Statutes)

Issue: At issue in this case is whether a state agency, such as the Medical Board, may condition its provision of a constitutionally mandated hearing on an accusation seeking the deprivation of a fundamentally vested right upon the accused physician's willingness to risk paying back the agency its potentially staggering investigation, enforcement and prosecution costs should his or her defense on all charges ultimately not prevail. On October 1, 2001, CMA filed an amicus curiae brief that explained that the purpose of such regulatory statutory fundraising schemes is to chill the exercise of the right of physicians to vigorously defend themselves. Such schemes seek to augment the Medical Board's budget through (1) the licensee's remittance of prosecution costs incurred by the MBC, and (2) the savings realized by the MBC by extorting early settlements and otherwise not having to provide a full hearing. As such, CMA explained, these schemes are unconstitutional on their face.

CMA's brief demonstrated that "cost recovery" schemes, such as those envisioned by "Business & Professions Code §125.3" vitiate the very elements so essential to due process—a fair decisional process and an impartial decision maker. These schemes force physicians to choose between (1) taking the risk of paying for the services of the very individuals who are prosecuting and investigating them if they are unsuccessful at the administrative hearing (a cost they could not possibly predict at the outset), or (2)

playing it safe by accepting settlement offers that are unfair or unnecessary to protect the public to avoid potentially high prosecution costs (in addition to their own attorneys fees). In neither case is the public interest served.

The cost recovery regulation at issue in the Zuckerman case, 16 C.C.R. §317.5 pertained to chiropractors. However, for all relevant purposes, it is identical to the statutory provision relating to health care licentiates, including physicians, generally, set forth in Business & Professions Code §125.3. Thus, CMA's AC brief discussed the general statute as it applies to physicians.

Outcome: On August 26, 2002, the California Supreme Court upheld the constitutionality of the Board of Chiropractic Examiner's (BCE's) cost recovery program. The Zuckerman ruling applies equally to the Medical Board's cost recovery program because it is virtually identical to that of the BCE. However, in its ruling, the California Supreme Court imposed new obligations on disciplinary boards, and offered new safeguards for licentiates, to help limit an agency's abuse of its cost recovery system.

Olszewski v. ScrippsHealth and Medical Liability Recoveries, Inc **Initial CMA Participation: June 2001**
(CMA supports Medi-Cal Lien Statute)

Issue: This case involves the viability of Welfare and Institutions Code §14124.791 (the CMA sponsored statute enacted first in 1985 and amended in 1992 for the purposes of complying with federal law and its prohibition against balance billing). On May 9, 2001, the Court of Appeals ruled in this case that the Medi-Cal lien statute violated the federal ban on balance billing, and thus a health care provider who accepts Medi-Cal payments to care for patients is prohibited from recovering upon a lien against any recovery resulting from a claim or lawsuit against a third party tortfeasor. CMA vehemently disagrees with this ruling because it believes that California law does not restrict beneficiaries to recover only those amounts that are expended by the Medi-Cal program in their personal injury lawsuits, as the Court assumed. Rather, CMA believes that the law allows them to recover the "reasonable value" of services, which includes a physician's and hospital's full charges if the physician or hospital seeks that amount.

On June 1, 2001, CMA filed an *amicus curiae* brief in support of the Scripps Health's Petition for Rehearing, which was denied. On June 22, 2001, CMA filed a letter in support of the Petition for Review before the California Supreme Court.

On August 29, 2001, the California Supreme Court granted review and on March 6, 2002 CMA filed a brief on the merits. The brief explained why Welfare & Institutions Code Section 14124.791—a provision critical to the ability and willingness of physicians and health care providers to participate in this state's beleaguered Medi-Cal program—is fully consistent with federal law, and indeed, encouraged by it.

Outcome: On June 2, 2003, the California Supreme Court ruled that the Medi-Cal lien statute set forth in Welfare & Institution's Code §14124.791 violated the federal ban on balance billing and thus a health care provider who accepts Medi-Cal payments to care for patients is prohibited from recovering upon a lien against any recovery resulting from a claim or lawsuit against a third party tortfeasor. CMA is working with other interested parties to remedy this ruling through legislation. The case can be found at *Olszewski v Scripps Health* (2003) 30 Cal 4th 798

Shuer v. County of San Diego **Initial CMA Participation: September 2003**
(Physicians Must Be Able to Obtain Prompt Direct Judicial Review of Actions Brought Pursuant to CMA-Sponsored Anti-Retaliation Statute—Business and Professional Code §2056)

Issue: This cases involves a physician was allegedly terminated from employment with a county juvenile hall in direct retaliation for her patient care advocacy. The trial court dismissed the physician's lawsuit on the grounds that she failed to exhaust her administrative remedies provided by the county. In September 2003, CMA filed an *amicus curiae* brief explaining that the exhaustion of administrative remedies doctrine (requiring an aggrieved individual let the agency or, in this case, county, decide the matter, before going to court) does not apply in this context.

CMA was the sponsor of Business & Professions Code §2056, a provision that protects physicians against retaliation for advocating for medically appropriate health care for their patients and/or for communications with patients. As the statute itself and its legislative history reveals, the Legislature intentionally enacted a provision with the broadest application to protect all physicians who provide medical services, whether permanent or probationary employees, "at will" employees or independent contractors, and ensure that if they face retaliation as a result of their advocating medically appropriate health care, they have a prompt and direct right to judicial recourse. Given the statute's purpose—to protect medical whistleblowers against retaliation for advocating for their patients, CMA believes that Business & Professions Code §2056 is not a statute for which exhaustion of administrative remedies is required.

CMA's brief explained that physicians are often trapped between their ethical and legal duty to remain dedicated to, and vigorously advocate for, their patients' health care needs and the practical necessity to protect their relationship with the entities that control their ability to practice medicine and treat patients, such as hospitals and managed care plans, and in this case, a county. To ensure that physicians not compromise their obligations to their patients, California law places an affirmative obligation upon physicians to become medical whistleblowers, that is—advocate for medically appropriate health care for their patients where they reasonably believe their ability to provide medically appropriate care is impaired. (*Wickline v. State of California* (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810.) To safeguard medical whistleblowers from retaliation, CMA explained that the California Legislature in Business & Professions Code §2056, recognized that **prompt and direct judicial** protection for all physicians victimized by improper terminations or penalties from hospitals, managed care organizations and other organizations that control a physician's ability to treat patients must exist. Without such protections, at best physician/patient relationships are needlessly destroyed; at worst, the provision of quality medical care is jeopardized. The law countenances neither result.

Physician advocates must have the ability to have their claims heard first and promptly before an independent judiciary as the Legislature intended. If the organization subject to the complaint must first address the charges, no longer will physicians feel safe in zealously acting in their patients' best interests. No longer will critical physician/patient relationships be maintained. No longer will physicians be able to give, and patients be able to receive, unquestionably un-compromised health care. For these reasons, California Medical Association filed an *amicus curiae* brief urging that the Court of Appeal reverse the trial court's judgment and provide the affected physician with the opportunity to seek judicial recourse as the Legislature intended.

