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# Legal Briefs

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## The administration of anesthesia and the practice of medicine

In 1985, this column answered the question: Is the administration of anesthesia the practice of medicine? Medical practice acts were designed to protect the public, not to create monopolies for physicians. The fact that a procedure such as anesthesia is in the scope of one profession's practice does not mean that another profession cannot also engage in the procedure.

That same column cited a number of cases including *Sermchief v Gonzales*, 660 S.W. 2d 683 (Missouri 1983), in which the Missouri Supreme Court determined that it was unnecessary to "define and draw that thin and elusive line which separates the practice of medicine from the practice of professional nursing in modern day delivery of health services."

When the Missouri legislature amended the nurse practice act, the legislature had intended to permit nurses to engage in the activities which the Board of Registration for the Healing Arts claimed was the "practice of medicine." The Missouri Supreme Court ruled that it was the legislature, not the "practice of medicine" which determined what nurses could do. Because of the overlap of functions between nursing and medicine there were many activities which belonged to both the practice of medicine and the practice of nursing. Anesthesia is a proper nursing function; it has been determined to be so by *Frank v South*, 175 Ky. 416, 194 S.W. 375 (1917); *Chalmers-Francis v Nelson*, 6 Cal. 2d 402 (1936) and other court decisions, as well as by more than 100 years of practice. Whether anesthesia is also the practice of medicine is of little interest to nursing.

### Anesthesiologists view anesthesia as the practice of medicine

Recently some CRNAs have been faced with a document prepared by the law firm which customarily represents the American Society of Anesthesiologists (ASA). The document, a memorandum, reports that there are definitely legal cases in which the administration of anesthesia has been declared the practice of medicine.

There are two reasons why anyone would care whether anesthesia was the practice of medicine. The first is can a physician with only a physician's license administer anesthesia? There are very few

nurse anesthetists who question whether a physician's scope of practice includes the administration of anesthetics. This is probably not the reason why someone has gone to the trouble of having a law firm do significant research on the practice of medicine. Yet, this is the only meaning the phrase has.

The second reason to claim that anesthesia is the practice of medicine is to argue that anesthesia is *exclusively* the practice of medicine. Anesthesiologists continue to act as if no one else should be permitted to practice anesthesia because anesthesia is the practice of medicine. The memorandum cites a number of cases which allegedly have held that anesthesia is the practice of medicine. An examination of the cases is very instructive. Not surprisingly, the very cases cited in the memorandum confirm our point: *Practice acts are not exclusive and do not create monopolies. Specifically, physicians do not have a monopoly on the practice of anesthesia.*

### Dentists and the practice of anesthesia

One of the cases cited in the memorandum was *Spiro v Hylands General Hospital*, 489 So. 2d 802 (Fla. Dist. Ct. App. 1986) where the court held that a dentist could not practice nondental anesthesia. The case holds that a dentist, even one with special training in the field of general, nondental anesthesia, is not licensed to administer anesthesia except as limited to the practice of dentistry.

Although the court mentions the Florida statutes on medical licensing, the court is primarily concerned with the dental statutes. After all, the practitioner was a dentist and the dental practice act is where one would normally look to find the areas in which a dentist is permitted to practice. The court determined that the Florida legislature intended to limit dentists to administering anesthesia which is dental related.

Thus, the issue in the *Spiro* case was not whether anesthesia was the practice of medicine. The court (unlike those to whom the memorandum was addressed) already knew that physicians could administer anesthesia. *The issue was whether anesthesia was the practice of dentistry.* If it was, the dentist was entitled to practice it, but if it was not, the dentist must have another type of license in order to practice it. The court's analysis showed that the type of

anesthesia being provided by the dentist was not included in his dentistry license.

In *Paravecchio v Memorial Hospital of Laramie County*, 742 P. 2d 1276 (Wyo. 1987), the court was asked to determine whether a person licensed to practice dentistry but not medicine, who had special training and experience in the field of general anesthesia, was authorized to practice general anesthesiology. The court held that, in Wyoming, a dental license does not authorize the administration of anesthesia for nondental purposes. The court makes it clear that it is interpreting the Wyoming Dental Practice Act, "To find that the practice of general nondental anesthesiology is within the practice of dentistry would be to ignore obvious legislative intent as expressed in the Wyoming Dental Practice Act."

