

# Cal Ortho On-Line

Orthopaedic Legal News

EMERGING TRENDS IN ORTHOPAEDIC  
PRACTICE MANAGEMENT, DELIVERY MODELS,  
AND LEGAL ISSUES

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and to register for the  
meeting.

## Employment of a Physical Therapist by a Professional (Medical) Corporation

COA, along with the California Medical Association and other organizations, have been working to clarify that medical corporations may employ physical or occupational therapists. The California Physical Therapy Association (CPTA) has been adamantly opposed to this clarification unless it is tied to allowing patients to seek care directly from a physical therapist without a referral. SB 924 has been amended to address both of these issues and is currently pending in the Assembly. **COA is making every effort to reach agreement on this issue this year and we are encouraged that Senate President pro Tempore Darrell Steinberg and Senator Curren Price, Chair of the Senate Business, Professions & Economic Development Committee have signed on as co-authors of the bill.**

However, with this uncertainty, health care attorneys representing medical corporations, have also been exploring other structural alternatives for a medical corporation to be able to continue to offer physical medicine services as a part of their integrated health care system. The below summary of structural alternatives was prepared by the Calton Law Group and the law firm of Carlson & Jayakumar. The summary is provided to you for your information.

## Working with (or without) a Physical Therapist: Structural Alternatives for the Professional Corporation

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### Introduction

Over the past 20 or more years, it has been commonly accepted that a medical corporation in California could employ a physical therapist. There are literally hundreds of medical practices which employ one or more physical therapists. But in September of 2010, the Legislative Counsel Bureau issued an opinion which narrowly interpreted the California Corporations Code and concluded that a physical therapist cannot be employed by a medical corporation.<sup>1</sup>

Corporations Code, §13401.5 provides that the following individuals may be shareholders, officers, directors or professional employees of a medical corporation:

- (1) Licensed physicians and surgeons.
- (2) Licensed doctors of podiatric medicine.
- (3) Licensed psychologists.
- (4) Registered nurses.
- (5) Licensed optometrists.
- (6) Licensed marriage and family therapists.
- (7) Licensed clinical social workers.
- (8) Licensed physician assistants.
- (9) Licensed chiropractors.
- (10) Licensed acupuncturists.
- (11) Naturopathic doctors.

<sup>1</sup> [http://ptbc.ca.gov/forms\\_pubs/opinion\\_ptemployment.pdf](http://ptbc.ca.gov/forms_pubs/opinion_ptemployment.pdf)

### Working with (or without) a Physical Therapist: Structural Alternatives for the Professional Corporation

Physical therapists are not mentioned specifically, but then neither are licensed occupational therapists, vocational nurses, licensed pharmacists, licensed aestheticians, licensed audiologists, etc., many of whom commonly work for medical corporations. While we don't believe that this section of the law was ever designed to preclude other types of people from being employed by a medical corporation, the Legislative Counsel's opinion was directed at this one section of the law, holding that because physical therapists are not specifically mentioned, then they must be excluded.

Interestingly, when this law was last amended, adding the ability for naturopathic doctors to incorporate, physical therapists were included in that subsection (Corporations Code §13401.5(m)). While there is no logical reason to allow naturopathic corporations to employ physical therapists, and not a medical corporation, this amendment may bolster the Legislative Counsel's position – that the exclusion was intentional.

In February of 2011, the Legal Affairs office of the Department of Consumer Affairs considered the issue and concluded that a physical therapist is authorized to render professional services as a professional employee of a naturopathic doctor corporation, but not for a medical corporation. This was their opinion unless there were to be a statutory change.<sup>2</sup> Until January 1, 2013, the Physical Therapy Board of California is prohibited from taking disciplinary action against a physical therapist providing physical therapy services as a professional employee of a medical corporation, podiatric medical corporation, or chiropractic corporation. (California Business & Professions Code § 2674.) Nonetheless, while this issue should be clarified by the Legislature, we felt it appropriate to consider what alternatives may be available for medical groups who want to provide physical therapy and physical rehabilitation services to their patients without involving the issues raised by the opinions discussed above. With thousands of physical therapists in California adversely affected by these opinions, we hope to find solutions for the many who enjoy working directly with physicians and their support staff. From the physicians' standpoint, they also need to evaluate what alternatives may allow them to continue to provide physical therapy services to their patients with the convenience of the services being provided in their offices.

