

Is Your Medical Assistant Practicing Medicine Illegally?

August 1, 2016

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Is your medical assistant practicing medicine illegally? Understand the difference between medical *assistance* and medical *practice*.

Don't Confuse the Roles of the MD and the MA

What happens when the MD and MA work together so seamlessly that patients can misunderstand who's who? What if one of the "patients" is an undercover medical board investigator? Consider this practice scenario.

Dr. Barbara is a licensed medical doctor (MD), and her best friend Gina is a non-licensed medical assistant (MA).

Gina studied medicine in Germany, got her license and practiced there, but she is not licensed anywhere in the U.S. However, she is very knowledgeable, and good with patients.

Gina is particular good with patients who have stomach upset. Barbara has her palpate these patients to assess where there might be some gastrointestinal disorder requiring treatment or referral to a specialist.

Gina also gives patients nutritional advice when she accompanies Dr. Barbara on rounds. Dr. Barbara usually nods her head, and once in a while will make her own comments on the dietary supplements Gina recommends. Gina is expert in homeopathy as well and may recommend various homeopathic remedies that are commonly available at the local dietary supplement store, pharmacy, or holistic grocery store.

Dr. Barbara wants to know if she is following the rules (in California) for her medical assistants.

Watch The Perils of "Unlicensed Practice" of "Medicine"

Let's start with the definition of "practicing medicine." This varies by state, but there are many commonalities.

California's definition of "practicing medicine" in California Business and Professions Code Section 2052(a) is typical of many:

any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish,

deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person.

Violation can result in a fine of up to \$10,000, imprisonment in a county jail of up to a year, or both.

Know The Safe Harbor for Non-Licensed Practitioners

In a minority of states, the legislature has provided a safe harbor for non-licensed practitioners to offer services, so long as they are not “practicing medicine” or another licensed profession (such as, for example, psychology).

In California, this legal shelf is known as “SB 577,” after Senate Bill 577.

SB 577 is codified into the provisions of Sections 2053.5 and 2053.6 of the California Business and Professions Code.

Referencing the prohibitions against “practicing medicine” in Sections 2051 and 2052, Section 2053.5 provides:

(a) Notwithstanding any other provision of law, a person who complies with the requirements of Section 2053.6 shall not be in violation of Section 2051 or 2052 unless that person does any of the following:

- (1) Conducts surgery or any other procedure on another person that punctures the skin or harmfully invades the body.
- (2) Administers or prescribes X-ray radiation to another person.
- (3) Prescribes or administers legend drugs or controlled substances to another person.
- (4) Recommends the discontinuance of legend drugs or controlled substances prescribed by an appropriately licensed practitioner.
- (5) Willfully diagnoses and treats a physical or mental condition of any person under circumstances or conditions that cause or create a risk of great bodily harm, serious physical or mental illness, or death.
- (6) Sets fractures.
- (7) Treats lacerations or abrasions through electrotherapy.
- (8) Holds out, states, indicates, advertises, or implies to a client or prospective client that he or she is a physician, a surgeon, or a physician and surgeon.

(b) A person who advertises any services that are not unlawful under Section 2051 or 2052 pursuant to subdivision (a) shall disclose in the advertisement that he or she is not licensed by the state as a healing arts practitioner.

Section 2053.6 provides:

(a) A person who provides services pursuant to Section 2053.5 that are not unlawful under Section 2051 or 2052 shall, prior to providing those services, do the following:

(1) Disclose to the client in a written statement using plain language the following information:

(A) That he or she is not a licensed physician.

(B) That the treatment is alternative or complementary to healing arts services licensed by the state.

(C) That the services to be provided are not licensed by the state.

(D) The nature of the services to be provided.

(E) The theory of treatment upon which the services are based.

(F) His or her educational, training, experience, and other qualifications regarding the services to be provided.