The dentist also contended that the general delivery of anesthesia was not exclusive to the practice of medicine as defined by the Wyoming Medical Practice Act. The court said that the practice of anesthesiology was the practice of medicine. The court did not say that anesthesia was *exclusively* the practice of medicine. In fact, there is no evidence that the court was even aware that other professions administered anesthesia. The case stands for the proposition that under the laws of Wyoming a person licensed as a dentist may only give anesthesia in connection with "the oral cavity region."

Despite a similar conclusion in *Everett v The State of Washington*, 99 Wash. 2d 264, 661 P. 2d 588 (1983), the case actually exposes the fallacy of believing that a scope of practice is exclusive. A dentist entered the 33-month general anesthesia residency program open to graduates of medical schools who wished to specialize in anesthesiology. The dentist became a very successful, gifted anesthesiologist. He served as assistant professor at the medical school and became particularly well known for his expertise in anesthetizing infants for open heart surgery. In the process of obtaining a Medicare number, he came to the attention of the Attorney General's Office, which informed him that his license to practice dentistry did not authorize him to administer anesthesia for nondental purposes. He disagreed and eventually the dispute came to trial.

The court analyzed the Washington Dental Licensing Act and determined that the legislature had intended to restrict the practice of dentistry to treatment which concerns the teeth and oral structure. Once more, the issue was not whether anesthesia is the practice of medicine. The Washington court was concerned only with whether anesthesia was the practice of dentistry. Dentists were limited by the legislature to administering anesthesia for dental procedures.

The fact that dental practice was limited by the

legislature and not the "practice of medicine" became very important. Because of the outstanding success of the dentist, the Washington legislature reconsidered whether anesthesia was the practice of dentistry and in February 1982, the statutes of the State of Washington were amended to allow a dentist who has completed a medical residency program in anesthesiology to administer general anesthesia.

It is, at the very least, misleading to give Washington as an example of a determination that anesthesia is the practice of medicine. First, in the *Everett* case the court was not even considering the practice of medicine; it was interpreting what was the practice of dentistry. Second, there has now been a legislative determination that dentists in Washington may practice anesthesia. That is, in the State of Washington, anesthesia is the practice of dentistry.

The situation in Washington is very similar to the situation which was described in the 1985 article in *Sermchief v Gonzales*. There, the Missouri statutes had been amended to allow nurses, acting under protocol, to engage in various activities which previously had been the practice of medicine. The Missouri Board of Registration for the Healing Arts challenged the nurses on the grounds that they were illegally practicing medicine. The Missouri Supreme Court determined that the nurses were merely doing what the legislature had intended for them to do. Dentists in Washington may give general anesthesia. When they do, they are not practicing medicine; they are practicing dentistry. Similarly, nurse anesthetists are not practicing medicine; they are practicing nursing.

### **A malpractice viewpoint**

The memorandum supposedly identifies various cases where the issue of whether anesthesia is the practice of medicine was considered in the context of malpractice. The memorandum highlights the case of *McKinney v Tromley*, 386 S.W. 2d 564 (Tex. Civ. App. 1965). Here the memorandum has taken a quote out of context: "In the context of a malpractice action, one court has expressly stated that 'the administration of an anesthetic is not an administrative function of a hospital and constitutes the practice of medicine.'" *McKinney v Tromley* was decided in 1964 when Texas, like many other states, was still following the doctrine of "Captain of the Ship."

We have discussed "Captain of the Ship" before in this column and by now virtually everyone knows that it has been discredited and is dying. In 1964, it was still the law. Even in its day, it was recognized that "Captain of the Ship" created inequities; and in efforts to make a doctrine that was basically unfair, less unfair, certain exceptions were recognized. One

of those exceptions was that where the "Captain's subordinates" were engaged in administrative, as opposed to medical acts, "Captain of the Ship" did not impose liability.