#### Alternatives

**Solo Practice and Partnerships.** First of all, the Corporations Code section, and therefore this interpretation, only applies to professional corporations. If a physician is in a solo practice (unincorporated), the restriction would not apply. Although we don't typically recommend unincorporated practice, we are not aware of any law or board interpretation which would prohibit a physical therapist from being employed by a physician in a solo and unincorporated practice. Similarly, if the entity is a medical partnership, then the limitation would not apply. Although not too common, there are some medical groups which are operated as a partnership, consisting of individual medical corporations, with all of the staff being employed by the partnership. While the medical corporations could not employ the physical therapist, the partnership could.

Because it is unclear whether the Legislature will pass and the Governor will sign legislation clarifying this issue, it is important to explore alternative arrangements for a medical corporation who wants to continue their in-office physical therapy services.

<sup>2</sup> [http://www.ptbc.ca.gov/forms\\_pubs/dcaopinion.pdf](http://www.ptbc.ca.gov/forms_pubs/dcaopinion.pdf)

### Working with (or without) a Physical Therapist: Structural Alternatives for the Professional Corporation

#### Alternative #1

#### Independent Contractor Arrangements

Because the recently raised issues apply only to the employment of a physical therapist by a professional corporation, it may be feasible to instead use an independent contractor arrangement, either with an individual therapist or a group of therapists.<sup>3</sup> Under this arrangement, the medical group would bill for the services performed by the physical therapists, and pay the therapists a contractual amount for their services. However, it is vitally important that corporations not simply change physical therapists' titles from employee to independent contractor – both procedural and substantive changes must be made and legal counsel should be consulted.

Here are what we believe to be the parameters for such an arrangement.

First, the arrangement would need to be compliant with the Stark law (42 U.S.C. §1395nn), California Business & Professions Code §650.01, and for Workers' Compensation cases, Labor Code §139.3. To meet these requirements, there would need to be a written contract which defines the services to be rendered, having a term of one year or more, establish compensation for the P.T. or P.T. entity at a fixed rate, set in advance, and which does not go up or down with the volume or value of any referrals of business.

Secondly, the services would need to be performed within the facility owned and operated by the medical entity. In an Attorney General's Opinion issued in 1999,<sup>4</sup> the California Attorney General held that it would be illegal under California law for a physician to refer patients to an outside physical therapy entity, to bill for the services provided, and to retain a portion of the payment received.

Lastly, there are a number of governmental agencies who have an interest in whether a person is an employee or independent contractor, and who have the capability to make their own determination and reclassify the independent contractor relationship as an employee. These entities include:

- The Internal Revenue Service
- The California Department of Revenue
- The California EDD
- The U.S. Department of Labor
- The California Labor Commission

Any reclassification will include some type of penalties. For instance, if the IRS reclassifies a person who has been treated as an independent contractor into an employee, they will be asking the "employer" for amounts which should have been withheld from their payroll, interest, and penalties.

The risks can, however, be reduced significantly with a properly structured and documented relationship. The arrangement should be structured so that it will meet the IRS guidelines concerning independent contractor relationships. The IRS follows a 20-factor test and evaluates the fact situation by these tests. If, on balance, the arrangement looks more like an employment relationship as opposed to an independent contractor, then the IRS can administratively reclassify the person as an employee, which will likely result in money due from the employer.

<sup>3</sup> The California Physical Therapy Association, a group that worked hard to defeat AB 783, agrees that a physical therapist may enter into an independent contractor relationship with a medical corporation. (<http://www.ccapta.org/associations/9137/files/CPTAEmploymentToolKit-12-22-2010.Website.pdf>)

<sup>4</sup> 82 Ops. Cal. Atty. Gen 225

### **Working with (or without) a Physical Therapist: Structural Alternatives for the Professional Corporation**

The IRS 20 factors are included at the end of this article. Before entering into an independent contractor relationship with a physical therapist, you should first consult legal counsel. Nevertheless, we offer the following guidelines which may be helpful in successfully establishing an independent contractor relationship:

- Have a written, non-exclusive, contract.
- The physical therapist determines the course of therapy for each patient.
- The physical therapist provides their own malpractice and Workers' Compensation coverage and pays any expenses they incur.
- The physical therapist does not receive any benefits from the medical corporation – vacation, medical, dental, and the like.
- The physical therapist chooses the times when they will provide their services and provides their own equipment.
- The physical therapist, not the medical corporation, employs or engages any physical therapist assistants and aides.

While these measures require the medical corporation to cede a certain amount of control of the practice to the physical therapist, they are important toward establishing that the physical therapist is properly classified as an independent contractor. In this regard, it is also noteworthy that effective January 1, 2011, there are increased penalties for the “willful misclassification” of an independent contractor. To ensure that misclassified workers do not lose rights (such as wage protections, Workers’ Compensation insurance, etc), California law now provides enhanced monetary penalties for employers who misclassify their employees (between \$5,000 and \$25,000 in addition to any other fines and penalties permitted by law.) “Willful misclassification” means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor. (Labor Code §226.8). This new law makes it even more important that the medical practice be vigilant in establishing and maintaining an independent contract relationship..