Outcome: On April 8, 2004, the California Court of Appeal, Fourth Appellate District, Division One reversed the trial court's dismissal of the physician's lawsuit and ruled that 1) it was unclear whether the physician had the right to seek an administrative remedy and 2) the County was barred from asserting that she had failed to exhaust her administrative remedies. Because of these findings, the Court of Appeal did not make a ruling on the physician's claims and returned the case to the trial court for consideration as to whether Business & Professions Code §2056 was violated.

In June 2004, the County of San Diego and various constituencies, including the California Employment Lawyers Association, requested that the Court's opinion be de-published. On August 11, 2004, the Court denied these requests and the court's opinion will remain published.

The case is now pending in the trial court to address the merits of the physician's case.

REPORTING ABUSE/VIOLENCE

San Diego County Department of Social Services v. Joan M., In re Noah M.
(child abuse construed to not encompass fetus abuse)

Initial CMA Participation: August 1989

Issue: This case involved a trial court's order declaring an infant to be a dependent child of the court and removing the infant from his mother's custody and control pursuant to Welfare & Institutions Code §§300 and 361. In so doing, the court suggested that prenatal drug use constituted "abuse in utero," evidence of which must be reported to a child protective service agency pursuant to Penal Code §11166(a). The California Court of Appeal upheld this order. On August 3, 1989, the CMA filed an *amicus curiae* letter with the California Court of Appeal, in which CAHHS, ACOG District 9 and AAP, California Division joined asking the Court to depublish the opinion in this case, as it would expand the definition of "child abuse" to encompass "fetus abuse."

Outcome: On September 28, 1989, pursuant to the CMA's request, the Court of Appeal ordered the opinion depublished.

Loeblich v. City of Davis
(protected immunity for investigative activities pursuant to child abuse reporting)

Issue: This case raised the question of whether the immunity provided by Penal Code §11172(a) extends to investigative activity necessarily involved in a report of child abuse. On November 14, 1989, the CMA filed an *amicus curiae* brief in the California Supreme Court, in which the American Academy of Pediatrics joined asking the Court to depublish the opinion in this case because it was inconsistent with existing case law which gives immunity for the investigative activities incident to a report of child abuse.

Outcome: On December 14, 1989, pursuant to the CMA's request, the California Supreme Court ordered the appellate decision depublished.

In re: Troy D. (San Diego County Department of Social Services v. Kelly D.)
(upheld prenatal drug use as adequate basis for instituting child dependency proceedings)

Initial CMA Participation: December 1989

Issue: This case involved a dependency petition brought by the San Diego Department of Social Services alleging that an infant was born under the influence of dangerous drugs and that his parents were unable to protect him. The San Diego County Superior Court declared the infant a dependent child of the juvenile court, and the mother appealed. The Court of Appeal ruled that the fact that the infant was diagnosed as being born under the influence of drugs was sufficient to establish the juvenile court's jurisdiction and the evidence was sufficient to sustain the allegations in the amended petition. On December 29, 1989, the CMA filed an *amicus curiae* brief with the California Supreme Court in which CAHHS, ACOG District 9 and AAP California division joined, asking the Court to depublish the appellate opinion which ruled that prenatal drug abuse alone could justify the exercise of dependent child jurisdiction.

Outcome: Regrettably, the California Supreme Court declined the CMA's request for depublication. The appellate opinion can be found at In re: Troy D. (San Diego County Department of Social Services v. Kelly D.) (1989) 215 Cal.App.3d 889, 263 Cal.Rptr. 869, review denied Jan. 31, 1990.

In re Stephen W. (Butte County Child Protective Services v. Rayla W.)
(upheld prenatal drug use as adequate basis for instituting child dependency proceedings)

Initial CMA Participation: February 1990

Issue: This case involved a newborn infant who was declared a dependent child by the Butte County Superior Court and placed with his paternal grandparents, pending the successful completion by the parents of a family reunification plan. The mother appealed this decision. On February 2, 1990, the CMA filed an *amicus curiae* brief with the California Court of Appeal, asking the Court to rule that prenatal drug use alone was not an adequate basis for instituting dependency proceedings. While viewing with great concern the growing incidence of newborn infants who have been exposed to dangerous drugs and alcohol, the CMA stressed that it is essential to realize that invoking the child neglect system and the judicial process may not always be an appropriate response, and in some cases, may even worsen the plight of these infants and their families.

Outcome: The California Court of Appeal (3d Dist.) ruled that the allegation—that because the infant was born with opiates in his urine and displayed symptoms of drug withdrawal shortly after birth, it was necessary to medically treat his withdrawal symptoms—sufficiently stated a cause of action to place the infant under the jurisdiction and power of the juvenile court. In so ruling, the Court rejected the contention that the parents had been singled out based solely on their status as substance abusers. On June 12, 1990, the CMA filed a request with the Court of Appeal that this decision remain unpublished. On July 2, 1990, CMA, along with ACOG District IX and the California Division of AAP, filed a request for depublication of the appellate opinion with the California Supreme Court. Unfortunately, in both cases, the CMA's requests were denied. The appellate decision can be found at In re Stephen W. (Butte Cty. Child Protective Services v. Rayla W.) (1990) 221 Cal.App.3d 629, 271 Cal.Rptr. 319.

Thomas v. Chadwick
(upheld immunity from federal civil rights actions of participants pursuant to state child abuse reporting law)

Issue: This case involved parents whose child was taken from them after another child's medical difficulties and death were attributed to their abuse. After the parents were cleared of all charges with respect to injury and death of the child, they brought a civil rights action under federal law, 42 U.S.C. §1983, against the physician and hospital that had reported the abuse suspicions. The San Diego County Superior Court granted judgment for the physician and hospital, and the parents appealed. On June 22, 1990, the CMA filed an *amicus curiae* brief with the California Court of Appeal, arguing that the participation of private parties in a reporting scheme mandated by state law did not make them "state actors" for purposes of 42 U.S.C. §1983.

Outcome: Consistent with the CMA's views, the Court of Appeal ruled that 1) mandated reporters of child abuse enjoy absolute immunity under state law even for negligent, reckless, or intentionally false reports; 2) such immunity encompasses both the initial and subsequent reports required or authorized by state law; and 3) such immunity bars a claim under 42 U.S.C. §1983. On November 9, 1990, the CMA filed a letter with the Court of Appeal, requesting modification of footnote 12 due to the Court's comments concerning the "under color of state law" element of a §1983 claim. These comments suggested that "State action can exist when the private party acts under compulsion of State law." The CMA, however, pointed out that prior cases more accurately assert that there is a state action when the State has compelled the private party to commit the specific wrongful conduct at issue or the private party is a willful participant in joint activity with the State. In this case, the State has not fostered or compelled the making of allegedly knowingly false or negligent reports. Rather, the State has enacted a valid law compelling certain categories of individuals to report child abuse. CMA argued that the Court's misconstruction could subvert a host of State reporting schemes and inappropriately subject physicians and other private citizens to suits under federal civil rights law. On November 14, 1990, the Court agreed

with the CMA and modified footnote 12. This decision, as modified, can be found at Thomas v. Chadwick (1990) 224 Cal.App.3d 813, 274 Cal.Rptr. 128.

