



## Health care competition in Georgia: Still restricted for general surgeons

by

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**S**urgical care in this country has made tremendous strides over the past couple of decades. New technology and improvements in surgical technique have revolutionized the provision of this care, including a shift in site of service for some procedures from hospitals to ambulatory surgery centers (ASCs). Millions of patients benefit from this change, receiving high-quality, cost-effective, and safe surgical care for a variety of surgical procedures.

In some states, certificate of need (CON) laws can be highly restrictive when it comes to the construction of ASCs, making it more difficult for patients to receive care in these settings. One state in particular, Georgia, not only tightly controls the development of health care facilities and services through

the CON process, it also controls which surgical specialties may apply for exemptions to the CON process for ASCs. In fact, under the state's CON program, single specialty ASCs are exempt from the CON requirements and do not have to obtain a CON to build and operate their facility. Rather, they must apply to the Department of Community Health (DCH) for a letter of non-reviewability (per regulations issued in 1998). Because general surgery is defined as a "multispecialty" rather than a "single specialty," general surgeons are ineligible for the exemption.

In other words, the state of Georgia, contrary to every other state in the nation, considers general surgeons to be nonspecialists.

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### ***Why Georgia's CON rule is a problem***

Because of the current definition of general surgery in the state's CON regulations, general surgery groups have been prevented from opening ASCs in Georgia. One in particular, Albany Surgical PC, began the process in a different way: Instead of applying for a letter of non-reviewability they knew the proprietors wouldn't get, they filed a lawsuit to overturn the definition of general surgery as a multispecialty. As the lawsuit worked its way through the Georgia courts, the American College of Surgeons and the Medical Association of Georgia filed amicus briefs in support of Albany Surgical. After years of legal wrangling, the state's Court of Appeals ruled that general surgery did not qualify for the single specialty exemption, and the Georgia Supreme Court affirmed that the regulation defining general surgery as a multispecialty was authorized by the CON statute. However, the courts did rule DCH had the authority to determine what a specialty was and how it was defined.

### ***Additional attempts to change the rules***

After the case was finished in 2003, other efforts were undertaken to gain recognition for general surgery as a single specialty in the CON rules. In 2004, the DCH considered revisions to its guidelines governing CON for ASCs, with organized medicine urging the group to add general surgery to the definition of a single specialty. The DCH insisted it did not have the authority to do this despite the specific rulings of the appellate courts to the contrary. Subsequent to this, the Board of Community Health was asked to consider a similar action, but an opinion issued February 1, 2005, from the attorney general's office reiterated the position that the department does not have the authority to revise what is in the CON statute.

Georgia Attorney General Thurbert E. Baker was asked to reconsider the previous opinion and issue an opinion putting his office in line with the courts by stating that the DCH has full authority to promulgate rules defining what is or is not a single specialty within the CON process. In addition, the Surgery State Legislative Action Center, a Web-based advocacy tool sponsored by the College, was activated to pro-

vide Georgia surgeons the opportunity to send a letter to Gov. Sonny Perdue (R), urging him to work with the DCH to address this issue.

### ***The origin of CON regulations***

During the 1970s, the federal government enacted legislation requiring states to adopt CON programs. The intent of CON legislation was to restrain skyrocketing health care costs, prevent the unnecessary duplication of health resources, and achieve equal access to quality health care at a reasonable cost. By the early 1980s, most states were in compliance, although by 1986, Congress had repealed this requirement in light of the ascendancy of free markets and competition and decreasing reliance on government regulation.

The U.S. Federal Trade Commission and the Department of Justice issued a report—*Improving Health Care: A Dose of Competition*—in 2004, recommending that states with CON programs should reconsider whether these programs best serve their citizens' health care needs. This report notes that, "On balance, CON programs are not successful in containing health care costs, and that they pose serious anti-competitive risks that usually outweigh their purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market.... Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anti-competitive barriers to entry."\*

### ***Further advocacy—Change the definition***

In 2005 and 2006, other efforts were undertaken to revise the definition of general surgery. The Georgia General Assembly, while refusing to pass legislation to do so, did adopt a bill establishing the State Commission on the Efficacy of the Certificate of Need Program in the Department of Community Health; its mission is to conduct a broad study of the CON program and report back with recommendations by July 1, 2007. As such, the commission began meeting on a monthly basis.