#### **What about Medicare?**

With respect to Medicare, a physical therapist could work as an independent contractor for a medical corporation, subject to the above described restrictions to make the arrangement compliant with the anti-kickback rules. Some additional requirements would apply, including the following:

1. Both the therapist and the medical entity must be Medicare providers. The individual therapists would need to obtain a PIN number if they have not already done so.
2. The therapist must reassign the right to receive benefits paid by Medicare to the medical entity.
3. The agreement must contain a provision for joint and several liability of any Medicare overpayments.
4. The agreement must contain a provision for the therapist to have full access to the billing records.
5. A reassignment form must be filed with Medicare, (CMS-855R).

Note that Medi-Cal and other federal program restrictions may be different and should be separately considered.

#### **What about PPOs?**

With the independent contractor arrangement, the medical group would bill for the services provided by the physical therapist in the facility, based upon an assignment of the right to

### **Working with (or without) a Physical Therapist: Structural Alternatives for the Professional Corporation**

bill. Thus, for most medical groups who currently employ one or more physical therapists, the billing structure would not need to change. It would, however, be wise to review any PPO contracts in advance. We would expect most PPOs to continue to cover the PT services based upon the participating provider contract with the medical group.

#### **What about MPNs?**

Within the Workers' Compensation system, many employers and carriers have created medical provider networks (MPNs). While we would expect the coverage to be similar to PPOs (above), the MPNs seem to be continually developing and evolving. For those practices heavily involved in Workers' Compensation cases, a review of your MPN contracts would be advisable.

#### **Can the physical therapist be a sole proprietorship or does he/she need to incorporate?**

Businesses, including health care businesses, can operate as an unincorporated business (sole proprietorship or partnership) or as a corporation. In most instances, however, a corporate entity is advisable as it offers an important degree of liability protection to the owner(s). In addition, the use of a separate therapy corporation may help to bolster the independent contractor position described above. We also would recommend a corporate structure for the therapy entity in Alternative #2 below.

#### **Alternative #2**

##### **The Facility License and Management Services Agreement**

Another alternative is to enter into a Facility License and Management Services Agreement with a PT or PT corporation. The professional medical corporation would provide the facility, the equipment, and the management (including billing) in a Stark-Compliant type contract (fixed fee, fair market value, minimum one year term). The PT or PT corporation would bill for the PT in their own name, and pay an annual fee (which could be paid in monthly installments) to the professional corporation for the facility, equipment, and services provided. This same arrangement can be limited just to facilities and equipment, using a proper lease agreement.

This type of arrangement can be structured to help the physician's office cover a portion of the overhead costs, and to make a reasonable level of profit over and above those costs, but the amount paid to the medical corporation, whether for space or equipment rental or for management services must be set at an amount that reflects the fair market value of the space, rental and/or services. This still allows the physician to offer patients the convenience of receiving physical therapy at the same location, and for the physician and therapist to communicate more easily about the patients' condition and progress.

With this arrangement, however, the physical therapists would be billing separately. The therapists would need to obtain individual PIN numbers, and if working through a physical therapy corporation, they would need to register with Medicare as physical therapists, and register as a group provider and obtain a PIN for the group.

For PPOs, they would need to obtain separate provider contracts for any PPOs in which they want to become participating providers. For practices which are contracted with a number of PPOs, this may be a significant hurdle. For practices which are typically "out-of-network," this would not be an issue.

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#### Alternative Number 3

##### The Naturopathic Corporation

One other alternative is to establish a Naturopathic corporation. Under Corporations Code §13401.5(m), a naturopathic corporation is specifically authorized to employ a physical therapist (13401.5(m)(7)). The naturopath must own 51% or more of the shares of stock in the corporation, and there cannot be more non-Naturopathic Doctors (ND) owners than there are ND owners. The Corporation can employ a variety of licensed professionals including physicians and surgeons, psychologists, chiropractors, registered nurses, physician assistants, acupuncturists, podiatrists, clinical social workers, marriage, family and child counselors, and optometrists. With the limited number of naturopathic doctors in California, this option may be of limited import at the present time.