In Re: Adrianna May H. (Yolo County Dept. of Social Services v. Winona D.)
(CMA advocates for the availability of pre-natal and other medical care for drug-addicted pregnant women)

Initial CMA Participation: June 1993

Issue: This case involved a baby, Adrianna, whose urine at birth tested positive for marijuana, amphetamines and methamphetamines. Although exhibiting no signs of drug withdrawal or other medical problems, she was removed by the Department of Social Services from her mother's care and custody. A petition was filed in a juvenile court based on the allegation that a urine sample of the infant was positive for illegal drugs. Two weeks after the infant's birth, the court declared Adrianna a dependent of the court. One month later, the court made a dispositional ruling, placing the child outside of the home. Approximately seven months later and after notice of appeal, the court returned Adrianna to her mother's care. On June 17, 1993, the CMA filed an *amicus curiae* brief on behalf of itself and ACOG with the California Court of Appeal, 3d Dist., arguing that a neonate's positive drug screen alone does not constitute a basis for exercising dependant child jurisdiction and removing the child from parental custody. CMA contended that such actions would deter drug-addicted pregnant women from seeking pre-natal and other medical care. CMA maintained that a child should be removed only if there were actual evidence of parental unfitness.

Outcome: In an unpublished opinion, the Court of Appeal held that the mother's admission of guilt was not voluntary and intelligent and that the juvenile court erred in not properly advising her of her due process rights and obtaining a waiver of these rights under California Rules of Court, rule 1449. As such, the Court set aside the dispositional ruling.

REPORTING DISEASES, CONDITIONS & EVENTS

Paul v. United States of America
(CMA helps define Health & Safety Code §410)

Issue: In this case, the plaintiffs, Mr. and Mrs. Paul, alleged that the physicians employed by the defendant, the United States of America, failed to report a patient suffering from a disorder characterized by lapse of consciousness, as required by state law. The plaintiffs claimed that subsequently the patient suffered a loss of consciousness while driving an automobile and the automobile collided with another vehicle causing serious injury to the plaintiffs. On October 13, 1989, CMA filed an *amicus curiae* brief in the U.S. District Court. CMA asked the court to rule that the report of the patient's condition made by the initial diagnosing physician satisfied the requirements of Health & Safety Code §410. CMA argued that requiring multiple reporting by subsequent physicians (who may treat the patient for various causes) would undermine the physician-patient relationship and force the government to use scarce resources to screen and eliminate redundant reports. CMA also argued that MICRA should apply to a physician's reporting obligations.

Outcome: Before the district court could rule on the matter, the plaintiff voluntarily dismissed the case. There is no published opinion.

Romero v. Levine
(CMA sought favorable ruling on lapse of consciousness reporting)

Issue: In this case, it was alleged that Dr. Levine failed to report to the Department of Motor Vehicles a change in his patient's epilepsy condition, as required by Health and Safety Code §410. After the alleged failure to report, the patient, Ms. Stevenson, allegedly suffered a seizure while driving, causing an

accident seriously injuring her passenger and friend, Ms. Romero. The jury attributed 95% fault for Romero's injuries to Stevenson's negligence. The remaining 5% fault was attributed to Dr. Levine for his alleged failure to report a change in Stevenson's epilepsy condition to the DMV, the theory being that had Levine "properly" reported, Stevenson would not have driven, and Romero would not have been injured. Since Stevenson had settled with Romero prior to trial, the judgment was entered against Levine for the entire amount of Romero's damage minus the $50,000.00 settlement between Romero and Stevenson, for a total judgment of approximately $3 million. On March 12, 1992, the CMA filed an *amicus curiae* brief with the California Court of Appeal. The CMA argued that a single report by the initial diagnosing physician satisfies the requirements of §410; reporting should be required only of physicians who initially diagnose the reportable condition; and mandating reports by the initial diagnosing physician only will not jeopardize the safety of the public.

Outcome: The Court of Appeal (4th Dist.) Court overturned the jury verdict and pronounced it to be a "miscarriage of justice." On October 5, 1993, the CMA filed a request for publication of the opinion. When the Court of Appeal refused that request, on October 28, 1993, the CMA filed a request for publication with the California Supreme Court, arguing that the appellate opinion was of profound importance to the medical community as it resolves issues concerning mandatory reporting and MICRA. The Supreme Court, however, denied review in this case and also declined to order the opinion to be published.

SOLICITATION OF PATIENTS

Maxicare v. Hawthorne Community Medical Group, Inc.
(CMA fights against HMO termination of patient-physician relationship)

Initial CMA Participation: March 1988

*Issue:*This case involved a dispute arising as a result of Maxicare's termination of its contract with the defendant Hawt physicians "must transfer to a new Maxicare facility." In response, HCMG sent its patients a letter stating they were not required to terminate their relationships with HCMG physicians, and provided them with a list of HMO's that currently contracted with HCMG. This letter attempted to correct the misleading impression created by the Maxicare letter that HCMG patients had no choice as to whether they wished to remain with their HCMG physicians and must transfer to a new Maxicare facility. On March 21, 1988, CMA filed an *amicus curiae* brief with the Los Angeles Superior Court in support of the defendants, arguing that an HMO cannot unilaterally terminate a patient-physician relationship. Further, CMA argued, HMO patients must be informed in a timely fashion of their options to either stay with a physician whose contract was canceled and switch to a different plan, or stay with the HMO and change physicians.

Outcome: The case went through binding arbitration. Hawthorne Community Medical Group was awarded in excess of $15 million. Maxicare thereafter settled the case in favor of the medical group, in part due to CMA's amicus brief. This case remains unpublished.

Johnson v. East County Medical Group
(CMA advocates for patient right to continue existing patient-physician relationship after physician is terminated from IPA)

Issue: This case involved Dr. Johnson whose contract with East County Medical Group, an IPA, was terminated. ECMG sent letters to Dr. Johnson's patients implying that they could no longer see Dr. Johnson as their physician. The IPA moved to dismiss Dr. Johnson's claim. On July 20, 1998, the CMA submitted an *amicus curiae* brief in support of Dr. Johnson with the Superior Court of Contra Costa County. In its brief, the CMA addressed negative impact of this case upon the patient-physician relationship. More specifically, the CMA argued that patients should be told of their right to

continue seeing their physician after his or her contract is terminated. This notification is necessary to maintain strong patient-physician relationships which, in turn, promote quality health care.

Outcome: The Superior Court rejected the CMA's request to file an amicus brief. However, the Court did rule in favor of the plaintiff, Dr. Johnson, and allowed him to continue his lawsuit against the IPA. Unfortunately, Dr. Johnson lost his case at trial, for reasons unrelated to the issues on which our brief was filed.

STATE JURISDICTION OVER THE PRACTICE OF MEDICINE

Raich v. Ashcroft
(Constitutional Right of Patients to Access Medically Necessary Treatment)

Initial CMA Participation: May 2003

Issue: This case involves whether or not patients have a constitutional right, "upon a physician's advice, to seek medical treatment to treat medical conditions, to alleviate pain and suffering, and to preserve one's life, when conventional treatments have failed."

On May 1, 2003, CMA filed an AC brief on behalf of the patients in this case, challenging the federal government's right to prohibit seriously ill patients from accessing medical marijuana in cases where all conventional medications have been tried without success, and where medical marijuana has been reasonably shown to be effective in ameliorating the patient's pain and suffering. The brief points out that governmental action prohibiting a person from taking measures to ameliorate severe pain and suffering is just as offensive to constitutional principles of liberty and personal sovereignty over one's body as is government infliction of server pain and suffering. The brief also explains that while the federal government plays an important role in regulating pharmaceuticals, and ensuring that marketing claims are justified, the consumer protection role does not justify interference with a specific doctor's recommendations to a specific patient concerning a specific treatment regimen, as the exception for off-label prescription make clear.

