

## *Memorandum*

**TO:** Maine Board of Licensure in Medicine  
**FROM:** Dennis E. Smith, Assistant Attorney General  
**DATE:** 7/9/07  
**SUBJECT:** Delegation of Radiography

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The Board has asked the Office of Attorney General to provide it with a legal opinion concerning the authority of physicians to delegate radiography to staff who are not licensed as radiologic technicians with the Maine Board of Radiologic Technology. It is the opinion of the Office of Attorney General that physicians cannot delegate radiography to their staff.

In 1983, the Maine Legislature passed the Medical Radiation Health and Safety Act, Title 32 M.R.S. Chapter 103.<sup>1</sup> In section 9851 of the Act, the Maine Legislature expressed its concern for the safety of Maine citizens stating:

*the citizens of this State are entitled to the maximum protection practicable from the harmful effects of excessive and improper exposure to ionizing radiation; that the protection can be increased by requiring appropriate education and training of persons operating medical and dental equipment emitting ionizing radiation; and that it is therefore necessary to establish standards of education, training and experience for these operators, to provide for the appropriate examination and licensure and to emphasize the professional nature of the service.*

Title 32 M.R.S. § 9851 (emphasis added).

In accordance with the concern it expressed in section 9851, the Maine Legislature created the Radiologic Technology Board of Examiners to license and regulate radiography in this State. Title 32 M.R.S. § 9854(1) provides as follows:

- 1. License required.** A person may not practice or profess to be authorized to practice after September 1, 1984, as a radiographer, a nuclear medicine

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<sup>1</sup> Title 32 M.R.S. § 9851-9862.

technologist or a radiation therapist unless that person is licensed in accordance with the provisions of this chapter. A license issued by the board must be displayed conspicuously in each place of regular employment of the licensee.

Section 9854(2) provides that “[n]othing in this Act may limit, enlarge or affect the practice of licensed practitioners.” Section 9852(5) defines “licensed practitioner” as “a person licensed to practice medicine, dentistry, chiropractic, podiatry or osteopathy in this State.” Thus, section 9854 does not prohibit a physician from practicing radiography to the extent that it is within the scope of the physician’s license. Although there are other exceptions to the requirement for licensure in order to practice radiography, none of them permit a physician to delegate the ability to perform radiography to his or her staff.<sup>2</sup>

Title 32 M.R.S. § 9852(11) defines “radiography” as:

the use of ionizing radiation on human beings for imaging purposes, excluding the administration of radiopharmaceuticals, under the supervision of a licensed practitioner. For purposes of this subsection, "use" means all activities involved in the application of ionizing radiation. These activities include, but are not limited to, adjusting equipment settings, positioning the patient, positioning the equipment and positioning the image receptor.

Title 32 M.R.S. § 9852(10) defines a “radiographer” as “a person, other than a licensed practitioner, who applies ionizing radiation to human beings for imaging purposes, excluding the administration of radiopharmaceuticals.” Title 32 M.R.S. §§ 9852 & 9854 clearly require, with certain specific exceptions, that anyone administering ionizing radiation on human beings must be licensed by the Radiologic Technology Board of Examiners. How does this statute interface with the Maine Board of Licensure in Medicine’s statute that permits delegation?

Title 32 M.R.S. Chapter 48<sup>3</sup> contains the laws with regard to the Board of Licensure in Medicine. Title 32 M.R.S. § 3270 broadly defines the “practice of medicine” as:

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<sup>2</sup> Specific statutory exceptions include:

- A. A dental hygienist licensed under chapter 16, subchapter IV;
- B. A dental assistant holding a valid license or certificate issued by the Maine State Board of Dental Examiners as a dental radiographer;
- C. A resident physician or a student enrolled in and attending a school or college of medicine, osteopathy, chiropractic, podiatry, dentistry or radiologic technology or an individual who is concurrently obtaining the education and clinical training required by the board by rule who applies ionizing radiation to a human being while under the supervision of a licensed practitioner; or
- D. Any person serving in the United States Armed Services or public health service or employed by the Veterans' Administration or other federal agency performing his official duties, provided that the duties are limited to that service or employment.

<sup>3</sup> Title 32 M.R.S. §§ 3263-3300-A.

relieving in any degree or curing, or professing or attempting to diagnose, relieve or cure a human disease, ailment, defect or complaint, whether physical or mental, or of physical and mental origin, by attendance or by advice, or by prescribing or furnishing a drug, medicine, appliance, manipulation, method or a therapeutic agent whatsoever or in any other manner...

Physicians are trained and educated to take radiographs of patients for diagnostic purposes, and doing such appears to be within the scope of their licenses under Title 32 M.R.S. § 3270 and therefore is authorized under Title 32 M.R.S. § 9854(2).

Title 32 M.R.S. § 3270-A authorizes physicians to delegate certain activities to their *employees*.<sup>4</sup> Section 3270-A provides in relevant part:

This chapter may not be construed as prohibiting a physician or surgeon from delegating to the physician's or surgeon's employees certain activities relating to medical care and treatment carried out *by custom and usage* when the activities are under the control of the physician or surgeon who must be present on the premises at the time the activities are performed. The physician delegating these activities to employees, to program graduates or to participants in an approved training program is legally liable for the activities of those individuals, and any individual in this relationship is considered the physician's agent.

