1st Civil No. _____

IN THE

Court of Appeal

OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ____

CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS, *et al.*,
Petitioners,

v.

SAN FRANCISCO COUNTY SUPERIOR COURT,
Respondent;

ARNOLD SCHWARZENEGGER, *et al.*,
Real Parties in Interest.

SAN FRANCISCO SUPERIOR COURT, CASE NO. CPF-10-510191
Hon. Peter J. Busch, Judge Presiding, Dept. 301

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST **APPELLATE DISTRICT, DIVISION** _____	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Curtis A. Cole, SBN 52288 Matthew S. Levinson, SBN 175191 COLE PEDROZA LLP, 200 So. Los Robles Avenue, Suite 300, Pasadena, CA 91101 TELEPHONE NO.: 626-431-2787 FAX NO. *(Optional):* 626-431-2788 E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):* Petitioners CSA and CMA	Superior Court Case Number: CPF-10-510191 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: California Society of Anesthesiologists, et al. RESPONDENT/REAL PARTY IN INTEREST: Arnold Schwarzenegger, Governor	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party *(name)*: Cal. Society of Anesthesiologists, Cal. Med. Assn.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 31, 2011

Matthew S. Levinson
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

The California Society of Anesthesiologists ("CSA") and the California Medical Association ("CMA") petition for extraordinary relief from the denial of their motion for summary judgment in the San Francisco Superior Court action entitled *California Society of Anesthesiologists and California Medical Association v. Schwarzenegger* (No. CPF-10-510191). The real parties in interest are the Governor of the State of California and the California Association of Nurse Anesthetists. It is anticipated that the California Hospital Association will appear as *amicus curiae* against petitioners, just as it did in the Superior Court.

The issue is whether Governor Arnold Schwarzenegger was wrong to opt out of the federal regulations promulgated by the Centers for Medicare and Medicaid Services, a branch of the Department of Health and Human Services, that require physician supervision of nurse anesthetists. (42 C.F.R. § 482.52(a)(4).) The federal regulations permit the governor to opt out only if, inter alia, doing so would be consistent with California law – *i.e.*, only if California law permits nurse anesthetists to practice anesthesia without physician supervision. (42 C.F.R. § 482.52(c)(1).) In other words, the case presents the question of whether California law imposes physician supervision on nurse anesthetists, not whether the law should do so.

The answer is yes. California law, which includes regulations and common law as well as statutes, requires physician supervision. Accordingly, the Superior Court erred in denying CSA and CMA's motion for summary judgment.

The Superior Court also erred in granting the cross-motions for summary judgment filed by the Governor and the California Association of Nurse Anesthetists. The CSA and the CMA have filed notice of appeal from the Superior Court judgment, which was entered on January 24, 2011. The issues in that appeal are substantially the same – but not identical to – the issues in this writ proceeding.

Therefore, petitioners urge the Court to grant an alternative writ and then consolidate this proceeding for extraordinary relief with that appeal.

Finally, petitioners CSA and CMA anticipate that the decision by this Court will resolve the issues in this case and that it will not be necessary for the matter to be remanded to the Superior Court for further proceedings.

ISSUES PRESENTED

There are two issues for consideration in this proceeding, one substantive and one procedural:

(1) Whether it is consistent with California law for nurse anesthetists to perform anesthesia without any degree of physician supervision, whether in hospitals or elsewhere? Put alternatively, does California law require any degree of physician supervision of nurse anesthetists' performance of anesthesia?

(2) How to ascertain California law, particularly as it relates to supervision requirements of nurse anesthetists and the responsibility of California physicians to supervise the rendition of medical care?

California law does require physician supervision of nurse anesthetists' practice of anesthesia. Moreover, determination of California law requires legal analysis, not mere adoption of an informal position of a regulatory agency.

SUMMARY OF REASONS TO EXERCISE WRIT REVIEW

This lawsuit arises from a decades-long campaign by the professional societies of nurse anesthetists, the American Association of Nurse Anesthetists and the California Association of Nurse Anesthetists. Their goal has been to "rescind" the physician supervision requirement and, thereby, achieve status as "licensed independent practitioners." The order denying petitioners' motion for summary judgment presents questions of significant public importance. Moreover, writ review is further warranted because there is arguably no legal remedy available by which the order may be reviewed on appeal from the judgment entered after cross-motions for summary judgment were entered against petitioners.

A. Writ Review Is Warranted Because The Issues Present Matters Of Significant Public Importance

The substantive issue of whether California law permits nurse anesthetists to practice anesthesia without physician supervision is of importance not only to all California physicians who specialize in anesthesiology and all California nurse anesthetists, but also to all California physicians who practice surgery and to all Californians who are or will become surgical patients.

The procedural issue of how California law is determined is of interest not only to the parties, but also to all California regulatory agencies, the California Legislature, and to all other persons whose responsibilities include the evaluation of California law as it relates to

the way in which regulatory agencies and the executive branch interpret California law.

These issues arise from the decision of Governor Schwarzenegger, based largely upon a position of the California Board of Registered Nursing, to opt out of federal requirements for physician supervision of nurse anesthetists. The Superior Court found that California law on the point is "ambiguous," but nevertheless agreed with the Governor that California law does not require physician supervision of nurse anesthetists. The effect of the decision, at least for purposes of those physicians, nurse anesthetists, patients, and hospitals that look to Medicare for reimbursement, will be to eliminate physician supervision of anesthesia services.

Obviously, the issues are of profound importance. The petition should be granted, and the issues in this proceeding for extraordinary relief be considered with the corresponding appeal.

B. There Is Arguably No Adequate Legal Remedy By Which The Order May Be Reviewed On Appeal Following Judgment

On cross-motions for summary judgment, where one is granted and the other denied, as in the underlying action, the latter should properly be reviewed on appeal from the judgment. (See *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343; *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 836.) However, there is authority that could be read to the contrary – that a denial of a summary judgment may not be reviewed on appeal from judgment. (*Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th

1242.) Accordingly, petitioners file this writ petition to preserve the right to seek review of the order denying their summary judgment on appeal from the judgment.

PETITION FOR WRIT OF MANDATE

By this verified petition, petitioner, The California Society of Anesthesiologists and the California Medical Association, allege as follows:

1. Petitioners are:

(a) The California Society of Anesthesiologists ("CSA"), a California corporation, is a physician organization dedicated to promoting the highest standards of the profession of anesthesiology, fostering excellence through continuing medical education, and serving as an advocate for anesthesiologists and their patients. Its approximately 4,000 members are licensed physicians specializing in anesthesiology, including members practicing the subspecialty of pain medicine or pain management (1 AA 133 [Tab 8]); and

(b) The California Medical Association ("CMA"), a not-for-profit, professional association of approximately 35,000 members, the vast majority of whom are licensed physicians practicing medicine in California or in residency training in all specialties and settings, including licensed physicians who are board-certified and/or trained to practice the specialty of anesthesiology. (1 AA 136 [Tab 9].)

2. Respondent is the Superior Court of the State of California, County of San Francisco.

3. Real Parties in Interest are:

(a) Arnold Schwarzenegger, as Governor of the State of California; and

(b) The California Association of Nurse Anesthetists, which moved for and was granted leave to file a complaint in intervention.