Outcome: On December 16, 2003, the 9th Circuit Court of Appeal ruled in favor of CMA's position. The Court directed the trial court to issue a preliminary injunction against government interference. Specifically, the Court found that Angel Raich's "class of activities—the intrastate, non-commercial cultivation, possession and use of marijuana for personal and medical purposes on the advice of a physician—is in fact, different in kind from drug trafficking." On February 25, the U.S. Court of Appeal denied the Government's request for rehearing and on April 20, 2004 the Government filed a writ of certiorari with the U.S. Supreme Court. On June 28, 2004, the Supreme Court agreed to review the case and CMA joined in an AC brief filed October 13, 2004 in support of the patients in the case. Oral argument in the case was heard in the U.S. Supreme Court on November 29, 2005 and the Court issued it's ruling on June 6, 2005.

In its ruling, the U.S. Supreme Court stated that, pursuant to the Commerce Clause, Congress has the power to regulate anything that it rationally concludes will substantially affect interstate commerce. The Court concluded that Congress acted rationally, stating among other things, "one need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use may have a substantial impact on the interstate market for this extraordinarily popular substance. The decision does not change state law, which protects medical marijuana use as specified in Proposition 215 and does not reduce the first amendment rights of physicians to discuss medical marijuana with their patients, as protected by the Conant case.

The decision did not decide the substantive due process questions which was the focus of CMA's AC brief –whether the US Constitution prohibits Congress from enacting laws criminalize the palliative care decisions of seriously ill people in consultation with their physicians. That question is still pending in the Oakland Cannabis case, discussed above.

UNPROFESSIONAL CONDUCT & LICENSING

In Re Matter of Accusation Against Robert Sinaiko, M.D.
(Allergist's license revoked; Medical Board Opinion failing to show clear & convincing evidence)

Initial CMA Participation: September 1996

Issue: An allergist/immunologist treated several patients allegedly in an "unorthodox" manner. Despite some support from the medical community that he did not practice below the standard of care, the Medical Board adopted the ALJ's opinion revoking his license. The written opinion failed to show clear and convincing evidence, completely ignored the testimony of ten witnesses of the Respondent Physician, and viewed as "highly credible" the testimony of one of the physician's competitors. The opinion condemned empirical treatment of clinical disorders and the use of drugs for off-label purposes as being inherently "dangerous" or constituting human experimentation. There was no documented patient harm in the opinion, and the ALJ awarded almost $100,000 cost recovery against the physician as being "reasonable" without a shred of evidence documented in the opinion to that effect. On September 1, 1998, CMA filed a letter in support of the physician's request for reconsideration before the Medical Board. When the Medical Board refused to submit our letter to the members of the Division of Medical Quality, CMA sent the letter directly to them. An additional letter ensued responding to the Medical Board's accusation that CMA violated the rules against "ex parte" communications. Although CMA did not take a position on the merits of the physician's treatment, CMA raised the concerns listed above. When the Medical Board granted the motion for reconsideration, CMA submitted an amicus brief on October 15, 1998. We received a notice from the Medical Board that it apparently would not submit the amicus brief to the Division members, at which time we submitted a letter to the Medical Board demanding that the Medical Board permit the Division members to decide whether the brief should be accepted in the case.

Outcome: The Medical Board agreed to review the entire transcript rather than just the nature of the penalty. The Medical Board of California (MBC) issued its decision after reconsideration on September 3, 1999. Although the MBC reduced the penalty, Dr. Sinaiko was still placed on 5 years probation with multiple conditions, including nearly $50,000 in cost recovery.

The Medical Board's new decision addresses the issues raised in CMA's AC letter, at least to some extent. Most important, the new decision is based on, among other things, the appropriate standard of care and not off-label prescribing.

In discussing cost recovery, the recent decision reduced the cost reimbursement by nearly half, to $49,472.79, stating as follows: "Although the administrative law judge found the amount of $98,945.57 to be reasonable, the Panel exercises its discretion to reduce that amount."

The Medical Board's decision in this case is now final. Dr. Sinaiko's recourse, should he continue to dispute the decision, is an appeal to the Superior Court.

California Teachers Association v. State of California Initial CMA Participation: June 1998
(possible end to the cost recovery program)

Issue: This case involved the constitutionality of an Education Code provision requiring teachers who are unsuccessful at a hearing challenging their discharge on unprofessional competence grounds to pay one-half of all prosecution costs incurred. On June 8, 1998, CMA filed an *amicus curiae* brief before the California Supreme Court urging affirmance of the Court of Appeal's decision that the provision is unconstitutional. CMA filed the brief in light of this decision's application to Business & Professions Code §125.3 which makes physicians liable for Medical Board expenses for investigations and prosecutions. The brief explained that like teachers, physicians and other professionals cannot exercise their constitutional rights for a hearing when charged with wrongdoing because the administrative and

attorney fees are so high. As a result physicians may enter into settlements inappropriately, adversely impacting their ability to pursue their livelihood and serve patients.

Outcome: On May 10, 1999, the California Supreme Court, consistent with the position taken in CMA's AC brief, struck down the statute which required teachers to pay half of the expenses for the administrative law judge hearing the teacher's initial challenge to a termination decision. The court concluded the statute violated teacher's due process rights by creating the risk that teachers would forego hearings or limit their defense against the school district's charges. This decision may be found at California Teachers Association v. State of California (1999) 20 Cal.4th 327, 84 Cal.Rptr. 2d 425.

Landau v. Superior Court (Medical Board of California) Initial CMA Participation: March 1998
(CMA advocates for appellate review of MBC decisions)

Issue: This case involves the physician-appellant arguing that he was denied appropriate review of an MBC opinion. On March 19, 1998, CMA submitted a petition for review in support of the appellant Dr. Landau with the California Supreme Court, arguing that this case provided the Supreme Court opportunity to scrutinize whether physicians lawfully may be denied equal and adequate appellate review of Medical Board disciplinary decisions. CMA urged the Court to grant Dr. Landau's petition for review and hold the case pending the outcome of another case pending review in the Supreme Court, Leone v. Medical Board of California (1997) 57 Cal.App.4th 1240, 67 Cal.Rptr.2d 689. The decisions handed down by the appellate courts in these two case give directly conflicting opinions on whether California's Business & Professions Code §§2237 validates the California Constitution, Article VI, Section 11, which vests appellate jurisdiction in the appellate courts when superior courts have original jurisdiction. Therefore, CMA argued, it is appropriate to review each case.

Outcome: The petition for review was granted and the case is being "held" pending resolution of the Leone case mentioned below. In light of the ruling in the Leone case, which upheld the constitutionality of California's Business and Professions Code § 2237, a decision should be issued at any time on this case.

Leone v. Medical Board of California Initi
(CMA argues to reinstate physicians' right to full direct appellate review of Medical Board decisions)

*Issue:*In 1995, the Legislature changed Business & Professions Code §2237 to do away with automatic right of appeal o grounds. On October 21, 1998, CMA submitted its amicus brief to the California Supreme Court. The Supreme Court accepted CMA's brief on October 26, 1998.