#### Alternative Number 4

##### Working without a PT

First of all, some types of therapy, particularly routine, safe and simple modalities, can be performed in a medical office by a medical assistant, functioning under direct supervision of the physician (See PM&R Associates v. Workers' Compensation Appeals Board and Zenith Insurance Company, 80 Cal.App.4th, 357, 94 Cal.Rptr. 2d 887 and a subsequent ruling in the same case, 2002 WL 1362450, 67 Cal.Comp Cases 485). The physician must, however, be on premises at the time the service is performed. In addition, there must be a written order for the services to be performed as well as a record in the patient's chart identifying the medical assistant and the physician who ordered the task and indicating the date, time and description of the service performed. Modalities could include things such as diathermy, ultra-sound, electrical stimulation, and traction and the medical assistant must be adequately trained in the use of these modalities. Note, however, that therapy services provided by a medical assistant will not be reimbursable by Medicare. The article below, entitled "*The Role of Medical Assistants In An Orthopaedic Surgeons' Practice*" discusses the scope of practice of a medical assistant more fully.

Within the physical therapy licensing/supervision scheme, there are licensed physical therapists, physical therapy assistants (also licensed), and physical therapy aides (unlicensed). Both the physical therapy assistant and the physical therapy aide must work under the supervision of a licensed physical therapist. For this reason, a person who is a physical therapy aide couldn't work in this capacity under a physician's supervision. However, that same person could be classified as a medical assistant, functioning under the supervision of a physician with the limitations described above, and would probably already have sufficient training.

Other types of licensed health care professionals who can perform a broad range of physical therapy procedures within the scope of their licenses, assuming they are properly trained include:

- Physicians and Surgeons (MD)
- Osteopath Physicians (DO)
- Physician Assistants (PA)
- Nurse Practitioners (NP)
- Chiropractors (DC)
- Naturopathic Doctors (ND)

For some practices, hiring a Doctor of Chiropractic (DC) may be a viable alternative. The chiropractic scope of practice includes physical therapy techniques in addition to manipulation and chiropractors are trained in physical rehabilitation. The chiropractor can perform manual

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#### Your Input

COA wants to hear from you so that *Cal Ortho On-Line* can be of the most value to its members.

Let us know of any issues that you would like to see addressed in future editions.

Comments can be forwarded to:

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techniques as well as modalities.<sup>5</sup> The chiropractor can also have a chiropractic assistant, who can assist with these techniques. Note however, that as described below, Medicare has specific limitations upon physical therapy and will not pay for therapy services provided by a chiropractor. Medicare will, however, pay for manipulation when performed by a chiropractor.

Medicare will basically only pay for physical therapy services which are performed by a physician (M.D. or D.O.), a Nurse Practitioner, a Physician Assistant, a Physical Therapist, or a Physical Therapy Assistant working under direct supervision of a physical therapist.<sup>6</sup> Compensation by other types of carriers may vary, depending upon the terms of their benefit programs and contractual requirements.

Some offices have chosen to use athletic trainers to assist their patients with recovery, strengthening, and conditioning. While some athletic trainers do excellent work, they are not licensed by any state agency, and don't fit easily within the health care delivery and reimbursement system. Medicare explicitly has said that it will not pay for services provided by an athletic trainer. We know of no statutory authorization for the use of athletic trainers under this title. So, if a medical group were to hire an athletic trainer, that person might be able to function as a medical assistant, subject to the limitations above, but there is no specific legal support for the ability to bill for other types of services provided by an athletic trainer.

#### Are Disclosures Required?

**Financial Interests.** Several California laws require some type of disclosure whenever a physician refers to an entity or facility in which he or she has some type of financial interest or arrangement. Whether there is an independent contractor relationship or a facility license and management services agreement, some type of disclosure will be required. The particular disclosure depends upon the structure, and is not difficult; it just has to be done in a way to meet the requirements of the particular statute.<sup>7</sup>

**Type of License Conferred.** In addition, so that patients are not confused as to which type of health care practitioner is providing them services, California law sets forth a number of requirements concerning the disclosure of licensure status to patients. See Business & Professions Code §§ 680, 680.5.

#### Conclusion

We believe there are several viable alternatives which can be used until the California Legislature is able to clarify the law on this issue. Whereas, an employment arrangement can be based upon a hand-shake and doesn't necessarily require a written contract, some of these alternate arrangements will require a carefully constructed contract. This is the time to be proactive in relationships with physical therapists, altering those arrangements if necessary. ■

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<sup>5</sup> California Code of Regulations, Title 16, Division 4, §302

<sup>6</sup> Federal Register, Volume 69, No. 219, November 15, 2004; 42 CFR § 410.60.

