

# ASA Legislative Conference 2004

*By R. Lawrence Sullivan, Jr., M.D., ASA Director California*

**T**he annual gathering of ASA's politically motivated members convened at the J. W. Marriott Hotel in Washington, D.C., from May 3rd-5th for the 2004 ASA Legislative Conference. Under the leadership of ASA's Director of Governmental Affairs, Mr. Michael Scott, J.D., overseeing his last such conference as he will be retiring at the end of this year, attendees participated in another outstanding session. Numerous informative speeches and lectures were presented by members of Congress, representatives of the White House and other governmental agencies, as well as from ASA members from the Administrative Council, the Committee on Governmental Affairs, and the ASA PAC Board. Ms. Diane Turpin, J.D., ASA Associate Director of Governmental Affairs, and Mr. Manuel Bonilla, ASA Assistant Director (Federal), were also instrumental in putting together this excellent three-day program.

Over four hundred anesthesiologists were registered for this event, making it one of the largest ever for ASA. Among the eighteen CSA members from California were CSA President H. Douglas Roberts, M.D., CSA President-elect Linda J. Mason, M.D., and CSA Immediate Past President Patricia A. Dailey, M.D. Kudos go to the Texas Society of Anesthesiologists for having twenty-seven of its members in attendance, the most of any state component and a reflection of the TSA's genuine commitment to political advocacy.

My colleague, ASA Alternate Director from California, J. Kent Garman, M.D., M.S., has kindly summarized the many issues which were the focus of the conference and our subsequent visits to Capitol Hill, as well as the various speakers who addressed the gathering. His report can be found following this article. However, I would like to offer some of my own thoughts on this year's visit to our nation's capitol.

As most Americans are keenly aware, 2004 is a presidential election year. Currently, there is immense division between the political parties. The Democrats feel that the 2000 election was stolen from them by a conservative dominated Supreme Court, not to mention pregnant chads in Palm Beach, Florida. The Republicans are using every opportunity of their control of Congress and the White House to redefine many aspects of America life from taxes and the

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economy, morality, civil rights, the criminal justice system, the environment, and, of course, foreign affairs. The political stakes in the November [federal] election are huge and will impact this country for years to come. In a luncheon speech by Professor Larry Sobato, an election analyst from the University of Virginia (be sure to visit his web site ([www.centerforpolitics.org/crystalball/](http://www.centerforpolitics.org/crystalball/)) for an election update), it was quite apparent that the country is divided fairly evenly. In this political environment, it is unlikely that any substantive legislation will pass through the Congress until after the November election.

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With physician reimbursement under Medicare being one of the key issues for the AMA and the ASA, most members of Congress have been willing to express their concern about the illogical use of outpatient prescriptive medications and the Gross Domestic Product (GNP) as key actuarial factors within the Sustainable Growth Rate (SGR) formula in calculating physician fees. The Prescription Benefit Bill of 2003 (a.k.a. the Medicare Reform Bill) temporarily derailed the SGR process by declaring a 1.5% increase in physician fees in 2004 and again in 2005. The problem will re-emerge in the year 2006 when it is projected that the requisite SGR methodology will result in a 5% decrease for each of the next six to seven years. Representative Bill Thomas (R-CA), Chair of the House Ways and Means Committee, has indicated that he will hold hearings on the SGR methodology later this summer. But do not expect anything definitive to happen.

Since the implementation of the Medicare fee schedule in 1992, reimbursement for anesthesia services has been undervalued compared to other specialties. The ASA has twice attempted to correct this inequity through the five-year review process within the AMA’s Relative Value Update Committee (the “RUC”) and through the Center for Medicare and Medicaid Services (CMS). Despite a modest correction of the Medicare anesthesia conversion factor after the first five-year review, significant disparity continues to exist. In his address to the Conference attendees, Representative Pete Stark (D-CA), the ranking member on the Subcommittee on Health of the Ways and Means Committee, announced that he and Subcommittee Chair Nancy Johnson (R-CT) had agreed to co-sign a letter to the Governmental Accounting Office asking that the issue be studied. The fact that these two political adversaries were both concerned that a genuine disparity in reimbursement for anesthesia services does exist has given some hope that ASA’s attempts to rectify this problem will not be thwarted. For this reason, other

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members of Congress were also asked by anesthesiologists, in their visits to the Hill, to express their own indignation to CMS.