Outcome: The California Supreme Court heard oral arguments in this case on January 6, 2000, and in its April 3, 2000 written opinion upheld the constitutionality of the statute.

Lounsberry v. Superior Court(MBC)
(CMA fights for physician's right of due process after inappropriate Medical Board decision)

Issue: Respondent Lounsberry's license was put on probation for a year with other conditions based on an ALJ's findings that did not correlate to any charges in the accusation, nor relate to issues which the defense was given an opportunity to defend against at the hearing. Dr. Lounsberry was accused of several counts of sexual misconduct, one count of gross negligence, and one count of negligence in the examinations of three female patients. He was found guilty of negligence for failing to have a chaperone present for those three examinations. The standard of care does not require the presence of a chaperone, nor was Lounsberry charged with violating such a "requirement". The numerous CMA briefs and letters submitted to the appellate court and Supreme Court argued that the MBC failed to explain how the evidence presented supported the findings of guilt, thus ignoring the precedent which requires the administrative law judge to set forth the "analytic route" the administrative agency traveled from evidence to action. CMA argued that discipline cannot be meted out on basis of a charge not made in the

Accusation (Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 527, 192 Cal.Rptr. 693, 696); and that when a decision's findings do not adequately support its conclusions, or when the conclusions drawn leave the reviewing court to speculate as to the basis for the agency's decision, the agency has engaged in an abuse of discretion. (Topanga Association for a Scenic Community v. County of Los Angeles ("Topanga") (1974) 11 Cal.3d 506, 515, 113 Cal.Rptr. 836, 841.) (*See also* Medlock Dusters, Inc. v. Dooley (1982) 129 Cal.App.3d 496, 499, 180 Cal.Rptr. 80, 83-84 [agency decision imposing discipline must specify the manner in which a licensee violated the relevant legal standard.])

CMA submitted an *amicus curiae* brief to the Superior Court supporting Lounsberry's petition for writ of mandate on judicial review of the Medical Board's decision. That court denied the petition on December 6, 1996, but did not adopt its own decision on the matter until February 19, 1997, and did not file it as a final judgment until June 18, 1997. On July 29, 1997, CMA submitted a letter to the appellate court (2d District) in support of the physician's request for stay of discipline, and supporting review of the petition for writ of mandate. The appellate court denied it on August 15, 1997. CMA then submitted a letter to the Supreme Court on September 3, 1997, supporting the physician's petition for review and request for stay of decision. On October 8, 1997, CMA submitted a second letter in support to the Supreme Court in light of a new case Leone v. MBC (9/24/98) which struck down the appeal-limiting provision of Business & Prof. C. §2337. The Supreme Court transferred the petition to the Appellate Court for consideration, which petition was denied on December 1, 1997. CMA submitted another letter to the Supreme Court supporting the physician's petition for review on denial of the petition by the appellate court, which petition was rejected.

Outcome: All efforts by the physician to obtain a full appellate review failed. (Business and Professions Code §2337 permits review of a superior court's decision by petition for extraordinary writ only.) There is no published opinion.

WARNING OBLIGATIONS

PROPOSITION 65

Dowhal v Smithkline Beecham Consumer Healthcare **Initial CMA Participation: May 1998**

(Challenge to the Application of Proposition 65 Warnings to Nicotine Patches)

Issue: On May 18, 1998, CMA submitted a letter to the Attorney General's office to express concern that litigation against the marketer and manufacturer of smoking cessation products for failure to provide a Proposition 65 warning may have the unintended public health consequence of deterring Californians from attempting to quit smoking. In CMA's view, Prop. 65 warnings on prescription drugs interfere with the physician-patient relationship and might dissuade patients from taking smoking-cessation medications. Such medications could, in the long run, dramatically reduce cancer risk. CMA also pointed out that the FDA-approved labeling of prescription drugs, together with prescribing physicians' accepted practice of obtaining informed consent; fulfill the intent of the proposition without an additional warning.

On July 10, 1998, the AG's office responded to the 60-day notice under Prop. 65 of intent to sue, declining to pursue this case on behalf of the State. Consistent with CMA's opinion, the AG concluded both that the action is preempted by the FDA regulation mandating a specific warning requirement for nicotine patches and that pursuit of such an action would be against public policy.

In response, some Prop. 65 proponents filed suit in the San Francisco Superior Court charging that the smoking cessation products should carry the Prop. 65 warning in addition to the FDA-required warning. In September 1999, CMA President J.C. Pickett, M.D., signed a declaration supporting manufacturers of smoking-cessation products.

In September 1999, the San Francisco Superior Court agreed with CMA, ruling that it is not necessary to put Prop. 65 warnings on smoking cessation products. The Prop 65 proponents have appealed this decision and on December 28, 2001 CMA filed an *amicus curiae* brief. The brief emphasizes that the known reproductive harms of smoking are far greater than the speculative risks associated with the smoking cessation products and the warning advocated by the Prop 65 proponents and the Attorney General is injurious to the health of Californians because it misleads pregnant smokers about the risks associated with the products, and thus may discourage use of a potentially life saving product.

On July 12, 2002, the state Court of Appeal for the First District overturned the favorable lower court's decision, and reinstated the suit seeking to require new or additional health warning labels on nicotine patches and other anti-smoking products. The Court ruled that Prop. 65 was not trumped by the requirement of uniform labeling of over-the-counter drugs under the federal Food, Drug and Cosmetics Act (FDCA). The Court based its decision on a 1997 federal law, which expressly exempted from the FDCA any state initiative or referendum enacted prior to September 1, 1997. The respondents filed a petition for review with the California Supreme Court in August 2002. On September 6, 2002, CMA filed an *amicus curiae* letter with the California Supreme in support of the petition for review. On October 23, 2002, the Supreme Court granted review.

On July 21, 2003, CMA filed an a*micus curiae* brief in the California Supreme Court, reiterating its previous arguments. CMA also emphasized that our objective in opposing the application of Proposition 65 and any similar warning is not to under warn Californians, but rather to ensure that they receive accurate information about any effects of nicotine replacement therapy products, as determined by the FDA, based on its evaluation of the relevant and available science.

Outcome: On April 15, 2004, the California Supreme Court unanimously ruled, consistent with CMA's position, that the warning requirements of Proposition 65 with respect to over-the-counter medicines cannot be enforced when they conflict with federal law. Agreeing with CMA's AC brief, the court noted that the impact of the proposed warnings might cause consumers to give too much weight to an unknown risk and decide to continue smoking instead of using a nicotine replacement therapy product to stop smoking. This decision marks the first ruling by the California Supreme Court that places restrictions on the enforcement of Proposition 65.

