

HEALTH POLICY IN THE COURTS

California Medical Association's participation in *Amicus curiae* Briefs filed on behalf of the California Medical Association, California Healthcare Association, and California Dental Association in cases involving MICRA and other professional liability issues.

January 2007

The following summarizes the litigation filed between 1987 and the present to influence health policy on issues involving professional liability in which the California Medical Association participated as *Amicus curiae* or "friend of the court" as a member of the CMA-CHA-CDA AC Committee. 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.

PROFESSIONAL LIABILITY—ELDER ABUSE

Community Hospital of San Bernardino v. San Bernardino County Superior Court
(Extension of the application of the Elder Abuse and Dependent Adult Civil Protection Act)

Initial CMA Participation: October 1999

Issue: This case involves issues as to whether MICRA can be avoided in medical injury cases which allege that "dependent adult abuse" occurred during an adult patient hospitalization. The plaintiff in this case, an adult woman who alleged that her physician was negligent in failing to perform a cesarean section, sought to amend her complaint after the *Delaney* decision (which held that MICRA does not apply to elder and dependant adult abuse claims), to add causes of action under the dependent adult abuse statute. The defendant health care providers unsuccessfully opposed amendment, filed a petition for extraordinary relief, which was denied, and have now filed a petition for review with the California Supreme Court. CMA has filed a letter with the Court, urging the court to grant review of the case.

Outcome: In November 1999, the Supreme Court denied the petition for review.

Gregory v. Beverly Enterprise*
(Application of the Elder Abuse Statute)

Initial CMA Participation: July 2000

Issue: This case involves the application of the Elder Abuse statute and the appropriate instructions to give to a jury concerning the definition of "elder abuse". The trial court allowed the jury to consider, as instructions on the law, seven pages of federal administrative regulations that define the federal government's Medicare reimbursement policy and enunciate a "Patient's Bill of Rights." These instructions are dangerously broad and far beyond the scope of the statutory parameters.

In the *Gregory* case, the plaintiff, an elderly woman who was partially paralyzed after having suffered a stroke, accidentally fell while being attended in a nursing home by a Certified Nurse Assistant. Her injuries from this accidental fall, while real, were relatively minor, and she eventually recovered. Plaintiff sued the operator of the home and related corporate entities, asserting claims under California's Elder Abuse Statute, as well as for fraud and negligence. In brief, plaintiff alleged that her injuries were the result not of simple negligence, but of "intentional under staffing."

The jury found for plaintiff on all counts and awarded almost \$95 million in punitive damages and over \$365,000.00 in compensatory damages. In a post trial motion, the trial court reduced the punitive damages to \$3 million and the compensatory award to \$124,000.00.

The Court of Appeal affirmed in a partially published opinion. In the published portion of the opinion, the Court of Appeal specifically approved the trial court's elder abuse jury instructions. On July 17, 2000, CMA, CDA and CHA filed an amici letter in support of a petition for Review to the Supreme Court in support of Beverly Enterprises.

Outcome: In August, 2000 the underlying case was settled, and, accordingly, the defendants withdrew their request for review of the case by the Supreme Court. Unfortunately, the Supreme Court denied the defendant's request for de-publication of the case and that portion of the Court's opinion which supports the trial court's elder abuse jury instructions remains a published opinion. The opinion can be found at 95 Cal Rptr. 2d 336.

Marron v. Superior Court*
(Interpretation of Elder and Dependant
Adult Abuse Act)

Initial CMA Participation: July 2003

Issue: This case involves the interpretation of the Elder Abuse and Dependant Adult Civil Protection Act, specifically whether or not a 44-year old woman hospitalized for a liver biopsy falls within the definition of "dependant adult." Secondly, this case involves the interpretation of "reckless neglect."

In this case against the Regents of the University of California, a 44-year old woman was admitted to the hospital for a liver biopsy. During the procedure, the biopsy needle perforated the patient's middle colic vein, causing abdominal damage and necessitating emergency surgery. During a lengthy hospital stay, the patient developed several complications, was discharged and later readmitted and it was ultimately determined that she had an intra-abdominal abscess. The patient became progressively septic and eventually died.

Although the complaint alleged conduct sounding in negligence only, the plaintiff pursued the case under a recklessness theory. (To obtain the heightened remedies under the Act, plaintiffs must establish reckless not just negligent conduct.) The plaintiffs offered no specific evidence as to the conduct of any one individual. The trial court granted UC's motion for summary judgment but the Court of Appeal reversed, ruling that the plaintiff was a "dependant adult" and that acts of omission may be deemed "reckless neglect" without a showing of the specific time or place or the omission or the specific person who was responsible for the omission.

This statutory definition of "dependent adult" has technically included an individual such as the plaintiff in the instant case. However, the plaintiffs' bar has historically brought such actions on behalf of elderly patients and has not "pushed the envelope" as far as they have in the *Marron* case. If every hospital patient is allowed to bring an action under the Act, it will have further impact on malpractice premiums etc. The statute defines dependant adult as follows:

"A dependant adult is any California resident between the ages of eighteen (18) and sixty-four (64) who (1) has physical or mental limitations that restrict the ability to carry out normal activities or to protect his or her rights, including, but not limited to persons who have physical or developmental disabilities, or (2) whose physical or mental abilities have diminished because of age or, (3) who is an in-patient at a 24-hour health care facility. (Welfare & Institutions Code §15610.23.)"

On July 24, 2003 CMA-CDA and CHA filed an *amicus curiae* letter in support of de-publication of the opinion in this case. The letter requesting de-publication discussed the importance of limiting the application of the Elder and Dependant Abuse Act. Otherwise, anyone over the age of eighteen who is admitted as an inpatient to a hospital would fall within the definition of dependant adult. The letter argued that such an unrestrained reading would compromise the stability of health care providers and the entire health care system in California.

Outcome: On July 30, 2003, the California Supreme Court declined to de-publish this decision.

Norman v. Life Care Centers*
(Burden of Proof in Elder and Dependent
Adult Abuse Cases)

Initial CMA Participation: June 2003

Issue: This case involves the negligence *per se* doctrine. Generally, when such a doctrine is invoked, the burden of proof for proving “negligence” shifts from the plaintiff to the defendant. Ordinarily, in medical malpractice cases, the burden of proof lies with the plaintiff to establish that the physician or health care provider was negligent in the care and treatment of the plaintiff.

The trial judge in the *Norman* case refused to instruct the jury regarding the plaintiff’s negligent *per se* theory based on the defendant’s alleged regulatory violations. The Court of Appeal reversed the trial court’s ruling, and the effect of the Court’s ruling is to allow a plaintiff to use the violation of a regulation to prove the violation of a statute. We believe this ruling is erroneous because the negligence *per se* doctrine applies only in common law negligence actions; it does not apply to a cause of action for a violation of a statute.

In the *Norman* case, the decedent, Dorothy Quartermaine was a resident of a licensed skilled nursing facility operated by Life Care, and others. When Life Care initially admitted Quartermaine, it assessed her risk of falling as “moderate”, and the center’s initial care plan required a call bell and a low bed position. The patient’s physician ordered that the bed’s side rails be kept up.

Over the next few weeks, Mrs. Quartermaine fell on several occasions, and her fall risk was upgraded to “high.” Life Care did not, however, seek an order from Quartermaine’s physician for restraints or inform her physician of hallucinations that Quartermaine was experiencing. About a week after the last fall risk assessment, the patient was found lying on the floor near her bed with facial and hand injuries. Quartermaine died a few months later after being transferred to another skilled facility.

The decedent’s daughter, Nancy Norman sued Life Care alleging fraud and deceit, medical malpractice, elder abuse and wrongful death. At trial, Norman pursued, among other things, a neglect theory of elder abuse based on the Elder and Dependant Adult Abuse Act, and she requested an instruction on negligence *per se* based on violation of California Code of Regulations Title 22, which requires skilled nursing facilities to identify each patient’s care needs in a care plan, review and update the patient’s care needs as necessary when the patient’s condition changes, and notify the attending physician promptly of an adverse change in the patient’s signs, symptoms or behavior.

As mentioned above, the trial court refused the instruction but gave the jury the standard jury instructions in elder abuse. The jury found in favor of Life Care.

On appeal, Division One of the Fourth Appellate District held that the trial court erred when it refused Norman’s request for a negligence *per se* instruction with regard to her neglect theory of elder abuse. The Court ruled that the error was prejudicial and reversed for a new trial.

On June 16, 2003, CMA, CHA and CDA filed an AC letter requesting depublication or review of the case. The letter argues that the Court of Appeal opinion wrongly applies the negligence *per se* to a cause of action created by statute and that the Court of Appeal’s ruling creates an unprecedented, erroneous extension of the law by allowing the plaintiff to rely on the violation of a regulation to create a presumption that a statute has been violated.

Outcome: On August 13, 2003, The California Supreme Court denied the request for de-publication and the petition for review filed on behalf of Life Care. As a result, plaintiffs will now be able to use violation of a regulation to establish negligence *per se* in Elder and Dependant Adult Abuse Act litigation.

Benun v. Superior Court*
(Statute of Limitations in Elder Abuse Cases)

Initial CMA Participation December 2004

Issue: The issue in this case involves the appropriate statute of limitations for actions brought against health care providers under the Elder and Dependent Adult Abuse Act. The trial court dismissed the plaintiff's cause of action for elder abuse because the case was not filed in a timely manner under Code of Civil Procedure §340.5. The plaintiff appealed and the court of appeal ruled that the appropriate statute of limitations is the general civil statute of limitations of 2 years. The defendants have asked the California Supreme Court to review the case.

On December 16, 2004, CMA, CDA and CHA filed an AC brief in support of the defendants' appeal, arguing that the appropriate statute of limitations is the statute applicable to actions against health care providers.

Outcome: On January 19, 2005, the California Supreme Court declined to review the case and the case is now final.

Reyome v. Sunrise Senior Living Services, Inc.*
(Elder and Dependent Adult Abuse)

Initial CMA Participation: December 2004

Issue: The issue in this case relates to the circumstances under which an action under the Elder and Dependent Adult Abuse Act can be brought. In this case, Decedent Reyome, a patient at a skilled nursing facility, fell and hit her head on the bedrail while being transferred from her wheel chair to her bed by two nursing assistants. The patient eventually became comatose and non-responsive, and was taken to the hospital, where she later died from her head injury. The patient's son sued the nursing home for elder abuse and other claims. The nursing home requested that the elder abuse claims be dismissed. The plaintiffs argued that the conduct of the skilled nursing home was reckless because the nursing staff had violated the facility's written policies by transferring the patient improperly and failing to call the physician, among other things. The trial court dismissed these causes of action and, in an unpublished opinion, the Court of Appeal agreed. On December 28, 2004, CMA, CDA, and CHA requested that this case be published for the reasons discussed in the *Furlong* case below.

Outcome: On April 13, 2005, the Court denied CMA's request for publication and the case is now final.

Furlong v. Catholic Healthcare West*
(Elder and Dependent Adult Abuse)

Initial CMA Participation: January 2005

Issue: This issue in this case involves the circumstances under which the Elder and Dependent Adult Abuse Act does not apply. In this case, the decedent, Margaret Furlong, a resident of a skilled nursing facility, had a DNR advance directive. One day she was taken to a hospital emergency room for treatment of vomiting and abdominal pain. She was later admitted. The hospital was provided with a copy of the DNR, but her admission paperwork erroneously stated that she did not have an advance directive. Later that night, the patient suffered respiratory and cardiac arrest. Life-saving measures were taken and the patient regained consciousness. Life support was withdrawn 10 days later, and she died.

The patient's son sued the hospital and several physicians for violation of the Elder and Dependent Adult Abuse Act and unfair business practices under Business and Profession Code §17200, on the theory that, as a direct result of the wrongful resuscitation, the patient endured extreme pain and suffering during the last ten days of her life. Additionally, the plaintiff alleged that the admitting physician failed to monitor, assess, and manage the patient pain level by administering pain medication on an as-needed basis, rather than around the clock.

The defendants requested a dismissal of the case by arguing that the Elder Abuse laws were not intended to apply to garden-variety medical negligence claims. The trial court dismissed the causes of action for elder abuse and unfair business practices and the plaintiffs appealed. In an unpublished opinion, the Court of Appeal ruled that dismissal of the case was appropriate and set forth the circumstances under which such cases can be brought. The court said that the failure to comply with the advance directive was negligence not reckless and that the admitting physician's administration of pain medication on an as needed basis was not culpable or reckless. On January 10, 2005 CMA, CHA and CDA filed a request that this case be published as there is no published opinion setting forth the factual circumstances under which reckless neglect does not exist as a matter of law.

Outcome: On March 23, 2004 the Court denied the request for publication and the Writ Petition and the case is now final.

Marchesano v. Dekkers*

Initial CMA Participation: March 2006

(Appropriate Interpretation of Elder Abuse Act)

Issue: This case involves the type of conduct under the Elder Abuse prevention statutes of California that constitutes abuse and gives rise to a successful claim that a physician acted with "willful misconduct". This case is an example of the plaintiff bar's campaign to expand the application of California's elder abuse law as an end-run to MICRA.

In this case, the plaintiff is attempting to blur the line between custodial caretakers and health care providers. The California Supreme Court has specifically ruled that the Elder Abuse Act does not apply to health care professionals when they are acting in the capacity of health care providers (*see Covenant Care v. Superior Court*). Plaintiffs argue that the physician violated the Elder Abuse Act because as a physician he had care or custody of an elder. The plaintiffs are inappropriately urging an extremely expensive interpretation of this language which would effectively remove the custodial care requirements and expand the coverage of the Elder Abuse Act far beyond its legislative purpose.

The gravamen of plaintiff's lawsuit is that Dr. Dekker negligently failed to diagnose a hip fracture that the plaintiff/decedent sustained during a fall. The plaintiff argued that Dr. Dekker's actions amounted to abuse because he failed to see his patient until his regular monthly rounds and then failed to take steps to ascertain the cause of the patient's pain and immobility. Thus, rather than attempt to assert a cause of action for negligence, the plaintiffs are arguing that Dr. Dekkers' conduct amounted to "neglect" under the elder abuse statute.

On March 15, 2006, CMA's Amicus Curiae Committee filed a brief in the California Court of Appeal, Second Appellate District, Division Six, on behalf of defendant, Dr. Robert Dekkers. CMA's brief urges the court to reject the plaintiff's arguments on appeal and to publish the underlying decision as it is an example of the appropriate interpretation of the Elder Abuse Act in terms of what is meant by "neglect" on the part of health care providers. CMA's brief argues that the plaintiff has misconstrued the statute and that there is only one type of neglect under the Elder Abuse Act and that is custodial care.

Outcome: On May 18, 2006, the Court of Appeal issued its opinion in favor of Dr. Dekkers. Unfortunately, it is an unpublished opinion, and the court declined CMA's request that the case be published.

The Court's ruling affirmed the trial court's dismissal of the elder abuse causes of action from the complaint and the striking of the punitive damages claim against Dr. Dekkers. In the Court's opinion, it took special note of the fact that after the initial injury of the decedent, a hip X-ray was taken with negative

findings. This important fact was omitted from the plaintiffs' complaint.

The Court of Appeal opinion has an excellent discussion of what isn't willful misconduct. For example, the allegation that Dr. Dekkers failed to examine the decedent until his next regular round and belatedly failed to arrange a consultation was simply an allegation of negligence and did not fall into the category of willful misconduct. The Court also ruled that Dr. Dekkers' alleged failure to observe federal and state nursing home regulations was not tantamount to willful misconduct. The Court also confirmed prior opinions that a medical malpractice action cannot be recast as a claim for elder abuse. CMA's request that the case be published was denied.

MICRA—COLLATERAL SOURCE RULE

Cox v. Los Angeles Superior Court*
(MICRA Collateral Source Rule)

Initial CMA Participation: April 2002

Issue: This case involves issues concerning MICRA's collateral source provision, Code of Civil Procedure §3333.1(a). In this case, the plaintiff in a medical malpractice case, is claiming that Dr. Shield's conduct resulted in the plaintiff's inability to work.. The patient/plaintiff is receiving substantial payments, approximately \$180,000 per year, from a disability insurance policy, which he is given tax-free. Our letter supports the position of the defendant, Dr. Shields, who successfully argued in the trial court that the jury should hear the fact that the plaintiff is receiving these disability payments tax-free. (The plaintiff earned approximately \$300,000 per year annually). Allowing the jury to hear this evidence supports the purpose of MICRA's collateral source provision—to contain the costs of medical malpractice insurance. The brief also argues that the tax-free status of disability payments is highly relevant to the issue of malingering. The plaintiff filed a petition for review with the court of appeal.

Outcome: On May 21, 2002, the California Court of Appeal, Second Appellate District, Division Four issued a ruling granting the plaintiff's petition for review. The Court's opinion reversed the trial court's ruling that the jury should hear the fact that the plaintiff is receiving these disability payments tax-free. The Court confirmed that evidence that plaintiff is receiving disability insurance benefits is admissible under Civil Code §3333.1.

MICRA—IMPLEMENTATION

Atkins v. Stravhorn
**(Inapplicability of MICRA's \$250,000 Cap to
Loss of Consortium; Periodic Payment Explained)**

Initial CMA Participation: October 1989

Issue: This case involved payment for a medical malpractice suit in which the jury awarded a periodic payment judgement that spread payment of future damages over a period shorter than plaintiff's life expectancy, although award was to be sustained for plaintiff's entire life expectancy. The judgment also awarded multiple \$250,000 limits for non-economic damages. On October 16, 1989, the AC Committee entered as amici before the California Court of Appeal to argue that the Superior Court misapplied both the periodic-payment statute and the \$250,000 limit on non-economic damages. On November 13, 1990, the AC Committee filed a request with the California Supreme Court that the affirming opinion of the Court of Appeal be depublished. The Committee argued that if allowed to remain on the books, this decision posed a real threat to California's medical malpractice insurance system.

Outcome: The Court of Appeal disagreed with the AC Committee and held that the trial court correctly

applied a separate \$250,000 limit to both the patient's claim for medical malpractice and the spouse's claim for loss of consortium. Also, the Court of Appeal decided that in structuring a periodic payment schedule, the trial court is simply "guided," not bound, by the evidence of future damages introduced at trial. The Committee's efforts to persuade the Supreme Court to decertify the appellate opinion were not successful. The Court's decision may be found at *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 273 Cal.Rptr. 231.

Barrett v. Jones
(Applicability of MICRA's Periodic Payments to Wrongful Death Actions)

Initial CMA Participation: August 1991

Issue: In this case, plaintiff argued that the purpose of periodic payments is not effectuated in a wrongful death action. On August 15, 1991, the AC Committee filed amicus curiae brief in the Court of Appeal (5th Dist.) on behalf of Dr. Jones, arguing that §667.7 of MICRA, allowing periodic payment of future damages, applies in a wrongful death action and criticizing the trial court's handling of periodic payment of future damages.

Outcome: This case was settled before reaching the Court of Appeal, so there was no published opinion.

Deocampo v. Ahn
(Plaintiff Attempt to Modify MICRA Periodic Payment Rule)

Initial CMA Participation: February 2002

Issue: This case involves issues concerning the proper implementation of Code of Civil Procedure §667.7, which provides for periodic payments of future damages in medical malpractice actions. The statute is part of the tort reform provisions of MICRA. In this case, the plaintiff came to an emergency room complaining of chest pain and was diagnosed with a heart attack. A cardiologist and the admitting physician decided to administer an anticoagulant to improve the plaintiff's heart condition. Over the next several hours, the plaintiff began complaining of progressive back pain with extraordinary neurological problems. A STAT MRI was ordered, which was performed several hours later and which revealed a spinal cord bleed. Despite surgical spinal cord decompression, the plaintiff remains a paraplegic.

After an initial jury verdict in favor of the defendants and a complex procedural history, the case ultimately resulted in a jury verdict award of several million dollars. Thereafter, the trial court made several post-trial rulings with regard to periodic payments, pretrial interest and MICRA. The appeal of the case relates to those issues.

On February 27, 2002 CMA, CDA and CHA filed an amicus curiae brief with the California Court of Appeal, Second Appellate District, Division Three in support of returning of the case to the trial court for a new hearing on the periodic payment issues. The brief extensively discusses the legislative intent underlying the periodic payment statute as an aspect of MICRA. A summary explanation of the legislative intent, as stated in the brief is as follows:

"In summary, periodic payments are a win-win situation. Healthcare providers and their insurers save money, which keeps medical malpractice affordable and medical care available. Injured plaintiff's are protected from dissipation and receive a substantial tax advantage. The only losers are a plaintiff's heirs who previously obtained a windfall when damages were paid in a lump sum and the plaintiff died sooner than expected."

Outcome: On August 29, 2002, the California Court of Appeal, the Second Appellate District, Division One, issued its decision, affirming the judgment of the lower court with some amendments. The defendant physicians filed a petition for rehearing and CMA/CHA/CDA filed a letter brief on September 12, 2002 in

support of the petition for rehearing. The court denied the petition for rehearing and de-publication.