(2) Obtain a written acknowledgment from the client stating that he or she has been provided with the information described in paragraph (1). The client shall be provided with a copy of the written acknowledgement, which shall be maintained by the person providing the service for three years.

(b) The information required by subdivision (a) shall be provided in a language that the client understands.

This basically references the SB 577 Disclosure (or Consent) that a non-licensed practitioner provides for the client.

Last, 2053.6(c) provides that the statutes does not:

(1) Affect the scope of practice of licensed physicians and surgeons.

(2) Limit the right of any person to seek relief for negligence or any other civil remedy against a person providing services subject to the requirements of this section.

Although this legal shelf exists, and provides some legal umbrella for non-licensed practitioners, this is still subject to other statutory prohibitions, such as the prohibition against unlicensed practice of medicine.

Under the Legal Rules about Nutritional Advice

Certain titles are protected by licensing statutes and cannot be used without the license.

In some states, only a person with designated training can offer nutritional advice as this is reserved for licensed healthcare practitioners.

In California, the law allows persons to give “nutritional advice” or “advice concerning proper nutrition,” so long as such individuals do not practice medicine (i.e., do not violate B&P 2052), and “post in an easily visible and prominent place the following statement in his or her place of business:

NOTICE

State law allows any person to provide nutritional advice or give advice concerning proper nutrition—which is the giving of advice as to the role of food and food ingredients, including dietary supplements. This state law does NOT confer authority to practice medicine or to undertake the diagnosis, prevention, treatment, or cure of any disease, pain, deformity, injury, or physical or mental condition and specifically does not authorize any person other than one who is a licensed health practitioner to state that any product might cure any disease, disorder, or condition.

The notice required “shall not be smaller than 8¹/₂ inches by 11 inches and shall be legibly printed with lettering no smaller

than $\frac{1}{2}$ inch in length, except the lettering of the word "NOTICE" shall not be smaller than 1 inch in length."

Our healthcare law team usually also includes such a notice in the SB 577 disclosure (as well as other provisions aimed to reduce legal risk for the practitioner).

Understand the Legal Rules about Medical Assistants

There is a fair amount of statutory verbiage around what medical assistants can and can't do.

In California, there are:

- Statutes
- Regulations
- Interpretations or discussions by the California Medical Board

The relevant statutes are California Business & Professions Code Sections 2069 through 2071.

Section 2069 provides in part (we've added bold below).

(a) (1) Notwithstanding any other law, a medical assistant may administer medication only by intradermal, subcutaneous, or intramuscular injections and perform skin tests and additional technical supportive services upon the specific authorization and supervision of a licensed physician and surgeon or a licensed podiatrist. A medical assistant may also perform all these tasks and services upon the specific authorization of a physician assistant, a nurse practitioner, or a certified nurse-midwife.

(2) The supervising physician and surgeon may, at his or her discretion, in consultation with the nurse practitioner, certified nurse-midwife, or physician assistant, provide written instructions to be followed by a medical assistant in the performance of tasks or supportive services.....

(b) As used in this section and Sections 2070 and 2071, the following definitions apply:

(1) "Medical assistant" means a person who may be unlicensed, **who performs basic administrative, clerical, and technical supportive services** in compliance with this section and Section 2070 for a licensed physician and surgeon or a licensed podiatrist, or group thereof, for a medical or podiatry corporation, for a physician assistant, a nurse practitioner, or a certified nurse-midwife as provided in subdivision (a), or for a health care service plan, who is at least 18 years of age, **and who has had at least the minimum amount of hours of appropriate training pursuant to standards established by the board**. The medical assistant shall be issued a certificate by the training institution or instructor indicating satisfactory completion of the required training. A copy of the certificate shall be retained as a record by each employer of the medical assistant.