32 M.R.S. § 3270-A (emphasis added).

Similar language is contained in the statutes of the Board of Osteopathic Licensure,<sup>5</sup> the Board of Chiropractic Licensure,<sup>6</sup> and the Board of Licensure of Podiatric Medicine.<sup>7</sup> The

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<sup>4</sup> Physicians who are themselves employed by hospitals by definition cannot delegate to persons who are not their "employees" (*i.e.* who are actually employees of the hospital).

<sup>5</sup> 32 M.R.S. § 2594-A provides in part: Nothing in this chapter may be construed as prohibiting a physician from delegating to the physician's employees certain activities relating to medical care and treatment carried out by custom and usage when these activities are under the direct control of and in the personal presence of the physician. The physician delegating these activities to employees, to program graduates or to participants in an approved training program is legally liable for the activities of those individuals, and any individual in this relationship is considered the physician's agent.

<sup>6</sup> 32 M.R.S. § 555 provides in part: This chapter does not prohibit a chiropractor from delegating to an employee certain activities relating to the care and treatment being performed by custom and usage when those activities are under the direct control of and in the presence of the chiropractor. The chiropractor delegating those activities to an employee, to a program graduate or to a participant in an approved training program is legally liable for those activities performed by such an individual and that individual is considered to be the chiropractor's agent.

<sup>7</sup> 32 M.R.S. § 3552-A provides in part: This chapter may not be construed to prohibit a podiatrist from delegating to a podiatric assistant certain activities relating to medical care and treatment that are delegated by custom and usage, as long as those activities are under the supervision or control of the podiatrist, who must be present on the premises at the time the activities are performed. This section may not be construed to require the presence of the supervising and controlling podiatrist during the rendering of nondiagnostic or nontherapeutic services.

language of each of these statutes appears to mean that nothing contained in *them* (as opposed to any other statute) prohibits a physician, chiropractor, or podiatrist from delegating to their employees certain activities that might technically fall within the practice of medicine, chiropractic, and podiatry but which have been “by custom and usage” delegated by the licensed practitioner to his/her employees in order to facilitate the provision of medical/chiropractic/podiatric services. Thus, this language does not provide authority to physicians to delegate activities to their employees that require licensure by another licensing board (*i.e.* The Radiologic Technology Board of Examiners).

In addition to the fact that the Board of Medicine’s statute does not provide for the delegation of services that require licensure by other laws, the activity of exposing patients to ionizing radiation has not “by custom and usage” been delegated by Maine physicians to their employees. In May 2007, the staff of the Board of Medicine conducted a survey of Maine physicians regarding the “custom and usage” of delegating the taking of x-rays to non-licensed employees. According to that survey, of the thirty-one physician offices that have x-ray equipment, only one physician had delegated the task of assisting<sup>8</sup> with the taking of x-rays to an unlicensed employee. None of the physician offices had delegated the complete task of taking x-rays to an unlicensed employee. Twenty-eight of the thirty-one offices have a licensed radiologic technician taking x-rays. In all of the offices, only the physician activates the x-ray machine and actually exposes the patient to ionizing radiation. A copy of the result of that survey is attached to this memorandum.

In conclusion, it is the opinion of the Office of the Attorney General that Maine law does not permit a physician to delegate to his/her employees the ability to practice radiography on human patients. Radiography may only be practiced upon human patients by physicians, dentists, chiropractors, and podiatrists, and by persons licensed by the Radiologic Technology Board of Examiners.

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<sup>8</sup> The one office permitted an unlicensed employee to assist in taking x-rays by positioning the patient, adjusting support or equipment, helping with the equipment setting, and holding the patient. The employee never activated the x-ray machine or exposed any patients to radiation. Permitting an unlicensed employee to assist in this manner violates Title 32 M.R.S. §§ 9851 & 9852(11).

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**BOARD OF LICENSURE IN MEDICINE**

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**DATE:** 5/31/07  
**TO:** DENNIS SMITH, AAG  
**CC:** BOARD MEMBERS  
**FROM:** MARIA A. MACDONALD  
**RE:** X-RAY SURVEY

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The Attorney General's office asked Board staff to obtain information regarding current x-ray "custom and usage" practices regarding delegation to unlicensed staff, so the Attorney General's office may respond to a Board request regarding a possible conflict between the Medical Board statute and the Rad-tech Board rule.

Board staff attempted to obtain the requested information through the Maine Primary Care Association and the Maine Medical Association. The sources were unresponsive. Board staff has conducted its own research to provide information regarding "custom and usage" to the AG's office.