4. There are several types of anesthesia, including "general anesthesia." General anesthesia means "a controlled state of depressed consciousness or unconsciousness, accompanied by partial or complete loss of protective reflexes, produced by a pharmacologic or nonpharmacologic method, or a combination thereof." (See Bus. & Prof. Code, § 1646.)

5. The Centers for Medicare and Medicaid Services ("CMS"), an agency of the United States Department of Health and Human Services, charged with the responsibility of administering the federal Medicare program, has had and does continue to have a regulation to make Medicare payments for anesthesia administered by a nurse anesthetist only if the nurse anesthetist is "under the supervision of the operating practitioner or of an anesthesiologist who is immediately available if needed." (42 C.F.R. § 482.52(a)(4) [1 AA 121 [Tab 7]]; 66 Fed.Reg. 56762 [1 AA 124 [Tab 7]].)

6. However, in 2001, CMS implemented regulations permitting that a hospital participating in Medicare may opt-out of the supervision requirement if the governor of the State in which the hospital is located:

> "submits a letter to CMS signed by the Governor, following consultation with the State's Boards of Medicine and Nursing,

> requesting exemption from physician supervision of CRNAs. The letter form the Governor must attest that he or she has consulted with the State Boards of Medicine and Nursing about issues related to access to and the quality of anesthesia services in the State and has concluded that it is in the best interest of the State's citizens to opt-out of the current physician supervision requirement, *and that the opt-out is consistent with State Law*."

(42 C.F.R. § 482.52(c)(1)) [1 AA 121-122 [Tab 7]], emphasis added.)

7. This requirement and the opt-out provision are paralleled in two other provisions as well. (See 42 C.F.R. §§ 416.42(b)(2) and (c); and 485.639(c) and (e).)

8. In June 2009, the Governor sent a letter to CMS stating:

> Pursuant to the final rule published in the November 13, 2001, Federal Register, Volume 56, Number 219, I am exercising the option to exempt the State of California from the requirement that certified registered nurse anesthetists be supervised by a physician.
>
> Having consulted with the California Board of Medicine and California Board of Registered Nursing and having determined that this exemption is consistent with state law, I have concluded that it is in the interests of the people of California to opt out of this requirement.

(1 AA 140 [Tab 9].)

9. CMS sent a letter in reply, stating:

> I am writing to confirm receipt of your letter dated June 10, 2009, requesting state exemption from the federal requirement for physician supervision of Certified Registered Nurse Anesthetists (CRNAs) in California.
>
> We received your letter by way of electronic mail on July 17, 2009. Given the standard set forth in the final rule published on November 13, 2001 (66 Fed. Reg. 56762), your request for exemption was granted upon the date of receipt. In the letter, you attested that you had consulted with the State Boards of Medicine and Nursing about issues related to access to and quality of anesthesia services and concluded that it is in the best interest of the citizens of your state to opt-out of the current supervision requirements.

(1 AA 142 [Tab 9].)

10. The California Board of Registered Nursing has not taken any regulatory action regarding the opt-out communication from the Governor.

11. In February 2010, CSA and CMA filed the underlying Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and Request for Declaratory Relief action against the Governor. (1 AA 1 [Tab 1].) It alleged, inter alia, that Medicare regulations provide that participating hospitals may allow CRNAs to administer anesthesia only under physician supervision, but that a Governor of a state may opt-out of such requirement if the Governor certifies that certain conditions are met. (1 AA 2 [Tab 1] at ¶ 2.) The Governor of

the State of California has submitted such an "opt-out" letter. And, the Governor's certification – that the opt-out is consistent with state law – is incorrect. (1 AA 2 [Tab 1] at ¶ 3.) In other words, state law does not permit nurse anesthetists to practice anesthesia unsupervised by a physician.

12. The Governor filed an answer to the Petition. (1 AA 13 [Tab 2].)

13. The California Association of Nurse Anesthetists ("CANA") moved for leave to file a verified complaint in intervention as a respondent in the action and the trial court granted the motion over the opposition of CSA and CMA. CANA then filed a Complaint in Intervention. (1 AA 21 [Tab 3].) CANA alleged that, without the opt-out, Californians' would face "cascading adverse effects on price and availability of" trauma services. (1 AA 25 [Tab 3] at ¶ 15.)

14. CSA and CMA filed a motion for summary judgment. (Tabs 3-14.) CANA filed opposition (Tabs 15-24) as did the Governor (Tabs 29-36.) CSA and CMA filed a reply. (Tabs 36-44.)

15. CANA and the Governor filed cross-motions for summary judgment. The motion and cross-motions presented various substantive issues, the primary of which are whether California law requires that nurse anesthetists must be supervised by a physician, and whether nurse anesthetists in California are "licensed *independent* practitioners."

16. The cross-motions also presented procedural issues: How do judges, lawyers, and others determine what applicable California law is? How did Governor Schwarzenegger determine

what California law is? How did the Executive Director of the Board of Registered Nursing, Ruth Ann Terry, on whose correspondence the Governor expressly relied, determine what California law is?

17. California Hospital Association filed an amicus brief and evidence in connection therewith. (Tabs 24-28.) Petitioners filed a response. (Tab 45.)

18. A hearing was held on the cross-motions on October 8, 2010. A copy of the reporter's transcript of the hearing is attached as Tab 46.

19. The trial court denied the petitioners' motion for summary judgment. A copy of the Order denying petitioners' motion for summary judgment, entered on December 27, 2010, is attached as Tab 47. (By way of that order, the trial court also granted motions for summary judgment brought by the Governor and CANA, which are the subject of petitioners' appeal from judgment.)

20. Notice of Entry of Order/Notice of Ruling was served by mail on January 7, 2011. (Tab 48.)

21. This petition is filed within 25 days of the service of the Notice by mail (20 days per Code of Civil Procedure section 437c, subd. (m)(1), plus 5 days per Code of Civil Procedures section 1013, subd. (a)).

22. The Governor of California should be directed to withdraw the "opt out" letter. The Governor of California should be directed to arrange for the appropriate evaluation of what California law is, and the Governor will find that the appropriate evaluation of California law is that there is a supervision requirement for California

nurse anesthetists. Declaratory relief is also warranted – the Court should declare that lack of supervision of nurse anesthetists is not consistent with California law.

