1. MEMBERSHIP

The membership of the Colorado Society of Anesthesiologists currently consists of:

Active	684
Affiliate	9
Retired	79
Resident	49
TOTAL	**821**

2. RESULTS OF COMPONENT SOCIETY ELECTIONS

The current officers of the Colorado Society of Anesthesiologists include:

President	Daniel J. Janik, M.D.
President Elect	Joy L. Hawkins, M.D.
Secretary/Treasurer	Melissa Brooks Peterson, M.D.
Immediate Past President	Murray S. Willis, M.D.

3. GOVERNMENTAL AND LEGISLATIVE EVENTS

3.1 The Colorado Rural and Critical Access Hospital Opt-Out -

In September 2010, the Colorado Medical Society (CMS) and the Colorado Society of Anesthesiologists filed suit in District Court seeking to reverse then-Governor Bill Ritter's 2010 opt-out from the federal requirement for physician supervision of nurse anesthetists. The lawsuit was brought on the grounds that his action was not consistent with Colorado statute and Colorado common law. This limited opt-out exempted the state's critical access hospitals (CAH) and 14 non-CAH rural hospitals.

In 2011, the Denver District Court ruled against the societies, and this decision was upheld by the Court of Appeals in 2012. In October 2012, CMS and the CSA filed a petition for a writ of certiorari with the Colorado Supreme Court seeking to overturn the unfavorable rulings from the lower courts. In October 2013, the Colorado Supreme Court agreed to accept the petition.

On June 1, 2015 the Colorado Supreme Court released its ruling in the case. The Court ruling and its implications for the regulation of nurse anesthetists in Colorado is detailed in Report 606-2.2.

3.2 Colorado Medicaid –

Under the exemplary leadership of CSA president Murray S. Willis, M.D. and with the superb management of CSA lobbyist Edie Busam of the Denver firm Aponte & Busam, CSA found a receptive audience in the 2015 Colorado General Assembly for an increase in the Colorado Medicaid anesthesia conversion factor. $13 million was appropriated by the General Assembly during the 2015 session specifically for an increase for Medicaid anesthesia services. This resulted in the Colorado Medicaid conversion factor increasing from $20.98 to $28.53 on July 1, 2015.

This increase was achieved through a change of tactics from the last increase in 2006. CSA representatives, led by Dr. Willis, worked primarily with the state Joint Budget Committee (JBC) to make our case. This was accompanied by a compelling argument and a prepared written position paper with detailed facts and figures. CSA and its lobbyist then directly lobbied individual legislators, key leadership, the Governor, and the Medicaid department. Interestingly, once JBC set its spending figures, the pot of money for the anesthesia increase came under significant attack by other members of the General Assembly in the hope of redirecting the money to other needs. While the final appropriation was reduced from the preliminary budget projections, most of the new dollars were retained.

While any increase is significant, the new dollars appropriated to anesthesia services did not increase the conversion factor as much as was expected. This turned out to be due to the effects of the Medicaid expansion under the Affordable Care Act. The Colorado Medicaid program has grown significantly since 2012. The one-year increase in Medicaid spending for the 2015-2016 fiscal year is projected to be $757 million, an amount equal to what Colorado currently appropriates for higher education spending. Because anesthesiology's new $13 million was spread over a much larger volume of anesthesia services, the increase was less than what CSA representatives expected.

CSA still believes that Colorado's anesthesiologists are significantly underpaid by Colorado Medicaid, especially as compared to other physician services paid by the program. The ACA expansion has made correction of this problem all the more necessary as the volume of Medicaid anesthesia services in the state has increased significantly. CSA will continue to lobby for a greater increase in the coming years and has targeted the Colorado Workers Compensation fee schedule conversion factor, increased this year to $53.73, as an appropriate amount for the Colorado Medicaid anesthesia conversion factor.

3.3 Anesthesiologist Assistants (AA) –

Colorado enacted legislation for AA licensure in 2012. Later that academic year the new University of Colorado School of Medicine Anesthesiologist Assistant Program accepted its first class. This class of six will graduate in December 2015 and five of the six will be staying in Colorado for employment.