(2) "Specific authorization" means a specific written order prepared by the supervising physician and surgeon or the supervising podiatrist, or the physician assistant, the nurse practitioner, or the certified nurse-midwife as provided in subdivision (a), authorizing the procedures to be performed on a patient, which shall be placed in the patient's medical record, or a standing order prepared by the supervising physician and surgeon or the supervising podiatrist, or the physician assistant, the nurse practitioner, or the certified nurse-midwife as provided in subdivision (a), authorizing the procedures to be performed, the duration of which shall be consistent with accepted medical practice. A notation of the standing order shall be placed on the patient's medical record.

(3) "Supervision" means the supervision of procedures authorized by this section by the following practitioners, within the scope of their respective practices, who shall be physically present in the treatment facility during the performance of those

procedures:

(A) A licensed physician and surgeon.

(B) A licensed podiatrist.

(C) A physician assistant, nurse practitioner, or certified nurse-midwife as provided in subdivision (a).

(4) (A) **“Technical supportive services” means simple routine medical tasks and procedures that may be safely performed by a medical assistant who has limited training and who functions under the supervision of a licensed physician and surgeon or a licensed podiatrist, or a physician assistant, a nurse practitioner, or a certified nurse-midwife as provided in subdivision (a)....**

(c) Nothing in this section shall be construed as authorizing any of the following:

(1) The licensure of medical assistants.

(2) The administration of local anesthetic agents by a medical assistant.

(3) The board to adopt any regulations that violate the prohibitions on diagnosis or treatment in Section 2052.

(4) A medical assistant to perform any clinical laboratory test or examination for which he or she is not authorized by Chapter 3 (commencing with Section 1200)....

Section 2070 provides that “a medical assistant may perform venipuncture or skin puncture for the purposes of withdrawing blood upon specific authorization and under the supervision of a licensed physician and surgeon or a licensed podiatrist, or a physician assistant, a nurse practitioner, or a nurse-midwife as provided in subdivision (a) of Section 2069, if prior thereto the medical assistant has had at least the minimum amount of hours of appropriate training pursuant to standards established by the Division of Licensing. The medical assistant shall be issued a certificate by the training institution or instructor indicating satisfactory completion of the training required. A copy of the certificate shall be retained as a record by each employer of the medical assistant.”

Section 2071 provides for the California Medical Board to adopt and administer “regulations that establish standards for technical supportive services that may be performed by a medical assistant.”

As for regulations, look to the California Code of Regulation (CCR) Title 16 (Professional and Vocational Regulations), Division 13 (Medical Board of California), Chapter 3 (Affiliated Healing Arts), Article 2 (Medical Assistants), Section 1366-1366.4. These supplement what is said in the statutes.

The Medical Board Hotly Enforces Violations Involving Medical Assistants

IF you want to know what your medical assistant can and can't do, it's best to consult an attorney, who can work through the statutes and regulations and advise you as to what is allowed.

You can get a sense by seeing what the California Medical Board says on its website. The warnings are fairly stern.

First, the California Medical Board warns against medical assistants practicing *beyond* their scope of training:

Medical assistants are unlicensed, and may only perform basic administrative, clerical and technical supportive services as permitted by law. **An unlicensed person may not diagnose or treat or perform any task that is invasive or requires**

assessment. The responsibility for the appropriate use of unlicensed persons in health care delivery rests with the physician.... (emphasis added)

Under the law, **“technical supportive services” are simple, routine medical tasks and procedures that may be safely performed by a medical assistant who has limited training and who functions under the supervision of a licensed physician,** podiatrist, physician assistant, nurse practitioner, or nurse midwife. “Supervision” is defined to require the licensed physician, podiatrist, physician assistant, nurse practitioner, or nurse midwife to be **physically present in the treatment facility during the performance of those procedures**.... (emphasis added)

Medical assistants are not allowed to perform such invasive procedures as:

- placing the needle or starting and disconnecting the infusion tube of an IV.
- administering medications or injections into the IV line.
- charting the pupillary responses.
- inserting a urine catheter.
- independently performing telephone triage.
- injecting collagen.
- using lasers to remove hair, wrinkles, scars, moles or other blemishes.
- administering chemotherapy.

