Use of Unlicensed Medical Assistants in the Physician's Office

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A significant number of physicians use medical assistants or other unlicensed staff to assist in treating their patients in clinical settings and private offices. Medical assistants can be a valuable part of a physician's staff, as long as they are given the appropriate responsibilities and tasks.

It is often assumed that "certified medical assistants" can perform all tasks within their training by a physician. However, medical assistants are not recognized as licensed professionals in New York State. Licensure and certification are not interchangeable. Medical assistants are usually certified by a national organization such as the American Association of Medical Assistants. However, since the New York State Department of Education does not recognize medical assistants as licensed professionals, they may not perform tasks and duties which are reserved only for licensed medical or nursing professionals.

The New York State Board of Medicine, which governs the practice of physicians, physician assistants, and specialist assistants, has clarified the functions which unlicensed personnel may perform. The Board has provided a sample list of tasks which physicians are permitted by law to delegate to such individuals.[1] These tasks include, but are not limited to:

- secretarial work, such as assembling medical records;
- assisting with billing, and acting as receptionists and/or chaperones;
- measuring vital signs (if appropriately trained);
- performing an EKG, if trained to do so;
- collecting laboratory specimens, including performing phlebotomy, if appropriately trained; and
- acting as a "second set of hands" under the direct personal supervision of a licensed professional. For example, medical assistants may maintain a patient's body part in the position practitioners (not the medical assistant) have established while a bandage is applied or sutures are removed.

The above are acceptable tasks for medical assistants only if they have undergone the necessary training and the practitioner has deemed them able to safely and competently perform these tasks. Practitioners should periodically re-evaluate medical assistants' skills, particularly if problems, such as consistently abnormal vital signs, are noted. Additionally, licensed emergency medical technicians acting in a hospital, clinic or private office setting are also restricted to only those tasks deemed acceptable for delegation to medical assistants.[2]

The Board for Medicine has also provided a list of tasks that unlicensed personnel or medical assistants may not perform, regardless of training. This list includes, but is not limited to:

- triage of any kind;
- administering medication through any route (oral, IV, IM or ophthalmic), including "drawing up" medication and administering contrast dye;
- placing or removing sutures;
- taking x-rays or independently positioning patients for x-rays;
- applying or removing casts, or applying a brace after a cast has been removed; and
- acting as a first assistant in any surgical procedure.[3]

There is a common misconception that if physicians train competent unlicensed persons to perform an act or task which is reserved for licensed personnel, they may then delegate that task to the unlicensed individuals. However, this is not true, even when the unlicensed individuals are under the direct supervision of physicians.

State law provides that "permitting, aiding or abetting an unlicensed person to perform activities requiring a license" constitutes unprofessional conduct.[4] Physicians may also face charges of professional misconduct if they delegate "professional responsibilities to a person" when he/she "knows or has reason to know that such person is not qualified, by training, by experience, or by licensure, to perform them."[5] Therefore, physicians who inappropriately delegate any task or procedure to any unlicensed person risk an investigation by the Office of Professional Medical Conduct (OPMC) and potential charges of professional misconduct, up to and including revocation of their license. OPMC counsel recently

1. Memorandum from Walter Ramos, RN, JD, Executive Secretary to the New York State Board of Medicine to Interested Parties (April 2010) (on file with author).
2. Public Health Law §§ 3001 (1),(5), and (6), Telephone Interview with the New York State Department of Health Bureau of Emergency Medical Services, November 2010.
3. Memorandum from Walter Ramos, RN, JD, Executive Secretary to the New York State Board for Medicine to Interested Parties (April 2010) (on file with author).
4. Education Law § 6530 (11)
5. Education Law § 6530 (25)

has indicated that OPMC investigations are being commenced more often due to patient injuries resulting from the inappropriate delegation of tasks to unlicensed individuals. Improper delegation of duties to medical assistants may also result in malpractice claims or lawsuits by patients. Finally, medical assistants who perform inappropriately delegated tasks may face allegations of practicing medicine or nursing without a license, and may be charged with a Class E felony.[6] The Department of Health may choose to investigate and penalize the physicians based upon such allegations, and criminal proceedings could potentially be commenced for aiding and abetting medical assistants to "practice medicine or nursing" without a license.[7]

In summary, it is in the best interests of both physician employers and medical assistants to function solely within the confines of State law and the guidance provided by the New York State Board of Medicine. Physicians will then avoid allegations of professional misconduct, medical malpractice, or even criminal acts, which have potential consequences for their licenses and professional medical liability insurance coverage.

Risk Management Recommendations

1. Comply fully with New York State laws governing the delegation of tasks by physicians and other licensed professionals to medical assistants.
2. Medical assistants should wear badges identifying themselves by both name and the title "medical assistant."
3. Medical assistants must be allowed access to only those portions of patients' medical records that are necessary to perform their job function.
4. Medical assistants must never be permitted to perform any task that is considered the practice of medicine or nursing, particularly administering or "drawing up" any type of medication or injection.[8]
5. Medical assistants must be strictly limited to performing those tasks deemed acceptable by the New York State Board of Medicine. Further, tasks that are limited to licensed cosmetologists and estheticians must not be inappropriately delegated to medical assistants.
6. Non-licensed individuals may call in renewals of non-narcotic medications with provider approval, and may complete information on prescriptions dictated or provided by physicians. However, providers must understand that they have assumed a risk by allowing non-licensed individuals to do so. Providers are ultimately responsible and liable for any and all errors made by those individuals.[9]
7. Physicians' offices must have a written policy regarding prescriptions and communication with pharmacies, and all staff must know, understand and comply with that policy. When pharmacists question the dosage of a drug written on a prescription, only the licensed provider who prescribed the drug may adjust the dosage. Pharmacists must speak directly with licensed prescribers to avoid errors in communication. ❖

6. Education Law § 6512 (1).
7. Education Law § 6514.
8. Education Law §§ 6522, 6903, Memorandum from Barbara Zittel, RN, PhD., Executive Secretary to the New York State Board for Nursing, (2001) (copy on file with author).
9. Letter from Peter D. VanBuren, Deputy Counsel to Bureau of Professional Medical Conduct, to Frances A. Ciardullo, Esq. (September 7, 2007). (copy on file with author)

How a Plaintiff's Attorney...

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This is a useful check and balance for the plaintiff's attorney and assists with the decision whether to commence the case.

The understandable unwillingness of many physicians to testify against their fellow physicians often results in the establishment of a small group of physicians who do testify frequently. While such witnesses are sometimes compromised at trial by their frequent appearances as trial experts, most juries sense that doctors are reluctant to speak ill of a colleague. Thus, juries are often willing to accept an expert who frequently performs medical/legal work for plaintiffs.

The objective of a competent plaintiff's attorney is to obtain an honorable expert who can effectively communicate the defendant's failures to a jury without using "smoke and mirrors." Resorting to the latter is a recipe for defeat at trial. Thus, the final step in screening a case is to obtain a credible expert for trial and properly disclose this expert's qualifications to the defendant as required by State law. Once all of these pieces are in place, the litigation can proceed until either a settlement or trial takes place.

In summary, only a fraction of the referrals or calls attorneys receive from potential clients result in the commencement of medical malpractice litigation. While the plaintiff's attorney makes every attempt to pursue only those cases which have merit, even with the most careful screening by the attorney, there is no guarantee that the plaintiff will win the case. ❖

For over 30 years, Robert F. Julian, Esq. has represented primarily plaintiffs in complex cases including medical malpractice, products liability and personal injury. Mr. Julian has served as a New York State Supreme Court Justice from 2001-2008. He has an active trial practice in both personal injury and matrimonial cases.