At the time of AA licensure, the initial supervisory ratio was capped at 1:3. Proponents of licensure accepted these terms with the provision that the supervision ratio could be changed after three years by rule-making at the Colorado Medical Board. That change has now been scheduled for consideration by the Board.

4. SOCIO-ECONOMIC TRENDS

The Colorado economy continues to be healthy with state unemployment at 4.2% compared to the national figure of 5.1%.

5. MEDICO-LEGAL TRENDS

A record Colorado medical malpractice judgment of $17.8 million was entered against Children's Hospital Colorado in April 2015. The judgement is especially significant as it appears to be much greater than the $1 million cap on judgements enacted during Colorado's tort reform legislation of the 1980's. The case was brought on behalf of Naomi Pressey, who as an infant suffered complications during surgery at Children's and now suffers from intellectual disability and cognitive and motor skill impairment. This author is unaware of efforts to reconcile this judgement with previous Colorado law, although limitations on public disclosure make this process difficult.

6. ACTIONS OF STATE/LOCAL MEDICAL SOCIETIES RELATING TO ANESTHESIOLOGY

The Colorado Medical Society joined with the Colorado Society of Anesthesiologists in the 2010 opt-out lawsuit against Gov. Ritter as it had in the 2003 opt-out lawsuit against then Gov. Owens. CMS joined with CSA in the subsequent appeals to the Colorado Court of Appeals and the Colorado Supreme Court. Unfortunately, the Colorado Medical Society declined to participate with CSA in our request for reconsideration after delivery of the Supreme Court ruling in June. This development was shared with the members of CSA.

Legislation introduced in the 2015 session sought to overturn previous legislation holding patients harmless in balance billing when care is rendered by an out-of-network physician. The legislation was defeated. An interim study group has been assembled by the Colorado Medical Society and CSA's Dr. Willis will serve as a representative.

7. POLITICAL ADVOCACY AND ASAPAC PARTICIPATION

The residency program at the University of Colorado School of Medicine continues to lead the way with 100% participation in ASAPAC. Unfortunately, the CSA membership at large has not quite accepted the challenge and Colorado ASAPAC participation continues to match the participation seen across the county, at a rate of about 20%. CSA leadership has committed to improving this performance.

CSA PAC and the CSA Small Donor Committee, the Committee for Physician Anesthesia Care, continues to expand under the leadership of Bridget A. Bailey, D.O.

8. ACTIVITIES ALIGNED TO ASA STRATEGIC PLAN

Service to its members, advocacy, and education are at the top of the ASA Strategic Plan. The Colorado Society of Anesthesiologists continues to be a national leader among mid-size component societies. It is my opinion that CSA could not achieve these goals without the tireless efforts and long-time service of Murray S. Willis, M.D., Daniel J. Janik, M.D., Kristin T. Woodward, M.D., Bridget A. Bailey, D.O., J. Michael Hall, M.D., the other Officers and Board members of CSA, Edie Busam, Carol Goddard, and the staff of Goddard and Associates, our management firm. Thank you all for your exceptional efforts.

RANDALL M. CLARK, M.D., Director

Colorado Supreme Court Decision on the Colorado Society of Anesthesiologists' Rural and Critical Access Hospital Opt-Out Lawsuit

On June 1, 2015, the Colorado Supreme Court released its long delayed ruling on the opt-out lawsuit brought by the Colorado Medical Society and the Colorado Society of Anesthesiologists. https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2012/12SC671.pdf

In September 2010, the Colorado Medical Society (CMS) and the Colorado Society of Anesthesiologists (CSA) filed suit in District Court seeking to reverse then-Governor Bill Ritter's 2010 opt-out from the federal requirement for physician supervision of nurse anesthetists. The lawsuit was brought on the grounds that the governor's action was not consistent with Colorado statutes and Colorado common law. This limited opt-out exempted the state's critical access hospitals (CAH) and 14 non-CAH rural hospitals. Updates on these court actions have been included in the Colorado Director's Report since 2010. The following opinions are solely those of the author and do not necessarily reflect the opinions or policies of the Colorado and American Societies of Anesthesiologists or the Colorado Medical Society.