Medical assistants may not interpret the results of skin tests, although they may measure and describe the test reaction and make a record in the patient’s chart.

In summary, **medical assistants are not licensed, and it is not legal to use them to replace highly trained, licensed professionals. The medical assistant is present to assist and perform basic supportive services in the physician’s office.** (emphasis added)

Those duties must be appropriate with the medical assistant’s required training.

On its FAQ page for Medical Assistants, the California Medical Board outlines a number of common MA practices that are either legal or illegal. For example:

Are medical assistants allowed to take a patient’s blood pressure?

Yes. Medical assistants are allowed to take the necessary information to prepare a patient for the physician’s or podiatrist’s visit. This information may include taking the patient’s height, weight, temperature, blood pressure and noting the information on the patient’s chart.

Are medical assistants allowed to perform telephone triage?

No. Medical assistants are not allowed to independently perform telephone triage as they are not legally authorized to interpret data or diagnose symptoms.

Can medical assistants call in refills to a pharmacy?

Yes. Under the direct supervision of the physician or podiatrist, a medical assistant may call in routine refills that are exact and have no changes in the dosage levels. The refill must be documented in the patient’s chart as a standing order, patient

specific. Medical assistants may not call in new prescriptions or any prescriptions that have changes. The physician should view carefully his or her decision to allow medical assistants to perform this task, as the authority to prescribe or refill prescriptions is only granted to licensed physicians and surgeons, podiatrists, or those individuals authorized by law to do so.

The California Medical Board is particularly concerned about improper use of medical assistants in medical spas. The Board has a webpage, [Frequently Asked Questions—Cosmetic Treatments](#), in which it has the following

9. What is the penalty if I get caught using or helping an unlicensed person to perform medical treatment?

The law provides a number of sanctions, ranging from license discipline to criminal prosecution, for aiding and abetting the unlicensed practice of medicine. Physicians could be charged with aiding and abetting unlicensed practice, and the employee could be charged with unlicensed practice.

The Board is clear that its enforcement posture here is strong.

Clarifying Roles Should Help

In our practice scenario above, Dr. Barbara the MD and Gina the MA have to be very clear about their practice roles.

Even though Gina may have been a licensed medical doctor in Germany, that license does not allow her to practice “medicine” in the U.S. She cannot diagnose or treat. She can only provide “technical, supportive” and other designated services as outlined in the medical assistant laws and regulation.

(In California, look to the regulations for a list of additional technical supportive services).

Gina should not be palpating patients; this sounds like a diagnostic function that should be left to the medical doctor.

As well, Gina’s homeopathic recommendations could be construed as the practice of medicine. Even though the remedies might be commonly available, homeopathic medicine is a medical art.

A handful of states designate licensure for homeopathy physicians; and homeopathy may be within the scope of practice of some licensed practitioners; but to the extent it involves diagnosis and treatment, it could be seen as the practice of medicine.

Nutritional advice is separate from the medical assistant function. This might require an SB 577 disclosure with the required disclosure for nutritional practice (if in California), or other documentation depending on state law.

Many physicians assume that someone like Gina can practice “under” their licensure. This is a false concept. There is licensed practice, allied health practice under physician supervision (or independent), and complementary and alternative medical practice (licensed or non-licensed). The fact that Dr. Barbara nods her head doesn’t mean that Gina is *not* giving medical advice.

The California Medical Board makes clear that the physician is responsible for appropriate use of medical assistants. If the use is inappropriate, the physician could be aiding and abetting unlicensed medical practice, and prosecuted and/or disciplined accordingly.

Both clinical practitioners and patients have to be clear about the professional roles and boundaries of clinical staff within the medical practice.

Ask your healthcare lawyer if you have any questions about who can do what, within the medical center, clinical or group.

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.