HENRY MCMASTER
ATTORNEY GENERAL

November 29, 2010

Jennifer Root, M.D.
President, South Carolina Society of Anesthesiologists
PO Box 20189
Charleston, SC 29413

Dear Dr. Root:

Pursuant to your request, this Office has reviewed the opinion written to Representative Tracy Edge on June 23, 2010. After review, we conclude that, under state law, our conclusion stands. At the time the opinion was issued, the only question posed concerned state law. We were not made aware of the possible impact of any relevant federal regulations until subsequent questions were raised.

Ordinarily, this Office does not opine on federal regulations. However, in researching whether our June 23, 2010 opinion is correct, it has come to our attention that 42 C.F.R. § 482.52, is germane to the issue presented. In relevant part, 42 CFR 482.52 which addresses hospital anesthesia service requirements, states as follows:

> If the hospital furnishes anesthesia services, they must be provided in a well-organized manner under the direction of a qualified doctor of medicine or osteopathy. The service is responsible for all anesthesia administered in the hospital.
>
> (a) Standard: Organization and staffing. The organization of anesthesia services must be appropriate to the scope of the services offered. **Anesthesia must be administered only by--**
>
> (1) A qualified **anesthesiologist**;
> (2) A **doctor of medicine or osteopathy** (other than an anesthesiologist);
> (3) A **dentist, oral surgeon, or podiatrist** who is qualified to administer anesthesia under State law;
> (4) A **certified registered nurse anesthetist** (CRNA), as defined in § 410.69(b) of this chapter, who, unless exempted in accordance with paragraph (c) of this section, is under the supervision of the operating practitioner or of an anesthesiologist who is immediately available if needed; or
> (5) An **anesthesiologist's assistant**, as defined in § 410.69(b) of this chapter, who is under the supervision of an anesthesiologist who is immediately available if needed.

. . .

42 C.F.R. § 482.52 (emphasis added).

The Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS) issued a memorandum on February 5, 2010 entitled Revised Hospital Anesthesia Services Interpretive Guidelines in an attempt to clarify 42 CFR § 482.52. The memorandum issued by CMS essentially eliminated propofol[1] as an agent that can be used by nurses. Under 42 C.F.R. § 482.52, only 1) an anesthesiologist; 2) a doctor of medicine or osteopathy; 3) a dentist, oral surgeon, or podiatrist who is qualified to administer anesthesia under State law; 4) a certified registered nurse anesthetist (CRNA), or 5) an anesthesiologist's assistant (AA) can administer anesthesia.

Under the S.C. Code of Laws, registered nurses may administer and deliver "medications and treatments prescribed by an authorized licensed provider." S.C. Code § 40-33-20(48)(f). Exceptions where registered nurses are limited in their ability to administer sedation medication are carved out by S.C. Regulation 81-96,[2] in reference to office-based surgeries, and S.C. Regulation 61-12,[3] in reference to abortions. Nevertheless, State law is such that, in most instances, registered nurses may administer medications, including propofol.

Accordingly, South Carolina state law, S.C. Code § 40-33-20(48)(f), appears to be, on its face, in direct conflict with the federal regulation 42 C.F.R. § 482.52. Of course, only a court can determine if a state law is preempted by federal law. Moreover, there is a strong presumption against preemption;[4] however, it is well established that where a "state statute conflicts with, or frustrates,

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[1] Propofol is an "intravenous sedative-hypnotic agent for use in the induction and maintenance of anesthesia or sedation in a human patient." Astrazeneca Pharmaceuticals LP v. Mayne Pharma (USA) Inc., 2005 WL 2864666. Propofol administration is considered an anesthesia service.

[2] S.C. Reg. 81-96 "prohibit[s] the administration of anesthetics, for sedation by [anyone] other than a qualified anesthesia provider" during office-based surgeries. S.C. Reg. 81-96 (statutory authority derived from S.C. Code §§ 40-1-70 and 40-47-10(I)(3)).

[3] S.C. Reg. 61-12 explains that "[g]eneral anesthesia shall be administered only by a certified registered nurse anesthetist, anesthesiologist, or dentist anesthetist or physician anesthetist during an actual abortion procedure. S.C. Reg. 61-12.

[4] See e.g., Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644, 645, 123 S.Ct. 1855, 1858 (2003) ("there is a presumption that the state statute is valid").

federal law, [the] former must give way."[5] In this instance, we have located no decision addressing the preemptive effect of 42 C.F.R. § 482.52. Since only a court can determine if a state law is preempted, a declaratory judgment may thus be advisable in order to settle with finality the status of this question.

Sincerely,

Henry McMaster
Attorney General

Leigha Blackwell

By: Leigha Blackwell
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REVIEWED AND APPROVED BY:

Robert D. Cook

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[5] Quigley v. Rider, 593 S.E.2d 476 (2003). See, Weston v. Kim's Dollar Store, 684 S.E.2d 769 (2009) ("any state law that conflicts with federal law is without effect."); U.S.C.A. Const. Art. 6, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").