While the Societies' primary interest in bringing the challenge to the governor's decision has always been patient safety, the standard of review required the plaintiffs to base our arguments on Colorado law. In the challenge to the Ritter decision, CMS and CSA called attention to provisions of Colorado law that require physician supervision of advanced practice nurses while performing delegated medical functions, including the delivery of anesthesia care by a nurse anesthetist. The Societies also cited Colorado common law, the 'Captain of the Ship' Doctrine as recently reaffirmed by the Colorado Court of Appeals, which assumes physician supervision of other persons in an operating room. "Consistency with state law" is a requirement of any opt-out from the federal supervision regulations and the opt-out appeared to contradict both aspects of Colorado law. CMS and CSA presented a detailed legislative history of the Colorado Nurse Practice Act, especially its recent reenactment and revisions, which included testimony by legislators that advanced practice nurses perform delegated medical functions requiring supervision, and do not practice independently.

The Colorado Hospital Association, the Colorado Association of Nurse Anesthetists, and the Colorado Nurses Association requested and were granted "Intervenor" status by the courts and filed legal briefs in support of the governor's opt-out.

In 2011, the Denver District Court ruled against the Societies, and in 2012 this decision was upheld by the Colorado Court of Appeals. In October 2012, CMS and the CSA filed a petition for a writ of certiorari with the Colorado Supreme Court seeking to overturn the unfavorable rulings from the lower courts. In October 2013, the Colorado Supreme Court agreed to accept the petition. The American Society of Anesthesiologists and the American Medical Association filed friend of the court briefs on behalf of the medical societies. The American Hospital Association and the American Association of Nurse Anesthetists filed friend of the court briefs on behalf of the governor and the Intervenors. Oral arguments were heard in June 2014.

In the June 1, 2015, ruling, the Colorado Supreme Court stated, "We thus disagree with the Court of Appeals decision to the extent that it considered whether, as a matter of de novo interpretation, Colorado law permits CRNAs to administer anesthesia without supervision." This is a significant statement as the Court of Appeals had interpreted Colorado law to allow nurse anesthetists to

practice without physician supervision. This interpretation applies statewide, not just in the rural opt-out hospitals. Addressing Governor Ritter's opt-out determination, the Court found that it was "simply an expression of his opinion" and that "the Governor's attestation with regard to physician supervision of CRNAs is not a generally binding interpretation of Colorado law."

Unfortunately, the Court made no definitive ruling on the pertinent Colorado law (the legal reason for the lawsuit) and then went on to dismiss the case on procedural grounds leaving intact the rural opt-out and the hazard this creates for patients receiving anesthesia care in the rural and Critical Access Hospitals in the state. The court ruled that it cannot second-guess the governor's determination under the Federal Regulations without proof that he had grossly abused his discretion—a point not raised by either lower court. In its mandate filed later in the month, the Court simply reaffirmed the Court of Appeals decision without qualification. This action leaves open the question of how Colorado law should be interpreted.

Attorneys for the state society recommended that CSA submit a petition for rehearing that demonstrated the flaws in the procedural approach by the Colorado Supreme Court. The petition refocused the legal background for the challenge to the governor's action and the requested withdrawal of the governor's opt-out letter. The Court denied the petition for rehearing.

Why did the Colorado Supreme Court accept review of this case and then fail to provide a clear answer on the interpretation of Colorado law? Are there similarities between this decision and the California Supreme Court ruling in the opt-out lawsuit in that state?