<u>People of the State of California v. Alpharma USPD, Inc.</u> Initial Participation: March 1999
(challenge to the application of Proposition 65 warnings to prescription drugs)

Issue: On March 9, 1999, CMA and the California Healthcare Association filed an amicus brief in support of the motion for summary judgment, seeking to convince the Court not to reinterpret the role of Proposition 65 with respect to prescription drugs. California's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, requires clear and reasonable warnings to be given before exposing anyone to a chemical known to the state to cause cancer or reproductive toxicity. CMA noted, however, that California regulations, 22 C.C.R. §12601(b)(2), unambiguously provide that the health care industry's obligation under Proposition 65 for prescription drugs is fully satisfied where 1) the drug is labeled in accordance with FDA requirements, and 2) the physician has obtained informed consent from the patient. The FDA - Informed Consent regulatory scheme is comprehensive, founded in science, and reflects the art of medicine. For each drug, there has been years of clinical testing and review by physician boards to develop guidelines for effective FDA-approved uses. In turn, physicians rely on the FDA as an "expert agency" to transmit relevant information, including health risks and hazards, to patients under their legal and ethical obligation to obtain informed consent. In its brief, CMA argued that

if the plaintiff, the State of California, is successful, all healthcare entities (with ten or more employees) could be required to provide Proposition 65-specific warnings to patients, in addition to the information required by the FDA. This impact would be enormous, as it would interfere with the physician/patient relationship to the detriment of patient health. The Proposition 65 warning, which is not necessarily scientifically-based, can tend to overemphasize remote risks against the best medical judgment of the treating physician and could increase stress and undermine the patient's confidence in the prescribed course of treatment. Further, the brief argued that the plaintiff's interpretation of Proposition 65, as applied to manufacturers, pharmacists, and hospitals, would impose an untenable burden on California health care system, because in the clinical setting where drugs are administered without any packaging or product information at all, there is no mechanism for third parties to provide warnings to patients.

Outcome: On May 20, 1999, the San Francisco Superior Court agreed with CMA and CHA and granted the defendant's motion for summary judgment. The Court ruled that FDA-approved labeling for prescription drugs and the prescribing physician's "accepted practice of obtaining informed consent" fully satisfies Proposition 65, even if a Proposition 65 warning is not included on the label and regardless of whether a warning actually gets to the patient. While this is a major victory for the healthcare industry, prescription medical devices, over-the-counter drugs, and other patient exposures are not covered by this ruling. The time to appeal has expired and the case has been dismissed.

People v. Baxter International, et al.

Issue: This case involves a Proposition 65 lawsuit by the Attorney General's office against Baxter International, Inc and Columbia Healthcare / HCA for failure to provide a Prop. 65 warning to patients exposed by DEHP contained in Baxter's prescription medical devices. On October 13, 1998, CMA and the California Healthcare Association submitted a letter to the CEO of Baxter International, Inc. to express opposition to the terms of Baxter's consent judgment and to request that immediate steps be taken to prevent the consent judgment from being entered by the Alameda County Superior Court. CMA objected to this consent judgment because it shifts full responsibility for Prop. 65 compliance onto its customers, hospitals and health care providers, unjustly making them targets of future Prop. 65 lawsuits. This consent judgment would allow Baxter to merely send vague letters informing their direct customers that they have a duty to provide "treatment-specific" Prop. 65 warnings to patients exposed to DEHP contained in Baxter's medical devices. Baxter, however, would have no obligation to identify the "specific treatments" that require warnings, to communicate or consult with physicians using Baxter's devices to treat their patients, or to perform and provide State-approved exposure assessments to confirm Baxter's unilateral determination that Prop. 65 warnings are required. In sum, CMA adamantly refused to accept letters that purport to inform physicians of a duty to warn patients, and nothing more. (*People v. Baxter* (2000) Super. Ct. Alameda County, No. 794514-8.)

Outcome: Baxter had settled on terms that would require hospitals and physicians to be fully responsible for supplying warnings to patients, but without Baxter performing the exposure assessments. In the meantime, CMA is working with the entire industry to reach an acceptable solution regarding Prop. 65 warnings and prescription medical devices.

Subsequently, Baxter submitted an administrative petition asking the Office of Environmental Health Hazard Assessment (OEHHA) to promulgate a regulation finding that there is insufficient evidence that exposure to DEHP poses a significant risk of cancer in humans, provide an exemption from the Prop 65 warning requirement for DEHP prescription medical devices where human exposure is non-oral, make a determination that DEHP presents no significant risk of cancer by non-oral exposure, and revise the Prop 65 list to reflect "DEHP by oral route of exposure." When OEHHA denied the petition, Baxter sought relief from the court first by writ of mandate to challenge OEHHA's denial and to compel OEHHA to promulgate a regulation, per above. After the court denied the petition for writ, Baxter amended its complaint for declaratory relief that exposure to DEHP from prescription medical devices poses no significant risk of cancer to humans and that hence the Prop 65 warning of carcinogenicity was not

required to be given to persons exposed to DEHP. At trial, Baxter presented evidence that while exposure to DEHP induces cancer in rats and mice, the same consequence does not occur in humans. In October 2002, the trial court granted Baxter's request for declaratory relief.

On July 1, 2004, California Court of Appeal, Third District, affirmed the lower court's decision, finding that OEHHA failed to meet its burden of showing there is no substantial evidence to support the superior court's judgment. This decision may be found at Baxter Healthcare Corp. v. Denton (2004) 120 Cal.App.4th 333, 15 Cal.Rptr.3d 430.

WORKERS' COMPENSATION

Gould, M.D., v. Workers' Compensation Appeals Board Initial CMA Participation: June 1991
(physicians need not justify circumstances for fees in excess of official medical fee schedule)

Issue: In this case, a psychiatrist sought review of a Workers' Compensation Appeals Board determination that the psychiatrist was limited to charging fees provided by the Official Medical Fee Schedule. On June 4, 1991, the CMA filed an *amicus curiae* brief with the California Court of Appeals (2nd Dist.), requesting that the Court overrule the WCAB ruling requiring physicians to show that fees for services submitted in excess of WCAB Official Medical Fees Schedule are not presumed "unreasonable," and that such fees can only be paid upon the physicians' showing of "extraordinary circumstances." The brief asked that physicians be able to charge in excess of the fee schedule "when reasonable and accompanied by itemization and explanation," so long as the fee charged does not exceed the physician's "usual fee." (Labor Code §5307.1.)

Outcome: The Court of Appeal ruled consistent with CMA's position that the physician did not have to make showing of "extraordinary circumstances" in order to justify fee in excess of official medical fee schedule. The Court's decision may be found at Gould, M.D., v. Workers' Compensation Appeals Board (1992) 4 Cal.App.4th 1059, 6 Cal.Rptr.2d 228. Unfortunately, the legislature subsequently amended the law to require a showing of "extraordinary circumstances" for fees above the schedule.

Swatez v. Workers Compensation Appeals Board (WCAB)
(CMA fights against the unfair reduction of medical liens payments to physicians)

Initial CMA Participation: September 1992

*Issue:*In this case, when the applicant received a favorable ruling in a workers compensation case, his attorney, Swatez, pe
the CMA filed an *amicus curiae* brief on behalf of the WCAB with the California Court of Appeal. CMA pointed out that the conditions required under Labor Code §4903.2 were simply not met. In addition, CMA argued that the legislature intended a "bright line" rule regarding applicant attorneys' fees from lien claimants in order to avoid protracted litigation on what is essentially a matter that is collateral to the underlying workers' compensation adjudication. This avoids increasing the already excessive overall cost of operating the workers' compensation system, which now exceeds $9 billion per year. Further, a more "liberal" interpretation of §4903.2, which increases the potential for applicant's attorneys to obtain legal fees from lien claimants, would increase the overall operating costs of health care providers and insurers who recoup liens in workers' compensation cases, and would bring more pressure to bear upon these entities to raise costs of health care to cover this increase in operating costs.