Garcia v. St. Joseph's Hospital
(Implementation of Periodic Payments
Under MICRA)

Initial CMA Participation: November 1987

Issue: This case concerned proper implementation of Code of Civil Procedure §667.7, which provides for periodic payment of future damages in medical malpractice cases. On November 18, 1987, the AC Committee prepared an amicus curiae brief to be filed in the Court of Appeal (3d Appeal. Dist.) on behalf of St. Joseph's Hospital.

Outcome: This matter was settled before the brief was filed.

Gilman v. Beverly California Corp.
(Applied MICRA's \$250,000 Cap)

Initial CMA Participation: December 1990

Issue: This case involved a wrongful death action against operator of a nursing facility. On December 26, 1990, the AC Committee filed an amicus curiae brief with the Court of Appeals (6th Dist.), arguing in favor of the trial court decision to reduce plaintiff's damages for non-economic losses to \$250,000 pursuant to the Medical Injury Compensation Reform Act (MICRA). The Committee also argued that the decision in *McAdory v. Rogers* should not be followed.

Outcome: The Court of Appeal agreed with the AC Committee, holding that the award of non-economic damages was properly reduced pursuant to MICRA before negligence of the treating physician was factored in and damages were further reduced to reflect operator's several, rather than joint, liability. This decision may be found at *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 283 Cal.Rptr. 17.

Gorman v. Leftwich
(Clarified Periodic Payments
Under MICRA)

Initial CMA Participation: October 1988

Issue: This case involved an appeal by physician of a \$1.6 million damages award to plaintiff patient in a medical malpractice action. On October 25, 1988, the Committee filed a letter supporting Dr. Leftwich's request for periodic payments. On February 13, 1990, AC Committee filed a letter with the Court of Appeal (6th Dist.) requesting publication of this case. The Committee argued that the *Gorman* decision resolved several significant questions concerning the proper implementation of Code of Civil Procedure §667.7, MICRA's periodic payment provision. Most notably, this decision utilized a gross value verdict, as opposed to a present-value-only verdict.

Outcome: The appellate decision was published and may be found at *Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 266 Cal.Rptr. 671.

Hrimnak v. Watkins
(Established that Periodic Payment be
Based on Gross Value, Not Present Value)

Initial CMA Participation: October 1995

Issue: This case involved the proper implementation of Code of Civil Procedures §667.7, concerning periodic payment of future damages in medical malpractice claims. The trial court used its discretion to fashion a periodic payment schedule from the jury's present value verdict instead of first converting present value to gross value. On May 31, 1994, AC Committee filed an amicus curiae brief with the Ct. of Appeal (3d Dist.) on behalf of Dr. Watkins, arguing that the trial court's refusal to allow the jury to render a gross value verdict warranted reversal for a new trial on future economic damages. The Committee also

argued that the trial judge had no basis to ignore the evidence which warranted the fashioning of a shorter payment period. Third, the Committee asserted that the trial judge could not require completion of all periodic payments before defendant was entitled to an Acknowledgment of Satisfaction of Judgment. On October 20, 1995, the AC Committee filed a letter in support of petition for rehearing before the Court of Appeal. On November 27, 1995, the AC Committee filed a letter with the California Supreme Court, supporting petition for review, or in the alternative, request for depublication.

Outcome: The Court of Appeal agreed with the AC Committee in part, holding that the trial court erred by failing to specify dollar amount for periodic payments and by periodizing present value of payments rather than their gross amount. The trial court also abused its discretion by establishing a schedule which didn't consider when the patient would incur certain losses. Further, the Court found that the parties had a constitutional right to have the jury assess the gross amount of future economic damages. Unfortunately, however, the Court concluded that a physician is not guaranteed a satisfaction of judgment until the last periodic payment is made, and that jury determination of present value of damages, rather than the cost of the annuity, provided a proper basis for determining the patient's attorney's contingency fee. The petition for review and request for depublication, were denied. This decision may be found at *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 45 Cal.Rptr.2d 514.

Hunter v. City of Berkeley
(Periodic Payments Under MICRA)

Initial CMA Participation: March 1988

Issue: This case involved implementation of Code of Civil Procedure §667.7, regulating periodic payment of future damages. On March 15, 1988, AC Committee filed an *amicus curiae* brief with the Court of Appeal (1st Dist.), arguing that the trial court erred because the periodic payment amounts were not supportable on the record.

Outcome: The Court of Appeal remanded the case for the adoption of a new periodic payment schedule in an unpublished opinion.

Hurlbut v. Sonora Community Hospital
(Applicability of MICRA \$250,000 Cap and Periodic Payments)

Initial CMA Participation: June 1988

Issue: This case involved a suit for damages brought by the parents of child who suffered brain damage allegedly due to hospital's failure to timely perform a caesarean delivery. On June 3, 1988, AC Committee filed an *amicus curiae* brief with the Court of Appeal (5th Dist.), concerning the proper application of MICRA's \$250,000 cap and the periodic payment of future damages.

Outcome: The Court of Appeal agreed with the AC Committee, holding that the evidence did not support an award of damages for the parents' emotional distress. Also, evidence of negligence on part of the physicians was insufficient to justify special findings as to their liability. Finally, the hospital was not entitled to periodic payment of future income loss award because it failed to propose the necessary special findings. This decision may be found at *Hurlbut v. Sonora Community Hosp.* (1989) 207 Cal.App.3d 388, 254 Cal.Rptr. 840.

Jordan v. Long Beach Community Hospital
(Inapplicability of MICRA's \$250,000 Cap to Loss of Consortium)

Initial CMA Participation: August 1988

Issue: This case involved the applicability of Civil Code §3333.2 and MICRA's \$250,000 cap where a claim for loss of consortium is joined with a spouse's claim for medical malpractice. On August 12, 1988, AC Committee filed a letter with the California Supreme Court on behalf of defendant, Long Beach Community Hospital and Dr. Waters, requesting that petition for review be granted or that the opinion of the Court of Appeal (2d Dist.) be decertified. The Committee argued that the legislative intent behind

MICRA could not be served by allowing multiple caps for multiple claims arising out of a single act of professional negligence.

Outcome: The California Supreme Court ordered the appellate opinion not to be published. The Court of Appeal had interpreted §3333.2 to allow separate \$250,000 caps, one for each of the claims.

**Lipman v. Superior Ct. (Barker) & South
Bay Hospital Dist. v. Superior Ct.)**
(Statute of Limitations Under MICRA)

Initial CMA Participation: March 1988

Issue: This case involved Code of Civil Procedure §340.5 which shortens the applicable statute of limitations for medical malpractice claims. On April 5, 1988, the AC Committee filed a letter with the California Supreme Court requesting that review be granted, arguing that the lower court's interpretation of "intentional concealment" to mean "failure to disclose" was contrary to legislative intent. The net effect of this interpretation was to reestablish the "discovery rule," thereby extending the statute of limitations. The Committee also asked that both cases be considered in connection with each other as the issues at stake are the same.

Outcome: The California Supreme Court denied the petition for review, but neither opinion was published.

McAdory v. Rogers
(Applied MICRA's \$250,000 Cap to
Comparative Negligence Theory)

Initial CMA Participation: July 1989

Issue: This case involved a medical malpractice suit by patient who was also found to be contributorily negligent. On July 10, 1989, AC Committee filed an *amicus curiae* brief with the Court of Appeal (2d Dist.), arguing that in a suit involving comparative negligence, a court should first limit non-economic damages to \$250,000, and only then apply the rule of comparative negligence. Under comparative negligence, fault is assessed between plaintiff and defendant in proportion to their respective degree of liability. On December 26, 1989, the Committee filed a letter with the California Supreme Court requesting review or depublication of the Court of Appeal's decision.

Outcome: Contrary to the AC Committee's view, the Court of Appeal held that non-economic damages should first be reduced to reflect comparative negligence and then be subject to the MICRA cap. As the Supreme Court did not review or depublish it, this decision may be found at *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 264 Cal.Rptr. 71.

Norgart v. Upjohn Company
(Clarification of Statute of Limitations in
Medical Malpractice and Products Liability Cases)

Initial CMA Participation: March 1999

Issue: This case concerned the question of when the one-year statute of limitations begins in medical malpractice and products liability cases that involve several potential defendants whose separate and unrelated acts may have resulted in a plaintiff's injury. This case stemmed from the 1985 suicide of a young woman and the subsequent discovery years later of the possible side-effect of the drug, Halcion. On March 19, 1999, the AC Committee filed an *amicus curiae* brief in the California Supreme Court to urge a middle position regarding the "discovery rule" exception to the general rule that a cause of action accrues, and the statute of limitations begins, on the date of the injury. The Committee suggested that when a party suspects, or has reason to suspect, negligence by someone, the party must then conduct a reasonable investigation into the causes of the injury. The statute of limitations would begin to run with respect to any person whose negligence a reasonable investigation would disclose as contributing to the injury. Thus if a plaintiff could have reasonably discovered the alleged negligence of a particular defendant over a year before filing suit, the plaintiff's claim would be barred by the statute of limitations. Further, the Committee argued that the plaintiff should bear the burden of proving that it filed the suit within one year

of reasonable discovery of the injury's cause.

Outcome: Consistent with CMA's position, on August 16, 1999, the California Supreme Court ruled that the statute of limitations begins to run when the plaintiff at least suspects that someone has done something wrong to him/her. Wrong, in this sense, is to be assessed according to the lay understanding of that term. Unfortunately, the Court did not resolve the issue as to whether the statute of limitations begins to run as to all defendants when it is triggered as to one defendant. This decision may be found at *Norgart v. Upjohn* (1999) 21 Cal.4th 383, 87 Cal.Rptr.2d 453.

**Nguyen v. Los Angeles County Harbor/
UCLA Medical Center**
**(Established the Maximum Allowable
Attorney Fees Under MICRA)**

Initial CMA Participation: November 1991

Issue: This case involved proper implementation of Business & Professions Code §6146 which limits contingent attorney fees in medical malpractice cases. On November 4, 1991, the AC Committee filed a letter with the Court of Appeal (2d Dist.), requesting permission to file an amicus curiae brief in support of respondent LA Cty. Harbor/UCLA Medical Center.

Outcome: The Court of Appeal denied the AC Committee's request to file an amicus brief. The Court then affirmed the trial court. Regarding the attorney fees, the Court held that the trial judge did not err in failing to specify the attorney fee award in the judgment. The trial court had ruled that attorney fees would be payable to plaintiffs' attorney in part out of the lump sum award for pain and suffering and accrued medical costs, and in part out of each periodic payment, as the plaintiff received them. The California Supreme Court subsequently denied the petition for review but remanded the case back to the trial court to determine instructions regarding the attorney fees. On remand, the court refused the plaintiff attorney's request to modify the judgment to order defendants to advance periodic payments on the basis of damages already paid, plus total future payments, and that fees be paid in a lump sum funded by advance fees by the defendants and credited against future periodic payments. The Court of Appeal affirmed. The appellate decision regarding the issues other than determination of the attorney fees may be found at *Nguyen v. LA Cty. Harbor/UCLA Med. Ctr.* (1992) 8 Cal.App.4th 729, 10 Cal.Rptr.2d 709.

Ojeda v. Sharp Cabrillo Hospital
**(Applied MICRA Cap on Attorney's
Fees to Consultant Fees)**

Initial CMA Participation: January 1992

Issue: This case involved a medical malpractice action brought against hospital. Upon settlement, plaintiff applied for an order approving compromise, including payment of attorney fees, cost reimbursement, and fees to a medical-legal consulting service retained to assist counsel. On January 20, 1992, the AC Committee filed a letter with the Court of Appeal urging the court to grant a rehearing of its first decision in this case. On February 28, 1992, the AC Committee filed an amicus brief with the California Court of Appeal, arguing that the Court might wish to consider other authorities in determining the validity of a medical consultants contract, and that the consultants fee should not be allowed to evade the legislature's limit on attorneys fees in medical malpractice cases.

Outcome: The Court of Appeal held that the contingent fee contract with consulting service was not automatically invalid, but what plaintiff paid in attorney fees, fees to consulting service, and separately identified expenses could not exceed the statutory maximum attorney fees recoverable plus all allowable statutory "disbursements and costs." This decision may be found at *Ojeda v. Sharp Cabrillo Hosp.* (1992)

Orellana v. Mejia
**(Erroneously Applying Periodic Payments Statute,
Code of Civil Procedure §667.7)**

Initial CMA Participation: May 1988

Issue: This case involved implementation of the periodic payment statute., Code of Civil Procedure §667.7. On May 5, 1988, the AC Committee filed an AC brief arguing that the trial court has jurisdiction to enter a periodic payment award notwithstanding the clerk’s initial entry of a lump sum award, that trial courts have discretion to award a lump sum payment sufficient to pay attorneys fees, and that post-judgment interest accrues on periodic payments only *after* they become due. On September 12, 1998, the Committee filed a letter with the Supreme Court requesting that a hearing be granted or the Court of Appeal’s opinion depublished.

Outcome: Unfortunately, the Court of Appeal disagreed with the AC Committee and ruled that post judgment interest was required on unpaid periodic payments. Although the California Supreme Court did not grant review, it did depublish the opinion.

Perry v. Shaw
**(CMA Advocates for Application of
MICRA Limit in a Battery Claim)**

Initial CMA Participation: October 2000

Issue: This case involves the issue of whether MICRA should apply to a common law intentional tort claim that is based on the same facts supporting a claim for medical negligence. In this case, after losing over 100 pounds, plaintiff underwent extensive reconstructive surgery on several parts of her body. As part of that surgery, Dr. Shaw performed a breast augmentation procedure. Plaintiff claimed she never wanted and never consented to breast surgery. The jury found in plaintiff’s favor on both her medical negligence and battery claims, and among other items, awarded over \$1 million in non-economic damages for both claims. Dr. Shaw argued that MICRA should apply to the case, and the trial court disagreed, stating that it was a non-MICRA claim not subject to the statutory cap. (The court’s decision was issued before the decision in *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, which held that EMTALA claims are subject to MICRA). Dr. Shaw has appealed this decision.

On October 4, 2000 CMA, CDA and CHA requested leave to file an *amici curiae* brief and the Court has granted the request. CMA filed it’s brief on January 11, 2001, which explains why the trial court’s refusal to apply the statutory limitation on non-economic damages was improper.

Outcome: On April 23, 2001, the California Court of Appeal, Second District ruled that the MICRA \$250,000 limit on non-economic damages does not apply to common law battery. The Court stated its belief that there is nothing in the legislative history of MICRA to suggest the Legislature intended to exempt intentional wrongdoers from liability by treating such conduct as though it had been nothing more than mere negligence. The Court ruled that the doctor’s failure to obtain informed consent was both intentional and negligent and, accordingly, the limit does not apply. The Court denied the defendants’ petition for review and CMA’s request for de-publication of the case. The case can be found at 88 Cal App 4th 658, 106 Cal Rptr. 2d 70.

Rutledge v. Stewart
**(Unfavorable Application of Periodic
Payments Under MICRA)**

Initial CMA Participation: November 1995

Issue: This case concerns the proper implementation of Civil Code §3333.2 which limits liability for non-economic damages in malpractice cases, Civil Code §1431.2 which precludes joint liability for non-economic damages, Code of Civil Procedure §667.7 which provides for periodic payment of future damages, and the “lost years” rule which allows plaintiff to recover damages while alive for lost earning capacity attributable to premature death. On November 1, 1995, the AC Committee filed an amicus brief in the Court of Appeal (4th Dist.) in support of appellant, Dr. Stewart, arguing that while the non-economic damages in the judgment are correct, the settlement setoff against the economic damages and the damages for future lost earnings are incorrect.

Outcome: The Court of Appeal disagreed with the AC Committee’s argument that when apportioning settlement between economic and non-economic damages in the same manner as the verdict, the non-economic damages in the verdict first should be reduced to \$250,000. The Court also rejected the AC Committee’s argument that, under the “lost years” rule, the “saved” cost of necessities should be subtracted from the award for future lost earning capacity. However, the opinion is unpublished and may not be cited in future cases.

Ryan v. Laven
(Periodic Payments Under MICRA)

Initial CMA Participation: October 1992

Issue: This case concerns Code of Civil Procedure §667.7 which provides for periodic payment of future damages in medical malpractice cases. On October 27, 1992, AC Committee filed an amicus brief with the Court of Appeal (1st Dist.) in support of defendant/appellant Dr. Laven, arguing that plaintiff was not entitled to prejudgment interest on the periodic payment portion of the judgment.

Outcome: The trial court entered a judgment in the plaintiff’s favor, consisting of a lump-sum amount due immediately and periodic payments due in the future. The issue presented on appeal was whether the trial court erred in awarding prejudgment interest under Civil Code §3291 on the periodic payment portion of the judgment. The case settled before the Court of Appeal rendered a decision.

Salgado v. County of Los Angeles
(Cap on Non-Economic Damages and Periodic Payments)

Initial CMA Participation: June 1998

Issue: This case concerns a child who allegedly developed Erb’s palsy as a result of a negligent delivery. The jury awarded \$10,000 in past non-economic damages, \$550,000 in future non-economic damages, and \$125,000 for future medical care. The trial court, pursuant to MICRA, reduced the non-economic damages to \$250,000 and then periodicized the payments over 66 years, resulting in a cost of \$61,785 to LA County to purchase an annuity. On June 9, 1998, the AC Committee filed an AC brief before the California Supreme Court arguing that the periodic payment schedule for future economic losses should be upheld, the periodic payment schedule for non-economic losses should be overturned, and that the annuity cost should be the basis for calculating attorneys fees or periodic payments.

Outcome: The California Supreme Court ruled, consistent with the position taken in the AC Committee’s brief, that the \$250,000 cap on damages for pain and suffering refers to a “present value” of \$250,000. Thus, non-economic damages may not be periodicized unless interest is added to maintain the “present value” of those damages over time. As a practical matter, this means that non-economic damages will be paid “up front,” a position the MICRA Manual has encouraged for some time. Unfortunately, the Court’s ruling did not resolve remaining ambiguities in the law as to periodic payments of economic damages. The Court’s opinion may be found at *Salgado v. County of Los Angeles* (1999) 19 Cal.4th 629, 80 Cal.Rptr.2d 46.

Santos v. Wheeler
(Inapplicability of MICRA’s \$250,000

Initial CMA Participation: September 1991

Cap to Loss of Consortium)

Issue: This case involved a suit for medical negligence and loss of consortium in connection with hip surgery. The trial court ruled in favor of plaintiffs, allowing the patient to recover \$150,000 in past non-economic damages, \$135,000 in future non-economic damages and \$12,000 in special damages. In addition, the patient's spouse was awarded \$100,000 in non-economic damages for loss of consortium. Upon motion by defendant, the trial court applied Civil Code §3333.2 and reduced the total non-economic damages awarded to patient to \$250,000 but permitted the separate \$100,000 award to the spouse to remain. On September 18, 1991, the AC Committee filed an *amicus* brief in the Court of Appeal (5th Dist.) on behalf of Ronald Wheeler, M.D., arguing that when a spouse's claim for loss of consortium is joined with a patient's claim for medical malpractice, each should not be entitled to recover up to \$250,000 (MICRA) for non-economic losses.

Outcome: The Court of Appeal rejected the AC Committee's argument and held in an unpublished decision that a claim for loss of consortium filed by a spouse is separate and distinct from a claim of medical malpractice filed by the patient.

Schiernbeck v. Haight (Favorable Application of Periodic Payments Under MICRA)

Initial CMA Participation: May 1991

Issue: This case concerns the implementation of Code of Civil Procedure §667.7 which provides for periodic payments of future damages in medical malpractice cases. The question presented is whether the trial court correctly awarded interest on periodic payments from the date of the verdict. On May 31, 1991, the AC Committee submitted a brief to the California Court of Appeal, arguing that there was no precedent for allowing interest on future non-economic damages. While the courts consider a plaintiff's pain and suffering to be sufficiently quantifiable to permit a jury to assign a lump-sum dollar amount to such loss, it would appear beyond the jury's capacity to assign a value for each future year, taking inflation into account, for non-economic losses such as pain and suffering.

Outcome: The Court of Appeal agreed with the AC Committee and held that plaintiff was not entitled to interest on unpaid balance reflecting future economic loss which had not been reduced to present cash value. Plaintiff also was not entitled to interest on future non-economic damages. This decision may be found at *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 9 Cal.Rptr.2d 716.

Sosunova v. Regents of University of California (Statute of Limitations Under MICRA)

Initial CMA Participation: October 1992

Issue: This case concerns Code of Civil Procedure §340.5 which shortens the statute of limitations to one year, commencing at the time plaintiff suspects that she has been injured by the defendant's negligence. On October 14, 1992, AC Committee filed a letter on behalf of respondent Regents in the California Supreme Court requesting that review be granted, or in the alternative, that the appellate opinion be depublished. The Committee argued that the opinion sets poor precedent and would allow plaintiffs to argue that questions of fact exist, regardless of how conclusively the record shows that an action was untimely filed.

Outcome: The California Supreme Court denied petition for review but ordered that the appellate opinion be depublished. The appellate decision held that a question of fact regarding the date the action accrued was created by assurances from the clinic's personnel that the clinic did not cause plaintiff's injury. This question arose despite the fact that the record clearly indicated that plaintiff did not believe those assurances, but rather believed that defendant clinic negligently caused her injuries.