PRAYER

WHEREFORE, petitioners California Society of Anesthesiologists and California Medical Association pray that this Court:

1. Issue an alternative writ and hold the proceedings on this petition pending petitioners' appeal from summary judgment entered against it and in favor of real parties, and consolidate the writ proceeding with the appeal;

2. In conjunction with the consideration of petitioners' appeal from the summary judgment, issue a peremptory writ of mandate, or such other appropriate relief as is warranted by the facts, directing respondent court to vacate its order filed December 27, 2010, which denied petitioners' motion for summary judgment, and issue a new and different order directing that such motion be granted, or in the alternative, to show cause before this Court why it should not be directed to do so;

3. Award petitioners their costs herein; and

4. Grant such other relief as may be just and proper.

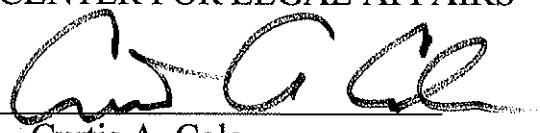
Dated: January 31, 2011

COLE PEDROZA LLP,

HASSSARD BONNINGTON LLP,

and

CALIFORNIA MEDICAL ASSOCIATION
CENTER FOR LEGAL AFFAIRS

By 

Curtis A. Cole
Matthew S. Levinson
Attorneys for Petitioners CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS and CALIFORNIA MEDICAL ASSOCIATION

VERIFICATION

I, Curtis A. Cole, declare as follows:

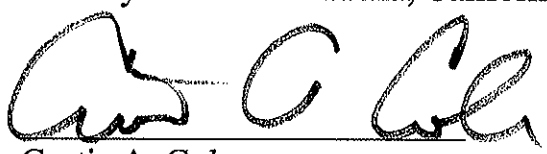
1. I am an attorney licensed to practice in the State of California and am a partner in the law firm Cole Pedroza LLP, co-counsel for the California Society of Anesthesiologists and the California Medical Association in this original proceeding.

2. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and know its contents. The facts alleged in the petition are within my knowledge and I know those facts to be true.

3. Exhibits 1 through 48 in the Appendix of Supporting Exhibits to The Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief, are true and correct copies of the original documents.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 31st day of January 2011 at Pasadena, California.



Curtis A. Cole

MEMORANDUM OF POINTS AND AUTHORITIES

The order denying CSA and CMA's motion for summary judgment should be reversed following independent review. Denial of a summary judgment motion is *de novo*. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.)

SUMMARY OF ARGUMENT

The California Legislature has not said that California nurse anesthetists are "licensed *independent* practitioners." At most, the California Legislature has simply acknowledged the "expanded" role of nurses as collaborative providers. That is, California nurse anesthetists, like California nurse practitioners, California physician assistants, and others, are collaborative providers. They do not supplant physicians as the providers of medical care in California. They do not engage in the independent, unsupervised practice of medicine.

Governor Schwarzenegger was wrong. The California Association of Nurse Anesthetists was wrong. They stated what they thought the law should be. None of them is qualified to determine what the law is.

The California Attorney General has issued a number of opinions on the subject. Those opinions are consistent with the conclusion that California nurse anesthetists are and must be supervised by physicians. Admittedly, there is no California Attorney

General opinion that is directly on point, but the ones that that address the subject area are compelling.

Even more compelling is the fact that the Board of Registered Nursing's Nursing Practice Committee Meeting entertained thanks for reviewing the Governor's decision to "remove medical supervision from CRNA practices" at its committee meeting on February 24, 2010. (<http://www.rn.ca.gov/pdfs/meetings/np/np_materials _feb10.pdf > (as of January 26, 2010).) This is recognition that, prior to the opt-out, California law required physician supervision, but that the Governor purportedly rescinded it by his pronouncement by letter to CMS.

The California Board of Registered Nursing is responsible for promulgating regulations applicable to nurse anesthetists. Despite the position of the Executive Director of that board, however, there are no such regulations. That is, there is no California law defining the details of regulation of California nurse anesthetists as "independent" of California physicians. Compare that with the extraordinarily detailed California law, in the form of regulations relating to physicians.

DISCUSSION

I. THE TRIAL COURT'S ORDER IS ERRONEOUS BECAUSE THE GOVERNOR'S DECISION TO OPT OUT IS NOT CONSISTENT WITH CALIFORNIA LAW

The Governor's opt-out election is not consistent with California law, as demonstrated by a plethora of points.

The substantive issue on appeal is not whether anesthesia falls within a certified registered nurse anesthetist's "scope of practice," but rather, regardless of that scope, whether California law permits nurse anesthetists to administer anesthesia without physician supervision. It does not. There is no provision in California law that permits such practice. Nurses' authority to engage in acts that constitute the practice of medicine must be expressed affirmatively by law. Moreover, California regulations and statues require physician supervision of CRNAs, if not in all administrations of anesthesia then at least in some significant circumstances.

A. California Law Expressly Requires Supervision Of Nurse Anesthetist Practice In Many Situations

1. The California Administrative Code Requires Supervision Of Nurse Anesthetists In Trauma Facilities

The California Administrative Code requires supervision of nurse anesthetists in facilities that are Class I, II, and III trauma facilities. The Administrative Code is undisputedly a component of California law. (See, *e.g.*, Gov. Code, § 11342.600.)

The Administrative Code requires that nurse anesthetists be supervised by an anesthesiologist in facilities that include Level I, II, and III trauma centers. For Level II centers the regulations require as follows:

> Level II [trauma care] shall be promptly available with a mechanism established to ensure that the anesthesiologist is in the operating room when the patient arrives. This requirement may be fulfilled by senior residents or **certified registered nurse anesthetists** who are capable of assessing emergent situations in trauma patients and of providing any indicated treatment and are **supervised by the staff anesthesiologist.** In such cases, the staff anesthesiologist on-call shall be advised about the patient, be promptly available at all times, and be present for all operations.

(Cal. Code Reg., tit. 22, § 100259(a)(9)(B), emphasis added.)

Level I centers must make:

> [a]nesthesiology immediately available. This requirement may be fulfilled by senior residents or **certified registered nurse anesthetists** who are capable of assessing emergent situations in trauma patients and of providing treatment and are **supervised by the staff anesthesiologist.**

(Cal. Code Reg., tit. 22, § 100260(d), emphasis added.)

With regard to Level I and Level II pediatric trauma centers,

> Level II [pediatric trauma care] shall be promptly available with a mechanism

> established to ensure that the anesthesiologist is in the operating room when the patient arrives. This requirement may be fulfilled by a senior resident or **certified registered nurse anesthetists** with pediatric experience who are capable of assessing emergent situations in pediatric trauma patients and of providing any indicated treatment and are **supervised by the staff anesthesiologist.**

(Cal. Code Reg., tit. 22 § 100261(a)(9)(B), emphasis added.)

And, Level III trauma centers must make available:

> [a]nesthesiology, on-call and promptly available with a mechanism established to ensure that the anesthesiologist is in the operating room when the patient arrives. This requirement may be fulfilled by senior residents or certified **registered nurse anesthetists** who are capable of assessing emergent situations in trauma patients and of providing any indicated emergent anesthesia treatment and are **supervised by the staff anesthesiologist.**

(Cal. Code Reg., tit. 22 § 100263(j)(2), emphasis added.)

It is noteworthy that these regulations, adopted in 1986 and 1999, post date *Chalmers-Francis v. Nelson* (1936) 6 Cal.2d 402, as well as the 1983 and 1984 Attorney General opinions, which the Real Parties in Interest and the Respondent Court stated were not controlling. Indeed, the statute underlying the regulations was not enacted until 1983, the same year the Nurse Anesthetist Act was adopted.

2. Nurse Anesthetists Must Be Supervised When Administering Anesthesia At The Order Of A Dentist

Nurse anesthetists must be supervised when administering anesthesia at the order of a dentist. Business and Professions Code section 1646.1, subdivision (b), requires supervision when a dentist authorizes anesthesia. It states: "No dentist shall order the administration of general anesthesia unless the dentist is physically within the dental office at the time of the administration." Section 1646.8 corroborates that the requirement of the dentist's physical presence constitutes a supervision requirement. It provides: "Nothing in this chapter shall be construed to authorize a dentist to administer or directly supervise the administration of general anesthesia for reasons other than dental treatment . . . ." (Bus. & Prof. Code, § 1648.8.)