Outcome: Rather than risk a lengthy court battle, Kaiser decided to settle with the attorney Swatez in this matter. This case is not published.

Beverly Hills Multispecialty Group, Inc. v. Workers' Compensation Appeals Board

(Preserved a physician's right to participate a worker's case which impacts the physician's right to payment)

CMA Initial Participation: May 1994

Issue: In this case, a medical group argued that it was deprived of its due process rights when it was denied payment for medical-legal services pursuant to an adjudication of several workers' compensation claims. For example, the group did not receive notice before trial that fraud was being alleged against the group. Moreover, the group's attorney was not allowed to fully participate in the case. On May 13, 1994, CMA filed an *amicus curiae* brief with the California Court of Appeal, arguing that it was not appropriate to fight fraud by depriving lien claimants of due process. CMA further argued that such deprivation was unconstitutional, contrary to the Legislature's intent as reflected in statutes and regulations, and damaging to the already faltering lien system upon which a worker's access to necessary medical care depends.

Outcome: On July 17, 1994, the Court of Appeal affirmed CMA's analysis and found for the petitioner-Beverly Hills Multispecialty Group, Inc. Soon after, respondent-WCAB filed a request to the Supreme Court that the opinion in this case be depublished. On September 28, 1994, CMA filed an *amicus curiae* letter arguing against this WCAB request. In its letter, CMA noted that the opinion in this case was extremely significant for both physicians participating in the workers' compensation system and their patients, and therefore should be available to cite as precedent. On October 12, 1994, the Court agreed with CMA and denied WCAB's request for review and depublication. This case can be found at Beverly Hills Multispec. Grp., Inc. v. WCAB (1994) 26 Cal.App.4th 789, 32 Cal.Rptr.2d 293.

American Psychometric Consultants v. Worker's Compensation Appeals Board (WCAB)
(CMA sought to uphold payment for medical legal services)

Initial CMA Participation: February 1995

Issues: In this case, in three separate proceedings, employers/payors sought restitution of payments made for medical-legal fees paid in workers' compensation cases to medical lien claimants more than two years earlier on grounds of provider fraud. On February 27, 1995, the CMA filed an amicus curiae brief with the Second Appellate District on behalf of the respondent, WCAB, arguing that in view of the constitutional and statutory framework of the Worker's Compensation system, the failure to raise objections during the 60 day period within which payment must be made should preclude payors from challenging payments already disbursed without objection.

Outcome: Unfortunately the Court overlooked CMA's arguments, and found for the payor, stating that in this case the 60 day payment period had no application, since the medical provider failed to comply with the "contested claim rule." This rule requires that medical-legal expenses be incurred for the purpose of proving or disproving a contested claim. This decision may be found at American Psych. Consultants v. WCAB (1995) 36 Cal.App.4th 1626, 43 Cal.Rptr.2d 254, rev. denied November 22, 1995.

FWHC Medical Group v. CNA Casualty of California,
NPI Medical Group v. CNA and Vacanti v.State Compensation Insurance Fund

(clarification of California workers= compensation exclusivity rule)

Initial CMA Participation: April 1999

Issue: These consolidated cases involved lawsuits by medical groups that provided workers= compensation services. The plaintiff physicians alleged that the defendant workers= compensation insurers engaged in a conspiracy to drive the physicians out of business and to prevent them from providing medical services to injured workers. The physicians believed they were singled out on the basis of their total dollar volume of receivables from the insurers, and their persistence in pursuing payment before the WCAB, not on the basis of any evidence of fraud. The lower court dismissed the physicians= claims, holding that they were barred by the workers= compensation exclusivity law. This law states that all claims for compensation relating to employee, work-related illness, injuries or death must be brought before the Workers= Compensation Appeals Board (WCAB).

On April 21, 1999, CMA filed *amicus curiae* briefs in the California Supreme Court, arguing that because the issues presented here concerned unfair business practices and not employee injuries, these claims should not be barred. CMA further stressed the importance of this case in that if the lower court=s decision to dismiss these cases was upheld, it would condone improper retaliatory activity by insurers, including the elimination of physicians from the workers= compensation system and destruction of physician businesses. The CMA also argued that insurers must not be permitted to drive physicians out of the workers= compensation system because those physicians treat large numbers of workers and aggressively pursue their rights and those of the patients. Such physicians are essential to the proper functioning of the workers= compensation system.

Outcome: On January 19, 2000 the medical groups plaintiffs/petitioners in the FWHC Medical Group v. CNA Casualty of stated that some of the medical groups= claims, specifically, those alleging violation of the Cartwright Act (Business and Professions Code ‘ 16700 et seq.) and the RICO, are not barred by the exclusivity rule. The Court also ruled, however, that the medical groups= claims for abuse of process and fraud were barred by this rule. The Supreme Court=s opinion states that some of the alleged acts or motives of the insurers do not constitute Aa risk reasonably encompassed within the compensation bargain@, and therefore are not subject to the exclusivity rule. The case has been returned to the trial court to proceed on the merits as to the surviving causes of action.

Alpine
Surgery Center v. Workers' **Initial Participation: February, 2003**
Compensation Appeals Board
(Reasonableness of Medical Charges)

*Issue:*This case involved a workers' compensation claim, the liability of which was accepted by the employer. The insu Golden Eagle Insurance Co. submitted its own brief and, relying on its interpretation of the Official Medical Fee Schedule (OMFS), admitted that it owed $634.94 on top of the $1810.10 it had already paid. Golden Eagle, however, offered no evidence and presented no witnesses at trial. Surprisingly, the Workers' Compensation Judge dismissed the lien, questioning whether the medical treatment provided by Alpine Surgery Centers was reasonably medically necessary despite the fact that Golden Eagle had neither objected to the reasonableness of the treatment nor raised medical necessity as an issue at any time. On appeal, the Workers' Compensation Appeals Board (WCAB) affirmed the WCJ's decision to disallow the medical lien.

On February 4, 2003, CMA submitted a letter in support of the Petition for Writ of Review, urging the Court to compel the Workers' Compensation Appeals Board (WCAB) to interpret and apply in a consistent manner the statutory requirements governing time limits for paying or objecting to medical treatment claims, as well as the acceptable criteria for determining reasonable charges for medical services. CMA did not take a position on whether or not the workers' compensation lien in question was reasonable.

Outcome: On June 5, 2003, the California Court of Appeal, Sixth District, dismissed the Petition for Writ of Review, citing that the matter was premature for review.

By dismissing the petition, the Court allowed the WCAB's en banc decision to stand, which was an egregious and unprecedented departure from established California law. This decision reached an unfavorable conclusion on several issues of serious concern: 1) whether employers and workers' compensation insurance carriers must detail their reasons for contesting a physician's bill for medical services within 30 days after receiving the bill; 2) whether, by failing to raise an objection during this 30-day period, the employer or carrier has waived any objection to the bill; 3) whether the WCAB, notwithstanding established case law, may change the criteria for determining the reasonableness of charges for medical services; and 4) whether the WCAB may, by fiat, require physicians to give discounts to insurers who have provided no consideration for those discounts.

Immediately after this decision was filed, the defendant, Alpine Surgery Center, settled its case. Consequently, there will not be a petition for review filed with the California Supreme Court. It is unclear what precedent this decision will set and how broadly it will be applied to physician services.