South Bay Hospital Dist. v. Superior Ct. & Lipman v. Superior Ct. (Barker)

Initial CMA Participation: April 1988

(Statute of Limitations Under MICRA)

Issue: This case involved Code of Civil Procedure §340.5 which shortens the applicable statute of limitations for medical malpractice claims. On April 5, 1988, the AC Committee filed a letter with the California Supreme Court requesting that review be granted, arguing that the lower court's interpretation of "intentional concealment" to mean "failure to disclose" was contrary to legislative intent. The net effect of this interpretation was to reestablish the "discovery rule," thereby extending the statute of limitations. The AC Committee also asked that both cases be considered in connection with each other as the issues at stake are the same.

Outcome: The California Supreme Court denied the petition for review, but neither opinion was published.

**Steingart v. Oliver
(Statute of Limitations Under MICRA)**

Initial CMA Participation: April 1988

Issue: This case concerns a malpractice claim that physician failed to diagnose a breast lump as cancerous. The issue pertains to the scope of the statute of limitations under MICRA. On April 20, 1988, the AC Committee filed a letter with the California Supreme Court requesting decertification of the Court of Appeal (2d Dist.) opinion, arguing that it was inconsistent with the spirit of MICRA.

Outcome: The California Supreme Court denied request to decertify the appellate decision. The Court of Appeal had ruled that the 3-year statute of limitations began to run when the patient discovered she had cancer, rather than the date of misdiagnosis, even though patient was aware of the lump in her breast at the time of misdiagnosis. This opinion may be found at *Steingart v. Oliver* (1988) 198 Cal.App.3d 406, 243 Cal.Rptr. 678.

**Szkorla v. Vecchione
(Scope and Applicability of MICRA's
\$250,000 Cap)**

Initial CMA Participation: May 1990

Issue: This case dealt with the application of the \$250,000 cap under MICRA to cases involving claims of battery. On May 16, 1990, the AC Committee filed an AC brief with the Court of Appeal arguing that MICRA applies to all claims involving the delivery of health care services, including claims of technical battery. The Court of Appeal (4th Dist.) disagreed and ruled that the cap did not apply in this instance, interpreting MICRA to apply only to cases of alleged negligence. On August 8, 1991, the AC Committee submitted a letter to the California Supreme Court requesting that review be granted or that the opinion of the appellate court be depublished.

Outcome: The California Supreme Court initially granted review but then dismissed review and remanded the case back to the Court of Appeal with instructions to issue a new opinion consistent with the decision in *Central Pathology*. This case has since been settled out of court.

**Weinholz v. Kaiser Foundation Hospitals
(Favorable Application of Contingency
Fee Arrangements)**

Initial CMA Participation: December 1989

Issue: This case concerned the allocation of attorney fees after settlement of a medical malpractice claim. The trial court granted \$434,149 in attorney fees to plaintiff's attorneys to reflect a 1987 amendment to Business & Professions Code §6146 which effectively raised maximum compensation permitted under contingency fee arrangements for medical malpractice recoveries greater than \$200,000. The Court of Appeal reversed, holding that the amendment was not retroactively applicable to cases where the fee agreement was entered into prior to January 1, 1988, the effective date of the amendment. On December 26, 1989, the AC Committee filed a letter with the Court of Appeal (1st Dist.) to be forwarded to the

California Supreme Court, requesting that the appellate court's opinion be certified for publication.

Outcome: The California Supreme Ct. certified the appellate opinion. This decision may be found at *Weinholz v. Kaiser Foundation Hospitals* (1989) 217 Cal.App.3d 1501, 267 Cal.Rptr. 1.

Woods v. Young
(Clarified Statute of Limitations Period for
Medical Malpractice Cases Under MICRA)

Initial CMA Participation: November 1988

Issue: This case concerned a medical malpractice action brought as a result of a misdiagnosis. On November 14, 1988, the AC Committee filed an amicus brief to argue that Code of Civil Procedure §340.5 establishes an exclusive limitations period for medical malpractice actions and that the legislature intended to make available only those tolling provisions specified in §340.5 and related provisions of MICRA. The brief pointed out that the appellate court ignored the well-established rule that specific and narrowly drawn statutory enactments take precedence over general statutes which govern the same subject matter.

Outcome: The California Supreme Court held that service of notice of intent to sue tolls (i.e., stops the clock, so to speak) the one-year limitations period imposed following discovery of medical malpractice injury only when notice is served during the last 90 days of the one-year period. This decision may be found at *Woods v. Young* (1991) 53 Cal.3d 315, 279 Cal.Rptr. 613.

Yates v. Shore
(Explained Attorney Fee Arrangements in
Medical Malpractice Cases)

Initial CMA Participation: August 1990

Issue: This case involved an action by clients against their attorney, seeking refund of a portion of the contingency fee paid in a medical malpractice action. On August 29, 1990, the AC Committee filed an *amicus curiae* brief in the California Court of Appeal (2d Dist.), arguing that the trial court properly granted summary judgment in favor of plaintiff clients. The brief contended that no triable issue of fact was presented and the attorney had no defense to the charge that he collected an illegal fee. The Committee subsequently filed a letter on June 6, 1991, with the California Supreme Court urging the Court not to depublish the opinion.

Outcome: The Court of Appeal ruled in favor of the clients and the AC Committee, holding that an attorney, who represents several heirs in a wrongful death case grounded on medical malpractice, may not compute the statutory fee separately upon each plaintiff's share of the award. Rather, the statutory fee must be scaled towards the judgment as a whole. Also, the attorney may not charge the clients hourly fees for services provided by another attorney with whom he arranges to handle the appeal. This decision remains published and may be found at *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583, 280 Cal.Rptr. 316.

MICRA—SCOPE

Allen v. Los Alamitos Medical Center*
(Eligibility of Physician Groups for
MICRA Protection)

Initial CMA Participation: May 2002

Issue: This case involves whether or not medical groups are entitled to the protections of MICRA. The trial court ruled that a partnership comprised strictly of physicians and formed for the practice of medicine is not a "healthcare provider" and thus is not entitled to the vital protections afforded by MICRA. The defendant medical group has appealed the trial court's decision and on May 10, 2002, CMA, CDA and CHA filed an *amicus curiae* brief in support of Healthcare Partners Medical Group. The *amicus curiae* brief reminds the court of MICRA's statutory framework and the current jeopardy to the provision of

medical care given the current healthcare environment. The brief argued that a physician group is entitled to the benefits of MICRA, particularly where its liability for professional negligence is premised on respondeat superior and its employee was a licensed physician entitled to MICRA protections.

The brief also points out that even when physicians and their lawfully organized groups contract with managed care plans to assist the plan in meeting its obligation to provide accessible healthcare, physicians and their groups are still practicing medicine and are thus protected by MICRA.

Outcome: While the case was pending in the Court of Appeal, the parties entered into a confidential settlement. Therefore, there will be no Court of Appeal opinion in this case.

**Andrea N. v. Laurelwood Convalescent Center
(MICRA Applies Only to Physician's
Professional Medical Judgment)**

Initial CMA Participation: April 1993

Issue: This case dealt with a negligence action brought against a convalescent hospital which allegedly provided inadequate security, thus allowing for the rape of a disabled patient. On April 26, 1993, the AC Committee filed a letter with the California Supreme Court urging the Court to grant a hearing. On August 9, 1993, the AC Committee entered as *amici* in the Supreme Court to argue against the Court of Appeal's very restrictive interpretation of the MICRA statutes to apply only in cases involving a physician's professional medical judgment.

Outcome: Because this case was settled, the California Supreme Court dismissed the petition for review before addressing the AC Committee's concerns. Inconsistent with the AC Committee's views, the Court of Appeal had ruled that failure to provide security was not "professional negligence" under Medical Injury Compensation Reform Act (MICRA), and hence MICRA did not apply. However, the effect of the Supreme Court's action was to depublish the opinion.

**Ashcraft v. King
(Battery Theory is Outside the
Provisions of MICRA)**

Initial CMA Participation: May 1991

Issue: This case dealt with a patient who brought action against surgeon to recover for battery and negligence after receiving a transfusion of HIV-contaminated blood. On May 9, 1991, the AC Committee filed a letter supporting the request for review by the Supreme Court, or for depublishation of the Court of Appeal's opinion, in the event that the petition for review was denied. The AC Committee argued that the *Ashcraft* opinion was erroneous because the Court of Appeal misinterpreted the court's decision in *Cobbs v. Grant* (1972) 8 Cal.3d 229, concerning proof of the element of intent in civil battery cases. As it stood, by considering battery to be beyond the reaches of MICRA, the Court could hold defendant liable for punitive damages and the defendant's malpractice insurance coverage could be defeated.

Outcome: Unfortunately, the California Supreme Court refused to either hear the case or depublish it. The Court of Appeals ruled that the plaintiff presented sufficient evidence of battery to have the claim determined by the jury. The Court's decision can be found at *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 278 Cal.Rptr. 900.

**Barris v. County of Los Angeles
(MICRA's \$250,000 Cap Applies to
Negligence and EMTALA Claims)**

Initial CMA Participation: October 1997

Issue: This case dealt with MICRA's \$250,000 limitation on non-economic damages applying to EMTALA claims. The plaintiff sued for medical negligence and EMTALA violations when plaintiff's infant daughter died following transfer from County to a Kaiser facility. On October 3, 1997, the AC

Committee filed an *amicus curiae* brief in support of the County, arguing that the \$250,000 non-economic damages limitation under Civil Code §3333.2 applies to a cause of action for violations of EMTALA. In March 1998, the Committee filed a letter opposing Supreme Court review of the Court of Appeals decision.

On June 24, 1998, the AC Committee filed an AC brief before the California Supreme Court reiterating the argument in its prior brief.

Outcome: The Court of Appeal (2d. Dist.) agreed with the AC Committee and found that MICRA's \$250,000 limitation on non-economic damages applied to both the negligence and EMTALA claims. The California Supreme Court agreed, finding that an EMTALA claim for failure to stabilize an emergency medical condition is a claim "based on professional negligence" for purposes of MICRA. The Court's opinion may be found at *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 83 Cal.Rptr.2d 145.

Belton v. Bowers Ambulance Service
(Scope of MICRA Statute of Limitations,
Code of Civil Procedure §340.5)

Initial CMA Participation: April 1999

Issue: The issue in this case was whether prisoners suing healthcare providers for their professional negligence are bound by the MICRA statute of limitations, Code of Civil Procedure §340.5, or by Code of Civil Procedure §352.1, a tolling provision of general applicability for prisoners. On April 20, 1999, the AC Committee filed an *amicus curiae* brief in the California Supreme Court, arguing that none of the tolling statutes external to MICRA apply to cases covered by MICRA. The Committee noted that the Legislature intended MICRA to operate independently of other statutes of limitations and tolling provisions. If the Legislature intended prisoners to have special rights in connection with professional negligence claims against health care providers, the Legislature would have so provided during the adoption and amendment of §340.5. The Committee further argued that public policy supported prohibiting a non-MICRA statute from tolling the MICRA statute, as prisoners and others entitled to exercise general tolling provisions are adequately protected by the tolling provisions that MICRA affords.

Outcome: Unfortunately, on July 1, 1999, the California Supreme Court affirmed the judgment of the Court of Appeal and ruled that the MICRA statute of limitations, Code of Civil Procedure §340.5, did not preclude the tolling provision of Code of Civil Procedure §352.1. Thus, the provision of the MICRA statute of limitations, which requires that a plaintiff file his or her complaint within one year of the date the plaintiff discovers or should have discovered the injury, does not apply to prisoners. In other words, a prisoner's time to sue a health care provider could be extended by incarceration up to the maximum three years from the time of the injury, as permitted by MICRA. The Court's decision may be found at *Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928, 86 Cal.Rptr.2d 107.

Coe v. Superior Court (Irwin Memorial Bloodbank)
(Extended Applicability of MICRA and Professional
Negligence Standard to Blood Banks)

Initial CMA Participation: March 1990

Issue: This case involved two actions against Irwin Memorial Bloodbank as a part of the Complex Blood Bank Litigation for damages for injury, wrongful death, and/or loss of consortium, allegedly arising out of the receipt and transfusion of AIDS tainted blood or blood plasma. At issue was whether the blood bank could be considered a "healthcare provider" and therefore be subject to MICRA's \$250,000 limitation on non-economic damages. On March 8, 1990, the AC Committee filed an *amicus curiae* letter with the Court of Appeal, arguing the applicability of MICRA to blood banks. The Court of Appeal agreed and held that a blood bank is a "healthcare provider" within the meaning of the MICRA statutes. The plaintiffs filed a petition for review. In response, the AC Committee led an *amicus curiae* letter to the Supreme Court on July 20, 1990, in support of the appellate court's opinion and requesting that the petition for review be

denied.

Outcome: The California Supreme Court agreed with the AC Committee and denied review. The appellate decision can be found at *Coe v. Superior Court (Irwin Memorial Bloodbank)* (1990) 220 Cal.App.3d 48, 269 Cal.Rptr. 368.

Davis v. Superior Court (Fuentes)
(MICRA Applies to Plaintiff's Fraud Allegation)

Initial CMA Participation: May 1994

Issue: This case involved plaintiff who alleged that several physicians conspired to mistreat his condition in order to serve their financial interests. On May 11, 1994, the AC Committee filed an amicus curiae brief with the Court of Appeal (2d Dist.), arguing that CCP §425.13, regulating punitive damages pleading, applies to plaintiff's fraud allegation against defendant physician arising out of physician's evaluation and communication of plaintiff's medical condition.

Outcome: The Court agreed with the AC Committee, holding that where conspiracy to commit fraud was directly related to the manner in which health practitioner provided professional services, the suing patient was required to comply with pleading requirements for seeking punitive damages from health care provider. The Court's decision may be found at *Davis v. Superior Ct. (Fuentes)* (1994) 27 Cal.App.4th 623, 33 Cal.Rptr.2d 6.

Delaney v. Baker
(MICRA Does Not Apply to Elder Abuse Act Claim)

Initial CMA Participation: February 1998

Issue: This case involves the issue of whether MICRA applies to cases alleging that a health care provider committed elder or dependent adult abuse in the course of providing health care services. After the Court of Appeal ruled that MICRA does not apply to such claims, the AC Committee filed a letter with the California Supreme Court urging the Court to grant review of the case or depublish the opinion.

Outcome: The Supreme Court ruled that the enhanced remedies provided by the Elder Abuse and Dependent Adults Civil Protection Act (attorneys fees add up to \$250,000 in damages for non-economic losses which survive the person's death) and not MICRA, apply to health care providers, if the jury finds, by clear and convincing evidence, they acted recklessly, oppressively, fraudulently, or maliciously in causing the injury. The Court emphasized that its interpretation of the Act, and particularly of the phrase "based on professional negligence," was not necessarily applicable to the MICRA statutes. The Court's opinion may be found at *Delaney v. Baker* (1999) 20 Cal.4th 23, 82 Cal.Rptr.2d 610.

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Flowers v. Torrance Memorial Hospital Medical Center
("Professional Judgement" Test is Inconsistent with Scope of MICRA)

Initial CMA Participation: April 1994

Issue: This case involved a patient presented in the Emergency Room who was placed on a gurney with one of the guard rails down. At some point, she fell asleep, reached for the absent rail, fell to the ground, and hurt her hand. On April 29, 1994, the AC Committee filed an amicus curiae brief with the California Supreme Court on behalf of Torrance Memorial Hospital, arguing that the Court of Appeal's (2d Dist.) "professional judgment" test is inconsistent with the scope of MICRA.

Outcome: Consistent with the AC Committee's view, the Supreme Court reversed, holding that the Court of Appeal erroneously premised their result on a perceived distinction between ordinary and professional negligence (a defendant has only one duty measured by one standard of care). This perceived distinction is misplaced in resolving a motion for summary judgment in which the question is whether the moving party has demonstrated or negated negligence as a matter of law. The Court's decision may be found at *Flowers*

**Jackson v. Superior Ct. (Mem. Hosp. Of Gardenia)
(Applicability of Punitive Damages Pleading
Hurdle Extended to Federal EMTALA Laws)**

Initial CMA Participation: March 1997

Issue: This case involved an “acutely suicidal” patient who went to the Memorial Hospital emergency department on a Friday evening, but was not admitted nor transferred to another hospital with an appropriate psychiatric facility. Instead, the patient was sent home and told to report to a public hospital on Monday. Subsequently, the patient shot and killed himself. On March 3, 1997, the AC Committee filed an amicus brief with the Court of Appeal (2d Dist.), arguing that Code of Civil Procedure §425.13 governing punitive damages pleading applies to cases alleging failure to properly transfer a patient under the federal EMTALA laws. On August 8, 1997, AC Committee filed a letter requesting that the Ct. of Appeal decision be certified for publication.

Outcome: The Court of Appeal agreed with the AC Committee and upheld the trial court’s decision to remove punitive damages from the plaintiff’s EMTALA claim. Because the gravamen of the complaint was that defendant was professionally negligent in its care of plaintiff, the provisions of Code of Civil Procedure §425.13 applied, requiring that a court enters an order allowing an amended pleading to include a claim for punitive damages. However, the request for publication was denied.

**Kitzig v. Nordquist*
(Enforcing MICRA Statute of Limitations)**

Initial CMA Participation: September 2000

Issue: This case involves whether the MICRA one-year statute of limitations starts running when a patient goes to another dentist to investigate her suspicion that the failure of her dental implants was caused by her treating dentist’s wrongdoing, because the second dentist told the patient that “everything looked ‘okay’” and the patient thereafter continued to rely on her treating dentist. The Court of Appeal ruled that the statute is not triggered under these circumstances, which is contrary to the Supreme Court’s decision in *Norgard v. Upjohn Co.* (1999) 21 Cal.4th 383. The *Norgard* case, and other cases have established that, once a patient suspects her health care provider has done something wrong, the one-year statute of limitations in Code of Civil Procedure §340.5 begins to run. On September 1, 2000 CMA submitted a letter brief to the California Supreme Court, requesting de-publication of the opinion, or, in the alternative, review of the case.

Outcome: On October 3, 2000, the California Supreme Court denied both the request for review and the request for de-publication of the case.

**Medical Mutual of Ohio v DeSoto*
(Enforcing MICRA Against Out-of-State
Insurance Carriers)**

Initial CMA Participation: July 2000

Issue: This case involves the issue of whether a health insurance policy from a non-California insurer, operating in California, is subject to the MICRA statute (specifically the California’s anti-subrogation/reimbursement provision of California Civil Code §3333.1 (b).)

This case arises from an underlying medical malpractice action which was settled in 1998. All of the plaintiff’s medical expenses were paid by collateral source, in this case Blue Cross of Ohio (now Medical Mutual of Ohio). The plaintiff was a secretary in the Orange County office of an Ohio-based law firm, hence her health insurance was through an Ohio-based health care insurer. The alleged medical

malpractice occurred in California, and the case was eventually resolved pursuant to California law. The settlement agreement specified that plaintiff was not receiving any funds to pay for any medical expenses which may have been incurred, as they had all been paid for by collateral source.

For unique reasons, the defendant (The Regents of the University of California) agreed to indemnify the plaintiff in the event her health insurance carrier sought reimbursement.

Subsequently, Medical Mutual of Ohio filed a declaratory relief action in the U.S. District Court for the Western District of Ohio seeking reimbursement of all the funds it had paid on DeSoto's behalf. Cross-motions for summary judgment were filed. Medical Mutual contended that ERISA preempts California law in this situation, and since under Ohio contract law, Medical Mutual would be entitled to reimbursement, The Regents were liable for it. The University argued that ERISA does not preempt California law, since DeSoto realistically would not have recovered her medical expenses in the underlying action (or settlement) pursuant to case law and Civil Code §3333.1(b). Further U.C. argued that Medical Mutual could not obtain reimbursement for that which DeSoto had no legal right to receive, and did not receive. The U.S. district court granted a summary judgment to Medical Mutual essentially finding California law irrelevant. The case was appealed to the Sixth Circuit.

On July 26, 2000, CMA, CDA and CHA filed an amicus curiae brief. An adverse published opinion in this case could have a devastating effect on one of the linchpins of MICRA. Should the Sixth Circuit conclude that any time the master health insurance policy is written by a non-California corporation, or that the insurance contract has a choice of law provision naming something other than California law, the anti-subrogation/reimbursement provision of section 3333.1(b) will not apply, it will shift the burden of paying medical expenses back to California malpractice insurers. This would create a situation which is exactly the opposite of what the legislature intended when it enacted Civil Code §3333.1.

Outcome: The Court heard oral arguments on September 21, 2000. On November 30, 2000, the United States Court of Appeals for the Sixth Circuit accepted the arguments of the Regents and CMA and ruled that California law applies to the insurance contract between the patient, Mrs. deSoto and Medical Mutual of Ohio. Accordingly, the Court ruled that Medical Mutual of Ohio is prohibited from recovering the medical expenses it paid on behalf of Mrs. deSoto pursuant to California's MICRA statutes.