<sup>7</sup> Business & Professions Code §§650.01, 654.2 and 2426; Labor Code §§139.3(e) and 139.31(4)(D). A memo with sample disclosures can be found at <http://caltonlaw.com/articles-resources/wp-content/themes/calton/assets/media/Disclosures%20Required%202009.pdf>



### The IRS 20 Factors - Independent Contractor or Employee

#### The IRS 20 Factors— Independent Contractor or Employee

1. **Instructions.** An employee must comply with instructions about when, where, and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved.
2. **Training.** An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services.
3. **Integration.** An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control.
4. **Services rendered personally.** An employee renders services personally. This shows that the employer is interested in the methods as well as the results.
5. **Hiring assistants.** An employee works for an employer who hires, supervises, and pays workers. An independent contractor can hire, supervise, and pay assistants under a contract that requires him/her to provide materials, labor, and to be responsible only for the result.
6. **Continuing relationship.** An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals.
7. **Set hours of work.** An employee usually has set hours of work established by an employer. An independent contractor generally can set his or her own work hours.
8. **Full-time required.** An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he or she chooses.
9. **Work done on premises.** An employee usually works on the premises of an employer, or works on a route or at a location designated by an employer.
10. **Order or sequence set.** An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control.
11. **Reports.** An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control.
12. **Payments.** An employee is generally paid by the hour, week, or month. An independent contractor is usually paid by the job or on straight commission.
13. **Expenses.** An employee's business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control.
14. **Tools and materials.** An employee is normally furnished significant tools, materials, and other equipment by an employer.
15. **Investment.** An independent contractor has a significant investment in the facilities he or she uses in performing services for someone else.
16. **Profit or loss.** An independent contractor can make a profit or suffer a loss.
17. **Works for more than one person or firm.** An independent contractor is generally free to provide his or her services to two or more unrelated persons or firms at the same time.
18. **Offers services to general public.** An independent contractor makes his or her services available to the general public.
19. **Right to fire.** An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract.
20. **Right to quit.** An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.

THIS ARTICLE IS WRITTEN BY ROGER W. CALTON, KEITH CARLSON, AND JEHAN JAYAKUMAR, ALL OF WHOM ARE LICENSED ATTORNEYS IN THE STATE OF CALIFORNIA. THE ARTICLE IS A GENERAL DISCUSSION OF THE LAW, AND SHOULD NOT BE CONSTRUED TO BE LEGAL ADVICE SPECIFIC TO ANY INDIVIDUAL CLIENT OR SITUATION.

### The Role of Medical Assistants in an Orthopaedic Surgeons' Practice

### The Role of Medical Assistants in an Orthopaedic Surgeons' Practice

Given the pressures on all physicians to work more efficiently, see a larger volume of patients, reduce costs and improve quality of care, orthopaedic surgeons are exploring all practice options as to how best to utilize their staff. Medical assistants have a long history of working in an orthopaedic office. This document outlines the scope of practice of a medical assistant in California and discusses the role that they can play in an orthopaedic practice under California and federal laws.

Medical assistants can perform administrative tasks to help the physician's office run smoothly, and under California law, they also can provide basic health care services to patients under the supervision of a physician. No specific formal training is required of the medical assistant other than that required in 16 C.C.R. §1366.3(b) discussed later in the document and many are trained on the job. The *Occupational Outlook Handbook, 2010-2011 Edition* lists their medium salary range at \$28,710, although we would expect that this will vary depending on their skill/experience level and geographic location. The United States Bureau of Labor has ranked medical assistants among the fastest growing occupation over the 2008-2018 decade. Id.

Medical assistants can have various duties, and indeed may even provide aspects of physical therapy and other services customarily provided by an orthopaedic surgeon's office that are simple, routine and safe. However, orthopaedic surgeons must keep in mind that they are responsible for the appropriate use of their medical assistants. Medical assistants cannot replace highly skilled licensed health professionals.

California law imposes specific requirements governing their use. Below is a summary of those requirements.

#### GENERAL QUALIFICATIONS

##### 1. What are the General Qualifications Required of a Medical Assistant?

Medical assistants must be at least 18 years of age and meet specified training requirements, summarized below. Licensure is not required for these individuals. In a physician's office, their services must be supervised in the manner set forth below. (Business & Professions Code § 2069.)

#### CLINICAL SERVICES

##### 2. What Clinical Services May Medical Assistants Provide?

Upon the "specific authorization" and supervision of a licensed physician, a medical assistant may:

- administer medication only by intradermal, subcutaneous, or intramuscular injections;
- perform skin tests;
- perform venipuncture or skin puncture for the purposes of withdrawing blood as long as additional training requirements are met; and
- provide "additional technical supportive" services, as defined below. (Business & Professions Code § 2069.)

