

Court Rules Against CSA and CMA on Opt-Out

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On October 8, 2010, Governor Arnold Schwarzenegger and the San Francisco Superior Court missed yet another opportunity to ensure the highest standard of care for every Californian during a time when quality matters most—while under anesthesia.

In June 2009, Governor Arnold Schwarzenegger submitted a letter to the Centers for Medicare and Medicaid Services (CMS) requesting that California be allowed to “opt out” of the CMS regulation that physicians directly supervise nurse anesthetists. Last February, the CSA and the California Medical Association (CMA) filed suit against Governor Schwarzenegger in response to the Governor’s letter. The motion filed by the CSA and the CMA to require that Governor Arnold Schwarzenegger withdraw his letter was denied by the San Francisco Superior Court judge in a preliminary ruling. The CSA and CMA are awaiting the final opinion.

The ruling was based on the judge’s opinion that given the absence of a State statute requiring physician supervision of nurse anesthetists who administer anesthesia, federal regulations allow the Governor discretion to conclude that opting out of the Medicare supervision requirement is consistent with State law. The judge stated that with respect to the physician supervision issue, current California law does not directly refer to supervision, and that interjecting a supervision requirement into the law would create ambiguity. The judge went on to state that the Legislature has the ability to impose such a requirement into State law should it wish.

CSA notes that the State’s Legislative Counsel, Attorney General opinions, and prior court opinions came to a different conclusion.

“For the Governor and Superior Court to decide for the people of California that it is perfectly safe to remove the medical and physician component from anesthesia care is absolutely irresponsible,” said CSA President Dr. Narendra Trivedi. “The Governor’s plan goes against the belief of most practicing physicians and jeopardizes the quality of care that citizens of California will receive. The CSA asks the Governor to put patients first and work with physicians to find innovative and efficient solutions to our state’s health care concerns regarding maintaining quality of health care.”

CSA and CMA Opt-Out (cont'd)

The backdrop of the ruling on the lawsuit is troubling to CSA, especially in light of the recent *New York Times* editorial of September 7, 2010, "Who Should Provide Anesthesia Care?" Many in the anesthesia community were deeply distressed by the misguided and unfounded claims set forth in the editorial. Response by ASA leadership and others was swift and resulted in the publication of several letters to the editor denouncing the editorial. See "Talking Points" on pages 28-34.

The debate on the role and scope of practice of non-physician providers of health care, not just nurse anesthetists, clearly has national implications; this issue does not simply affect California or other states where an opt-out has been exercised. Those who attended the opening session of the ASA on Saturday, October 16, 2010, heard a compelling talk by Jeff Skiles, co-pilot of US Airways flight number 1549, who, along with Captain Chesley Burnett "Sully" Sullenberger III in January 2009, successfully landed in the Hudson River after a bird strike resulted in both engines failing. Skiles emphasized the importance of training, teamwork, standardized procedures and checklists, and above all experience in airline safety, and by extension in anesthetic care. Since the incident, Skiles has become a tireless advocate in Washington, D.C. for tightening of Federal Aviation Administration (FAA) licensing rules for pilots based on their level of training and experience. He is concerned that the agenda of the airline industry and the FAA will effectively lower the bar in pilot licensing to create an "equilibrium between costs and adverse outcomes."

The implications here for anesthesiologists are clear. Decades of research and the development of new drugs and procedures by anesthesiologists have resulted in enormous increases in anesthesia safety. Increased safety, however, does not separate the practice of anesthesiology from the practitioner. There is no equivalence of physician and nursing care, in either education or experience, notwithstanding attempts to administratively or judicially effect or legislate this. The *practice* of the medical specialty of anesthesiology equates to far more than the technical components that nurse anesthetists are trained to perform.

The court's ruling results from the efforts of nursing unions as well as hospitals and insurance companies to convince legislators, the courts, and the public to expand the scope of practice of nurses through the illusion of cutting costs. The CSA is vehemently opposed to this egregious decision that sacrifices patients' ability to choose to have a physician involved in their anesthetic care, and the CSA remains resolved in its commitment to ensure patient access to physician-led anesthesia regardless of political or financial pressures.

The CSA and CMA are analyzing the court's opinion and are exploring all available options for further action, including issuing an appeal.