**Osborn v. Irwin Memorial Blood Bank
(Extended Applicability of MICRA and
Professional Negligence Standard to Blood Banks)**

Initial CMA Participation: June 1992

Issue: This case involved a child who contracted AIDS virus from blood transfusion in the course of heart surgery at an university hospital. Parents filed damages action against blood bank and university on theories including negligence, intentional and negligent misrepresentation and products liability. The appellate court affirmed, for the most part, the superior court decision that the blood bank was liable only for negligent misrepresentation. Among the various issues raised, the appellate court held that the adequacy of blood bank's actions to prevent contamination of blood was a question of professional negligence and fulfillment of professional standard of care, rather than ordinary negligence. In response, the AC Committee on June 5, 1992 filed an amicus curiae letter with the California Supreme Court in support of the appellate court's opinion, arguing the applicability of MICRA to blood banks and requesting that rehearing not be granted.

Outcome: The California Supreme Court agreed with the AC Committee and denied review. The appellate decision can be found at *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 7

Palmer v. Superior Court*
(Eligibility of Physician Groups for MICRA Protection)

Initial CMA Participation: September 2002

Issue: This case involves whether or not medical groups are entitled to the protections of MICRA. In *Palmer*, Mr. Palmer sued the medical group, Sharp Rees-Stealy Medical Group, Pacific Care, and Dr. Rifkin. The plaintiff is upset because these entities declined to provide state of the art prostheses, (called “Ultralight”). The plaintiff alleges in his complaint that this decision was a medical decision (as opposed to an administrative economic decision). Notwithstanding, the plaintiff included in his complaint a claim for punitive damages.

Under Code of Civil Procedure §425.13, there are special procedural requirements that must be followed in order to state a claim for punitive damages against a health care provider. One cannot simply, as did Mr. Palmer, claim them in the complaint. The defendants challenged the complaint and the trial court ruled that the claim for punitive damages should be stricken because it did not comply with Code of Civil Procedure §425.13. The plaintiff took a writ on this issue, which means that the plaintiff asked the Court of Appeal for an immediate decision as to the propriety of the trial court’s decision on this issue. The trial court’s ruling did not preclude Mr. Palmer from later presenting facts sufficient to state a claim for punitive damages, but he must simply follow the correct procedural requirements.

On September 10, 2002, CMA, CHA and CDA, filed an *amicus curiae* letter brief in support of the medical group in the case. This was a writ proceeding, which proceeds very quickly and the Court heard oral argument on October 15, 2002. Because of the procedural posture of the case, the *Palmer* case was decided before the *Allen v. Healthcare Partners* discussed above.

Outcome: On November 19, 2002 the California Court of Appeal, Fourth Appellate District, Division One ruled that a professional medical corporation that performed utilization review for HMOs was a “health care provider” within the meaning of the statutory requirement of court approval of a claim for punitive damages in an action arising out of the professional negligence of a health care provider. The Court specifically ruled that a patient’s claim against the medical group to recover for intentional infliction of emotional distress resulting from a medical director’s determination during a utilization review that equipment was not medically necessary, arguably arose out of professional negligence and, therefore, was subject to the MICRA protections. The case was returned to the trial court to proceed on the merits. It remains to be seen how the issue will ultimately be resolved in the *Allen* case discussed above.

Preferred Risk Mutual Insurance Co. v. Reiswig, et al.
(Scope of MICRA Statute of Limitations, Code of Civil Procedure §340.5)

Initial CMA Participation: April 1999

Issue: The issue in this case is whether the MICRA statute of limitations applies to equitable indemnity actions against health care providers arising out of their professional services. On April 6, 1999, the AC Committee filed an *amicus curiae* brief in the California Supreme Court, arguing that the MICRA statute of limitations applies to all actions arising out of professional negligence, including equitable indemnity claims. The Committee noted that it would have been nonsensical for the Legislature to protect health care providers with the three-year liability cut off as to direct victims of alleged malpractice, while leaving

things open-ended as to third parties regarding equitable indemnity claims based on the very same provision of professional services. The Committee pointed out that applying the MICRA statute of limitations in this manner would cause no undue hardship because a cross-claim for indemnity may be filed in a pending action within one year of whenever the injury providing the basis for the indemnity claim is discovered by the person claiming indemnity. Further, in situations where the injury is not discovered within the longer three-year period of repose, the indemnitee is in no worse position than the injured party.

Outcome: Regrettably, the California Supreme Court ruled on August 5, 1999 that in this case, the MICRA statute of limitations did not apply. The opinion may be found at *Preferred Risk Mutual Insurance Co. v. Reiswig, et al.* (1999) 21 Cal.4th 208, 87 Cal.Rptr. 2d 187.

**Western Steamship Lines, Inc. v.
San Pedro Peninsula Hospital**
**(Extended MICRA Cap to Indemnity
Actions by Concurrent Tort Feasors)**

Initial CMA Participation: July 1993

Issue: This case concerned an employee of a cruise liner who became seriously ill while working aboard and was subsequently taken to a hospital in California. During her stay at the hospital, she suffered irreversible brain damage and died. The question is whether MICRA limited an employer's recovery in an equitable indemnity action to the amount its injured employee could have recovered from a medically negligent hospital and its physicians had the employee brought her malpractice action in California. The Court of Appeal upheld the trial court decision that although MICRA limited damages recoverable by the employee to \$250,000 in non-economic losses, this limitation did not apply to this suit between the employer and the hospital/physicians. On July 30, 1993, the AC Committee filed a letter urging the Supreme Court to grant review or depublish the Court of Appeal's decision. On November 29, 1993, the AC Committee filed a brief with the California Supreme Court, arguing that an indemnity action against a health care provider should not serve as a back door method to avoid MICRA's limitations.

Outcome: The California Supreme Court agreed with the AC Committee and reversed this ruling, holding that the MICRA provision limiting recovery of non-economic damages by the injured party against health care provider applies in action for partial equitable indemnification by a concurrent tortfeasor. This decision may be found at *Western Steamship v. San Pedro Hospital* (1994) 8 Cal.4th 100, 32 Cal.Rptr.2d 263.

MICRA STATUTE OF LIMITATIONS

Duncan v. Spivak*
**(Plaintiff Attempt to Extend MICRA
Statute of Limitations)**

Initial CMA Participation: February 2002

Issue: This case involves the application of the one-year discovery rule statute of limitations contained in Code of Civil Procedure §340.5. The Court of Appeal erroneously forged a new "diligence" standard and departed from previous Supreme Court opinions on the application of the one-year discovery rule. The Court of Appeal reversed a summary judgment obtained by defendant Dr. Spivak based on the fact that the plaintiff filed his action over two years after the surgery he contends caused his injury. In our view, the Court of Appeal erroneously concluded that the statute of limitations (Code of Civil Procedure §340.5) "does not necessarily bar a claim filed more than one year after a patient "suspects" medical negligence and serves a notice of intent to sue when that plaintiff subsequently receives medical advice allaying those suspicions." The decision runs contrary to the California Supreme Court's holdings in both *Norgardt v. Upjohn* and *Jolly v. Eli Lilly & Co.* On February 12, 2002, CMA, CHA and CDA filed an amici curiae letter brief with the California Supreme Court, supporting Dr. Spivak's petition for review with that court. The brief points out the danger of extending the one-year statute of limitations in that delaying a running of

the statute would “unfairly deprive the defendant of the right to be free from stale claims.” The appellate court’s proposed rule would abolish the notion that a statute of limitations must be fixed and uniformly applied.

Outcome: On February 27, the California Supreme Court denied Dr. Spivak’s petition for review but, ordered that the court of appeal’s decision be de-published. This is an important victory for physicians in that the de-publication of the opinion prevents parties in future cases from citing the court of appeal’s decision.

Fox v. Ethicon Endo-Surgical, Inc
(Statute of Limitations)

Initial CMA Participation: December 2003

Issue: This case involves whether or not a plaintiff’s suspicion of a tort claim triggers the running of the statutes of limitations as to all defendants or only those that the plaintiff initially suspects were negligent.

Plaintiff Brandy Fox underwent gastric bypass surgery in April 1999. A few days later, she was not feeling well and returned to the hospital for an exploratory surgery, which revealed a perforation or leak of a staple closure. A few days short of the one-year anniversary of her surgeries, Fox gave a 90-day notice to her surgeon and the two hospitals where her surgeries took place that she intended to sue them. One year later, her surgeon testified in deposition that a leaky closure of Fox’s small intestine had been stapled with an Ethicon stapler and that he had seen similar leaks in other circumstances where that stapler had been used.

Thereafter, over two years after her surgeries, Fox filed an amended complaint against Ethicon. Fox claimed that she did not suspect that the Ethicon stapler was the cause of her injury until her surgeon’s deposition. Ethicon sought to dismiss the complaint on statute of limitations grounds and the trial court denied the request for dismissal. By its ruling, the court disagreed with long-standing case law that holds that the statute of limitations begins to run as to all potential defendants when the plaintiff has cause to sue based on knowledge or suspicion of negligence. Such a ruling would extraordinarily extend the statute of limitations. On December 18, 2003, CMA filed a letter in support of the defendant’s request that the Supreme Court review this case or, alternatively, depublish it so that it cannot be cited.

On February 18, 2004 the California Supreme Court granted Ethicon’s petition for review, and the case is now pending in that court. On June 17, 2004, CMA-CHA and CDA filed an *Amicus curiae* brief in the California Supreme Court. In this brief, CMA urged the court not to blur the line as to when the statute of limitations begins to run so as to vary the time to file a lawsuit depending on the type of negligence or the person or entity committing the alleged negligence. CMA argued that such a ruling would extend the statute of limitations well beyond what is necessary to protect a plaintiff’s interest.

Outcome: On May 9, 2005, the Supreme Court ruled that the statute of limitations does not begin to run until the plaintiff discovered or should have discovered a cause of action even if the statute of limitations has started for a related cause of action arising from the same injury.

PROFESSIONAL LIABILITY—ARBITRATION

Broughton, et al. v. CIGNA Health Plans of California
(CMA Supports Ability of Arbitrators to Award Injunctive Relief)

Initial CMA Participation: April 1999

Issue: The question in this case is whether arbitrators have the power to award injunctive relief provided for by the Consumer Legal Remedies Act (Act), Code of Civil Procedure §1281.8, or whether such claims must be brought in the court system, notwithstanding a prior agreement to submit all disputes to arbitration. On April 28, 1999, the AC Committee filed an *amicus curiae* brief in the California Supreme Court, arguing that arbitrators do have the power to grant injunctive relief and any other remedies available under the Act. The brief noted that CIGNA had given every indication that it would abide by an

arbitrator's award, including injunction, and that the Superior Court could enforce this award. The Committee also pointed out that such a ruling by the Court would enable the parties to obtain the benefits of arbitration and avoid the inefficiencies of needing the case to be heard in two different forums (i.e., professional liability action by the arbitrator and the Act claim by a judge). In addition, this ruling would enable arbitrators to award other types of injunctive relief, including ordering the plan to provide healthcare services it had previously denied.

Outcome: On December 2, 1999, the California Supreme Court ruled that damage claims under the Consumer Legal Remedies Act covered by an arbitration agreement must be arbitrated, while a claim for an injunction based on the same facts would be heard by a court. The Court's decision may be found at *Broughton, et al. v. CIGNA Health Plans of California* (1999) 21 Cal.4th 1066, 90 Cal.Rptr.2d 334.

Cochran v. Rubens
(Arbitration Agreements Applies to
Direct Parties to That Agreement)

Initial CMA Participation: March 1996

Issue: This case involved a patient who signed an arbitration agreement with his primary care physician and later brought malpractice suit against his specialist, who seeks to compel arbitration based on the agreement signed at the initial visit with the PCP. On March 29, 1996, the AC Committee filed a letter with the California Supreme Court on behalf of Dr. Rubens, requesting depublication. The letter argues that the burden on health care providers and patients will be significant and unjustified if arbitration agreements are considered "biodegradable" and must be renewed on a regular basis.

Outcome: The Court of Appeal disagreed with the AC Committee, finding that no expectation of future medical transactions between the patient and specialist existed, so that the prior agreement with the PCP was not effective. The Court's decision remains published and may be found at *Cochran v. Rubens* (1996) 42 Cal.App.4th 484, 49 Cal.Rptr.2d 672.

Engalla v. Permanente Medical Group
(Judiciary to Supervise "Administration"
of Arbitration Programs)

Initial CMA Participation: October 1995

Issue: This case involved a patient's allegation that Kaiser's private arbitration program was unfairly protracted and thus Kaiser's arbitration requirement should be deemed waived. On October 11, 1995, the AC Committee filed a letter opposing the petition for review in the California Supreme Court. On March 25, 1996, the AC Committee filed a brief, arguing that this and similar attacks on arbitration proceedings, particularly arbitration programs under the California Arbitration Act, will be counterproductive, and that arbitrators have authority and responsibility for dealing with delays in the arbitration proceedings.

Outcome: The Supreme Court, in opposition to the AC Committee, reasserted "waiver" as a means to avoid arbitration. The Court's decision may be found at *Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 64 Cal.Rptr.2d 843.

Lemus v. Superior Ct. (Antelope Valley
Hospital Medical Center)
(Enforced Arbitration Agreement in Malpractice Case)

Initial CMA Participation: June 1997

Issue: This case involved a minor child/plaintiff who was seriously injured during birth due to an alleged failure to diagnose and treat the mother properly during labor and delivery. On June 3, 1997, the AC Committee filed an amicus brief with the Court of Appeal (2d Dist.) on behalf of Dr. Galloway, supporting arbitration of professional liability claims generally, and arbitration in this case specifically.

Outcome: The case was settled, subject to a Superior Court order compromising plaintiff's claim. Prior to

this settlement, the Superior Court had granted defendant's motion to compel arbitration.

Moore v. Conliffe
**(Established that Arbitration Accords
the Same Finality as Does the Court System)**

Initial CMA Participation: March 1993

Issue: This case involved an action by family members of deceased patient against hospital and physician to vacate an arbitration award. On March 19, 1993, the AC Committee filed a letter with the California Supreme Court supporting review or depublication of the Court of Appeal's decision. On July 15, 1993, the AC Committee filed an amicus curiae brief with the California Supreme Court to request a reversal of the appellate court's decision, arguing that the appellate decision in denying the litigation privilege to the physician in an arbitration proceeding violates the constitutional guarantees of substantive due process and equal protection. Moreover, the Court created a loophole whereby a party who is unhappy with an arbitration award could continue to pursue the matter through the court system, despite that party's express agreement that the arbitrator's decision was binding and final.

Outcome: The California Supreme Court agreed with the AC Committee and ruled that statements made by witnesses in private arbitration proceedings were protected by the same litigation privileges that attached to witnesses in court proceedings. In other words, a witness who testified at a deposition held in connection with arbitration was immunized from tort liability by virtue of the privilege for statements made in any judicial proceeding. This decision may be found at *Moore v. Conliffe* (1994) 7 Cal.App.4th 634, 29 Cal.Rptr.2d 152.

Navarro v. Superior Ct. (Davis)
(Unfavorable Application of Arbitration Agreement)

Initial CMA Participation: July 1993

Issue: This case involved the arbitration agreement executed by Ms. Navarro in connection with care for her first pregnancy. The issue was whether this agreement extended to services for her second pregnancy, both of which were delivered by Dr. Davis. On July 29, 1993, the AC Committee filed a letter with the California Supreme Court supporting petition for review on behalf of Dr. Davis. The Committee criticized the apparent judicial hostility toward contractual arbitration.

Outcome: The California Supreme Court denied the petition for review. In an unpublished opinion, the Court of Appeal (4th Dist.) had ruled that the arbitration agreement did not extend to all medical services, namely the second delivery, received by the patient.

Neaman v. Kaiser Foundation Hospitals
**(Vacated Arbitration Award Because
Arbitrator Failed to Disclose Prior Relation)**

Initial CMA Participation: November 1992

Issue: This case dealt with a suit by plaintiffs to vacate an arbitration award based on a "neutral" third arbitrator's failure to disclose a prior business relationship with the defendant. On November 18, 1992, the AC Committee filed a letter with the California Supreme Court supporting the petition for review, with an alternative request for depublication. The Committee questioned the appellate court's decision that arbitrators have a duty to provide litigants with information that will not assist the parties in making a decision about who should arbitrate.

Outcome: The California Supreme Court disagreed with the AC Committee and denied the petition for

review. In a published opinion, the Court of Appeal held that although he had disclosed he previously had acted as an arbitrator in Kaiser matters, the arbitrator should have disclosed that he had previously served as Kaiser's party arbitrator. This appellate decision may be found at *Neaman v. Kaiser Foundation Hosp.*(1992) 9 Cal.App.4th 1170, 11 Cal.Rptr.2d 879.

Nogueiro v. Kaiser Foundation Hospital
(Declined to Apply MICRA's \$250,000
Cap to This Arbitration Award)

Initial CMA Participation: November 1994

Issue: This case involved a hospital's effort to reduce an arbitration award for medical malpractice to conform with the \$250,000 cap imposed by MICRA. On November 4, 1988, the AC Committee filed a letter with the California Supreme Court requesting depublication of the Court of Appeal's opinion, arguing that this decision poses a real risk that arbitrators will disregard the dictates of Civil Code §3333.2 and award non-economic damages disguised in lump sums that exceed the \$250,000 cap.

Outcome: The California Supreme Court denied petition for review and the request for depublication. The Court of Appeal (1st Dist.) held that even if the award resulted from the arbitrators' erroneous refusal to apply the MICRA cap, the award would not be invalidated. The Court felt that the arbitrators decided an issue that was properly before them and such decision was one that the parties agreed would be conclusive. This decision may be found at *Nogueiro v. Kaiser Foundation Hosp.* (1998) 203 Cal.App.3d 1192, 250 Cal.Rptr. 478.

Shah v. Superior Ct. (Mickey)
(Arbitration Not Enforced)

Initial CMA Participation: September 1994

Issue: This case involved a successful attempt by plaintiff to avoid contractual arbitration. On September 21, 1994, AC Committee filed a letter with the California Supreme Court requesting that Dr. Shah's petition for review and request for order staying all proceedings in trial court be granted. The AC Committee argued that this case presented an opportunity for the Court to espouse the policy that arbitration is a favored and necessary method of dispute resolution which must be facilitated, not thwarted, by California courts.

Outcome: The California Supreme Court unfortunately denied Dr. Shah's petition for review.

PROFESSIONAL LIABILITY—FEAR OF DISEASE

Kerins v. Hartley
(Patient Cannot Sue HIV-Positive
Physician for Fear of AIDS/HIV)

Initial CMA Participation: April 1994

Issue: This case involved a suit by a patient seeking compensation for alleged severe mental anguish and emotional distress incurred when the patient discovered that a physician infected with Human Immunodeficiency Virus (HIV) had performed surgery on the patient. On September 28, 1993, the AC Committee filed a letter supporting the petition for review by the California Supreme Court of the first decision of the Court of Appeal allowing the case to proceed against the physician. The Supreme Court granted review and then remanded the case to the Court of Appeal for reconsideration in light of its decision in *Potter v. Firestone* (below). On April 21, 1994, the AC Committee filed an amicus letter in the California Court of Appeal, arguing that the evidentiary standard established in *Potter v. Firestone* for "fear of" disease claims forecloses the plaintiff's recovery in this case. The Committee also argued that plaintiff could not recover "fear of" HIV damages because defendant did not breach any legal duty owed to the plaintiff. Finally, the Committee agreed that plaintiff could not recover "fear of" damages either under

Potter or under the theory of intentional infliction of emotional distress.

Outcome: On remand, the Court of Appeal agreed with the AC Committee, finding that the statistically insignificant chance that plaintiff contracted HIV from the surgeon precluded recovery of emotional distress damages for fear of HIV. This decision may be found at *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 33 Cal.Rptr.2d 172.

Potter v. Firestone Tire and Rubber Co.
(Places Limits on “Fear of Disease” Cases)

Initial CMA Participation: August 1993

Issue: This case involved landowners living next to a landfill who brought an action against a tire manufacturer which disposed of hazardous wastes at the landfill. On August 31, 1993, the AC Committee filed a brief in the California Supreme Court, arguing that policy considerations militate in favor of foreclosing or, at the very least, imposing strict limits on “fear of disease” cases. The brief urges the court to rule that “fear of” claims should be recognized, if at all, only by the legislature. In the alternative, if the Court chooses to permit such claims without legislative sanction, the Court should impose objective standards more stringent than those used in typical negligent infliction of emotional distress (NIED) cases.

Outcome: The California Supreme Court agreed with the AC Committee, reversed the judgment of the Court of Appeal and imposed standards applicable to “fear of” cases. The Supreme Court, held that: (1) in the absence of present physical injury or illness, recovery of damages for fear of cancer in a negligence action should be allowed only if plaintiff proves that the fear stems from a knowledge which is corroborated by reasonable medical and scientific opinion that it is more likely than not that cancer will develop in the future due to the toxic exposure; (2) the more likely than not threshold need not be met if toxic exposure results from conduct amounting to oppression, fraud, or malice; (3) there is no liability for intentional infliction of emotional distress (IIED) in the absence of a determination that defendant’s extreme and outrageous conduct was directed at the plaintiffs or undertaken with knowledge of their presence; (4) medical monitoring costs are a compensable item of damages; and (5) comparative fault principles may be applied to reduce the amount of recovery for emotional distress based on fear of developing cancer when plaintiff’s smoking is negligent and a portion of the fear of cancer is attributable to the smoking. This decision may be found at *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 25 Cal.Rptr.2d 550.