The trial court's Order addresses Section 1646.1, but its discussion is mistaken because it limited itself to the question of whether Business & Professions Code section 2725, part of the Nursing Practice Act, requires supervision. But, the opt-out procedure requires that lack of supervision be consistent with state law, not merely Section 2725. The issue is whether any California law requires supervision of nurse anesthetists. Section 1646.1 includes such a requirement.

B. It Is The Default Rule That Nursing Practice Is Subject To The Supervision Of The Patient's Physician, And No Law Exempts Nurse Anesthetists From Supervision

1. Supervision Is Required By The Physician-Patient Relationship

It is the default rule that nursing practice is subject to the supervision of the patient's physician. Removing the supervision requirement violates the default rule that nurses report to, are answerable to, and subject to the direction of the patient's physician. Patients look to their physicians for their diagnosis and treatment. It is with the physician that a physician-patient privilege forms. The patient who receives anesthesia – an introduction into the body that involves the penetration of human tissue, and therefore constitutes the practice of medicine (Bus. & Prof. Code, § 2051) – is the physician's patient. (See 66 Ops. Cal. Atty. Gen. 427 (1983) [1983 WL 144830 (Cal. A.G.) at *10].) "It is the physician who must ascertain the relevant facts about the case, it is the physician who must interpret the results and make a diagnosis, and it is the physician who is responsible for the patient and on whose professional judgment the patient's well-being depends . . . . The responsibilities and duties always remain with the physician." (*Ibid.*)

Nursing practice is derivative of the physician's practice. Indeed, the purpose of nursing practice is to further the interest of the patient in accomplishing the purpose for which the physician is consulted.

"The concept of direct and immediate supervision by a physician who bore responsibility for treating the patient was a crucial factor in permitting registered nurses to perform many acts which constitute the practice of medicine." (64 Ops. Cal. Atty. Gen 240 (1981) [1981 WL 126737 (Cal. A.G.) at *5], citing *Chalmers-Francis Nelson, supra,* 6 Cal.2d at 404-405, and *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 83-84.) Indeed, "[W]hen the Legislature amended the Nursing Practice Act in 1974: although not specifically authorized to do so by statute, a registered nurse could nonetheless, according to the case law looking to custom and practice, perform 'certain' acts constituting the practice of medicine to assist a physician in a particular case provided that there was appropriate direction and supervision by the physician over the nurse's activity," something of which "the Legislature must have been aware." (66 Ops. Cal. Atty. Gen. (1983) [1983 WL 144830 (Cal. A.G.)], at *8.)

This well recognized requirement of physician supervision was not eliminated by the 1974 amendment to the Nursing Practice Act or the adoption of the 1983 Nurse Anesthetist Act. Rather, the 1974 amendment to the Nursing Practice Act merely increased the functional scope of nursing, but did not license nurses to engage in acts that would otherwise constitute the practice of medicine absent physician supervision. Furthermore, the 1983 Nurse Anesthetist Act does not authorize certified nurse anesthetists to engage in practice of anesthesia; rather, it merely provides for a certification mechanism and prohibition on use of the nurse anesthetist title without such certification.

The fact that the nature of nursing practice, regardless of its scope, is derivative and an outgrowth of the physician-patient relationship is reflected not only in the nurse anesthetists supervision requirements, but also in related areas of the law.

Evidence Code section 992 provides a physician-patient privilege. It does not provide a nurse-patient privilege. Communications with nurses are encompassed within the ambit of the privilege, but only with regard to communication between patient and physician, and to others "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of *the purpose for which the physician is consulted.*" (Evid. Code, § 992, emphasis added.) Whatever the scope of a nurse's practice, its *sine qua non* is derivative of the holder of the physicians and surgeons license.

Similarly, California law prohibits the corporate practice of medicine. (Bus. & Prof. Code, § 2400.) This is statutory recognition that only physicians may hold a physician-patient relationship with a patient, and that they are ultimately responsible for that relationship. The nature and purpose of the "corporate bar" further supports the conclusion that whatever the scope of a nurse's practice, it is still derivative of the physician's purpose to diagnose and treat patients, something only physicians may do.

2. Decisional Authority Recognizes The Supervision Requirement

The Supreme Court recognizes the supervision requirement, and applies the default rule – that nursing service is subject to physician supervision – in the context of a nurse anesthetist's provision of anesthesia. In *Chalmers-Francis, supra,* 6 Cal.2d 402, the Supreme Court considered the issue of whether a nurse administering anesthesia during surgery engaged in the unlawful practice of medicine. One rationale for the Court's decision was that the nurses' were "carrying out the orders of the physician to whose authority they are subject," which the Court described as "the legally established rule." (*Id.* at 404-405.) Furthermore, the Court explained that "the surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation." (*Id.* at 405.) The Court of Appeal echoed this point in *Magit v. Board of Medical Examiners, supra,* 57 Cal.2d 74, stating that "[u]nder some circumstances, persons not licensed to practice medicine in California may legally perform some medical acts, including the administration of anesthetics. For example . . . . in *Chalmers-Francis v. Nelson* (1936) 6 Cal.3d 402, 57 P.2d 112, [it] was held that a licensed registered nurse should not be restrained from administering general anesthetics in connection with operations under the immediate direction and supervision of the operating surgeon and his assistants." (*Magit, supra,* 57 Cal.2d at 82-83.)

Similarly, in 1985, even after the adoption of the Nurse Anesthetist Act, the supervision requirement was recognized by the

Ninth Circuit Court of Appeals. In *Bhan v. NME Hospitals, Inc.* (9th Cir. 1985) 772 F.2d 1467, the Court explained:

> Under California law, in administering anesthesia a nurse must act at the direction of, and under the supervision of, inter alia, a physician. See *Magit v. Board of Medical Examiners*, 57 Cal.2d 74, 83, 17 Cal.Rptr. 488, 491, 366 P.2d 816, 819 (1961); *Chalmers-Francis v. Nelson*, 6 Cal.2d 402, 404-05, 57 P.2d 1312, 1313 (1936); Cal.Bus. & Prof.Code § 2725 (West 1974); 22 Cal.Admin.Code §§ 51326(a)(1), 70235(a); 64 Ops.Cal.Att'y.Gen. 240, 250 (1981).

(*Bhan, supra,* 772 F.2d at 1471.) The Court also noted that "the supervising physician is not required to be an M.D. anesthesiologist, but might be any attending physician, dentist or podiatrist. See, e.g., 67 Ops.Cal.Atty.Gen. 122 (1984)." (*Bhan, supra,* 772 F.2d at 1471.)

These rulings are consistent with and reflect the rule that nurses, including those administering anesthesia, are subject to physician supervision.

3. State Attorney General Opinions Explain That The Supervision Requirement Was Not Removed By The 1974 Amendment To The Nursing Practice Act

Several opinions by the California Attorney General establish that nurse anesthetists must be supervised by a physician.