On May 21, 2007, the office of environmental health provided me with a list of physician's offices and clinics that have registered radiological equipment on site. The list included ninety-four (94) offices and clinics. I did not include any hospitals in the survey. I randomly surveyed fifty percent (50%) of the offices. The survey was with the individuals who actually perform the x-rays. The following were the questions included in the survey:

1. What type of equipment is located in the office? (i.e. standard, c-arm, mini c-arm)
2. Is there a licensed radiology technician on staff? If yes, how many?
3. Does unlicensed staff assist in the X-Ray process? (i.e. positioning of the patient, adjusting support or equipment, help with equipment settings, holding the patient)

The following are the results of the survey:

A. Of the forty-seven offices contacted:

- Ten (10) did not have any equipment or the equipment was not in use
- Six (6) had equipment that did not require a rad-tech (i.e. ultrasound, bone density)
- Thirty-one (31) offices have x-ray equipment

BOARD OF LICENSURE IN MEDICINE

B. Of the thirty-one offices that do have x-ray equipment:

- Three (3) have a mini or mobile c-arm
- Twenty-eight (28) have standard equipment

C. When the thirty-one (31) offices were asked if they have a licensed technician on staff they stated:

- Three (3) have no licensed technician to perform the x-ray (10%)
- Twenty-eight (28) have a licensed technician (90%)

*Note:* The three (3) offices with mini c-arms and mobile c-arms do not have a licensed tech on staff.

D. When the thirty-one (31) offices were asked if any unlicensed staff assists with the x-ray they stated:

- One (1) unlicensed staff assists with the x-ray process (3%)
- Two (2) the physician completes the x-ray (6%)
- Five (5) a physician or nurse helps with the process (16%)
- Seven (7) a family member or caretaker will help if available (23%)
- Sixteen (16) a licensed tech only (52%)

MAINE DEPARTMENT OF  
**Professional  
& Financial  
Regulation**

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**Memorandum**

To: Randal C. Manning, Executive Director, Board of Licensure in Medicine  
From: Penny Vaillancourt, Board Administrator, Radiologic Technology Board of Examiners (RTBE)  
Date: September 1, 2006  
RE: Consumer Complaint – Radiologic Technology Activities in a Physician’s Office

Please accept this memo as a response to your inquiry regarding a complaint that was received by the medical board against an employee within a physician’s office allegedly performing radiologic technology activities.

There are two issues that I am outlining below for the medical board’s consideration:

**I. Unlicensed Practice - Radiologic Technology Activities**

Pursuant to Title 32, Chapter 103 “Medical Radiation Health and Safety Act” a radiologic technology license is defined as the following:

“...a certificate issued by the board authorizing the licensee to use radioactive materials or equipment emitting ionizing radiation on human beings for diagnostic or therapeutic purposes in accordance with the provisions of this Act.” (32 MRSA §9852 §§4)

Chapter 1, Section 2(EEE) of the Board’s rules further explains the term “use” as:

“...all activities involved in the utilization of radioactive material and ionizing radiation equipment or ancillary devices including but not limited to adjusting equipment settings, positioning the patient, positioning the equipment or positioning the image receptor.”

There is additional statutory language that should be considered. Specifically, 32 MRSA §9854 states:

**“1. License required.** No person may practice or hold himself out as authorized to practice after September 1, 1984, as a radiographer, a nuclear medicine technologist or a radiation therapy technologist, unless he is licensed in accordance with the provisions of this chapter. A license issued by the board shall be displayed conspicuously in each place of regular employment of the licensee.”

**2. Effect of Act.** Nothing in this Act may limit, enlarge or affect the practice of licensed practitioners.

**3. Exceptions.** The requirement of a license shall not apply to:

A. A dental hygienist licensed under chapter 16, subchapter IV;

B. A dental assistant holding a valid license or certificate issued by the Maine State Board of Dental Examiners as a dental radiographer;

C. A resident physician or a student enrolled in and attending a school or college of medicine, osteopathy, chiropractic, podiatry, dentistry or radiologic technology or an individual who is concurrently obtaining the education and clinical training required by the board by rule who applies ionizing radiation to a human being while under the supervision of a licensed practitioner, (Emphasis added – new statutory language effective 2005 – board is currently in rulemaking) or

D. Any person serving in the United States Armed Services or public health service or employed by the Veterans' Administration or other federal agency performing his official duties, provided that the duties are limited to that service or employment.

## **II. Physician's Delegation Authority**

You may recall that a discussion was held last summer regarding the delegation authority of physicians as it related to the practice of radiologic technology. The conclusion was reached that licensed physicians have the authority to delegate certain activities to employees when the delivery of services is carried out by custom and usage and so long as the activity isn't otherwise licensable. (See also 32 MRSA § 3270-A).

### **In Conclusion:**

The RTBE handled a similar complaint that involved a licensed podiatrist and an employee working in the podiatrist's office. The board investigated the activities of the employee and filed a complaint with the Board of Licensure of Podiatric Medicine against the licensed podiatrist alleging unprofessional conduct for aiding and abetting the unlicensed practice of radiography. In addition, the board forwarded its investigation of the employee's activities to the Attorney General's Office for criminal prosecution.

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The medical board might consider a similar approach. I suspect the issue will be whether or not the activities being performed by the employee are covered under the custom and usage language found in the medical board's statute.

I hope this is helpful. However, if you need any additional information, please feel free to contact me. Thank you.

Cc w/enc.: Anne L. Head, Director, OLR  
Andrew Black, Assistant Attorney General