PROFESSIONAL LIABILITY—LOST CHANCE DOCTRINE

Bromme v. Pavitt
**(“Lost Chance” of Survival Must be Proved
By Reasonable Medical Probability)**

Initial CMA Participation: September 1991

Issue: This case involved a wrongful death action filed by patient’s husband against physician who failed to diagnose patient’s colon cancer. In September 1991, the AC Committee filed an amicus brief arguing that California courts should not recognize a cause of action for a “lost chance” of survival, and that liability should be limited to cases in which it is “more likely than not” that the negligence caused the injury. On April 27, 1992, the AC Committee submitted a letter to the Court of Appeal requesting publication of the *Bromme* decision. The letter argued that the Court’s opinion dealt with certain issues not previously addressed by other courts in this context, and that publication would lay a firm foundation for California law in this area.

Outcome: The Court of Appeal agreed with the AC Committee, saying that a wrongful death action arising from medical negligence must be proved by reasonable medical probability (i.e., greater than 50% chance of survival had the physician properly diagnosed and treated the condition). The Court’s decision

may be found at *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 7 Cal.Rptr.2d 608.

Duarte v. Zachariah
**(“Lost Chance” Compensation Awarded
for Malpractice Injury)**

Initial CMA Participation: May 1994

Issue: This case involved an alleged irreparable bone marrow injury resulting from defendant’s negligent overprescription of a drug which prevented plaintiff from completing chemotherapy treatment, thereby suffering a spread of cancer. On May 5, 1994, the AC Committee filed letter with California Supreme Court requesting depublication, arguing that Court of Appeal’s decision effectively nullifies the requirement that a negligent party’s conduct be the probable cause of plaintiff’s damages.

Outcome: The California Supreme Court denied petition for review and the AC Committee’s request for depublication. The Court of Appeal held that the injury resulted in a detrimental change in the physical condition of plaintiff’s body and that compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The Court of Appeal’s decision may be found at *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 28 Cal.Rptr.2d 88.

Dumas v. Cooney
**(“Lost Chance” Theory of Causation
Does Not Support Compensation)**

Initial CMA Participation: April 1991

Issue: This case involved a medical malpractice action filed against physicians for negligence in diagnosing plaintiff’s lung cancer, therefore depriving him of a longer and more comfortable life. On April 12, 1991, the AC Committee filed an amicus curiae brief with the Court of Appeal (6th Dist.) arguing that the trial court’s application of the “lost chance” theory of causation is contrary to California law, and that the majority of jurisdictions adhere to the reasonable medical probability standard. The Committee also stressed that important public policy considerations preclude lost chance causation in medical malpractice cases.

Outcome: The Court of Appeal agreed with the AC Committee, saying evidence showed the patient did not have a greater than 50% chance of surviving had the provider correctly diagnosed and treated the condition in the first place. Therefore no reasonable medical probability existed. The Court of Appeal’s decision may be found at *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1 Cal.Rptr.2d 584.

Grossman v. Petcher
**(“Lost Chance” of Survival Theory
Not Addressed)**

Initial CMA Participation: November 1993

Issue: This case involved an E/R physician who ordered an x-ray on himself. Since the usual requisition and billing processes were not engaged, a radiologist report was never generated. Nonetheless, the physician read the x-ray himself and interpreted it as negative. In a subsequent x-ray, radiologists discovered a cancerous lesion on the physician’s lung. The presence of the lesion had gone unnoticed since the physician chose to read it himself and not formally consult with the radiologists on the staff. In November 1993, AC Committee filed an amicus curiae brief with the Court of Appeal (4th Dist.) on behalf of a radiologist, arguing that the plaintiff E/R physician has to show a better than 50% chance of survival

with timely diagnosis in order to establish causation.

Outcome: At trial, the radiologist testified that he never saw the physician's x-ray nor did he have knowledge of it until more than a year after the physician ordered it for himself without consulting with the radiologist staff. Despite this testimony, the radiologist was found liable for \$1.4 million, plus attorney's fees. The jury's rationale was that Dr. Pechter could have read the x-ray, not that he misread the x-ray. Because this matter subsequently was settled out-of-court, the Court did not address the issue raised by the AC Committee.

**Levitin v. California Pacific
Medical Center**
(Lost Chance Doctrine)

Initial CMA Participation: November 2004

Issue: The issue in this case is whether a plaintiff should be allowed to recover damages for lost chance of a cure when no death or adversity has yet occurred. California courts have already rejected such lost chance recovery because it would make defendants liable for causing a harm that may not occur. This case also involves whether plaintiffs can recover damages for fear of cancer under California law. California law limits such cases to where the defendant's conduct exposes the plaintiff to a risk of cancer or other serious illness that otherwise would not exist.

On November 16, 2004, CMA, CDA and CHA filed an AC brief in support of the defendants in this case. In this case, the plaintiffs have sued CPMC and several radiologists for delay in diagnosis of cancer. According to the plaintiffs, the plaintiff's chance of being disease free was reduced from 90% to less than 50% and they are suing for this missed opportunity. The Court of Appeal will review and hopefully uphold the lost chance doctrine.

Outcome: On April 21, 2005, in an unpublished opinion, the court reversed the trial court's ruling in favor of the defendants. The court ruled that the plaintiffs had "successfully raised a triable issue as to whether harm resulted from the delay in diagnosis of the primary malignant tumor in the plaintiff's breast."

Werner v. Blankfort
**(Failed to Extend "Lost Chance of Survival"
Theory to California)**

Initial CMA Participation: February 1995

Issue: This case involved an allegedly negligent delay in diagnosis by defendant physicians who treated plaintiff for malignant melanoma by wide excision surgery and failed to detect metastasis of such condition, resulting in a 4-month delay in treatment. The question is whether physicians who failed to diagnose a life-threatening medical condition are liable when the plaintiff's chance of survival was already less than 50% at the time the timely diagnosis should have been made. On February 10, 1995, AC Committee filed an amicus curiae letter brief with the Court of Appeal (2d Dist.) regarding the "lost chance of survival" theory, arguing that the law operates on the premise that plaintiff may prevail on a claim only if there is a reasonable probability (i.e., greater than 50% likelihood) that plaintiff's harm was caused by the defendant's alleged negligence. On September 20, 1995, the Committee filed a letter with the California Supreme Court requesting review or depublishation of the Court of Appeal's decision.

Outcome: The Court of Appeal affirmed the trial court's order granting a new trial but avoided deciding whether the lost chance recovery should be allowed in California (which would overrule *Dumas v. Cooney*). The California Supreme Court denied petition for review, but ordered the appellate opinion depublished.

PROFESSIONAL LIABILITY—NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Anisodon v. Superior Court (Mercy Hosp.)

Initial CMA Participation: November 1991

**(Allowed Limited Recovery of Damages By
Mother for Child's Injury During Delivery)**

Issue: This case involved a mother who sued her physician seeking to recover damages for negligent infliction of emotional distress to herself, arising from injury to her child during delivery. On November 22, 1991, the Committee filed a letter with the Supreme Court supporting the petition for review. On March 23, 1993, the AC Committee entered as amici before the California Supreme Court to argue that the net result of the Appellate Court's decision would be to allow mothers to recover negligent infliction of emotional distress (NIED) damages in virtually every case involving injury to a child during delivery. The AC Committee also argued that it was nearly impossible to differentiate between the emotional distress suffered by the mother as a result of negligence towards her, as opposed to emotional distress suffered as a result of negligence towards her child.

Outcome: After initially granting review, the Supreme Court dismissed the petition for review and remanded the case. The Court of Appeal (4th Dist.) had upheld the mother's cause of action for NIED, but limited recovery of damages to those that would arise from participating in a negligent delivery and reacting to the unexpected outcome of the pregnancy. The Court also denied the mother damages for the loss of affection, society, companionship, and love of her child, and for general disruption to her normal life routine. The effect of the Supreme Court's action was to depublish the opinion. However, the Supreme Court ruled essentially the same way in *Burgess v. Superior Court* (below).

**Bird v. Saenz
(CMA Advocates Against the Improper
Extension of the Cause of Action for
Negligent Infliction of Emotional Distress)**

Initial CMA Participation: March 2001

Issue: This case involves the circumstances under which a plaintiff may recover damages for negligent infliction of emotional distress. In October 1994, 68-year old Nita Bird was diagnosed with ovarian cancer and thereafter began chemotherapy. To facilitate administration of chemotherapy, Dr. Saenz performed surgery on Mrs. Bird to install a "port-a-cath." Complications occurred during this surgery, resulting in the severance of the subclavian artery and vein. The surgery was terminated and the patient was transferred to the intensive care unit where Mrs. Bird's daughter observed that she was (purple and blown up like a balloon). Ultimately, Mrs. Bird died and the family sued under several theories, including negligent infliction of emotional distress related to the severance of the artery. The defendants asked the court for a summary judgment dismissing this cause of action. The Court granted the motion, but the Court of Appeal reversed the trial court's decision and ruled that there were sufficient facts to warrant a conclusion that the family was (present for the injury producing event and were at that time aware of the causal connection to resulting injury). The defendants are appealing this decision.

On March 7, 2001, CMA, CHA and CDA filed an amici curiae letter brief that requests de-publication of this opinion. CMA argues that the Court of Appeal's opinion is a major step backward in having a clear and limited rule for bystander negligent infliction of emotional distress liability. In this case, the plaintiffs were not present for the injury-producing event. Extension of this legal theory to the facts of this case would extend it in virtually every case where a family observes a patient post-operatively after a surgical complication.

On May 16, 2001 The California Supreme Court granted the physician's petition for review and has limited the briefing to whether, under the circumstances of this case, plaintiffs may state a claim of negligent infliction of emotional distress against defendant physicians. On December 10, 2001, CMA, CHA and CDA filed an amici curiae brief in the case.

Outcome: On August 12, 2002, the California Supreme Court ruled that the plaintiffs cannot state a negligent infliction of emotional distress claim based on either the unperceived injury to their other's artery

during surgery or the alleged failure to properly diagnose and treat the severed artery following surgery. The Court's ruling agrees with the arguments made in the *Amicus curiae* brief filed by CMA's AC Committee on behalf of CMA, CDA and CHA. As a result of this ruling, NIED lawsuits will be limited to cases where the negligence would be obvious to a layperson. And since prior court rulings have maintained that a layperson cannot perceive medical negligence except in very egregious circumstances, this decision should make it easier for physician defendants to obtain a dismissal of bystander plaintiffs from these cases.

Burgess v. Superior Court (Gupta)
**(Allowed Limited Recovery of Damages to
Mother for Child's Injury During Delivery)**

Initial CMA Participation: November 1991

Issue: This case involved a mother who sued her physician seeking to recover damages for negligent infliction of emotional distress to herself, arising from injury to her child during delivery. On November 5, 1991, the AC Committee filed a letter supporting review of the appellate court's decision. On March 23, 1992, the AC Committee entered as amici before the California Supreme Court to argue against the appellate court's decision allowing mothers to recover NIED damages in virtually every case involving injury to a child during delivery. The AC Committee also argued that it was nearly impossible to differentiate between the emotional distress suffered by the mother as a result of negligence towards her, as opposed to emotional distress suffered as a result of negligence towards her child.

Outcome: Unfortunately the Supreme Court disagreed with the AC Committee, ruling that, because the obstetrician owes a duty to the mother and the child, mothers may recover for negligent infliction of emotional distress when their children are injured due to a negligent delivery. However, the Court did deny the mother damages for the loss of affection, society, companionship, and love of her child, and for general disruption to her normal life routine. The Court's decision may be found at *Burgess v. Superior Court (Gupta)* (1992) 2 Cal.4th 1064, 9 Cal.Rptr.2d 615.

Christensen v. Pasadena Crematorium of Altadena
**(Recovery of Emotional Distress Damages for
Negligent Mishandling of Human Remains)**

Initial CMA Participation: June 1991

Issue: This case involved action brought by friends and relatives of decedents against mortuaries, crematoriums and biological supply company alleging that defendants negligently and intentionally mishandled decedents' remains. On June 28, 1991, the AC Committee joined with the Association for California Tort Reform to appear as amici before the California State Supreme Court to argue that recovery of emotional distress damages for negligent mishandling of human remains is, and should be limited to three plaintiff categories: 1) close relatives who actually witness the mishandling; 2) those specified in Health and Safety Code §7100; and 3) those who contract for the disposal of the remains. The AC Committee also argued that intentional mishandling of human remains is nothing more than intentional infliction of emotional distress and, as such, requires defendants to direct their actions at plaintiffs and plaintiffs to contemporaneously perceive the mishandling of the remains.

Outcome: The Supreme Court agreed with the AC Committee and held that close family members who were aware that funeral and/or crematory services were being performed had standing to seek damages for emotional distress. The Court's decision may be found at *Christensen v. Superior Court (Pasadena Crematorium of Altadena)* (1991) 54 Cal.3d 868, 820 P.2d 181, 2 Cal.Rptr.2d 79.

Huggins v. Longs Drug Stores
**(Denied Recovery of Damages for Negligent
Infliction of Emotional Distress to Non-Physically
Injured, Non-Bystander Plaintiffs)**

Initial CMA Participation: January 1993

Issue: Parents of an infant patient who suffered a drug overdose brought an action against a pharmacy to recover for negligent infliction of emotional distress (NIED). On January 22, 1993, the AC Committee filed a letter with the California Supreme Court supporting the request for review or, alternatively, requesting depublication. On May 14, 1993, AC Committee filed an amicus curiae brief with the California Supreme Court on behalf of Long Drug Stores, arguing that pharmacists have no “direct duty” to the parents of a child whose prescription is filled.

Outcome: The Supreme Court agreed with the AC Committee, ruling that parents who administered prescribed medicine to an infant patient could not recover for emotional distress as direct victims of the pharmacy which wrote directions for five times the dosage ordered by the treating physician. The parents and siblings of the injured minor did not have an independent claim against the pharmacist for the negligent prescription instructions. The Supreme Court concluded that existing tort law provided sufficient compensation for the injured minor, and that the pharmacist had no independent duty under tort law to the relatives of the child who administered the child’s medication. This decision may be found at *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 24 Cal.Rptr.2d 587.

Marchand v. Superior Ct. (Sutter Community Hospital) **Initial CMA Participation: June 1988**
(Vacated Unfavorable Ruling on Negligent
Infliction of Emotional Distress)

Issue: This case involved parents’ claim for negligent infliction of emotional distress (NIED) incurred while caring for a minor child who allegedly suffered permanent brain damage. On June 14, 1988, the AC Committee filed a letter with the California Supreme Court, requesting that review be granted, or alternatively, that the Court of Appeal (3d Dist.) opinion be decertified. The Committee argued that the appellate opinion created a new cause of action for emotional distress for parents of every minor child injured as a result of negligence.

Outcome: The California Supreme Court transferred the case back to Court of Appeal with orders to vacate its opinion and to dismiss the case as moot as a result of a settlement agreement.

Underwood v. Croy **Initial CMA Participation: July 1994**
(Depublished Appellate Court’s Ruling on
Negligent Infliction of Emotional Distress)

Issue: This case involved husband and child who brought suit against a marriage counselor for negligent infliction of emotional distress (NIED) as a result of an alleged sexual relationship between the wife and counselor which caused the wife to leave her family. The Court of Appeal (4th Dist.) ruled for the counselor, holding that the husband’s action for NIED was barred by statute of limitations under Code of Civil Procedure §340 and that the children had no cause of action for NIED. On July 22, 1994, the AC Committee filed a letter with the California Supreme Court to request depublication of the Court of Appeal’s opinion, because the court ruled that, had the statute of limitations not barred the matter, MICRA would not have applied and the husband would have been entitled to pursue a claim as a “direct victim” of the counselor’s negligence.

Outcome: The California Supreme Court agreed with the AC Committee and ordered the appellate opinion not to be officially published.

Zavala v. Arce **Initial CMA Participation: December 1997**
(Extended Recovery of Damages for
Mother’s Emotional Distress for Wrongful
Death of Unborn Children)

Issue: This case involved a plaintiff who, on defendant physician's advice, was not admitted to the hospital for induction of labor until almost 3 weeks after her anticipated delivery, even though earlier examination had shown a low amniotic fluid level. Subsequent testing revealed the cause of death of the baby to be an abrupt umbilical cord compression. On December 23, 1997, the AC Committee filed a letter with the California Supreme Court requesting depublication of the appellate opinion. While this opinion purports to merely extend the rule of *Burgess v. Superior Court* to cases in which the plaintiff's child dies in utero, the Committee urged the Court to defer extension of *Burgess* until a more appropriate case presents itself. In its letter, the Committee argued that this opinion appears to permit a plaintiff to recover damages (for emotional distress) merely because a duty existed, without further consideration of whether such damages are otherwise appropriate under the law. The opinion thus would provide plaintiff with an apparent back door opportunity to recover damages prohibited by Code of Civil Procedure §§377.60, *et seq.*, by allowing what is essentially recovery of damages for the wrongful death of an unborn child.

Outcome: Despite the AC Committee's efforts, the California Supreme Court denied the request for depublication. The appellate decision may be found at *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 68 Cal.Rptr.2d 571.

PROFESSIONAL LIABILITY—PUNITIVE DAMAGES

Adams v. Murakami (Defendant's Financial Condition is a Prerequisite to an Award of Punitive Damages)

Initial CMA Participation: June 1990

Issue: This case involved conservator/plaintiff action against hospital and attending physician for actual and punitive damages. On June 15, 1990, the AC Committee filed a letter before the California Supreme Court, requesting that review be granted or that the appellate opinion be decertified. The AC Committee argued that the Court of Appeal erroneously extended the collateral source rule, where the plaintiff has been compensated by an independent collateral source, to educational services and foster care paid for by the state through the South Central Los Angeles Regional Center.

Outcome: The California Supreme Court granted review, but only on questions relating to the punitive damages award against Dr. Murakami. Thus, the AC Committee achieved its goal of eliminating the collateral source discussion from the published cases. Moreover, the Court ruled in favor of Dr. Murakami that evidence of defendant's financial condition is a prerequisite to an award of punitive damages, and the burden is on the plaintiff to introduce evidence of the defendant's financial condition. The Court's decision can be found at *Adams v. Murakami* (1991) 54 Cal.3d 105, 813 P.2d 1348, 284 Cal.Rptr. 318.

Covenant Care, Inc. v. Superior Court (Pleading Requirements for Claims of Punitive Damages Against Health Care Provider in Actions Brought Under the Elder Abuse Act)

Initial CMA Participation: August 2001

Issue: The issue in this case is whether plaintiffs in Elder Abuse Act cases must comply with Code of Civil Procedure §425.13 before pleading a claim for punitive damages against health care providers. Under that section, plaintiffs may not include a claim for punitive damages in the complaint; instead, the plaintiff must make a request with the Court to amend the complaint and the plaintiff must demonstrate that there is a "substantial probability that the plaintiff will prevail on the claim." Further, the claim for punitive damages cannot be presented on the eve of trial.

The Court of Appeal, Second Appellate District, Division One, in *Covenant Care* disagreed with the Court of Appeal's opinion in *Community Care and Rehabilitation Center v Superior Court* (2000) 79 Cal. App. 4th 787, where the court correctly ruled that plaintiff who sue under the Elder Abuse Act are required to comply with the procedural requirements of section 425.13. The California Legislature enacted section

425.13 to shield health care providers from the unsubstantiated and belated claims for punitive damages. The Court in *Community Care* pronounced that section 425.13 applies to all such cases involving allegation of professional negligence.

Our letter brief expressed our concern that the Court's ruling in *Covenant Care* squarely contradicts the California Legislature's intent that health care providers not suffer the burden of defending meritless and belated demands for punitive damages.

Outcome: The California Supreme Court granted review in the case and on March 26, 2002, CMA, CDA and CHA filed an *amici curiae* brief further arguing as stated above. After an unusually long delay and after hearing oral argument on January 7, 2004, on March 25, 2004, the California Supreme Court ruled in favor of the plaintiff in a unanimous decision by ruling that the procedural requirements of Code of Civil Procedure § 425.13 in seeking punitive damages in actions arising out of professional negligence do not apply in actions alleging abuse under the Elder Abuse and Dependent Adult Civil Protection Act.

Bommareddy v. Superior Court (Williams)
(Punitive Damage Pleadings Under MICRA
Inapplicable to Battery Claims)

Initial CMA Participation: September 1990

Issue: This case involved a medical malpractice suit filed by patient asserting battery claim against ophthalmologist based upon allegation that he performed cataract extraction with intraocular lens implant on her right eye to which patient had not consented. On September 25, 1990, the AC Committee filed a letter in support of petition for review or depublication of the Court of Appeal's opinion. The AC Committee argued that the appellate court eviscerated Code of Civil Procedure §425.13 when it opined that the section pertained only to cases where the punitive damages claim was appurtenant to a legal theory of professional negligence, whereas if another theory such as technical battery was also asserted, the statute would not apply.

Outcome: Unfortunately, the California Supreme Court denied the petition for review and the request for depublication. The Court of Appeals ruled that a patient's intentional tort action against a physician for battery committed by performing the wrong surgery does not arise out of professional negligence and, consequently, the patient was entitled to seek punitive damages without first satisfying the stringent procedural and proof requirements of CCP §425.13. The Court's decision may be found at *Bommareddy v. Superior Court (Williams)* (1990) 222 Cal.App.3d 1017, 272 Cal.Rptr. 246. However, the case was subsequently overruled in *Central Pathology* (see below).