*McKinney v Tromley* was a case where a surgeon was held liable for the negligence of a nurse anesthetist under "Captain of the Ship." The Texas Superior Court was simply determining that the exception from "Captain of the Ship" for "administrative acts" did not apply. Of course as we have previously written, *the principles which govern the liability of the surgeon for the acts of others are equally applicable when surgeons work with anesthesiologists as they are when surgeons work with nurse anesthetists.* Under "Captain of the Ship," if the anesthetist had been an anesthesiologist, the surgeon nonetheless would have been responsible for the negligence, and there would have been a similar determination that the function was "medical" and not "administrative."

Though the memorandum admits that the Texas Supreme Court later rejected "Captain of the Ship," it asserts the court did not reject the "practice of medicine" statement. As I have indicated, when the Texas Supreme Court rejected "Captain of the Ship," it necessarily rejected the intricate exceptions which had arisen and were related to it, including the distinction between "administrative" and "medical" actions. The case cited by the memorandum, to support its claim that Texas did not reject the "practice of medicine" statement, *Sparger v Worley Hospital Inc.*, 547 S.W. 2d 582 (Texas 1977), is irrelevant because it does not even mention the statement.

Similarly, *Whitney v Day*, 100 Mich. App. 707, 300 N.W. 2d 380 (1980), belies the entire premise of the memorandum. In *Whitney v Day*, the Michigan Appellate Court determined that a nurse anesthetist was entitled to the benefit of the Michigan Professional Malpractice Statute. There had been a holding by an Ohio court that nurses were not entitled to the benefit of a professional malpractice statute. In *Whitney v Day*, the Michigan Appellate Court determined that nurse anesthetists "*are professionals who have expertise in an area which is akin to the practice of medicine*" and, therefore, they should be given the benefit of the statute. The court did not say that nurse anesthetists were practicing medicine. What the court said was that their area was "akin" to the practice of medicine.

### **The practice of anesthesia and nurse practice acts**

Finally, the memorandum misstates the holdings of *Magit v Board of Medical Examiners of the State of California*, 57 Cal. 2d 74, 366 P. 2d 816 (1961). The

chief of Anesthesiology at a California hospital had hired three unlicensed graduates of foreign medical schools to work as anesthetists. The chief of Anesthesiology was charged with violation of the California Medical Licensing Act. His defense was that it was a "*common and recognized practice in California and in other parts of the United States for licensed physicians to authorize and permit persons not licensed as physicians to administer anesthetics.*" In part, he relied on *Chalmers-Francis v Nelson*, in which Dagmar Nelson, a nurse anesthetist, was found not guilty of practicing medicine.

The Supreme Court of California stated that a determination that a licensed nurse could give anesthesia did not mean that any unlicensed person could administer anesthesia. It noted that there was an overlap of functions between nurses and physicians. Moreover, the *Dagmar Nelson* case did not discuss nor did it recite any evidence as to what persons other than licensed nurses could do. Thus, the *Dagmar Nelson* case was based on the special status of a licensed nurse and had no application to other practitioners.

In interpreting the California Medical Practice Act, the court came to the conclusion, as has virtually every other court, that medical practice acts do not mean that nurses are "*precluded from performing all acts which are medical or surgical in character but, rather, that they would be guilty of illegally practicing medicine or surgery only if their conduct in performing such acts did not come within the permissible scope of a nurse's functions, as defined in [the Nurse Practice Act].*"

Rather than coming to any conclusion as to whether anesthesia is or is not the practice of medicine, the *Magit* case clearly adopted the same analysis as did the *Sermchief* court, the Washington legislature and other examples cited in this column. What nurses are permitted to do can only be answered by reference to nurse practice acts. The fact that physicians can engage in a function or an area of practice, such as anesthesia, under medical practice acts does not mean that nurses are excluded from the function or area. To find out what nurses are allowed to do, you examine the nurse practice acts; to find out what dentists are allowed to do, you examine the dental practice acts. You certainly do not need to examine medical practice acts.

It is abundantly clear that nurse anesthetists may administer anesthesia. No one has seriously questioned that conclusion during the 54 years since the *Dagmar Nelson* case was decided. The insistence of anesthesiologists that anesthesia is the practice of medicine simply reflects a basic lack of understanding of who is protected by licensing laws and why these laws were adopted.