It is this author's opinion that the Colorado Supreme Court accepted the case because of the conflict between the wording of Colorado law and the legislative history of the Nurse Practice Act, on one hand, and the governor's determination that his opt-out decision was consistent with state law, on the other. Unfortunately, at some point the Court decided not to issue a clear interpretation of Colorado law. Worse, in explaining its position, the Court introduced into consideration matters that had not been part of the District Court and Court of Appeals rulings. The Court said that the Societies had not claimed "a gross abuse of discretion" by the governor, which the Court stated was required if the Court was to review the governor's decision. Unfortunately, the Court failed to recognize that the governor's action in conflict with state law is by definition a gross abuse of discretion and has been found so by other Colorado Supreme Court decisions. See, for example, *Antero Resources Corp. v. Strudley, 2015 CO 26, ¶ 14, __ P.3d __ (2015) ("A misapplication of the law constitutes an abuse of discretion."); DeLong v. Trujillo, 25 P.3d 1194, 1197 (Colo. 2001) ("When determining whether there has been an abuse of discretion, a reviewing court looks to see if the applicable law has been misconstrued or misapplied.)*

By contrast, the California Court of Appeal recognized that an abuse of discretion and a failure to follow the controlling law are the same thing. (*California Society of Anesthesiologists v. Brown*, 204 Cal. App. 4th 390 (2012).) However, it concluded that California statutes did not clearly require physician supervision of CRNAs.

What is the current status in Colorado? Court action has not changed the statutory language of the Colorado Nurse Practice Act which requires nurses performing delegated medical functions to have physician supervision. The opt-out from the federal supervision requirement does not apply to hospitals in urban areas. Notwithstanding the Colorado Court of Appeals decision, further legal action may be brought for supervision failures in locations outside of the exempted rural

hospitals. Legislative remedies to clarify the ill-considered Colorado Supreme Court decision may also be pursued.

What advice does this author have for other state societies? Should an opt-out be in place, or should an opt-out be under active consideration, state society representatives must engage legal counsel to examine the statutory and regulatory requirements for the delivery of anesthesia services in the state. Should statutory or regulatory language preclude an opt-out, the state society must bring this conflict to the governor's attention. Should an opt-out be issued, the society should challenge the opt-out in court as being inconsistent with state law. The process is long and expensive but our collective commitment to patient safety demands it.

It remains to be seen how the court decisions in Colorado will change practice. As noted in previous Director's Reports, there are more anesthesiologists practicing in the fourteen Colorado opt-out rural hospitals than nurse anesthetists and the volume of service by these anesthesiologists is likely many times that of the nurse anesthetists. Subtle changes in the degree of surgeon supervision of nurse anesthetists in the smallest rural opt-out hospitals in Colorado will be very difficult to detect. Combined with the fact that there are many issues that go into overall surgery and anesthesia outcomes, the quality reporting systems in these facilities may not be up to the task of finding variations in care.

What is clear is that the Colorado Hospital Association took a leadership role in the promotion of the threatened 2003 opt-out and the actual 2010 rural opt-out. The Colorado and American Hospital Association sought and were granted Intervenor status in the CMS and CSA legal challenge to the opt-out. The hospital association interest in the case seems to be far greater than the small and long-standing regulatory burden the federal supervision requirement places on hospitals would justify.

In the final analysis, anesthesiology and anesthesiologists remain at the forefront of patient safety. We are the guardians for our patients when they are the most vulnerable. Our daily work is challenging enough and extending our patient safety efforts into the political and legal realms is not something that comes naturally. But those efforts are necessary for us to continue our long quest for further improvements in patient care and patient outcomes.

I would like to thank long-standing counsel to the Colorado Society of Anesthesiologists, Joseph Bronesky and Fred Yu of Sherman & Howard, for their commitment and inspired legal efforts. I would also like to thank the American Medical Association, its legal counsel, and the Scope of Practice partnership for their efforts at the Colorado Medical Board and on the CMS/CSA lawsuit. Manuel Bonilla, Jason Hansen and the ASA State Affairs staff have been extraordinary. Finally, the Officers and Directors of the Colorado Society of Anesthesiologists are to be recognized for their commitment to patient safety in Colorado for many years but especially for their work on the legal challenges that date back to 2003.

RANDALL M. CLARK, M.D., Director