At one such meeting, in October 2005, Thomas Gadacz, MD, FACS, ACS Governor for Georgia,

\*U.S. Department of Justice. *Improving health care: A healthy dose of competition*. 2004. Available at: [http://www.usdj.gov/atr/public/health\\_care/204694.htm](http://www.usdj.gov/atr/public/health_care/204694.htm). Accessed May 18, 2006.

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testified on behalf of the Georgia Chapter that general surgery is a single specialty. Not only did he thoroughly describe the education and training that general surgeons receive, but he presented letters from the American Board of Medical Specialties, American Medical Association, American College of Surgeons, American Board of Surgery, American Society of General Surgeons, Georgia Chapter, and Georgia Surgical Society that general surgery is a single specialty.

Not unexpectedly, the commission voted to continue to discuss the issue and to address it in the final report for the legislature in 2007.

In February 2006, the Georgia Health Strategies Council invited representatives from the Georgia Chapter, Georgia Society of General Surgeons, and Medical Association of Georgia to address the issue of general surgery as a single specialty. Once again, Dr. Gadacz presented incontrovertible evidence that general surgery is a single specialty, only to have politics and profit win out over patient care when the council voted 12-9 to table revising the definition until the commission presents its report.

Also in February, surgeons met with Rhonda Meadows, MD, the new Commissioner of the Georgia Department of Community Health. At this meeting were W. Lynn Weaver, MD, FACS, President of the Georgia Chapter; Lamar McGinnis, Jr., MD, FACS, ACS Representative; Chris Smith, MD, FACS, president of the Georgia Society of General Surgeons (GSGS); and Dr. Gadacz. During this collegial conversation, Dr. Meadows recognized general surgery as a single specialty.

### ***No meetings in Georgia***

The College received a request from the Medical Association of Georgia (MAG) that the ACS inform Governor Perdue and the state Chamber of Commerce that the College would no longer conduct meetings in Georgia until the general surgery situation is resolved. The ACS Executive Committee agreed to this request in December 2005, and the governor and Chamber of Commerce were notified of this decision in early January 2006. The economic impact of this decision is sizeable, since the College's annual Clinical Congress generates an economic benefit of \$30 million to \$60 million.

### ***From this point forward***

The ACS, Georgia Chapter, the GSGS, and MAG will continue to advocate on behalf of general surgeons. The GSGS has hired an executive director/lobbyist to assist with these efforts. Advocacy will certainly focus on the definition of general surgery but could expand to complete repeal of the state's CON program (depending on the CON Commission report recommendations).

An independent political action committee (PAC) was formed earlier this year with the stated goal of repealing CON in Georgia. The CON PAC believes that CON regulations are unconstitutional, stifle free markets, and discriminate against physicians.

In the interim, it is important for Georgia general surgeons and their allies to attend meetings of the CON Commission, Board of Community Health, and Health Strategies Council to maintain visibility and involvement in the process. Hospital representatives are always in attendance at these meetings, as they clearly understand the importance of advancing their agenda within the state's regulatory structure. (The meeting dates are available at the DCH Web site at <http://dch.georgia.gov/02/dch/home/0,2467,31446711,00.html>). Georgia hospitals do not want to compete with ASCs and will do whatever it takes to keep general surgeons (and any other specialists) from being able to open these facilities. A recent example of such efforts is that hospitals have been buying up surgical practices, achieving greater control over the health care marketplace in their geographic areas, and ensuring that freestanding ASCs won't be built.

Finally, Georgia surgeons should be staunch grassroots advocates and regularly contact their state legislators to discuss these issues. Ultimately, it will be up to the Georgia General Assembly to act on the recommendations coming from the CON Commission, and established rapport with legislators will be essential for surgery to achieve desired results: recognition of general surgery as a specialty. □