

OPMC Consequences of Improper Delegation

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As the regulatory umbrella overshadowing physicians and their practices continues to expand, the corollary investigative intrusions by state agencies, the federal government and through civil litigation have brought about a dramatic increase of scrutiny into the permissive, and non-permissive, delegation of medical services throughout the rendition of care. As a result, physicians must be ever more vigilant to ensure that their practice acts only within the permissive (and ever changing) boundaries set by law.

One of the leading authorities in determining the propriety of delegation with a medical practice is the Office of Professional Medical Conduct of the State of New York ("OPMC"). One of the most prevalent areas of scrutiny by OPMC, and resulting professional discipline, is the controversial role of a medical assistant. Every physician must bear in mind that Medical Assistants, regardless of "certification" status are not licensed by the State of New York and, therefore, their role is by law (and must be in practice) severely limited.

According to the New York State Education Department, Medical Board Office:

"Medical assisting is not a licensed profession in New York State, therefore, there is no associated scope of practice and no detailed list of procedures that medical assistants may perform. A medical assistant, even if nationally certified by the American Association of Medical Assistants, is afforded no legal privileges to perform medical acts that are within the scope of practice of licensed professions such as medicine, nursing, and respiratory therapy. In accordance with the laws of New York State, medical assistants may perform a wide range of administrative and several non-medical clinical duties. Administrative duties include scheduling and receiving patients, preparing and maintaining medical records, performing basic secretarial skills and medical transcription, handling telephone calls and writing correspondence, serving as a liaison between the physician and other individuals such as patients, and managing practice finances. Clinical duties may include taking patient histories and vital signs, performing first aid in emergency situations, preparing patients for procedures, assisting the physician in examinations and procedures, collecting specimens, performing phlebotomy, and asepsis and infection control of examination and treatment rooms. Even under the supervision of a physician, a medical assistant may not perform functions that are within the scope of practice of nursing, physician assisting, respiratory therapy, medicine, and other professions granted licensure under Title 8 of Education law."

A brief summary of the laws of the State of New York reveals:

Education Law section 6522: Only a person *licensed or otherwise authorized* under this article shall practice medicine or use the title "physician." In light of the limitations and restrictions placed upon licensed health professionals such as PA's and nurses (discussed below), and in light of the fact that

medical assistants are unlicensed, the State of New York has consistently held that medical assistants are not permitted to insert IV's, much less administer substances, and that OPMC would charge such actions as constituting the unauthorized practice of medicine.

Education Law section 6542 (illustrating the limitations on Physician Assistants): A physician assistant may perform medical services, but only when under the supervision of a physician and only when such acts and duties as are assigned to him are within the scope of practice of such supervising physician. Supervision must be continuous; however, the physician is not required to be physically present when the assistant is rendering such services.

Education Law section 6902 (illustrating the limitations on Nursing): The practice of nursing is defined as performing tasks and responsibilities within the framework of case finding, health teaching, health counseling, and provision of supportive and restorative care under the direction of a physician. Registered nurses and nurse practitioners do not need direct supervision; a licensed practical nurse needs direct supervision from a physician or registered nurse.

To those physicians or practices who remain ignorant of these limitations, or act in defiance of them, and face scrutiny by OPMC, Education Law, Section 6530, No. 25, defines Professional Misconduct as "delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience, or by licensure, to perform them" and Section 6530, No. 33 further includes "failing to exercise appropriate supervision over persons who are authorized to practice only under the supervision of the licensee" as an additional potential charge of professional misconduct.

In reviewing actions undertaken by OPMC under these laws, the courts of the State of New York have been consistent in their endorsement that unprofessional conduct includes "delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience or by licensure, to perform them".

Of note, in *Taylor v. Board of Regents*, 617 N.Y.S.2d 926 (1994), the physician argued that while he never delegated duties to any employees, if it was found that he did, those employees were qualified by training and experience to perform the duties so delegated even if they did not have the requisite license or permit. The physician further contended that these regulations enabled him and or any other licensed professional, which may include a physician, dentist, podiatrist or social worker, to determine without any objective review that an individual in their employ is qualified to perform certain functions based upon their training and experience that would normally be limited to individuals who are licensed. Therefore, since such conduct would be permitted, pursuant to this regulation, any charge alleging a violation of Education Law §6509(7), which defines professional misconduct as including "[p]ermitting, aiding or abetting an unlicensed person to perform activities requiring a license", would be in error. The physician's argument was summarily rejected by the Court, ruling that his "attempt to excuse his conduct strains the credulity of this court."

Additionally, in *Huh v. NYDOH*, 681 N.Y.S.2d 872 (1998), the Appellate Division reviewed an OPMC decision holding a physician guilty of fraudulent practice, permitting unlicensed persons to perform activities requiring a trained professional and delegating professional responsibilities to unqualified individuals. The Hearing Committee had found the appropriate penalty to be revocation of the physician's license and the higher court upheld the OPMC determination and the revocation of the physician's license.

The potential consequences to a physician and/or their medical practice for the inappropriate delegation of services do not end with charges by OPMC. In *People v. Santi*, 3 N.Y. 3d 234 (Court of Appeals, 2004) the court held that a licensed physician could be subject to criminal prosecution under Education Law section 6512 (1) (establishing the unauthorized practice as a crime) for aiding and abetting an unauthorized individual in the unlawful practice of medicine. In this case, a "medical assistant" (a physician with a suspended license) inserted IV's into patients (administering anesthesia) and was subsequently charged with a criminal act.

Moreover, Section 6512 (1) provides that:

Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession... shall be guilty of a class E felony.

Section 6512 (2) further provides in part:

Anyone who knowingly aids or abets three or more unlicensed persons to practice a profession or employs or holds such unlicensed persons out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts ... shall be guilty of a class E felony.

In the arena of civil litigation, the impermissible delegation of services to patients may well also jeopardize the protections customarily afforded a physician and/or the medical practice under their medical malpractice insurance policy. Attorneys representing patients are becoming increasingly more knowledgeable in this area of law and frequently seek either preemptive action through the State of New York, plead the non-permissive delegation within the action for medical malpractice – or both. An action which contains non-insured claims for improper delegation of services places great pressures upon the physician to settle the action, expend great expense for the costs of personal defense counsel and/or risk personal asset exposure through jury verdict.

In *Hoffson v. Orentreich*, 562 N.Y.S.2d 479 (1990), an action for medical malpractice and negligence for disfiguring, permanent scars allegedly sustained by patient as result of procedure performed by registered nurse in draining acne cysts and removing blackheads from patient's face, the jury was permitted to decide whether the nurse acted in accordance with proper nursing standards or engaged in the practice of medicine without license.

In conclusion, each and every physician and/or medical practice should immediately undertake a step-by-step, detailed audit and/or review of the specific roles being imposed upon, or undertaken by, each and every employee – regardless of licensure status or the degree of involvement within the medical care being so rendered by the practice. Careful comparison of those roles against the limitations imposed by the laws of the State of New York may well reveal not only great exposures previously unknown to the practice but also great opportunities for truly productive risk management, threat reduction and prospective regulatory compliance.

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