Efforts to achieve professional liability reform through national legislation is another agenda item unlikely to achieve Congressional consensus. Although HR 5 was successfully passed through the House of Representatives in 2003 (and recently reaffirmed by the House with a narrow 229 to 197 vote on the passage of HR 4280), the companion bill in the Senate, S. 11, will continue to be stonewalled by the minority Democrats who have prevented cloture and thus consideration by the entire Senate. For Californians, this is probably a good thing as both Senate Majority Leader, Dr. Bill Frist (R-TN) and Senator Diane Feinstein (D-CA) have unfortunately agreed to promote an increased cap of \$500,000 on non-economic losses (“pain and suffering”). Although there would be an exemption for states to maintain a lower cap, such as the \$250,000 cap that has existed for twenty-nine years in California, a higher federal cap would generate unstoppable momentum in Sacramento to change the cap under our state’s time-tested MICRA laws. The malpractice carriers in California have predicted an average 30% increase in malpractice premiums should a higher cap be adopted. Although many pundits see the U.S. Senate as being controlled by the trial lawyers, there are many Democrats in Congress whose real objection to the Republican legislative proposal on medical malpractice reform is the inclusion of broad liability protection for pharmaceutical companies, health insurance plans, medical equipment manufacturers, and hospital facilities. Earlier this year, Senator Frist introduced tort reform legislation which would apply only to those physicians who practice obstetrics (there was uncertainty whether obstetrical anesthesia would be covered; if not, anesthesiologists would then become the deep pockets!); it too failed to come to a vote on the Senate floor. However, while the Senate leadership wanted to make the opposing Democrats look bad with their failure to support a “motherhood and apple pie” piece of legislation, this was a cynical gesture in which all other physicians would have been denied such liability protection, but the bill would still have provided broad reforms on liability for big business.

There is an obscure provision within the Medicare rules that allows hospitals with low surgical volume (under 800 cases annually) to sign lucrative contracts with nurse anesthetists for anesthesia coverage, and then recover such expenses through Medicare A on a reasonable-cost “pass through” basis. Such contracts have reported to be in the \$200,000 to \$300,000 range in some localities. While this rule was intended to attract qualified anesthesia providers to underserved areas, it does not apply to anesthesiologists. With payer mixes dominated by Medicare and Medicaid patients in rural areas, anesthesiologists who are restrict-

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ed to Medicare Part B or Medicaid reimbursement cannot generate fees that come close to such amounts. ASA formally appealed to Medicare last year to have this provision apply to anesthesiologists as well, but ASA was denied. Attempts to attach an amendment on the issue in the Medicare Reform Bill last November also failed. While there is no pending legislation which would correct this inequity, anesthesiologists included this issue in their discussions with their elected representatives on Capitol Hill in anticipation of future action.

In a year in which little movement is expected on any legislation, it is still a worthwhile endeavor to use the occasion of our visits to Washington as an opportunity to educate members of Congress and, especially, their staff. Like it or not, legislative staff assistants have immense influence in developing policy. The establishment of long-term relationships with these individuals as well as the expression of concern about patient access to quality care in this country often generates a sense of trust that can be invaluable when dealing with future issues. In the final analysis, the success of the specialty of anesthesiology to influence legislation and regulatory change is dependent on anesthesiologists who are willing to nurture solid relationships with their legislators and to speak out on matters of concern to the specialty.