A critical document is the Attorney General's 1983 opinion. This opinion considered whether under Section 2725(b), as amended

in 1974, a nurse could administer to a patient a chemical contrast agent for purpose of diagnostic imaging in the absence of physician supervision. The Attorney General relied on and applied the Supreme Court decisions in *Chalmers* and *Magit* in determining that a nurse who administers a contrast agent to a patient for purposes of a diagnostic imaging study must be under the supervision of a physician. (66 Ops. Cal. Atty. Gen. 427 (1983) [19873 WL 144830 (Cal. A.G.)].) In fact, the trial court recognized that the 1983 Attorney General Opinion reads and applies *Chalmers* for the point that administration of anesthesia without physician supervision constitutes unlawful practice of medicine. (13 AA 3104:26 – 3105:12 [Tab 46].)

The most important point of the Attorney General's opinion is that, at the time of the 1974 amendment to the Nursing Practice Act, the Legislature was aware of the supervision requirements imposed on nursing practice, including with regard to a nurse's practice of anesthesia; and, that the Legislature presumably intended to carry that practice forward. Specifically, it explains that when the Nursing Practice Act was amended, physician supervision was at the core of the permission for a nurse to engage in acts that would constitute the practice of medicine.

> At the point when the Nursing Practice Act was amended in 1974 then, the concept of supervision by a physician who would bear responsibility for treating a patient was considered to be the sine qua non for permitting a registered nurse to assist a physician in a case by performing many acts

> which constitute the practice of medicine.
> (Cf. 64 Ops.Cal.Atty.Gen., [ ] 246-247.)

(66 Ops. Cal. Atty. Gen. 427 (1983) [1983 WL 144830 (Cal. A.G.), at *8].)

The supervision requirement applied to a nurse's practice of anesthesia, as recognized in *Chalmers-Francis, supra,* and *Magit, supra.*

> Thus for example, it was held that a registered nurse might, at the immediate direction and under the supervision of a physician present in an operating room, administer general anesthesia to assist with a surgical operation (*Magit v. Board of Medical Examiners*, supra, 57 Cal.2d at 84; *Chalmers-Francis v. Nelson, supra*, 6 Cal.2d at 404-405; 56 Ops.Cal.Atty.Gen. []) and that a nurse might, providing there was effective supervision by a physician, furnish drugs to a patient (57 Ops.Cal.Atty.Gen. [] 98).

(66 Ops. Cal. Atty. Gen. 427 (1984) [1983 WL 144830 (Cal. A.G.), at *8].)

In amending the Act, the Legislature did not change the existing supervision requirement.

> The new Act must be viewed in light of that decisional background [citation] in which the concept of supervision by a physician who would bear responsibility for treating a patient, was the crucial factor in permitting registered nurses to assist a physician in a case by performing certain functions which constitute the practice of medicine [citation].

> Since the Legislature did not significantly redefine the scope of nursing practice to compromise that background, we must presume that the Legislature intended that it be carried forward in interpreting the statute as amended. [Citations.]

(*Ibid.*)

Based upon the legal background existing at the time of the 1974 amendment to the Nursing Practice Act, coupled with the Legislature's awareness thereof, and its election against changing that background, the Attorney General concluded that the Legislature intended to maintain the supervision as stated in *Chalmers-Francis* and *Magit.*

> We therefore believe the Legislature wished to adopt, ratify and continue the understandings that existed under prior law as expressed in *Chalmers-Francis*, *Magit* and our 1974 opinion regarding the scope of nursing practice. Remaining viable, therefore, were the observations that registered nurses, although not specifically authorized by statute, are nonetheless possessed of special skills which enable them to assist physicians and, according to custom and practice, might "perform certain functions under the supervision of a physician which, but for such supervision would constitute the [illegal] practice of medicine." [Citations.] Under the current Act then, as before, appropriate supervision by a physician over a nurse's activity would be essential for a registered nurse to perform certain functions and procedures which

> commonly accepted custom and usage might see the nurse perform.

(66 Ops. Cal. Atty. Gen. 427 (1984) [1983 WL 144830 (Cal. A.G.), at *8].)

In 1984 the Attorney General issued another opinion addressing the issue of the authority of certified registered nurse anesthetists. (67 Ops. Cal. Atty. Gen. 122 (1984).) In this opinion, the Attorney General was asked to consider whether CRNAs could lawfully administer regional anesthetics pursuant to "standardized procedures." The Attorney General concluded a CRNA could *not* lawfully administer either general or regional anesthetic pursuant to standardized procedures. The Attorney General further concluded Business & Professions Code section 2725 authorizes a CRNA to administer general and regional anesthetics only under *direct physician supervision.*

In this case, the Governor, represented by the Attorney General, addresses the Attorney General Opinions only by stating that they address nursing but not nursing by CRNAs. That effort to distinguish its Opinions is not persuasive for two reasons. First, the authority on which the Governor relies for his claim that California law permits CRNAs to practice anesthesia unsupervised, is the Nursing Practice Act, which applies to all registered nurses. Second, the subsequent enactment of the Nurse Anesthetist Act does not confer any authority to practice anesthesia.

The trial court's distinction of the 1983 Attorney General opinion is based upon an erroneous reading of Business & Professions Code section 2725(b)(2). To be sure, the order incorrectly concludes

that Section 2725(b)(2) authorizes administration of anesthetics. (13 AA 3153 [Tab 47] at line 16.) Neither the term "anesthetics" nor "anesthesia" appear therein. What is more, the trial court's order does not address, let alone refute, the Opinion's reasoning.

4. The Nurse Anesthetist Act Does Not Authorize Administration Of Anesthesia In The Absence Of Physician Supervision, But Instead Recognized An Additional Measure Of Supervision

The Nurse Anesthetist Act (Bus. & Prof. Code, §§ 2825, *et seq.*) does not authorize administration of anesthetics in the absence of physician supervision. In essence, the Act only allows for the conveyance of a certification and penalties for those who hold themselves out as nurse anesthetists absent such certification. (Bus. & Prof. Code, § 2829.)

Instead of authorizing administration of anesthetic in the absence of physician supervision, the Nurse Anesthetist Act imposes an additional measure of supervision. It provides that the "utilization of a nurse anesthetist to provide anesthesia services in an acute care facility shall be . . . at the *discretion* of the physician." (Bus. & Prof. Code, § 2827.) The primary definition of "discretion" in Black's Law Dictionary is "wise conduct and *management*; cautious discernment; prudence." (Bryan Garner, Black's Law Dictionary (8th Ed. 2004) 499, emphasis added.) This requirement is consistent with the general supervisory role of a physician toward management of that physician's patient.

C. The Trial Court's Reliance On Section 2725 Of The Nursing Practice Act Is Misplaced Because That Statute Does Not Authorize Nurse Anesthetists to Administer Anesthesia Unsupervised By A Physician

Section 2725 does not authorize nurse anesthetists to administer anesthesia unsupervised by a physician. The Nursing Practice Act, of which Section 2725 is a part, does not authorize administration of anesthesia by a nurse. Section 2726 states: "Except as otherwise provided herein, this chapter confers no authority to practice medicine or surgery." (Bus. & Prof. Code, § 2726.) The Trial Court's Order relies on Section 2725 as the purported authority of nurse anesthetists to administer anesthesia. But, that pivotal reliance is not well founded. At bottom, the trial court conflates the concept of scope of function with the distinct concept of depth or degree of authority to perform such function.