### The Role of Medical Assistants in an Orthopaedic Surgeons' Practice

#### 3. What are “Additional Technical Supportive Services?”

Additional technical supportive services are those that are “simple routine medical tasks and procedures which 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.” (Physician assistants, nurse midwives or nurse practitioners may also supervise medical assistants in a licensed non-profit community clinic.) (Business & Professions Code § 2069(b)(4).)

#### 4. In Addition to Being “Specifically Authorized” and Under the Supervision of a Physician, Are There Any Requirements that Must Be Met For a Medical Assistant To Provide “Additional Technical Supportive Services?”

Yes. Medical assistants may only provide such supportive services if the following conditions are met:

- Each supportive service is usual and customary to the medical practice where the medical assistant is employed;
- The supervising physician authorizes the medical assistant to perform the service, while maintaining responsibility for the patient's treatment and care;
- The medical assistant completes the training requirements (specified below) and demonstrates competence in the performance of each service; and,
- A record is made in the patient's chart of each supportive service performed by the medical assistant, which includes the name, initials, or other identifier of the medical assistant, the date and time, a description of the service performed, and the name of the physician who authorized performance of the task or who authorized performance under a patient-specific standing order. ([16 C.C.R. § 1366\(a\).](#)) (Physician order requirements are discussed below).

Further, a supervising physician may, at his or her discretion, provide written instructions to be followed by a medical assistant when performing tasks or supportive services. These instructions may provide that a physician assistant or registered nurse may assign a task authorized by the physician. Id.

#### 5. What are Some Examples of “Additional Technical Supportive Services?”

The Medical Board of California (MBC) adopted a regulation that illustrates a number of simple routine tasks that may be safely performed by a medical assistant. According to the regulation, medical assistants may:

- 1) Administer medication orally, sublingually, topically, vaginally or rectally, or by providing a single dose to a patient for immediate self-administration. Medical assistants may also administer medication by inhalation if the medications are patient-specific and have been or will be routinely and repetitively administered to that patient. In every instance, prior to administration of medication by the medical assistant, a licensed physician or podiatrist, or another person authorized by law to do so must verify the correct medication and dosage. This law does not authorize the administration of any anesthetic agent by a medical assistant.
- (2) Perform electrocardiogram, electroencephalogram, or plethysmography tests, except

### The Role of Medical Assistants in an Orthopaedic Surgeons' Practice

full body plethysmography. This law does not permit a medical assistant to perform tests involving the penetration of human tissues except for skin tests or to interpret test findings or results.

- (3) Apply and remove bandages and dressings; apply orthopedic appliances such as knee immobilizers, envelope slings, orthotics, and similar devices; remove casts, splints and other external devices; obtain impressions for orthotics, padding and custom molded shoes; select and adjust crutches to patient; and instruct patient in proper use of crutches. It is important to note, that while a medical assistant may remove casts, they may not apply casts. Also, the MBC has stated on its website that medical assistants are not authorized to set fractures or apply orthopedic devices, such as splints, even in emergency situations, as these activities do not fall within their scope of practice.
- (4) Remove sutures or staples from superficial incisions or lacerations.
- (5) Perform ear lavage to remove impacted cerumen.
- (6) Collect by non-invasive techniques, and preserve specimens for testing, including urine, sputum, semen and stool.
- (7) Assist patients in ambulation and transfers.
- (8) Prepare patients for and assist the physician, podiatrist, physician assistant or registered nurse in examinations or procedures including positioning, draping, shaving and disinfecting treatment sites; prepare a patient for gait analysis testing.
- (9) As authorized by the physician or podiatrist, provide patient information and instructions.
- (10) Collect and record patient data including height, weight, temperature, pulse, respiration rate and blood pressure, and basic information about the presenting and previous conditions.
- (11) Perform simple laboratory and screening tests customarily performed in a medical office.
- (12) Cut the nails of otherwise healthy patients. (16 C.C.R. § 1366.)

Again, this list is not exhaustive, and medical assistants may perform additional services so long as they are "simple routine medical tasks" that may be safely performed under the physician's supervision and meet the conditions specified under question 4.

#### 6. Can a Medical Assistant Perform Aspects of Physical Therapy?

Yes and this conclusion was confirmed by the Court in *PM&R Associates v. Workers' Compensation Appeals Board* (2000) 80 Cal. App.4<sup>th</sup> 357; 94 Cal Rptr. 2d 887. The Court held that adjunctive services to the practice of medicine involving concepts of physical therapy performed by unlicensed medical assistants are reimbursable under the Workers' Compensation system. As the Court stated:

Physicians and physical therapists are allowed to employ individuals to assist in their individual practices and provide adjunctive services. The statutes authorize the employment of such individuals, and therefore it is not unprofessional con-

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duct for PM & R to employ a medical assistant to assist in the medical practice, which includes concepts of physical therapy.