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## **ASA Legislative Conference Summary**

*By J. Kent Garman, M.D., M.S., F.A.C.C., ASA Alternate Director California*

I attended the ASA Legislative Conference in Washington and represented California anesthesiologists as your ASA Alternate Director. The purpose of the conference is to educate ASA leaders in legislative advocacy matters. In addition, an important part of the conference is direct advocacy efforts with members of Congress. The important issues that we discussed with legislators were:

### **Rebuilding the Medicare Update Formula**

All physician reimbursement under the Medicare Fee Schedule are currently governed by the “sustainable growth rate formula” (SGR), an unworkable and dated formula that limits annual updates in physician reimbursement. This formula should be scrapped in favor of an update mechanism recommended by the nonpartisan Medicare Payment Advisory Commission, which would allow

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**...anesthesia services are reimbursed an average of 40 percent of ... private insurers.**

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physician reimbursement to rise based on changes in the cost of delivery of care as measured by a revised Medicare Economic Index. The bottom line is that our reimbursement has not kept pace with our costs, and we need a new method of calculating rate increases.

### **Gaining Reimbursement Parity for Anesthesia Services under Medicare**

Currently, anesthesia services are reimbursed an average of 40 percent of what is paid for these services by private insurers. This contrasts with all other specialties which get an average of 80 percent of the private rate. This disparity has existed since the Medicare Fee schedule went into effect in 1992. ASA is asking the Centers for Medicare and Medicaid Services (CMS, formerly known as HCFA) to re-examine this disparity to reach a fair and equitable solution.

### **Enacting Professional Liability Reform Legislation**

California has been blessed by the MICRA tort reform legislation since 1975. This law has allowed California malpractice insurance rates to remain among the lowest in the nation. Many states without this legislation are experiencing a crisis in access to medical care because of abandonment or limitation of services by physicians unable to afford insurance. The House has passed a tort reform bill, but it has been blocked by filibuster by the Democratic minority in the Senate (mostly trial lawyers). ASA, along with the Republican majority in the House and Senate, continues to bring pressure on the Democrats to allow this legislation to come to the floor of the Senate for debate and vote. Of note, our two California Democratic Senators Boxer and Feinstein have consistently voted against this legislation.

### **Recommended Scope of Practice of Nurse Anesthetists and Anesthesiologist Assistants**

ASA continues to remind legislators that Anesthesiology is the practice of medicine. We and the rest of medicine must continue to bring pressure to maintain standards of practice and laws that prohibit non-physicians from practicing medicine.

### **Enacting Pain Care Legislation**

ASA supports the National Pain Care Policy Act of 2003 (HR 1863). This calls for a White House Conference on Pain Care and the establishment of an NIH Pain and Palliative Care Research Center. If passed, this act is an important first step

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in developing a national policy for the comprehensive treatment of pain and provision of palliative care.

### **Enacting Patient Safety Legislation**

ASA urges the passage of Senate bill SB 720, the Patient Safety and Quality Improvement Act. A similar bill was passed by the House (HR 663) in March 2003. This bill, if enacted, would provide a new voluntary medical error reporting system which would allow the confidential gathering of data on errors. This would then allow us to establish quality improvement initiatives to increase our patient safety initiatives.

This 3-day conference featured many important and influential speakers, among them:

- Senator Charles Grassley (R-IA), Chairman of the Committee on Finance
- Karen Tandy, Administrator, Drug Enforcement Administration
- Richard H. Carmona, M.D., M.P.H., F.A.C.S., United States Surgeon General (trained at UCSF in general surgery)
- Denny Fitch, Hall of Fame pilot (helped crash land the uncontrollable DC-10 in Iowa after a catastrophic hydraulic failure)
- Representative Pete Stark (D-CA), House Ways and Means Committee
- Representative Bill Thomas (R-CA), Chairman, House Ways and Means Committee
- Representative Ralph Regula (R-OH), Chairman Subcommittee on the Departments of Labor, Health and Human Services and Education, Committee on Appropriations

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### **Laughing Gas**

*A hug is better than all the theology in the world.*

*Those who believe in the “balance of nature” are those who don’t get eaten.*

*Education can be painful if you get your finger caught in your binder.*

–One-Liners From Charles Schultz of Peanuts fame.