1. Section 2725 Does Not Establish The Scope Of Practice Of Nurse Anesthetists

Section 2725, a part of Chapter Six of Division 2 of the Business & Professions Code, does not establish the scope of practice of a nurse anesthetist. Business & Professions Code section 2833.6, also a part of the same Chapter 6, states that "This chapter is not intended to address the scope of practice of, and nothing in this chapter shall be construed to restrict, expand, alter, or modify the existing scope of practice of, a nurse anesthetist." (Bus. & Prof. Code, § 2833.6.)

Note that Section 2833.6 was added by the Legislature as part of the Nurse Anesthetist Act in response to criticism that without such a provision there would be confusion regarding the "lawful scope of nurse anesthesia." (3 AA 656 [Tab 12].) At most, Section 2725 can be read to describe the scope of practice of registered nurses in general.

Thus, there is no statutory statement of the scope of practice of nurse anesthetists. I f one were to infer authority of a nurse anesthetist to administer anesthesia from Section 2725, one would have to equally infer the authority for all registered nurses, not merely nurse anesthetists.

Even if Section 2725 defined the functional scope of nurses' practice, it does not establish the depth of their authority to act. Although Section 2725 may have expanded the scope of functions nurses may provide, it does not expand their authority to engage in such function absent physician management and oversight. Indeed, "[a] physician cannot delegate to a nurse his authority to diagnose and to direct a course of treatment that he deems appropriate although he may utilize the services of others to help him ascertain the facts and to carry out his ordered treatment." (67 Ops. Cal. Atty. Gen. 122 (1984) [1984 WL 162046 (Cal. A.G.), at *17].)

2. The Trial Court's Interpretation Of Section 2725 Is Unreasonable Because It Would Empower All Nurses – Not Merely CRNAs – To Administer Anesthesia

The trial court's interpretation of Section 2725 as authorizing unsupervised administration of anesthesia by nurse anesthetists is unreasonable. This is because Section 2725 applies to all registered nurses, not only CRNAs. If Section 2725 were to authorize unsupervised administration of anesthesia, then all nurses could administer anesthesia merely upon a doctor's order, which undisputedly is not the case. Undoubtedly, the nurse anesthetists would oppose permitting a registered nurse who did not have training and certification as a nurse anesthetist by the Board of Registered Nursing to administer anesthesia.

Several points are noteworthy. First that the Superior Court's Order that physician supervision is unnecessary rests upon Section 2725, not on any other provisions. Second, the Order erroneously states that 2725(b)(2) expressly authorizes a nurse to administer anesthesia. Anesthesia does not appear in the section. Third, the Superior Court noted that there is no supervision requirement in Section 2725.

If there is no physician supervision requirement, and the authority for a nurse to practice anesthesia stems from Section 2725, then it would logically follow that any nurse – not only nurse anesthetists – would be able to practice anesthesia without supervision. It would also follow that a nurse may do anything else

within his or her functional scope of practice, as defined by Section 2725, subdivision (b), without physician supervision.

3. In Any Event, The Term "Order" Which Is Present In Section 2725 Implies There Is Physician Supervision

The term "order" which is present in Section 2725 implies a requirement of physician supervision of administration of anesthesia by nurse anesthetists. No definition of supervision is included within Section 2725, but a definition is found in Title 22 of the California Code of Regulations. This definition, to the extent upon which it is relied, reveals that an order or direction of an employee or subordinate is tantamount to supervision. It states: "Supervision means to instruct an employee or subordinate in his duties and to oversee or direct his work, but does not necessarily require the immediate presence of the supervisor." (Cal. Code Reg., tit. 22, § 70065(a).)

In other words, there is supervision required where a physician must instruct the nurse anesthetist in his duties and directs his work. It is undisputed that a physician must issue an order to a nurse anesthetist to administer anesthesia. This order constitutes an instruction and direction. Instruction and direction constitute supervision. Therefore, supervision is required.

The absence of the term "supervision" is not meaningful because, within the scope of the Nursing Practice Act, the default is that supervision is required. What is meaningful is that the statutory subsection on which the trial court, CANA, and the Governor rely (Section 2725, subdivision (b)(2)) requires physician direction but

subdivisions (b)(1), (3), and (4) do not. More specifically, subdivision (b)(2) permits nurse practice only when "ordered by and within the scope of licensure of a physician." This language connotes a particular need for physician involvement and oversight.

The examples of the Legislature's use of the term "supervision" in other statutes are not analogous to Section 2725. Rather, they address expansion of a particularly trained nurse's authority to conduct what would otherwise be the practice of medicine, *e.g.*, midwifery. Here, there is no authorization in Nursing Practice Act or in the Nurse Anesthetist Act that gives nurse anesthetists authority to perform anesthesia.

D. Section 2725.1 Imposes A Supervision Requirement Regarding Nurse Anesthetists

Section 2725.1 implicitly requires that physicians supervise administration of anesthesia by nurse anesthetists. It prohibits a nurse from dispensing substances included in the California Uniform Controlled Substances Act. "Dispensing of drugs by a registered nurse . . . shall not include substances included in the California Uniform Controlled Substances Act." (Bus. & Prof. Code, § 2725.1.) Controlled substances include anesthetics (*e.g.*, fentanyl). (See, *e.g.*, Health & Safety Code, § 11055, subd. (c)(8).) What is more, the Uniform Controlled Substances Act defines "administration" as by a practitioner or an agent of the practitioner in the practitioner's presence. (Health & Saf. Code, § 11002, subd. (a).) A "practitioner"

does not include a CRNA or any nurse, except under very limited circumstances. (Health & Saf. Code, § 11026.)

Similarly, Section 2762 also deems it unprofessional conduct for a nurse to "furnish or administer to another[] any controlled substance" as defined in the California Uniform Controlled Substances Act or any dangerous drug "except as directed by a licensed physician and surgeon, dentist, or podiatrist." (Bus. & Prof. Code, § 2762, subd. (a).) The physician supervision requirement with respect to administration of controlled substances, which encompass most if not all anesthetics, is consistent with and corroborates the conclusion that administration of anesthetics by a nurse be supervised by a physician.

There is no separate statute permitting a nurse anesthetist to dispense or administer such drugs. Accordingly, dispensing or administering such drugs requires supervision by the physician under whose license the controlled substance will be dispensed or administered.

E. The Board Of Registered Nursing's Activity And Statements Corroborate That California Law Requires Physician Supervision Of Nurse Anesthetists

The Board of Registered Nursing's activity and statements corroborate that California law requires physician supervision of nurse anesthetists' practice of anesthesia.

1. The Board Withdrew A Short-Lived Statement That It Did Not Require Physician Supervision And That Nurse Anesthetists Were Independent

The Board once included a statement on its website that nurse anesthetists are not required by the Board to be supervised by physicians and that there are "independent" practitioners who may practice without physician supervision. Shortly after posting that statement, however, the Board withdrew it with the instruction, cautioning that "No reliance shall be placed on [it]."