Physicians are not precluded from hiring a medical assistant to perform adjunctive services related to their practice of medicine. A medical physician may lawfully employ and supervise medical assistants providing technical supportive services, including those involving concepts of physical therapy, as long as those medical assistants meet the requirements governing their employment. Id at 369.

In making these rulings, the Court noted that the fact that the statutes and regulations governing medical assistants do not specifically authorize them to provide physical therapy type services was not important given the "wide range of services which a physician may assign to a medical assistant." Further, the Court explained that while medical assistants could not practice physical therapy, they nonetheless are authorized to provide adjunctive services to the practice of medicine that involve physical therapy.

Under these circumstances, while a medical assistant cannot perform all aspects of physical therapy, as an adjunct to the practice of medicine, a medical assistant is able to perform those "concepts of physical therapy" that fall within the definition of "additional technical supportive services," that is, "... simple routine medical tasks and procedures which 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." ([Business & Professions Code § 2069\(b\)\(4\).](#))

In conjunction with their attorney, every practice should individually decide which concepts of physical therapy are customary to practice and fall within the definition of "technical supportive services." However, COA understands that practices in California have been reimbursed for the following modalities:

- hot and cold packs
- ultrasound
- electrical stimulation
- diathermy
- hydrotherapy, including whirlpool and hubbard tank

In this regard, it should be noted that the introduction to the CPT Codes (developed by the American Medical Association and its physician consultants) for modalities (codes 97010-97028) suggests that these modalities may be provided by medical assistants as it provides that "the application of a modality that does not require direct (one-on-one) patient contact by provider." The MBC cautions, however, that billing codes are not a proper reference for ascertaining what is within a scope of practice and; thus, do not dictate what a medical assistant may perform. There are also arguments that safe and simple therapeutic procedures may be performed by medical assistants. COA is currently working with the MBC to clarify this issue, but again urges physicians to work closely with their individual attorney when deciding which services medical assistants can perform.

#### PAYMENT FOR SERVICES OF MEDICAL ASSISTANT

##### 7. But Can Physicians be Reimbursed for the Services of a Medical Assistant?

Generally yes, provided that the services are considered "incident" to those of the physician, though physicians are advised to check the terms of any managed care contracts they hold to confirm. Further, as is mentioned above, the Courts have found that such services are reim-

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bursable under the Workers' Compensation system. It should be noted, however, that payers may have policies specific to certain services, such as physical therapy services. Medicare, for example, will not provide reimbursement for physical therapy services provided by a medical assistant. (42 C.F.R. § 410.60.)

### SUPERVISING PHYSICIAN RESPONSIBILITIES

#### 8. What Requirements are Imposed Upon Physicians Who Supervise Medical Assistants?

As is mentioned above, supervising physicians who use medical assistants remain responsible for their patient's care. But in addition to this general responsibility, there are a number of specific obligations imposed upon physicians. For example, supervising physicians must:

- Always be physically present in the treatment facility during the performance of procedures that medical assistants may lawfully perform;
- Adhere to specific order and record-keeping requirements for services performed. First, all services to be performed by the medical assistant must be pursuant to a "specific authorization." Such an authorization requires a written order, either specific or standing, and if the latter, a notation in the patient's medical record. "Specific Authorization" is defined as a specific written order prepared by the supervising physician and surgeon ... 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 ... 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 in the patient's medical record. (Business & Professions Code § 2069).

In addition, for "technical supportive services," a record must be made in the patient's chart of each supportive service performed by the medical assistant, including the name of the physician who authorized performance of the task or who authorized performance under a patient-specific standing order. ([16 C.C.R. § 1366\(a.\)](#))

- If the physician's office undertakes the training of the medical assistant, the physician must ensure that the medical assistant receives the appropriate training, ascertains the medical assistant's proficiency, and upon completion of the training, makes the appropriate certification. ([16 C.C.R. § 1366\(b.\)](#))

### TRAINING FOR MEDICAL ASSISTANTS

#### 9. What are the Specific Training Requirements for a Medical Assistant?

**Technical Supportive Services.** Medical assistants wishing to perform technical supportive services must receive such training as is "necessary to assure the medical assistant's competence in performing that service at the appropriate standard of care." (16 C.C.R. §1366.2.)

