



April 17, 2020

The Honorable Doug Ducey
Governor, State of Arizona
1700 W. Washington
Phoenix, AZ 85007

Dear Governor Ducey:

On behalf of the Arizona Society of Anesthesiologists (AzSA) and its nearly 1,200 members, and the Arizona Chapter of the American College of Surgeons (AzACS) and its nearly 1,400 members, we are writing to express our appreciation for your leadership and commitment to addressing the State's healthcare needs during this unprecedented healthcare crisis. AzSA and AzACS understand that in a time of crisis, actions must be taken to ensure Arizona is equipped to handle patients' immediate needs, both in health care facilities and from trained health care professionals.

With this firmly in mind, we also believe it is important that emergent conditions do not lead the state to make rash departures from proven and sound laws and policies that have ensured the safety of Arizonans for many years. Thus, while we support many of your executive actions to date, **we strongly urge a "course correction" to your March 24 letter to the Center for Medicare and Medicaid Services ("CMS") in which the State of Arizona opted out of CMS's Conditions of Participation regarding the supervision of certified registered nurse anesthetists, and request that you make this opt out temporary rather than permanent.**

While we understand the idea of opting out in the context of actions by other states and the federal government to allow non-physician providers to provide a wider range of services during the current crisis, we feel strongly that this should not become the default rule, and should be rescinded as soon as the COVID crisis has passed. AzSA and our member anesthesiologists along with AzACS and our member surgeons believe that this opt out – if left in place after the current emergency - would permanently undermine Arizona's longstanding commitment to physician-led, high quality anesthesia care and patient safety, while at the same time not achieving the results you suggest in the letter.

We have the following concerns with the decision to opt out of the CMS supervision rule:

- 1) Contrary to the assertions in the Opt Out Letter, there is no shortage of anesthesia care in Arizona that requires this change, and in emergent circumstances the services of nurse anesthetists are better used to provide much needed critical care services.**

There is no shortage of anesthesiologists in the state, even in the current pandemic conditions. In fact, the recent cessation of nonessential surgeries has actually created a steep reduction in surgical volume and the need for surgical anesthesia. As a result, rather than a shortage there is now an overabundance of anesthesia professionals, all ready and willing to serve patients. Instead, because of the pandemic, the real access issue for patients is critical care nurses. Nurse anesthetists frequently and appropriately reference their critical care nursing experience, and that experience should be used where it is most

needed at the moment. Accordingly, we believe your Administration should be working with hospitals to quickly transition nurse anesthetists to providing care to patients in the critical care setting.

2) Looking beyond the pandemic, there is no fundamental problem that needs solving by opting out.

Throughout the years Arizona has maintained a settled and well understood harmony between state and federal requirements that define the relationship between physicians and nurse anesthetists. A.R.S. § 32-1634.04 specifically requires the direction and presence of a physician when anesthesia services are provided. This statute was amended by [S.B. 1336] as recently as 2017, when the state legislature reiterated its longstanding requirement for oversight of nurse anesthetists, and you signed this amendment into law. Importantly, this bill restated Arizona's oversight requirements *in the context of the Medicare supervision requirement being in place and providing a federal standard in addition to the state statute*. The March 24 letter to CMS upsets this twenty-year equilibrium - creating a gulf between the state and federal rules, with no corresponding benefit to patients.

We are aware some have attempted to position this change as a solution to a billing issue. There is no merit or support for such an argument. There is also no history at the state or federal level for using billing as a justification to eliminate physician oversight of surgical anesthesia patients.

3) The Opt Out Letter did not satisfy the requirements for opting out as laid out in the federal rule.

In addition to these arguments on the merits, we also do not believe the letter to CMS met the criteria for opting out as stated in the regulation itself. Specifically, 42 C.F.R. 482.52(c) (and the corresponding provisions in 42 C.F.R. 416.42(d) and 42 C.F.R. 485.639(e)) states that state may only opt out of the nurse anesthetist supervision requirement upon an attestation that the Governor "has consulted with State Boards of Medicine and Nursing about issues related to access to and the quality of anesthesia services in the State. . . ." The letter must also expressly conclude that the opt out is in the best interests of the State's citizens and "is consistent with State law."

AzSA and AzACS submit that none of these conditions have been appropriately satisfied. We do not believe, for instance, that the Boards of Medicine or Nursing were appropriately consulted with regard to the decision to opt out. Your opt out letter states that your office consulted with the "executive directors of the Arizona Medical Board and the Arizona Nursing Board." But the executive directors are state employees who do not personify the Boards, and do not speak on their behalf. CMS did not include "or their executive directors or agents" in the regulatory language, instead requiring consultation with the Boards themselves. We are aware of no members of either Board that discussed this critical decision with anyone in the Governor's office. We are also unaware of any suggestion that either executive director received guidance from their Boards on these important questions. Importantly, there is no public record of such dialogue with these state agencies. We are also concerned that AzSA, AzACS, and the Arizona Medical Association were not afforded an opportunity to provide input or otherwise notified prior to the March 24 letter to CMS.

AzSA and AzACS also suggest that the opt out is not in the best interests of the State's citizens, as required by the rule. Further, we also do not believe that the resulting situation is consistent with State law. [A.R.S. § 32-1634.04](#) requires the *direction and presence* of a physician. As mentioned above, as recently as 2017, the state legislature reiterated its longstanding statutory decision to require physician oversight of nurses administering anesthesia. We respectfully disagree that the opt out letter is consistent with this Arizona law.

4) **The COVID emergency is temporary, and any rule changes should also be temporary.**

Recognizing the temporary nature of this crisis, both the federal government and governors across the country are issuing temporary emergency orders waiving oversight rules and supervision requirements. Some are tying the waivers to those nurses aiding in the state's response to COVID-19, some of the orders speak to ensuring appropriate scope of practice, and others ensure the supervision waiver is determined by the facility in consultation with the facility's medical leadership. Almost all of these orders and extraordinary measures have one thing in common – they are temporary in nature, and will revert back to the established regulatory infrastructure when we have successfully overcome the current emergency. AzSA suggests that this is a good model for the state – emergency measures for emergent times, but return to established structures when the emergency abates. Our lawyers frequently warn us that “bad facts make bad law,” and this is one case in which we agree with the lawyers. We urge you to avoid the trap of making a permanent change when facing a temporary crisis.

In the midst of Arizona's emerging COVID-19 crisis, we ask that your Administration mitigate the concerns stated in this letter by: 1) rescinding the March 24 CMS letter and/or 2) in place of a permanent opt out, issuing an executive order *temporarily* suspending supervision requirements during the duration of the crisis, consistent with President Trump's March 30 federal waiver similarly temporarily suspending such requirements at the discretion of the hospital and state law.

Arizona's patients enjoy high quality, safe physician-led care. The March 24 letter permanently departs from that standard. This approach unfortunately takes us severely backwards with no benefit for our state's patients who would be losing their physicians. We appreciate your prompt attention this matter and your consideration of our course correction recommendations.

Sincerely,



Courtney Koshar, MD
President,
Arizona Society of Anesthesiologists



Nirav Y. Patel, MD, FACS
President,
Arizona Chapter of the
American College of Surgeons