Cedars-Sinai Medical Center v.
Superior Ct. (Bowyer)
(Applicability of Punitive Damages Pleading
to Intentional Spoilation Claims)

Initial CMA Participation: January 1996

Issue: This case involved a claim filed by respondent for professional negligence in connection with his birth and for negligent and intentional destruction of medical records (including fetal monitoring strips). On January 12, 1996, the AC Committee filed an *amicus curiae* brief in the Court of Appeal (2d Dist.) on behalf of petitioner Cedars-Sinai Medical Center, arguing that Code of Civil Procedure §425.13, regulating the pleading of punitive damage claims against health care providers, applies to this case and that respondent's evidence does not meet the statutory evidentiary requirements. On May 13, 1996, the Committee filed a letter with the California Supreme Court supporting the petition for review. On November 26, 1996, the AC Committee filed an *amicus* brief in the California Supreme Court.

Outcome: The Supreme Court reversed the appellate decision. The Court held that there is no tort remedy

for the intentional spoliation of evidence by party to underlying cause of action if spoliation victim knew of or should have known of spoliation before the decision on the merits of underlying action. This decision may be found at *Cedars-Sinai Medical Center v. Superior Ct.* (1998) 18 Cal.4th 1, 74 Cal.Rptr.2d 248.

Central Pathology v. Superior Court (Hull)
(Code of Civil Procedure §425.13 Applies in All
Cases Where Plaintiff Seeks Punitive Damages
from Health Care Provider)

Initial CMA Participation: June 1991

Issue: This case involved a complaint filed by patient and her husband for damages due to medical negligence and loss of consortium. Plaintiffs sought punitive damages based on new causes of action for fraud and intentional infliction of emotional distress. On June 21, 1991, the AC Committee filed a letter supporting the request for review by the California Supreme Court. On January 6, 1992, the AC Committee filed an amicus curiae brief with the California Supreme Court, arguing that Civil Code §425.13 and the MICRA statutes should each be broadly construed to effectuate legislative intent. Since the overriding purpose of MICRA is to control medical malpractice insurance costs, MICRA should apply whenever a plaintiff seeks insurable damages against a health care provider acting in a professional capacity, regardless of the legal theory or theories pled.

Outcome: The Supreme Court agreed with the AC Committee, holding that whenever an injured party seeks punitive damages for injury that is directly related to professional services provided by health care provider, the action is one “arising out of the professional negligence of a health care provider.” In such case, the injured party must comply with CCP §425.13 which precludes punitive damages claim unless court has determined there is a “substantial probability” that plaintiff will prevail on the claim. The Court also held that identifying cause of action as an “intentional tort” as opposed to “negligence” does not itself remove claim from these requirements. Applied to this case, the plaintiffs’ causes of action for fraud and intentional infliction of emotional stress were directly related to defendants’ performance of professional services, and were governed by statute. The Court’s decision may be found at *Central Pathology Service Medical Clinic, Inc. v. Superior Court (Hull)* (1992) 3 Cal.4th 181, 10 Cal.Rptr.2d 208.

College Hospital v. Superior Court (Crowell)
(Clarifies Punitive Damages Pleadings Under MICRA)

Initial CMA Participation: May 1993

Issue: This case involved an action for professional negligence against hospital as a result of a psychiatrist’s romantic relationship with his patient. On May 5, 1993 the AC Committee filed a letter with the California Supreme Court urging review of this case. The Committee argued against the Court of Appeal’s interpretation of CCP §425.13, which regulates the pleading of punitive damages against health care providers. In a brief filed September 10, 1993, the Committee claimed that if punitive damages may be pursued in this case, then they may be pursued in virtually any case against any health care provider or corporate employer without any significant degree of judicial control.

Outcome: The California Supreme Court, in agreement with the AC Committee, granted review and held that plaintiffs failed to satisfy CCP §425.13 requirements when they sought to plead punitive damages claim against hospital. The Court’s decision may be found at *College Hospital, Inc. v. Superior Ct* (1994) 8 Cal.4th 704, 34 Cal.Rptr.2d 898.

Deeley v. Superior Court (Ackerman)
(Code of Civil Procedure §425.13 Doesn’t Apply
to Complaint Filed Before January 1, 1988)

Initial CMA Participation: August 1988

Issue: This case involved Code of Civil Procedure §425.13 which was enacted as part of a tort reform

package to end the practice of routinely including punitive damage claims in medical malpractice cases. On August 15, 1988, AC Committee filed a letter with the California Supreme Court requesting petition for review be granted. The Committee argued that Code of Civil Procedure §425.13 should apply to a complaint alleging punitive damages filed prior to January 1, 1988, and that plaintiff did not make the required showing of “substantial probability” of success at trial.

Outcome: Unfortunately, the California Supreme Court denied the petition for review, thus failing to extend applicability of section 425.13 to punitive damage claims filed prior to January 1, 1988.

Krieger v. Superior Court
(Applicability of Code of Civil Procedure §425.13 to an Alleged Medical Fraud Claim)

Initial CMA Participation: April 1993

Issue: This case involved a claim for punitive damages and fraud against physicians for fraudulently inducing patient to undergo unnecessary bypass surgery. On April 28, 1993, the AC Committee filed a letter with the California Supreme Court in support of the physicians’ petition for review, arguing that despite the alleged reprehensibility of the defendant’s conduct, Code of Civil Procedure §425.13 should apply and thus bar plaintiff from filing punitive damage claims without evidentiary support.

Outcome: The California Supreme Court denied the petition for review but ordered the case depublished. The Court of Appeal had upheld the trial court decision that the plaintiff could amend his complaint to add the fraud cause of action along with the punitive damages claim.

Lehrman v. Superior Court,* Catholic Healthcare West v. Superior Court
(Pleading Requirements for Claims for Punitive Damages Against Healthcare Providers)

Initial CMA Participation: March 2001

Issue: This case involves whether the requirements of Code of Civil Procedure §425.13 apply in cases where the plaintiff has alleged negligent treatment and a claim under the elder abuse statute. That code sections requires a special showing and pleading to obtain punitive damages from a health care provider. The trial court ruled that plaintiffs do not have to make a special showing when alleging a violation of the elder abuse act. Under this ruling, plaintiffs need only allege such a violation to avoid the requirements of section 425.13 successfully make a claim for punitive damages. CMA believes that the trial court misapplied or misunderstood the *Central Pathology* and *Community Care* cases.

Outcome: On March 28, 2001, the Court of Appeal granted the writ and ordered the trial court to vacate its ruling and strike the allegations of punitive damages. With this ruling, a plaintiff cannot simply allege punitive damages by making a claim for elder abuse.

Norris v. Superior Court*
(Pleading Requirements for Claims of Punitive Damages Against Health Care Provider in Actions Brought Under the Elder Abuse Act)

Initial CMA Participation: September 2003

Issue: This case involves the issue of the application of the special rules for pleading punitive damages in medical negligence cases. In this case, a number of defendants are alleged to have engaged in elder abuse during the course of plaintiffs’ decedent’s residency at a skilled nursing facility. Plaintiffs are seeking trebled damages under Civil Code §3345—without having complied with Code of Civil Procedure §425.13, the statute that requires plaintiffs to meet certain procedural requirements to claim such damages. Plaintiffs are additionally premising entitled to yet further, enhanced civil remedies under Penal Code §368.

**(Upheld Applicability of Punitive
Damage Pleading Hurdle)**

Issue: This case involved a claim of misrepresentation constituting fraud in inducement and requiring an award of punitive damages where a dentist allegedly misrepresented himself as a specialist in orthodontics. The trial court held that plaintiff was barred from recovering punitive damages because he failed to comply with Code of Civil Procedure §425.13. On April 21, 1993, the AC Committee filed an AC brief with the California Court of Appeal to argue section 425.13 applied to plaintiff's case.

Outcome: The Court of Appeal denied plaintiff's writ petition, thereby upholding the findings of the trial court.

**Williams v. Superior Ct. (San Diego
Rehabilitation Institute, Inc.
(Extended Applicability of Punitive Damages
Pleading Hurdle to Non-Patient Plaintiffs)**

Initial CMA Participation: November 1994

Issue: This case involved a nonemployee phlebotomist bringing action against hospital for injuries sustained while drawing blood from a violent patient who subsequently tested positive for HIV. The trial court granted the defendant hospital's motion to strike the claim for punitive damages because the claim did not comply with Code of Civil Procedure §425.13. This section requires that in any action arising out of professional negligence, no claim for punitive damages shall be included in complaint unless the court enters an order that allows such complaint or pleading to be amended. The Court of Appeal affirmed this decision, holding that section 425.13 applies to any foreseeable injured party (even when plaintiff is not a patient) when injuries arose out of professional negligence. On November 18, 1994, AC Committee filed a letter with the Court of Appeal (4th Dist.) requesting that the Court certify its opinion for publication. The Committee argued that this opinion would provide needed guidance about the scope of MICRA and professional negligence.

Outcome: At the request of the AC Committee, the California Supreme Court ordered the appellate decision to be certified for publication. This opinion may be found at *Williams v. Superior Ct.* (1994) 30 Cal.App.4th 318, 36 Cal.Rptr.2d 112.

PROFESSIONAL LIABILITY—VICARIOUS LIABILITY

**Frasier v. Hanson, M.D.*
(Improper Expansion of Captain
of the Ship Doctrine)**

Initial CMA Participation: July, 2001

Issue: This case involves the care and treatment of a young boy, Daniel Frasier, while he was a surgical patient at a Southern California hospital. There were competing disputed theories of liability against the surgeon, Dr. Hanson. However what was not disputed was that a doctor other than Dr. Hanson, Dr. S., fell below the standard of care in treating plaintiff the evening after his surgery, after Dr. Hanson had gone home.

Under the defense's theory of the case, plaintiff was not injured until 5 hours after breast bone surgery performed by Dr. Hanson, plaintiff's attending physician, with the assistance of Dr. S., a fellow at the hospital. Five hours after the surgery, while Dr. Hanson was at home, and without his knowledge, Daniel was given excessive medication. The patient then exhibited signs of cardiac tamponade. Dr. S, who was still at the hospital, failed to call Dr. Hanson to advise him of the change in plaintiff's status or to seek his direction, and refused to operate on the patient to relieve the cardiac tamponade.

As a result, the patient went into cardiac arrest and had 40 minutes of closed-chest compressions, during

which time bone fragments or metal tore the patient's aorta. The plaintiff is now partially paralyzed.

The plaintiffs alleged that the aorta was negligently punctured during the breast bone surgery and argued that as Captain of the ship, Dr. Hanson is liable. However, the trial judge instructed the jury that Dr. Hanson could be held **solely** responsible for plaintiff's injuries under either the defendant's or plaintiff's version of the facts. The jury instructions used suggested that Dr. Hanson was responsible for everything that happened to plaintiff both during and after surgery—regardless of whether Dr. Hanson had an opportunity to oversee plaintiff's care. The jury allocated 100% fault to Dr. Hanson, even though it was uncontested that Dr. S's refusal to re-open plaintiff's chest contributed to plaintiff's injuries and fell below the standard of care.

Dr. Hanson has appealed the verdict. CMA, CDA and CHA filed an AC brief in support of Dr. Hanson on July 5, 2001. CMA argued that this expanded vicarious liability lacks support in the law or public policy. CMA also argued that to hold a surgeon vicariously liable for the negligence of those under his supervision during surgery in one thing, but to hold a surgeon responsible for the negligence of others over whom he had no control is quite another. Any such expansion in the scope of a surgeon's potential liability will inevitably lead to higher premiums for malpractice insurance, and is contrary to sound public policy.

Outcome: The California Court of Appeal heard oral argument on September 26, 2001. On November 1, 2001, The Court of Appeal ruled in favor of CMA's position, stating that the trial court's instructions were improper. The Court of Appeal denied plaintiff's petition for rehearing and the plaintiffs requested the California Supreme Court to review the case. The California Supreme Court denied the plaintiff's request on January 29, 2002 and the case is now concluded.

Jacoves v. United Merchandising Corp.
(Potential Liability of Hospital as Principal Under Agency Theory)

Initial CMA Participation: October 1992

Issue: This case involved potential civil liability for a man's suicide. The issue was whether the allegedly negligent physician who treated the man was an agent or ostensible agent of the Van Nuys Hospital. On October 30, 1992, the AC Committee filed a letter with the California Supreme Court on behalf of Hospital, requesting that petition for review be granted or that the appellate opinion be decertified.

Outcome: The California Supreme Court denied the petition for review and declined to depublish the appellate opinion. The Court of Appeal ruled that the genuine issues of material fact as to whether the psychiatrist was the Hospital's agent, the Hospital was negligent as a principal in allowing premature discharge of the patient, and the Hospital owed a direct duty to the parents, precluded summary judgment in favor of the Hospital. This decision may be found at *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 11 Cal.Rptr.2d 468.

Mejia v. Community Hospital*
of San Bernardino
(Extension of Ostensible Agency Theory)

Initial CMA Participation: September 2002

Issue: This case involves issues of ostensible agency. In *Mejia*, the plaintiff sought treatment for a neck injury at a hospital emergency room. The emergency room physician ordered x-rays, which he sent to the on-call radiologist for evaluation. The radiologist's report identified only a congenital fusion. Based on this report, the emergency room physician treated plaintiff for a twisted neck and discharged her. The next morning, Mejia was paralyzed. She was taken to another hospital where it was determined that her neck was actually broken.

Mejia sued the hospital, the emergency room physician, and the medical group that ran the emergency room and employed the emergency room physician, the radiologist and the medical group that ran the radiology department and employed the radiologist. The defendant physicians were not hospital

employees and there was no evidence that the hospital had been negligent, either in plaintiff's treatment or in allowing the defendant physicians to practice at the hospital. The hospital thus secured non-suit at the close of plaintiff's case. The jury then found that the radiologist and radiology group were negligent, but that the emergency room physician and the emergency room group were not negligent. Mejia appealed, contesting the order-granting non-suit in favor of the hospital.

The Court of Appeal reversed, holding that, even though the hospital was not itself negligent and even though the radiologist was not actually the agent of the hospital, the hospital could be vicariously liable for the radiologist's negligence under an ostensible agency theory. The Court of Appeal acknowledged that ostensible agency requires proof that (1) the hospital engaged in conduct that would cause a reasonable person to believe that the physician was an agent of the hospital; and (2) the plaintiff relied on that apparent agency to his or her detriment. But it held that these elements are generally satisfied as a matter of law whenever a patient seeks care at a hospital. The Court said: "*because it is commonly believed that hospitals are the actual providers of care, ostensible agency can be readily inferred whenever someone seeks treatment at a hospital.*"

The hospital appealed the Court of Appeal's ruling.

On September 10, 2002, CMA, CHA and CDA filed an amicus curiae letter brief in support of the hospital which expressed extreme concern that the law stated in the Court of Appeal's opinion, which essentially rules that all independent contractor physicians working at a hospital are presumptively the hospital's ostensible agents for purposes of imposing vicarious tort liability, threatens their continued ability to offer medical services by dramatically increasing potential liability and legal costs in cases arising from alleged medical malpractice occurring in hospitals.

Outcome: In early October 2002, the Supreme Court denied the hospital's petition for review.

Morin v. Henry Mayo Newhall Memorial Hospital **Initial CMA Participation: May 1995**
(Hospital not Liable for Acts of Independent Contractor Under Doctrine of Respondeat Superior)

Issue: This case involved a patient who was sexually molested by an ultrasound technician, an employee of an independent contractor with whom the hospital had an agreement. On May 17, 1995, the AC Committee filed an amicus curiae brief with the California Supreme Court on behalf of Henry Mayo Hospital, arguing that a hospital should not be held vicariously liable for the technician's actions under the doctrine of respondeat superior. Under this doctrine, an employer is responsible for the actions of an employee or agent when a tort liability is incurred during the course of this employment.

Outcome: The California Supreme Court sided with the AC Committee, ruling that the hospital was not vicariously liable for the sexual molestation committed by the technician. Holding otherwise would be inconsistent with the rationale of respondeat superior as the misconduct was entirely the independent act of the technician. The Supreme Court, though, did remand the case to the Court of Appeal for determination of whether the hospital was negligent in its own right (whether there is sufficient evidence that the requires routine ultrasound exams to be monitored by a 3d party). This remanded matter is unpublished. The Supreme Court decision may be found at *Morin v. Henry Mayo Hospital* (1995) 12 Cal.4th 291, 48 Cal.Rptr.2d 510.

PROFESSIONAL LIABILITY—MISCELLANEOUS

Akkerman v. Mecta **Initial CMA Participation: December 2005**

(CMA Advocates for Protection of the Physician/Patient Relationship, Confidentiality of Medical Information and Protection of Non-Parties to Class Action Lawsuits)

Issue: This case involves whether a trial court exceeded its authority by ordering non-party hospitals to contact former patients who had received electro-convulsive therapy in connection with a plaintiff's effort to certify a class action lawsuit.

Mecta is a defendant in a putative class action initiated by plaintiff Atze Akkerman, alleging that Mecta violated consumer protection laws by marketing its electro convulsive therapy (ECT) equipment in a deceptive manner. On October 25, 2005, the trial court granted Akkerman's request and required all California hospitals where Mecta's equipment has been used to mail a letter authored by Akkerman's lawyer together with a copy of Akkerman's complaint to all of their current and former patients who have received ETC. The purpose of this mass mailing is evidently to aid Akkerman's lawyer in identifying potential clients who may wish to assist in the putative class action. Significantly, the trial court has ordered nonparty hospitals to foot the bill for distributing the plaintiff's complaint and solicitation letter to this group of mentally vulnerable patients.

The AC Committee's brief argues that the trial court's order is in excess of its jurisdiction. What is more, it places at risk of disclosure indisputably private medical information and threatens the mental health of numerous persons who are not before the court.

Outcome: On January 11, 2006, the Court of Appeal directed the trial court to set aside its order "requiring the mailing of precertification notices and the appointment of a special master". This ruling is entirely consistent with CMA's AC brief.

Bussanmas v. Kawamoto

Initial CMA Participation: June 1991

**(Scope of Non-Negligence Theory of Liability/
Idea of "Contract Warranty")**

Issue: This case involved a medical malpractice action alleging negligence, lack of informed consent, and breach of warranty. Although physician communicated to patient there was "at least 2% chance of failure," patient argued that the failure of surgery was a breach of warranty. On June 3, 1991, the AC Committee filed an amicus letter supporting Kawamoto's petition for review before the California Supreme Court.

Outcome: After the Court of Appeal remanded the case for a new trial on all three charges, the Supreme Court denied petition for review. Subsequently, the case was settled out of court.

Coburn v. Sievert*

Initial CMA Participation: September 2005

(Scope of Immunity for Psychiatrist Release of Patient Involuntarily Detained)

Issue: The issue in this case involves the scope of immunity set forth in Welfare and Institutions Code section 5154 which immunizes psychiatrists who release patients before the end of an involuntary 72 hour confinement from liability for actions of their patients after the release.

In this case, the plaintiff was involuntarily detained pursuant to Welfare and Institutions Code section 5150 and placed under the care of the defendant. After observing the plaintiff for two days, the doctor decided that the patient no longer posed a threat to himself or others, nor was he gravely disabled. The next day, the patient had a violent outburst aboard an airplane and, as a result, faced criminal and civil prosecution. The patient sued the physician for damages. The trial court granted summary judgment (dismissal) of the case in the physician's favor. The plaintiff has appealed.

On appeal, the patient argued that the immunity does not apply because they have presented evidence that the physician negligently diagnosed and treated the patient during his detainment.

On September 9, CMA, CHA CHA and the California Psychiatric Association filed an AC brief in the California Court of Appeal, 5th Appellate District in support of defendant Dr. Dwight W. Sievert. CMA's brief discusses the appropriate scope of the immunity and argues that, under the plaintiff's theory, the immunity statute would be rendered meaningless as a plaintiff would easily plead around the immunity statute by alleging that the physician was negligent in any fashion, whether or not it contributed to the damage for which immunity is sought.

On the other hand, CMA's brief makes it clear that treating psychiatrists are not immune from all negligent behavior during the period of detainment. If the alleged negligence caused injury during the period of detainment or caused injury after release, other than damage caused by the patient action, no immunity would apply. For example, if the treating psychiatrist negligently prescribed medication that caused the patient to suffer an allergic reaction after release, the psychiatrist would be liable for damages because the scenario does not involve liability from a patient's actions.

Outcome: On November 10, 2005, the 5th Appellate District of the California Court of Appeal issued its ruling, which was entirely consistent with the position taken by CMA in its AC brief. The Court of Appeal, citing to CMA's *amicus curiae* brief, wholeheartedly agreed with CMA's argument and ruled that granting of immunity will apply when the conditions of section 5152 relating to early release have been met. The plaintiff attempted to argue that because the assessment and treatment was allegedly negligent during the course of Mr. Coburn's confinement, immunity should not be granted. The court rejected this argument.