The Board's website page regarding "Nurse Anesthetist Practice Information," provides no information regarding nurse anesthetists' practice. It only provides a link to the text of the Nurse Anesthetist's Act in the Business & Profession Code and makes a statement that:

> (a) The BRN [Board of Registered Nursing] has withdrawn, as of March 2005, NPR-B-10 ("Practice of a Certified Registered Nurse Anesthetist"), as revised and dated December 2004;
>
> (b) No reliance shall be placed on the December 2004 of NPR-B-10.

(< http:www.rn.ca.gov/regulations/na.shtml > (as of January 26, 2011).)

To put that into context, NPR-B-10 was a memorandum from the BRN, under then Executive Officer Ruth Ann Terry. (12 AA 2727 & 2730-2731 [Tab 38].) Among other things, NPR-B-10

characterized a nurse anesthetist as "a licensed **independent** practitioner" (*Id.* at 2730, emphasis added.) It also stated that: "The Board of Registered Nursing has no requirement for the . . . physician . . . to supervise the CRNA providing their anesthesia services." (*Id.* at 2730.)

As Terry subsequently explained (in her deposition on January 23, 2007, in the Sacramento Superior Court case entitled *California Society of Anesthesiologists v. Board of Registered Nursing*, case no. 05AS03825), the BRN had taken the position that under California law a nurse anesthetist does not require any physician oversight. (12 AA 2725 [Tab 38] at lines 19-24.) She explained that the December version of the document was an expansion from a draft version that was created three months earlier, in September of 2004. (12 AA 2726-2727 [Tab 38].) Terry testified that NPR-B-10 was removed from the BRN website in March 2005 because:

> We had a – after that meeting, as part of the discussion we were asked to remove it, we felt – I guess they – well, we were asked to remove it. We agreed until we could get some more input.

(12 AA 2728 [Tab 38] at lines 4-10.)

In 2009, under pressure from Governor Schwarzenegger, Terry resigned as Executive Officer and member of the Board. As reported in the Los Angeles Times newspaper,

> The longtime executive officer of the embattled California Board of Registered Nursing resigned Tuesday [July 14],

> enduring almost entirely new leadership for the agency as it strives to revamp its oversight of hundreds of thousands of caregivers.

(Charles Ornstein and Tracy Weber, *California Nursing Board's Executive Officer Resigns*, Los Angeles Times (July 15, 2009) < http:\\articles.latimes.com\print\2009\Jul\15\local\me-nurse15 > (as of January 26, 2011).)

> The near-gutting of the nine-member board occurred after The Times and the non-profit news organization ProPublica published an investigation Sunday showing that it takes the board an average of three years and five months to investigate and close complaints against nurses – leaving many to practice with clean records in the interim. [¶] Reporters found nurses who worked unrestricted for years despite documented histories of incompetence, violence, criminal convictions and drug thefts were abuse. Employers were often unaware of their histories, and some patients were injured or died as a result of poor care. [¶] "The Governor was not aware of the full extent of the problems until he read it in the paper," said Rachel Cameron, a Schwarzenegger spokeswoman. "Once he confirmed the findings, he took immediate action." [¶] [On Monday], July 13, 2009, the Governor abruptly replaced four board members and filled two vacancies, saying in a statement that his new panel would move "quickly and decisively" (there is still one vacancy on the board). He will swear in the new members today.

(*Ibid.*) The article concluded

> "Clearly the Governor found the circumstances within the board were not adequate to protect public safety and to ensure that vulnerable Californians are cared for at the time they most need it," said [Ann] Boynton, a consultant who was undersecretary for the state Health and Human Services Agency from 1006 to 1008. [¶] "He believes serious change is necessary," she said. "We will investigate what those changes need to be."

(*Ibid.*)

In other words, the Governor was unhappy with Ms. Terry's supervision. Ironically, Terry's resignation was just one month after the Governor sent his letter to the CMS Office of Clinical Standards and Quality.

2. The Board Describes The Functions Identified In Section 2725(b)(2) – Including Administration of Medications – As "Dependent"

The Board describes the functions identified in Section 2725, subdivision (b)(2) – including the administration of medications – as "dependent", not "independent." The Board's pronouncement entitled "An Explanation of the Scope of RN Practice Including Standardized Procedures" describes the four practice functions permitted by Section 2725, subdivision (b) as follows: Subdivisions (b)(1), (b)(2), and (b)(4) identify "independent functions"; subdivision (b)(4) also

identifies "interdependent functions"; and subdivision (b)(2) describes "**dependent functions.**" (< http:\\www.rn.ca.gov\pdfs\regulations\ npr-b-03.pdf > (as of January 26, 2011).)

In describing the "Scope of Registered Nursing Practice," the BRN pointed out that Section 2725(b) provides:

> A broad, all inclusive definition [that] states that the practice of nursing means those **functions**, including basic health care, which help people cope with difficulties in daily living which are associated with their actual or potential health or illness problems, or the treatment thereof, which requires substantial amount of scientific knowledge or technical skill.

(*Id.* at p.1, paraphrasing the first paragraph of § 2725(b), emphasis added.) The BRN then identified three separate categories of "functions and procedures" (§ 2725(a)) for nurses:

> **A. Independent Functions**
>
> Subsection (b)(1) of Section 2725, authorized direct and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients, and a performance of disease prevention and restorative measures. Indirect services include delegation and supervision of patient care activities performed by subordinates.
>
> Subsection (b)(3) of Section 2725, specifies that the performance of skin tests, immunization techniques and withdrawal of human blood from veins and arteries is included in the practice of nursing.

Subsection (b)(4) of Section 2725, authorizes observation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition and determination of whether these exhibit abnormal characteristics; and based on this determination, the implementation of appropriate reporting or referral, or the initiation of emergency procedures. These independent nursing functions have long been an important focus of nursing education, and an implied responsibility of the registered nurse.

B. Dependent Functions

Subsection (b)(2) of Section 2725, authorizes direct and indirect patient care services, including, but not limited to, the administration of medications and therapeutic agents necessary to implement a treatment, disease prevention, or rehabilitative regiment ordered by and within the scope of licensor of a physician, dentist, podiatrist, or clinical psychologist.

C. Interdependent Functions

Subsection (b)(4) of Section 2725, authorizes the nurse to implement appropriate standardized procedures or changes in treatment regiment in accordance with standardized procedures after observing signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition, and determining that these exhibit abnormal characteristics. These activities overlap the practice of medicine and may require adherence to a

> standardized procedure when it is the nurse who determines that they are to be undertaken.

(< http:\\www.rn.ca.gov\pdfs\regulations\npr-b-03.pdf > (as of January 26, 2011), at p. 2.)

It is in this way that the BRN not only explained "the Scope of RN Practice" (NPR-B-03) but did so in a way that acknowledged the different levels – or the hierarchy – in health care that are based on the different levels of "scientific knowledge or technical skill" of nurses and physicians. This is most apparent in the characterization of the "nursing functions" described in Subsection (b)(2) as "dependent." Those "functions" are "dependent" because they are "ordered by and within the scope of licensor of a physician." In other words, the physician manages those nursing functions. The physician directs those nursing functions. The physician supervises those nursing functions.