MISCELLANEOUS ISSUES

Artiglio v. Corning Inc., et al.
(rejected the extension of liability under negligent undertakings theory to scientific research)

Issue: This case involved patients with silicone gel breast implants manufactured by a medical device subsidiary who brought suit against the medical device manufacturer and its parent corporations. The plaintiffs' claim was based on a "negligent undertaking theory" under Restatement Second of Torts §324A, alleging that tort liability occurred as a result of the parent corporation's provision of silicone toxicology research to its subsidiary. The San Diego County Superior Court entered summary judgment in favor of the parent corporations and the Court of Appeal affirmed. On June 4, 1997, the CMA filed an *amicus curiae* brief with the California Supreme Court on behalf of the defendant / respondent corporations, arguing that liability to third parties for negligent undertakings should not be extended to scientific research. The duty owed under §324A extended only to those who specifically endorse or certify a product. Further, the CMA argued that §324A should be limited to situations where a defendant undertook to protect an identifiable group from a particular risk of injury. Finally, the CMA stressed the important public policy considerations of medical research and how acceptance of plaintiff's proposed rule on negligent undertakings would stifle such research and innovation.

Outcome: The California Supreme Court ruled in favor of the defendant corporation, consistent with the CMA's views. The Court rejected the plaintiff's proposed extension of Rule §324A with regard to scientific research concerning silicone risks. The Court concluded that research and subsequent communications of the results did not create duties to the consumers of medical products containing silicone. Any risk of physical harm from negligent undertaking was unforeseeable as many years had elapsed between the time of the toxicology research and the plaintiffs' alleged injuries. This decision can be found at Artiglio v. Corning Inc., et al. (1998) 18 Cal.4th 604, 76 Cal.Rptr.2d 479.

Briggs v. Eden Council for Hope & Opportunity (ECHO) Initial CMA Participation: July 1997
(CMA supports C.C.P. §425.16, the anti-SLAPP law)

Issue: CMA's interest in this particular case involves the importance of the anti-SLAPP(strategic lawsuits against public participation) law, Code of Civil Procedure §425.16, as it applies to physician communication. The anti-SLAPP law requires plaintiffs who file lawsuits against people who are exercising their right to free speech to establish early in the proceeding that "there is a probability" that they will prevail. In Briggs v. Eden, a landlord sued a nonprofit organization that provided services related to landlord-tenant disputes, alleging that the organization engaged in a pattern of harassment by giving false information to tenants and making defamatory statements about landlords. The appellate court decided for the appellant-landlord, Briggs. On July 21, 1997, CMA filed a letter with the California Supreme Court in support of review, arguing that in this case, disregarding the anti-SLAPP law would dilute important procedural protections provided to those who want to communicate with their government, including physician advocates of public health and welfare. On May 11, 1998, CMA filed an AC brief in the California Supreme Court expanding on the arguments set forth in its letter supporting review.

Outcome: The California Supreme Court ruled, consistent with the position argued in CMA's AC brief, that the anti-SLAPP statute applies to any cause of action arising from a statement or writing made in, or in connection with an issue under consideration or review by, any official proceeding or body. In such cases, the law does not require a separate showing that the matter involves a "public issue." As the court stated, "...it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." The decision is published as Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 81 Cal.Rptr.2d 471.

N.N.V. v. The American Association of Blood Banks (AABB)
(CMA argues the right of professional associations to make voluntary recommendations)

Initial CMA Participation: November 1997

Issue: This case involves an infant who received blood transfusions tainted with HIV. The petitioner-guardian sought to hold the respondent, AABB, liable for failing to promote a voluntary blood screening standard that the petitioner-guardian contends might have prevented the child's exposure to HIV. In November 1997, CMA, along with numerous other interested professional societies, filed an *amicus curiae* brief with the California Court, Fourth Appellate District, in support of the respondent. CMA argued that the plaintiff's tragedy did not justify holding a private association that had no contact with the plaintiff or involvement in the child's care, to burdensome litigation solely because of its role in recommending voluntary standards and guidelines to blood banks. Further, requiring a professional society to promulgate recommendations when scientific knowledge is in doubt, or technology is not fully developed, would open it to retrospective liability when later scientific knowledge or technology evolved. This would allow litigants to second-guess the society's prior recommendations, thus opening up an area of liability for all professional societies which currently does not exist.

Outcome: On October 28, 1999, the Court of Appeal ruled, consistent with the position taken in the AC brief, in which CMA joined, that the American Association of Blood Banks (AABB) could not be held liable for blood banking standards it set in good faith. Specifically, the Court concluded AABB was not liable to a child who became HIV-positive as a result of a transfusion with HIV-infected blood based on

its failure to adopt standards by the fall of 1984 recommending direct questioning of donors, directed donation and surrogate testing. The decision is published at N.N.V. v. American Ass'n of Blood Banks (1999) 75 Cal.App.4th 1358, 89 Cal.Rptr.2d 885.

Huff v. Matthews — Initial Participation: June 1999
(restraining order against former patient)

Issue: This case involved a long-term CMA member's appeal of the Superior Court's decision refusing to grant her request for a restraining order against a former patient, who the physician alleged stalked and harassed her over the past four years. On June 24, 1999, CMA filed an *amicus curiae* brief with the Court of Appeal (1st Dist.), explaining that the ramifications of this case went far beyond that of those directly involved. Rather, this case concerned the ability of physicians and other mental health professionals to render medical care to individuals suffering from mental illnesses. CMA explained that unless the Court provides the requisite protection assuring that mental health professionals will not be the subject of harassment, threats and any other inappropriate activity, physicians would severely restrict, if not curtail altogether, their provision of mental health services despite state and national efforts designed to increase access to mental health care. The brief concludes that if the mentally ill are to continue to have full access to care, physicians must feel confident that the courts will protect them against unstable patients.

Outcome: We are pleased to report that on September 20, 1999, in an unpublished opinion, the court of appeal took significant steps in protecting Dr. Huff by finding that the trial court abused its discretion, and reversed the trial court's judgment. Accordingly, the case has now been remanded to the trial court with appropriate directions concerning admissibility of evidence, thereby providing Dr. Huff with another opportunity to obtain a restraining order.

Boston Medical Center v. Committee of Interns and Residents
(CMA advocates for resident physicians' right to collective bargaining)

Initial CMA Participation: January 1998

Issue: This case involved the question whether resident physicians should be considered employees, as opposed to students, under the National Labor Relations Act and thus enjoy the right to collective bargaining. On January 30, 1998, the CMA filed an *amicus curiae* brief with the National Labor Relations Board in support of the petitioner Committee of Interns and Residents, pointing out that the CMA has long supported the right of resident physicians to collective bargaining under both California and federal laws. The CMA noted that residents should be considered employees, not students, because they spend the great majority of their time providing direct patient care. The CMA also stressed that collective bargaining would provide an important means for ensuring that the residents have a voice in the changes that occur as academic medical centers adjust to the current economic realities of managed care.

Outcome: In a long-awaited victory, the National labor Relations Board reversed long standing policy and declared that residents and interns were employees for labor organizing purposes. (In re Boston Medical Center v. Committee of Interns and Resident, Case No. 1-RC-20574 (NLRB).)