The plaintiff also argued that the psychiatrist's belief must be a "good faith belief." The court rejected the plaintiff's interpretation and stated that the standard is not an objective (i.e., whether or not the physician "reasonably believed" that the patient should be released), but it is a subjective standard—meaning that the physician's belief must be "truthful." The court concluded that the terms "belief" or "believe" used in section 5154 imply honesty in fact rather than reasonableness. The court reasoned that, if the plaintiffs prevailed in their argument that the psychiatrist must establish that he "reasonably believed" that the patient should be released, immunity would become virtually unavailable. The court concluded that this result would not be consistent with the legislative intent of the statute.

Covarrubias v. Kady
(CMA Advocates to Uphold Scope of Good Samaritan Laws)

Initial CMA Participation March 2006

Issue: This case involves Good Samaritan law immunity. In the case the trial court dismissed the case against the physician who was sued after he provided emergency care to the plaintiff shortly after the plaintiff's birth. The Court of Appeal affirmed the dismissal of the case and issued an unpublished opinion favorable to the physician.

On March 28, CMA, CHA and CDA filed a letter brief requesting that the court publish this opinion to provide further citable authority related to the scope of this immunity.

Outcome: On June 14, 2006, the California Supreme Court denied CMA's request for publication of the case and the case is now final.

Espinosa v. Little Company of Mary Hospital

Initial CMA Participation: April 1995

(Expanded Doctrine of Concurrent Causation)

Issue: This case involved a brain-damaged newborn whose complications were a direct result of the mother's ingestion of lithium during early stages of pregnancy, and the alleged negligence of the health care defendants prior to and at the time of the baby's delivery. On April 17, 1995, the AC Committee filed a letter with California Supreme Court supporting the petition for review, with an alternative request for depublication, arguing that the Court of Appeal impermissibly expanded the doctrine of concurrent causation by applying it to a situation where two events appeared to have caused separate injuries at separate times.

Outcome: The California Supreme Court denied AC Committee's petition for review and request for depublication. The Court of Appeal had ruled that defendants' negligence was a concurrent cause of all of plaintiff's damage, even that which occurred as a result of the lithium, over which the health care providers had no control. The Court's decision may be found at *Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 37 Cal.Rptr.2d 541.

**Fox v. Kramer
(Confidentiality of Medical Staff Peer Review Records)**

Initial CMA Participation: October 1999

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 §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 section 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.

**Gross v. Allen
(Established Equitable Indemnity
in Malpractice Cases)**

Initial CMA Participation: March 1994

Issue: This case involved a settlement between a psychiatrist, Dr. Gross, and patient for injuries suffered as a result of an attempted suicide. After settling, Dr. Gross filed cross complaint for equitable indemnity against the patient's two other psychiatrists, one of whom was Dr. Allen. On March 24, 1994, AC Committee filed a letter with California Supreme Court requesting depublication of Court of Appeal's (2d Dist.) opinion, or in the alternative, an order granting partial depublication of the portion discussing Dr. Allen's duty to disclose a patient's psychological history to a third person. The Committee argued that the appellate opinion was excessively broad and raised serious implications for the psychiatric community.

Outcome: The California Supreme Court denied the AC Committee's request to depublish the appellate opinion. The Court of Appeal held that the nonsettling psychiatrist, Dr. Allen, had a duty to inform the settling psychiatrist, Dr. Gross, who requested the patient's history, about the patient's history of suicide attempts. The Court of Appeal also held that the settling psychiatrist, Dr. Gross, was not required to prove that the settlement exceeded his proportionate share of liability in order to seek indemnity. This decision may be found at *Gross v. Allen* (1994) 22 Cal.App.4th 354, 27 Cal.Rptr.2d 429.

Mitchell v. Gonzales
**(Jury Instructions for "But For" Test of Causation
Should Not Be Given in Negligence Actions)**

Initial CMA Participation: July 1991

Issue: This case involved a suit by parents of a child who drowned against defendants for their alleged lack of supervision and negligence in allowing the child to go out on a paddle boat in the middle of a lake. On July 25, 1991, the AC Committee filed an amicus curiae brief with the California Supreme Court. The brief requested that BAJI 3.76 (book on jury instructions), covering the "substantial factor" test of causation, either be abolished or never be given without an instruction to the jury requiring a "but for" test of causation to be applied as set forth in BAJI 3.75.

Outcome: The California Supreme Court rejected the AC Committee's position, and instead rejected the instruction which contains the "but for" test of cause-in-fact, BAJI 3.75. This decision may be found at *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1 Cal.Rptr.2d 913.

Wilcox v. Birtwhistle
**(Challenge to Court's Application of
Code of Civil Procedure §2033)**

Initial CMA Participation: December 1998

Issue: This case involved the discovery process in a malpractice suit against a physician. During discovery, the defendant physician sought a request for admission from the plaintiff that the defendant was not negligent and did not cause the injury. After the plaintiff failed to respond to these requests, the trial court "deemed" these facts admitted and thus ruled in the defendant physician's favor.

The Court of Appeal reversed the lower court. The appellate court ruled that relief from a deemed admissions order could be granted on the grounds of mistake, inadvertence, or excusable neglect.

On December 16, 1998, the AC Committee filed a letter with the California Supreme Court in support of the petition for review. The Committee argued that the appellate court erred by giving the attorneys a "third bite" at the apple, when the legislature only authorized two. On July 1, 1999, the AC Committee joined with the Chamber of Commerce to file an AC brief which reiterates and expands on its prior letter.

Outcome: The California Supreme Court granted the petition for review, as requested by the AC Committee's letter. Regrettably, on November 22, 1999, the court upheld the Court of Appeal, and ruled that a party may obtain relief from a court order which deemed matters admitted upon a showing of "mistake, inadvertence, or excusable neglect."

Shooker v. Superior Court
**(Waiver of the Attorney-Client
Privilege by a Defendant Who Testifies
as an Expert)**

Initial CMA Participation: October 2003

Issue: The issue in this case is whether or not defendants who act as their own experts in a civil cause of action, including medical negligence cases, waive their attorney-client privilege by so testifying.

In this case, a lawsuit concerning a business dispute, the Court of Appeal held that the plaintiff's designation of himself as an expert for the litigation did not waive his attorney-client privilege because he withdrew the designation before disclosing a significant part of a privileged communication and before it was reasonably certain he would actually testify as an expert. The court went on to say, however, "if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition), the privilege is waived." The court's opinion in *Shooker* will substantially affect medical negligence cases where liability usually turns on expert testimony regarding the standard of care. Malpractice defendants regularly testify about the basic issue of the standard of care and always give expert testimony on issues pertaining to medical treatment. They often want to explain not only how they treated their patient, but also why they consider that the treatment was appropriate. They also regularly provide opinion about the significance of the plaintiff's physical condition and symptoms at the time of treatment. All of these questions are routinely asked in deposition. Because of the poor reasoning of the case, particularly as it applies to medical negligence cases, on October 22, 2003, CMA, CDA and CHA filed a letter with the California Supreme Court asking that the case be depublished.

Outcome: On November 25, 2003, the Supreme Court denied the multiple requests (CMA, CDA and CHA among them) to depublish the Court of Appeal's opinion, and denied the petition for a review.

CONSENT—INFORMED CONSENT

Arato v. Avedon
(Clarified Scope of Informed Consent)

Initial CMA Participation: October 1992

Issue: This case involved the alleged failure of treating physicians to obtain patient's informed consent by failing to disclose information regarding the life expectancy of pancreatic cancer patients. On October 6, 1992, the AC Committee filed a letter with the Supreme Court requesting review or depublishation. On April 29, 1993, the AC Committee filed an amicus curiae brief in the California Supreme Court, arguing that a physician does not have a unilateral obligation under the doctrine of informed consent to provide a patient with medical information relating to the patient's non-medical interests, needs and concerns. The AC Committee also argued that other than the basic information that a reasonable person would need to know in order to make a treatment decision (e.g., risk of death or serious bodily injury, serious complications), additional disclosure obligations that a physician may have under the doctrine of informed consent must be judged by the professional standard of care.

Outcome: The Supreme Court agreed with the AC Committee and held that physicians do not have a duty as a matter of law to disclose statistical life expectancy data or information material to patient's nonmedical interests. The Court's decision may be found at *Arato v. Avedon* (1993) 5 Cal.4th 1172, 23 Cal.Rptr.2d 131.

Daum v. SpineCare Medical Group, Inc.
**(Informed Consent Includes Obligation to Disclose
"Investigational" Status of Treatment)**

Initial CMA Participation: April 1997

Issue: In this case, a patient who had received a pedicle screw implant sued his physicians after he

developed a serious bone infection, even though he had been fully informed of all risks involved, including infection. It was questionable whether patient had been informed that the particular screw being used was “investigational” because it differed in a minor respect to the types commonly used. On April 24, 1997, AC Committee filed an amicus curiae brief with the California Supreme Court requesting that the Court of Appeal’s decision be decertified, arguing that the Court ignored established limits to the informed consent doctrine and misconceived the scope of the causation element. More specifically, the patient had been fully informed that pedicle screw surgery posed a serious risk of infection and the fact that a nominally “investigational” screw was used instead did not increase that risk of infection.

Outcome: The California Supreme Court denied AC Committee’s request for depublication of the appellate decision. The Court of Appeal ruled that the plaintiff had presented “substantial” evidence of causation and did not receive all information necessary to enable him to make an informed decision. The Court’s decision may be found at *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 61 Cal.Rptr.2d 260.

Huerta v. DeFeo
(Scope of Informed Consent)

Initial CMA Participation: July 2002

Issue: This case involves the scope of informed consent. Prior to performing spinal surgery on Mr. Huerta, Dr. DeFeo presented the patient with an informed consent document, which included a detailed list of risks, including the risk of weakness and paralysis of the lower extremities. Plaintiff alleges that the physician’s informed consent procedure was incomplete in that the physician did not specifically identify the plaintiff’s post-operative complications—incontinence and erectile dysfunction, as risks of the procedure, even though the physician listed other complications, such as death, infection, paralysis, etc., as risks of the procedure. The plaintiff asserts that had he been advised of these particular risks he would not have undergone the procedure.

On July 16, 2002, CMA, CDA and CHA filed an amicus curiae brief that discusses in detail the doctrine of informed consent and the plaintiff’s attempt to inappropriately expand the scope of it.

The case also involves the plaintiff’s allegation that the physician, during the informed consent process, should have disclosed to the patient personal information, specifically a settlement agreement with the Medical Board of California that resulted in the physician agreeing to a five-year period of probation. The brief discusses in detail the law, sound public policy and basic fairness arguments that support a position that such disclosure should not be required in the informed consent process. The brief argues that the standard for disclosure proposed by the patient would create a host of issues and place all physicians in the quandary of having no clear standard for disclosure of personal and professional qualifications. This is an issue of first impression for a California Court of Appeal.

The AC Committee’s brief discusses the fact that a probationary status with the MBC is not an indication of incompetence and a physician may decide to agree to probation to avoid the expense of defending the case or to avoid extensive time away from a clinical practice.

Outcome: On February 21, 2003, the California Court of Appeal in the Fourth Appellate District, Division Three issued an unpublished ruling in the case, granting reversal of Dr. DeFeo’s motion for summary judgment. Importantly, the ruling did not reach the heart of the issues raised in CMA’s brief and was based on technical error on the trial court’s part. Accordingly, the court did not make a ruling on whether or not a physician is required to disclose personal information as part of the informed consent process. The Court did, however, rule that the expert witness declaration submitted on behalf of Dr. DeFeo was insufficient because it lacked detail and was conclusory in that it simply stated that Dr. DeFeo had met the standard of care and did not give details as to why.

Schaeffer v. Superior Ct. (Brennan)

Initial CMA Participation: July 1994

(Duty to Disclose AIDS/HIV)

Issue: This case involves patient who allegedly acquired AIDS from unsterilized tools used by a dentist. On July 8, 1994, AC Committee filed an amicus curiae brief with the Court of Appeal (4th Dist.) on behalf of Dr. Schaeffer, arguing that the court should not proceed on an informed consent claim (that whether a health care provider is HIV positive is material information a reasonable person would want to know before accepting treatment from that dentist). Rather, AC Committee argued that established principles of medical malpractice should apply, focusing on the relevant factual and legal issues, namely Dr. Schaeffer's use of infection control measures and Mr. Brennan's source of HIV infection.

Outcome: The Court of Appeal denied defendant's petition for writ of mandate, declaring that the material in the pleading sought to be stricken is not "irrelevant, false or improper," as required by Civil Procedure §436. In other words, the court determined that the procedural posture of this case, founded on a motion to strike, was inappropriate for the court to rule on the substantive issue of whether a duty to disclose fell on the defendant. The court did note that disposition of that issue may be appropriate at a later juncture.

Schiff v. Prados (Duty to Inform Patient of Unapproved Treatment)

Initial CMA Participation: July 2000

Issue: This case involves whether or not a physician, who is a member of a tumor board at the University of California at San Francisco, and who has no direct contact with a patient, has a duty to disclose a non-FDA approved, unorthodox, and arguably illegal cancer treatment to the patient's family. The trial court granted summary judgment in favor of the physician, on the basis that the doctor had no duty to disclose an illegal treatment. The plaintiffs appealed the lower court's decision and in September 2000, CMA, CHA and CDA filed an *amicus curiae* brief in support of the physician. In addition to arguing that there should be no mandatory duty to disclose unapproved treatment (although a physician has such a right), amici argued that Dr. Prados had no physician-patient relationship and that he should not be held liable, as a matter of policy, as a member of the tumor board.

Outcome: On September 28, 2001, the California Court of Appeal ruled in favor of CMA's position in this case. The Court ruled that a physician has no obligation to inform patients of treatment that is not authorized by California law, even if it is available in another state. In *Cobbs v Grant*, the California Supreme Court ruled that a physician has a duty to disclose to a patient "the available choices with respect to proposed therapy and...the dangers inherently and potentially involved in each." In the *Schiff* case, the Court of Appeal ruled that an illegal treatment is not an "available" treatment. The Court also said that "to rule that a physician may have a duty to disclose a treatment that is currently unavailable because the treatment might become available in the future would be to discard the availability requirement altogether." On October 26, 2001, the Court of Appeal denied Plaintiffs' Petition for Rehearing.

Traxler v. Varady (Informed Consent to be Evaluated on a Case-by-Case Basis)

Initial CMA Participation: July 1992

Issue: This case dealt with suit against physicians and hospital for negligence after patient contracted HIV following a blood transfusion subsequent to giving birth. On July 9, 1992, the AC Committee filed an AC brief urging the Court of Appeal to be cautious in making any general statements as to the utility of Title 22 of the California Code of Regulations in setting standards of care in litigation. At best, whether a Title 22 regulation should serve to set the standard of care for a hospital in any litigation case is a matter of interpretation on a case-by-case basis. As to plaintiff's claim that the hospital was in some way responsible for obtaining the patient's informed consent, the Committee argued that informed consent was a matter for physicians and their patients. It would be inappropriate to expect the hospital to somehow

share in the responsibility for obtaining the patient's informed consent.

Outcome: The Court of Appeal affirmed the judgment of the Superior Court in favor of the physicians and hospital. In reaching this decision, the Court respected the AC Committee's concerns and analyzed the trial court findings on a case-by-case basis. This decision may be found at *Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 16 Cal.Rptr.2d 297.

Vaughn v. AcroMed & Nottingham
(Upheld Use of Pedicle Screws)

Initial CMA Participation: June 1995

Issue: This case involved a surgeon who did not disclose to the patient that he was using bone (pedicle) screws, one of many drugs/devices potentially used in spinal fusion surgery, in a fashion not indicated on the FDA-regulated labeling for these screws. This "off-label" use was a widespread and commonly accepted practice of medicine. The trial court found that Dr. Nottingham had sufficiently informed the patient of the risks and benefits of the medical procedure, including the uncertainty of such risks and procedures due to the novelty of the procedure. The court also rejected plaintiff's contention that this procedure was "investigational" or "experimental" based solely on the fact that an off-label use occurred. On June 19, 1995, the AC Committee filed a brief with the Court of Appeal (1st Dist.) in support of respondent Dr. Nottingham, arguing that the doctrine of informed consent should not be expanded to matters unrelated to the risks and benefits of medical treatment. On October 31, 1995, the AC Committee filed a supplemental letter bringing to the Court's attention the recent change in classification of pedicle screw spinal systems by the FDA.

Outcome: The Court of Appeal sided with the AC Committee and, in an unpublished opinion, upheld the trial court's ruling in favor of Dr. Nottingham.

Frasier v. Hanson, M.D.*
**(Application of Periodic Payment,
Collateral Source Laws Under MICRA;
Appropriate Jury Instructions)**

Initial CMA Participation: July, 2001

Issue: This case has been appealed on two separate occasions; the first appeal related to the "Captain of the Ship" doctrine and the second and current appeal relates to proper implementation of three MICRA provision: 1) the collateral source rule; 2) the collateral source's right to recover against the plaintiff; and 3) the application of the periodic payment rules under MICRA. This case involves the care and treatment of a young boy, Daniel Frasier, while he was a surgical patient at a Southern California hospital. There were competing disputed theories of liability against the surgeon, Dr. Hanson. However, what was not disputed was that a doctor other than Dr. Hanson, Dr. S., fell below the standard of care in treating plaintiff the evening after his surgery, after Dr. Hanson had gone home.

Under the defense's theory of the case, plaintiff was not injured until 5 hours after breastbone surgery performed by Dr. Hanson, plaintiff's attending physician, with the assistance of Dr. S., a fellow at the hospital. Five hours after the surgery, while Dr. Hanson was at home, and without his knowledge, Daniel was given excessive medication. The patient then exhibited signs of cardiac tamponade. Dr. S, who was still at the hospital, failed to call Dr. Hanson to advise him of the change in plaintiff's status or to seek his direction, and refused to operate on the patient to relieve the cardiac tamponade. As a result, the patient went into cardiac arrest and had 40 minutes of closed-chest compressions, during which time bone fragments or metal tore the patient's aorta. The plaintiff is now partially paralyzed.

The plaintiffs alleged that the aorta was negligently punctured during the breastbone surgery and argued that as Captain of the ship, Dr. Hanson is liable. However, the trial judge instructed the jury that Dr. Hanson could be held **solely** responsible for plaintiff's injuries under either the defendant or plaintiff's version of the facts. The jury instructions used suggested that Dr. Hanson was responsible for everything that happened to plaintiff both during and after surgery—regardless of whether Dr. Hanson had an

opportunity to oversee plaintiff's care. The jury allocated 100% fault to Dr. Hanson, even though it was uncontested that Dr. S's refusal to re-open plaintiff's chest contributed to plaintiff's injuries and fell below the standard of care. Dr. Hanson appealed the verdict. CMA, CDA and CHA filed an AC brief in support of Dr. Hanson on July 5, 2001. CMA argued that this expanded vicarious liability lacks support in the law or public policy. CMA also argued that to hold a surgeon vicariously liable for the negligence of those under his supervision during surgery in one thing, but to hold a surgeon responsible for the negligence of others over whom he had no control is quite another. Any such expansion in the scope of a surgeon's potential liability will inevitably lead to higher premiums for malpractice insurance, and is contrary to sound public policy. The California Court of Appeal heard oral argument on September 26, 2001. On November 1, 2001, The Court of Appeal ruled in favor of CMA's position, stating that the trial court's instructions were improper. The Court of Appeal denied plaintiff's petition for rehearing and the plaintiffs requested the California Supreme Court to review the case. The California Supreme Court denied the plaintiff's request on January 29, 2002.

The case has now been appealed based on the court's error in applying the rules related to collateral source and periodic payments, both provisions of law that are part of the MICRA package. On August 27, 2004, CMA, CDA and CHA filed an AC brief outlining to the court the appropriate application of these MICRA provisions. The brief outlines the legislative intent of MICRA and the importance of providing to Dr. Hanson and his insurer the main benefit of the periodic-payment statute. The Court also erroneously excluded from evidence, the cost of the annuity, which is relevant to proving the present value of plaintiff's future care costs. Such evidence could result in a lower present value verdict, which would still ensure giving the plaintiff the needed money to pay for care, while at the same time, reducing the money that needs to be paid by Dr. Hanson, thereby effecting the purposes of MICRA.

Outcome: On February 2, 2005, the California Court of Appeal, Second Appellate District, Division One issued an unpublished opinion upholding the trial court's decision.

EMERGENCY TRANSFER

Vargas v. Del Puerto Hospital
(Applied EMTALA Favorably to Hospital)

Initial CMA Participation: May 1996

Issue: This case involved allegations that a hospital violated the Emergency Medical Treatment and Active Labor Act (EMTALA) when a baby, appearing in the ER with seizures, was transferred to a tertiary facility after failed attempts to stabilize, where records did not reflect the physician's explicit balancing of risks and benefits of transfer. On May 21, 1996, the AC Committee filed an amicus brief in the 9th Circuit Court of Appeal, arguing that there is no EMTALA liability for a transfer under a certificate, even if that certificate omits specification of risks when the certifying physician genuinely weighed the risks and benefits of transfer (i.e., EMTALA does not import a medical negligence standard). The Committee also argued that MICRA applies to EMTALA actions arising out of, or based upon, professional negligence.