The BRN description of Subsection (b)(4) also reflected that there was physician management of some of those nursing "functions" that are "interdependent" with physician functions. That is because the "overlap the practice of medicine and may require adherence to a standardized procedure." (*Id.* at p. 2.)

Finally, the BRN acknowledged the different levels or hierarchy of practice in its explanation of "Standardized Procedures for Medical Functions":

> This means designated to authorize performance of a medical function by a registered nurse is a standardized procedure developed through collaboration among

> registered nurses, physicians and administrators and the organized health care system in which it is to be used. Because of this interdisciplinary collaboration, there is accountability on several levels for the activities to be performed by the registered nurse.

(*Id.* at p. 2; emphasis omitted.)

Significantly, the BRN then explained that:

> Eeach standardized procedure shall: . . . (7) Specify the scope of **supervision** required for performance of standardized procedure functions, for example, telephone contact with the physician. [¶] (8) Set forth any specialized circumstances under which the registered nurse is to immediately **communicate with a patient's physician** concerning the patient's condition. . . .

(*Id.* at p. 3; emphasis in original.) This dispels any doubt that physicians "supervise" certain nursing functions.

3. Additional Conduct By The Board Implicitly Acknowledges The Existence Of The Physician Supervision Requirement

Additional conduct by the Board of Registered Nursing implicitly acknowledges the existence of the physician supervision requirement. First, that no regulations have been issued by the Board is consistent with petitioners' point that nurse anesthetists must be supervised by a physician. That is, if supervision were not required, one would have expected the Board to issue regulations regarding the

conduct of unsupervised nurse anesthetists. The Board has not done so.

Additionally, the Board's website until very recently described nurse anesthetists' activity as being subject to the direction of physicians. (11 AA 2443 [Tab 33] at lines 26-28.) "Direction" is, in effect, supervision. (Cal. Code Reg., tit. 22, § 70065(a).)

F. The Office Of Legislative Counsel Opines That California Law Requires Supervision Of Nurse Anesthetists

The Office of Legislative Counsel opines that California law requires supervision of nurse anesthetists. In November 2009, the Office of Legislative Counsel (Legislative Counsel Bureau) issued an opinion on the question of "whether state law authorizes a certified registered nurse anesthetist to perform anesthesia services without physician supervision." (1 AA 157-164 [Tab 10].) The Legislative Counsel concluded: "State law does not authorize a certified registered nurse anesthetist to perform anesthesia services without supervision by a physician." (*Ibid.*)

It is noteworthy that even if there is not a supervision requirement in all instances, there is such a requirement in at least some (significant) instances, which makes the opt-out inconsistent with state law.

G. At Worst, The Law Is Ambiguous, But Opt-Out Cannot Be Consistent With Ambiguous Law

At worst, the law is ambiguous. It would be impossible to conclude that an "opt-out" is consistent with something that is ambiguous. The trial court's Order states that, at best, the law is ambiguous. (13 AA 3149:21 [Tab 47].) If the law is ambiguous, how may the Governor know whether the opt-out is consistent therewith? It would violate the role of separation of powers for the Governor to declare what the law is when faced with law that is ambiguous.

II. THE TRIAL COURT'S ERROR IS OTHERWISE APPARENT FOR SEVERAL REASONS

A. The Trial Court's Order Improperly Relies On Underground Regulations

The trial court's Order relies on illegal underground regulations. It relied in part on Board of Registered Nursing pronouncements to determine the law, but this was error. Admittedly the trial court said that the Board was "not controlling" but it relied on them nonetheless. Such reliance is unfounded for several reasons.

First, the fact that the Governor consulted with the Board regarding the law is not compelling. The three requirements of CMS require consultation as to two of them regarding the public welfare of the state, but the third requirement (addressing whether the opt-out is consistent with California law) is a legal determination. In fact, the Governor did not demonstrate that he requested an exemption, as

addressed in the federal regulation. (42 C.F.R. § 482.52(c)(1) [1 AA 121 [Tab 7]].)

Second, Board pronouncements do not carry the force of law, are not law, but instead are merely illegal, underground regulations.

The Board may not informally establish what the law is and may not informally opine on what the law requires. It can make law consistent with administrative procedures but it may not merely "restate" the law of the state.

Third, in any event, the consultation by the Governor was with an executive officer of the Board, Ruth Ann Terry, but not any Board members. The trial court relied on the pronouncements in a letter by that one person.

Fourth, Terry's letters were misleading. They refer only to the statute but not to other components of the law, including Cal. Code Reg., tit. 22, §§ 100259(a)(9)(B), 100260(d), and 100261(a)(9)(B), which impose supervision requirements in Level I, II, and III trauma centers. (11 AA 2459 [Tab 33] ["There is nothing in the statute that would preclude a CRNA from providing anesthesia services in Level I, II or III trauma centers"].) Moreover, they refer to the "Board's position," but the Board's position does not constitute the law. (11 AA 2465 & 2740 [Tab 33].) Additionally, the letters flip-flop in their statement of the "Board's position." (Compare 11 AA 2457 and 2465 [Tab 33] with 12 AA 2783 [Tab 39].) Finally, the officer's statements were in disagreement with several other agencies. (*E.g.*, 11 AA 2470 [Tab 33].)

B. There Are Additional Fatal Defects In The Trial Court's Order

There are additional fatal defects in the trial court's Order. First, the Order is inconsistent. It states that the law is ambiguous, but then makes a finding on what the law is. In any event, as discussed above, law cannot be established in the discretion of a governor.

Second, the Order incorrectly states – and is based on the false statement – that administration of anesthesia by a nurse anesthetist is expressly authorized by Section 2725(b)(2). In fact, anesthesia is not mentioned or referenced in Section 2725.

Third, the trial court misunderstood that supervision may be by a physician and need not be by an anesthesiologist. (13 AA 3139 [RT 5019:23].) In fact, the supervising physician may be the operating surgeon (42 C.F.R. § 482.52(a)(4) [1 AA 121 [Tab. 7]]), which undermines the argument that the supervision requirement must be eliminated in order to increase availability of anesthesia services where anesthesiologists are sparse.

CONCLUSION

For the foregoing reasons, the Court should issue an alternative writ and hold the petition pending petitioner's appeal from the judgment in this action, with which this proceeding should be consolidated.

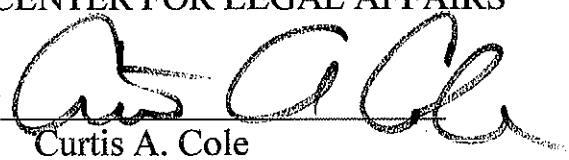
Dated: January 31, 2011

COLE PEDROZA LLP,

HASSSARD BONNINGTON LLP,

and

CALIFORNIA MEDICAL ASSOCIATION
CENTER FOR LEGAL AFFAIRS

By 
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CERTIFICATION

Appellate counsel certifies that this petition contains 9,871 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: January 31, 2011

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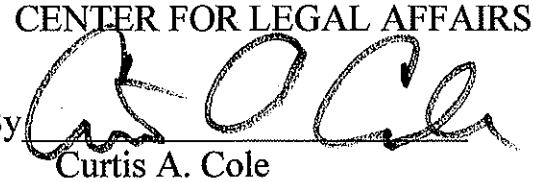
By 
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