**Venipuncture, Injections, and Inhalation of Medication.** Medical assistants performing skin tests, administering medications by intramuscular, subcutaneous and intradermal injection, and/or performing venipuncture or skin puncture for purposes of drawing blood, must receive no less than:

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- ten (10) *additional* hours of practical training in administering injections and performing skin tests, and/or
- ten (10) hours of training in venipuncture and skin puncture for the purpose of withdrawing blood.

In addition, they must satisfactorily perform at least ten (10) each of intermuscular, subcutaneous, and intradermal injections and ten (10) skin tests, and/or at least ten (10) venipuncture and ten (10) skin punctures. For those administering medication by inhalation, ten (10) hours of training in administering medication by inhalation is required. Training in these tasks must be accompanied by instruction and demonstration in:

- anatomy and physiology pertinent and appropriate to the procedure;
- choice of equipment;
- proper technique, including sterile technique;
- hazards and complications;
- patient care following test or treatment;
- emergency procedures; and
- California law and regulations for medical assistants. (16 C.C.R. §1366.1.)

**Infection Control.** All medical assistants must receive training in the Centers for Disease Control "Guidelines for Infection Control in Hospital Personnel (July 1983)," and demonstrate an understanding of the purposes and techniques of infection control. (16 C.C.R. §1366.4.)

#### 10. Where Can A Medical Assistant Be Trained?

Training for a medical assistant can occur in either of these settings:

- (1) in an office setting, from a licensed physician or podiatrist; or
- (2) in a public secondary, post secondary, or adult education program, a community college, or an accredited or approved private postsecondary institution. (16 C.C.R. §1366.3(a).)

If a physician undertakes the training of the medical assistant, he or she must ascertain the proficiency of the assistant. With one exception, a registered nurse, licensed vocational nurse, physician assistant or a qualified medical assistant acting under the direction of a licensed physician may determine the content of the training and the proficiency of the medical assistant. A licensed physician or a respiratory care practitioner must provide training to administer medication by inhalation. (*Id.*) For the purposes of this law, "a qualified medical assistant" is a medical assistant who:

- Is certified by a medical assistant certifying organization approved by the MBC pursuant to 16 C.C.R. §1366.3(c);
- Holds a credential to teach in a medical assistant training program at a community college; or
- Is authorized to teach medical assistants in a private postsecondary institution accredited agency recognized by the United States Department of Education or approved by the Bureau for Private Postsecondary and Vocational Education. (16 C.C.R. §1366.3(c).)

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CalOrtho On-Line is provided as a benefit to COA members to provide information (not advice) about legal developments affecting their medical practice.

The great number of legal developments does not permit the issuing of an update for each one, nor does it allow the issuing of a follow-up on all subsequent developments.

Internet subscribers and online readers should not act upon this information without consulting with legal counsel knowledgeable in health care law.

#### 11. What are the Requirements for Certification of Training?

Upon completion of training provided in a physician's office, the supervising physician must sign a certification documenting the place and date such training was administered, content and duration of the training and that the medical assistant was observed by the certifying physician and demonstrated the requisite competence in performing each supportive service or task. More than one service or task may be certified within a single document. Separate certifications must be made for subsequent training in additional tasks or services. (16 C.C.R. §1366.3(b).) For physicians "certifying" medical assistants in their office, there is no special form to be utilized. It is recommended that a certification be set forth on a physician's letterhead, comply with the requirements noted above, and be dated. Employers of medical assistants must maintain a documented record of all training received by a medical assistant. A sample certification is below.

Physicians may also have their medical assistants formally certified by an organization approved by the Medical Board (which may be a requirement of the physician's malpractice carrier in any event). A listing of Medical Board approved certifying agencies can be found under the medical assistants section of the Medical Board's website at [www.mbc.ca.gov](http://www.mbc.ca.gov). ■

#### Certification of Medical Assistant Training

[Physician Letterhead]

Date

The purpose of this document is to certify the administration, content and duration of training I provided to \_\_\_\_\_ (Name of Medical Assistant) \_\_\_\_\_, a medical assistant that I currently employ.

For the period \_\_\_\_ (Timeframe) \_\_\_\_, I personally trained \_ (Medical Assistant) \_\_\_\_ in the following areas: \_\_\_\_\_.

The training took approximately \_\_\_\_\_.

I have observed \_\_\_\_\_ (Name of Medical Assistant) \_\_\_\_\_ perform the tasks for which he/she has been trained and they have demonstrated competency in each of these areas.

\_\_\_\_\_  
Physician Signature

Note: Separate certifications must be made for subsequent training in additional tasks or services.