Outcome: The 9th Circuit Court of Appeal affirmed the U.S. District Court for the Eastern District of California which held for the hospital, refusing to premise EMTALA liability on a technical deficiency in the certification procedure. The 9th Circuit reasoned that the hospital could remedy the failure to summarize specific risks of transfer by establishing that the risk/benefit assessment was in fact performed. This decision may be found at *Vargas v. Del Puerto Hospital* (1996) 98 F.3d 1202.

EXPERT WITNESS ISSUES

Bonds v. Roy
**(Clarification of Laws Concerning Expert
Witness Testimony, Collateral Source Payment,
and Future Economic Damages Under MICRA)**

Initial CMA Participation: December 1998

Issue: On December 14, 1998, the AC Committee filed an *amicus curiae* brief in the California Supreme Court to address three issues in this medical malpractice case. First, the Committee addressed Code of Civil Procedure §2034, which authorizes the trial judge to exclude expert testimony if the expert witness declaration inaccurately describes the expected testimony. The Committee argued that section 2034 should apply when the brief statement summarizing the expert's expected testimony at trial fails to put the opposing party on reasonable notice of the scope and nature of the testimony. Testimony should also be excluded when the declaration does not state that the witness agreed to testify on the subject which the witness is being asked about at trial. Second, the Committee noted that damage awards should properly reflect the amount required to actually compensate the plaintiffs for their injuries caused by the defendants. Where evidence of collateral source payments to plaintiff is admissible pursuant to Civil Code §3333.1(a), the trial judge should instruct the jury that they may reduce an award of damages by the amount of the collateral source payments proven. Third, the Committee argued that juries should not be permitted to speculate regarding a plaintiff's future medical condition. Under MICRA, future economic damages that hinge on the plaintiff's future medical condition should be calculated by the jury based on the jurors' evaluation of the applicable expert testimony.

Outcome: The California Supreme Court ruled, consistent with the position taken in the AC Committee's brief, that a trial judge may preclude an expert witness from testifying at trial on a subject whose general substance was not previously described in an expert witness declaration. The Court's opinion may be found at *Bonds v. Roy* (1999) 20 Cal.4th 140, 83 Cal.Rptr.2d 289.

Bushling v. Fremont Medical Center
(Standard for Expert Witness Declarations
in Summary Judgment Motions)

Initial CMA Participation: May 2004

Issue: This case involves the scope of the trial court's statutory duty, in ruling on a summary judgment motion, to exclude expert opinion testimony that lacks a proper foundation. The summary judgment motion in this case involved a request by the defendant for a ruling by the Court that there were no issues of fact or law because the defendants' care was in the standard of care. To support the motion for summary judgment, the defendants submitted a declaration of a physician. In opposition to the defendants' summary judgment motions, the plaintiffs submitted the declarations of two experts. The Courts, both the trial and the Court of Appeal, concluded that the trial court properly refused to consider the plaintiffs' declarations because they were speculative, conclusory and lacked foundation. The Consumer Lawyers were desirous of the depublication of this opinion and requested the California Supreme Court to do so.

On May 28, 2004, CMA's AC Committee filed a letter brief in this case requesting that the court's opinion remain published.

Outcome: On June 16, 2004, the California Supreme Court denied the Consumer Attorneys' request for depublication of the Court of Appeal's opinion and the case is now concluded. The Court's opinion can be found at 117 Cal. App. 4th 483.

Cassandra P. v. Center for Women's
Health and Family Birth
(Discussed Role as Treating Physician
and Expert Witness)

Initial CMA Participation: February 1994

Issue: This case involved action by patient to preclude former treating physician from testifying as defense expert in medical malpractice action. On February 18, 1994, the AC Committee submitted a petition for

review and request “grant and hold” status pending the outcome in *Heller v. NorCal*.

Outcome: The California Supreme Court denied the request for depublication and the petition for review. Since then, this case has been overturned by *Heller v. NORCAL Mutual Insur. Co.*, insofar as the decision can be read to prohibit all ex parte contacts between a physician and that physician’s attorneys or insurers. The Court of Appeal had ruled that testimony of an undisclosed medical expert should have been limited to his percipient observations, but the trial court properly excluded the plaintiff from the courtroom during the liability phase of trial. The Court’s decision may be found at *C. Province v. Center for Women’s Health and Family Birth* (1993)20 Cal.App.4th 1673, 25 Cal.Rptr.2d 667.

Heller v. NORCAL Mutual Insurance Co.
(Allowed Ex-Parte Contact with Malpractice Carrier and the Disclosure of Medical Information)

Initial CMA Participation: September 1993

Issue: This case involved patient who had a finger amputated. The surgery was performed by two physicians, one of which was the patient’s treating physician. Patient sued the treating physician and deposed the other physician who was not a party to the suit but had agreed to appear as an expert witness for the treating physician. During discovery, the deposed physician revealed that during private interviews with NORCAL, he had discussed plaintiff’s condition and prognosis and disclosed her medical records. After settling with the treating physician, patient brought this action against NORCAL and the deposed physician on grounds that the disclosure violated the Confidentiality of Medical Information Act and her state constitutional right to privacy. On September 15, 1993, the AC Committee filed letter with California Supreme Court supporting petition for review on behalf of NORCAL. In addition, on February 15, 1994, AC Committee filed an amicus curiae brief, arguing that a health care provider can meet with a professional liability insurer (& its attorneys) to informally discuss the care provided to a patient who has brought, or threatened to bring, a malpractice action against another provider treating the same patient.

Outcome: The California Supreme Court agreed with the AC Committee, holding that the Confidentiality of Medical Information Act provided an exception which would allow NORCAL’s ex parte contact with the deposed physician. This exception allows a provider to disclose medical information to a person or group responsible for insuring, or defending against professional liability, if that person or group is reviewing the competence of the provider or the medical necessity, level of care, quality of care, or justification of charges for medical services. Further, the Act authorizes release of patient information to facilitate resolution of a claim prior to filing a lawsuit. The Court also held that there was no invasion of privacy. Plaintiff failed to adequately plead facts in her complaint to support the conclusion that any expectation of privacy would be reasonable here as her physical condition was an issue in this malpractice suit. Also, there was no serious invasion of privacy as such information would have been discoverable. This ruling overturns *Torres v. Superior Court* and *Cassandra P v. Center for Women’s Health & Family Birth*, insofar as these cases can be read to prohibit all ex parte contacts between physicians and their attorneys/insurers. This decision may be found at *Heller v. NORCAL* (1994) 8 Cal.4th 35, 32 Cal.Rptr.2d 200.

Lathrop v. Healthcare Partners
(Eligibility of Physician Groups for MICRA Protection)

Initial CMA Participation: July 2003

Issue: The issue in this case is whether or not a partnership comprised strictly of physicians and formed for the practice of medicine is a “health care provider” and thus entitled to the vital protections afforded by MICRA. In *Lathrop*, the trial court ruled that Healthcare Partners was not a “health care provider” entitled

to MICRA protections. Specifically, the Court found that Healthcare Partners was a “managed care entity.” In the *Lathrop* case, the patient and her husband sued Healthcare Partners, several licensed physicians employed by Healthcare Partners, and others for negligent failure to diagnose and treat her breast cancer. The defendants answered the complaint and asserted as an affirmative defense MICRA’s \$250,000 ceiling on non-economic damages. The jury found Healthcare Partners 58% at fault for the plaintiff’s damages. The patient was awarded approximately \$400,000 for economic losses and \$2,100,000 for non-economic losses. Healthcare Partners requested the Court to reduce these non-economic damages based on the \$250,000 MICRA cap. The Court denied the motion, ruling that Healthcare Partners was not entitled to the MICRA protections. Similar issues were raised in the *Palmer v. Superior Court* and the Court ultimately ruled that Healthcare Partners, Inc. is a health care provider for purposes of MICRA. A Southern California division of the Court of Appeal issued the *Palmer* ruling and *Lathrop* is venued in the First Appellate District out of San Francisco. Also currently pending is *Allen v. Los Alamitos Medical Center*, where again, the lower court ruled that a medical group is not a health care provider and, therefore, not entitled to the MICRA protections.

Outcome: On January 21, 2004, the Court of Appeal issued a partially published opinion favorable to Health Care Partners and CMA’s position that Health Care Partners should be able to assert the same defenses (MICRA included) in an action against it that arises solely as a result of the conduct of its employee physicians under a vicarious liability theory of liability. However, the Court also ruled that Health Care Partners is not a “health care provider” under the MICRA statute. The case has not been appealed.

Paxton v. Stewart
(CMA Advocates for Proper Scope of Expert Witness Testimony)

Initial CMA Participation: August 1999

Issue: This case involved issues concerning physicians acting as expert witnesses at trial. On August 11, 1999, the AC Committee filed an *amicus curiae* brief in the California Supreme Court, arguing that treating physicians could not be forced to testify as to non-treatment litigation matters, such as standard of care, causation and damages. The brief argued that not only did relevant statutes require that expert witnesses must voluntarily agree to testify as such, but a contrary rule would jeopardize patient welfare. This is because of the chilling effect that would ensue if consulting physicians understood that by agreeing to consult on cases involving complications of treatment or assume care of such patients, they could be forced to testify as an expert against the referring physician. The brief also argued that the same disclosures which must be made to other parties to the litigation with respect to expert witnesses generally must be made with respect to those treating physicians who agree to testify, not only as percipient witnesses, but also as experts on non-treatment matters.

Outcome: On March 15, 2000, the Supreme Court transferred this case back to the Court of Appeal, with directions to vacate its decision and to reconsider the cause in light of *Schreiber v. Estate of Kiser*. In *Schreiber*, the Supreme Court ruled that it is not necessary to disclose treating physicians as experts in order to obtain standard of care and causation testimony from them.

Pettus v. Cole
(Applied Confidentiality of Medical Information to Expert’s Psychiatric Evaluation of Employee)

Initial CMA Participation: November 1996

Issue: This case involved a suit by an employee for unauthorized release of medical information to the employer in violation of the Confidentiality of Medical Information Act (CMIA), invasion of constitutional right of privacy, breach of contract, wrongful termination, and unauthorized use of medical information.

On November 12, 1996, the AC Committee filed a letter in the California Supreme Court, requesting depublication of the Court of Appeal's decision. The brief emphasizes the special relationship that exists between treating physicians and their patients, and that this relationship creates special rights and duties, including the duty of confidentiality of medical information. This relationship, though, is distinguishable from that of a medical expert and an examinee, as in this case, where such information is used for purposes other than medical treatment. By obliterating this distinction, the appellate decision would drive health care professionals away from serving as medical experts, hence depriving employers of important information about employees. This, in effect, would negatively impact the employer's ability to provide a humane and safe workplace.

Outcome: On December 23, 1996, the California Supreme Court denied the petition for review as well as the request for depublication. Hence, the appellate decision still applies, holding, among other things, that the psychiatrists violated the CMIA by providing the employer with detailed report of their psychiatric examination of employee without specific written authorization for disclosure, and that the employee made a prima facie showing of invasion of privacy by the psychiatrists. The Court of Appeal's ruling may be found at *Pettus v. Cole*, (1996) 49 Cal.App.4th 402, 57 Cal.Rptr.2d 46.

Roberti v. Andy's Termite & Pest Control, Inc*
(Admissibility of Expert Witness Testimony)

Initial CMA Participation: January 2004

Issue: This case involves the appropriate standards for admissibility of expert witness testimony. Plaintiff appealed the judgment of dismissal entered in favor of defendant. Plaintiff contended the trial court erred by granting defendant's motion to exclude plaintiff's expert testimony on the effects of pesticides on humans under the admissibility test used in California in the case of *People v. Kelly* (1976) 17 Cal.3d 24. Plaintiff argued the expert testimony at issue was not subject to *Kelly*. The appellate court agreed and, reversed the dismissal. The plaintiff's expert testified that, to a reasonable degree of medical probability, *in utero* exposure to a pesticide caused Plaintiff's autism-like disorder. His experts, however, could not testify as to the amount of pesticide to which Plaintiff had been exposed or the dosage he received in relation to the studies upon which the experts relied to reach their conclusions.

The defendant appealed the decision and on February 9, 2004, CMA, CHA and CDA filed an AC letter in support of the appeal and, alternatively, requesting that the case be de-published. CMA's brief argued that the Court should uphold guidelines for the admissibility of expert testimony identified in recent California and Federal case law.

Outcome: On February 18, 2004, the Supreme Court denied the defendant's petition for review and request for de-publication and the case is now completed.

Torres v. Superior Court (Daily)
**(Treating Physicians May Not Talk
With Defense Counsel Ex-Parte)**

Initial CMA Participation: August 1990

Issue: This case involved an action by a patient to preclude her former treating physician from testifying as a defense expert in her medical malpractice action. The Court of Appeal ruled that while a prior treating physician may act as an expert witness for the defense, that physician may not communicate with defense counsel except pursuant to the discovery process where the plaintiff may be present. On August 10, 1990, the AC Committee filed a letter requesting that the California Supreme Court to decertify the opinion of the Court of Appeal and deny the patient's petition for review.

Outcome: The California Supreme Court denied the request for depublication and the petition for review. Since then, this case has been overturned by *Heller v. NORCAL Mutual Insur. Co.*, insofar as the decision can be read to prohibit all ex parte contacts between physician and his/her attorneys or insurers. This decision may be found at *Torres v. Superior Court (Daily)* (1990) 221 Cal.App.3d 181, 270 Cal.Rptr. 401.

Jennings v. Palomar Pomerado Health Systems*
**(Trial Court's Ability to Control Admissibility
of Expert Witness Opinions)**

Initial CMA Participation: June 2003

Issue: This case involves the scope of a court's ability to rule on the admissibility of expert witness testimony.

In this case, plaintiff Daniel Jennings suffered a post-operative abdominal infection following surgery to remove an abnormal connection between his colon and bladder. He filed a medical malpractice action against the hospital where the surgery was performed and the doctors who performed it, claiming that the infection was caused by the doctor's failure to remove a medical retractor during the initial surgery. The trial court struck the testimony of plaintiff's sole causation expert, Dr. Miller, because his opinion that the retractor caused the infection was based on speculation.

In this appeal, the plaintiff seeks to overturn the trial court's ruling, claiming that the Court improperly engaged in fact finding by excluding the plaintiff's expert testimony. On June 24, 2003 CMA, CDA and CHA filed an AC brief that generally discusses the admissibility of expert witness testimony and Court's satisfaction of its well established duty to direct a verdict where there is no substantial evidence to support a verdict in the plaintiff's favor. The AC brief also states that, contrary to the plaintiff's assertion; trial judges should not abdicate responsibility for determining the reliability and admissibility of evidence before it may be submitted to a jury. In fact, trial courts should be encouraged to do exactly what the Court did in this case: carefully analyze expert testimony to ensure that only well founded, non-speculative expert opinions reach the jury. The brief points out that this is particularly important in medical malpractice cases such as this one, where plaintiff's attempt to explain pivotal medical causation issues using expert testimony that relies on theories unsupported by actual evidence, may lead a jury to find liability where there is none.

Outcome: On December 11, 2003, the California Court of Appeal, Fourth Appellate District, Division One, issued a ruling in favor of CMA's position. Specifically, the court upheld the exclusion of medical expert causation testimony that was both speculative and conclusory. In doing so, the Court explained the development of the rule governing the admission of expert testimony and placed it in the context of the applicable "reasonable medical probability" causation standard. The court did not initially publish the opinion, but on December 17, 2003, CMA requested that the court publish the opinion as it met rules for publishing important court decisions. On January 8, 2004, the court granted CMA's request for publication and the opinion will now be able to be cited in cases where speculative medical expert testimony is an issue.

PEER REVIEW ISSUES

Hassan v. Mercy American Hospital
**(Scope of Peer Review Communications
Immunity)**

Initial Participation: February 2003

Issue: In this case, a physician sued Mercy American River Hospital for sending allegedly defamatory credentialing information to Roseville Hospital, where he was applying for medical staff privileges. The state appellate court ruled that Mercy was immune from the lawsuit under a statute, Civil Code §43.8, that protects from liability persons and entities that communicate information "intended to aid in the evaluation" of the qualifications and fitness of a practitioner of the healing arts. In so ruling, however, the court interpreted the immunity to apply only in cases where the information communicated was not "knowingly false" or "patently irrelevant" to the evaluation of the practitioner. This ruling imposes a new and troubling interpretation of the immunity, thereby creating a significant risk that communications of derogatory information in the credentialing process, whether true, false or simply "irrelevant," will lead to litigation by an aggrieved practitioner in order to defeat the immunity and obtain money damages. This

result would significantly “chill” the willingness of, physicians, medical staffs, hospitals, peer review bodies and others to share truthful but derogatory information with those who evaluate practitioners for medical staff privileges or other positions involving patient care. This chilling effect would have dire consequences for assuring practitioner competence and patient safety.

Mercy American Hospital appealed this ruling and on February 13, 2002, CMA, CHA and CDA filed an *amicus curiae* brief on behalf of the hospital. The brief argues that the immunity statute applies to hospitals and that a practitioner who is harmed by a defamatory communication in the context of this immunity is not without legal recourse—the affected practitioner should properly focus on the action taken by the recipient(s) of the offending information, such as the hospital medical staff evaluating a physician for membership, and not on the communicator of the offending information.

Outcome: On August 18, 2003, The Supreme Court upheld the ruling of the Court of Appeal.

STANDARD OF CARE

**Maheer v. Saad
(CMA Seeks Affirmation That Physician is
Within Standard of Care Even With Use of
Uncommon But Recognized Method of Treatment)**

Initial CMA Participation: October 2000

Issue: In this case, a physician used an innovative surgical procedure, which was unsuccessful. Defense experts testified that the patient’s condition warranted the surgeon’s novel approach, which complied with the standard of care. The jury returned a defense verdict, but the California Court of Appeal affirmed a new trial order, ruling that the trial court was wrong to allow use of the jury instruction which provides that it is within the standard of care for a physician to use any “recognized method of treatment” even if the “treatment selection later turns out to be a wrong selection, or one not favored by certain other practitioners.” Dr. Saad filed a Petition for review with the California Supreme Court and on October 9, 2000, CMA, CDA and CHA filed a letter brief with the Court, asking for de-publication of the opinion or a review of the case. CMA believes the Court of Appeal’s decision misconstrues California law and may be used to erroneously deprive future defendant physicians of the benefit of having a jury instructed that there are alternative, appropriate methods of treatment which are within the standard of care.

Outcome: In early December, 2000, the California Supreme Court denied Dr. Saad’s and CMA’s request for review of the case and de-publication of the opinion.

WARNING OBLIGATIONS

**Ewing v. Goldstein*
(Scope of Tarasoff Warning
Obligation Under Civil Code §43.92)**

Initial CMA Participation: September 2004

Issue: This case involves the scope of a psychotherapist’s duty to warning a third party about a potential threat to the third party based on knowledge gained by the psychotherapist by virtue of contact with the patient or patient’s family.

Dr. David Goldstein, a marriage and family therapist, treated Geno Colello over a period of four years for emotional problems related to both his work on the Los Angeles police force and his relationship with his former girlfriend. After learning that his former girlfriend had become involved with another man, Colello became increasingly depressed. He told his father that he had lost the desire to live, “he couldn’t handle the fact that [his former girlfriend] was going with someone else,” and he “was considering causing harm to the young man that [she] was seeing.” Colello’s father allegedly relayed these comments to Dr. Goldstein, who arranged for Colello to receive psychiatric care from another doctor at Northridge Hospital Medical Center, where Colello voluntarily committed himself. Shortly after his discharge from the

hospital, Colello killed his ex-girlfriend's new boyfriend, Keith Ewing, and committed suicide. Ewing's parents then sued Dr. Goldstein for failing to warn about Colello's violent behavior.

The trial court granted summary judgment for Dr. Goldstein, determining that the requirements for liability under Civil Code §43.92 had not been met because Colello - the patient himself - had not communicated any threat to Dr. Goldstein and, in any event, the information in Goldstein's possession did not rise to the level of a "serious threat of physical violence" required to trigger psychotherapist liability.

The Court of Appeal reversed. Although the Court of Appeal acknowledged that the plain language of Civil Code §43.92 provides for psychotherapist liability only where "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims" - and there was no such threat made by Colello to Dr. Goldstein here, the court nonetheless reasoned that the legislative history of section 43.92, principles of statutory construction, and the purported scope of the psychotherapist privilege favored a broader interpretation of circumstances under which a duty to warn could arise. The Court of Appeal determined:

If information about the serious threat of grave bodily injury is brought to the therapist's attention through a member of the patient's family rather than the patient, may the therapist be relieved of any obligation to act on the information, no matter how credible, simply because it has not come directly from the 'patient?' We do not believe so. When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose.

On September 20, 2004, CMA, CDA and CHA filed an AC brief in support of Dr. Goldstein. The brief argued that the Court's new open-ended rule of psychotherapist liability is at odds with the policy judgments already made by the Legislature when it enacted Civil Code §43.92, is contrary to the plain meaning of the statute and creates an overly broad and unworkable duty to warn. Under the court's ruling, a duty to warn would be imposed no matter what the motivation for a third party communication of a threat to a therapist might be. This is the very concern addressed by the Legislature when framing the statute.

Outcome: On November 10, 2004 the Supreme Court denied the petition for review. The case is now concluded.