

January 31, 2023

Senator _____, Chair
Representative _____, Chair
Committee on Health Coverage, Insurance and Financial Services
100 State House Station
Augusta, ME 04333

Re: *Report to the Committee Pursuant to LD 1858 An Act Regarding Delegating Authority for Services Performed by Emergency Medical Services Personnel in Health Care Facilities*

Dear Senator _____, Representative _____, and members of the Committee on Health Coverage, Insurance and Financial Services:

On April 12, 2022, LD 1858 was enacted into law. That law added “or health care facility” to provisions of 32 M.R.S. § 85, and also:

1. Ensured that a previously authorized pilot project in Jackman, Maine known as “the Maine EMS Critical Access Integrated Paramedic (CAIP) Pilot Project” would be permitted to continue notwithstanding any other provision of law “for so long as the project remains approved by the Emergency Medical Services’ Board.”
2. Directed the Board of Licensure in Medicine (BOLIM) and the Board of Osteopathic Licensure (BOL), in consultation with the Emergency Medical Services’ (EMS) Board and interested stakeholders, to develop guidance regarding the delegation of medical tasks by physicians and physician assistants to persons “acting contemporaneously pursuant to a contractual arrangement as a medical assistant under delegated authority and as an emergency medical services person... [and] submit a report including the guidance and any recommendations for statutory changes to the joint standing committee of the Legislature having jurisdiction over physician licensing matters no later than January 31, 2023.”

The BOLIM and BOL established a workgroup to review the issues and receive input from interested stakeholders and the staff of EMS. Following consultation with interested stakeholders and EMS staff, BOLIM and BOL issue the following guidance:

I. Background.

A. Physician/Physician Assistant Delegation – BOLIM and BOL Laws.

For four decades, the laws in Maine have authorized physicians licensed by BOLIM and BOL to delegate *certain activities relating to medical care and treatment* to medical assistants.¹ In 2015 the Legislature expanded this authority to delegate these activities to physician assistants. 32 M.R.S. §§ 2594-E(4), 3270-E(4).

Medical assistants are not licensed by BOLIM and BOL and receive education and training either directly by the physician or physician assistant or by other means, such as a medical assistant course. The type of training provided to medical assistants depends upon the nature of the medical practice in which they work – as do the types of medical acts that may be delegated. Because the practice of medicine and the provision of medical services is complex and includes numerous specialties and subspecialties as well as different methods of delivery (e.g., in person or via telehealth) it would be impossible to identify and categorize all of the different types of activities that may be performed by a medical assistant under delegation for all practice types and all settings.

It is important to note that currently the applicable statutes, as interpreted by BOLIM and BOL, limit a physician's and physician assistant's ability to delegate activities related to medical care and treatment in four significant ways:

1. The activities related to medical care and treatment being delegated must be of the type that are *carried out by custom and usage*. While the law does not define the terms *custom and usage*, BOLIM and BOL have interpreted this language to mean that activities may be delegated if those activities have traditionally been delegated and they are widely accepted in the practice setting that the activities are delegable. In other words, the activities may be delegated if it is the customary practice that they are delegated in those circumstances. Typical activities performed by a medical assistant may include communication with and the scheduling of patients, recording certain parts of an office visit in medical documentation, and taking patient vital signs.
2. If the activities being delegated would require a state license, registration, or certification to perform, then the activity cannot be delegated. For example, a physician or physician assistant cannot delegate to a medical assistant the activity of taking radiographs of patients as that requires specific education and training and a license to perform radiologic technology in order to safely expose patients to ionizing radiation.
3. The activities being delegated must be *under the control of the physician or surgeon or under control of the physician assistant*. The law does not define the terms *under the control of* and would allow either direct (on-site) or indirect (remote/telehealth) control.

¹ BOLIM's statute authorizing physician delegation is 32 M.R.S. § 3270-A <https://legislature.maine.gov/statutes/32/title32sec3270-A.html>. BOL's statute authorizing physician delegation is 32 M.R.S. § 2594-A <https://legislature.maine.gov/statutes/32/title32sec2594-A.html>.

At a minimum, BOLIM and BOL interpret these terms to mean that a physician or physician assistant delegating activities must be aware of the nature and scope of activities being delegated, ensures that the medical assistant has the appropriate training and education to safely and competently perform the delegated activities, and ensures that the activities were performed competently and safely.

4. While not explicitly stated in the law, BOLIM and BOL interpret the law to implicitly require that the physician or physician assistant delegating the activity must be competent to perform the activity being delegated. As an extreme example, a physician or physician assistant could not delegate the activity of intubating a patient if they are unable to do so because they would be unable to ensure that the procedure was being done correctly and safely – a requisite for activity to be *under the control* of the physician or physician assistant.

It is also important to note that the law makes the physician or physician assistant delegating activities relating to medical care and treatment to medical assistants *legally liable for the activities of those individuals*. This includes at least:

1. Civil/criminal liability – A physician/physician delegating activities relating to medical care and treatment are subject to medical malpractice actions for activities delegated to and performed by a medical assistant.
2. Professional liability – A physician/physician assistant delegating activities relating to medical care and treatment are subject to investigation and possible discipline by BOLIM or BOL for activities delegated to and performed by a medical assistant.

The expressly stated legal liability outlined in the law should ensure that physicians and physician assistants contemplating delegating an activity to a medical assistant ensure that the activity is one that is performed *by custom and usage*, is appropriately *under their control*, and that the medical assistant is appropriately trained to safely perform the activity.

In conclusion, while BOLIM and BOL laws authorize physicians and physician assistants to delegate activities related to medical care and treatment, the law explicitly and implicitly places *reasonable limitations* upon that authority and imposes the ultimate legal liability and responsibility upon the delegating physician or physician assistant.

B. Physician/Physician Assistant Delegation – EMS Laws.

According to information provided by the stakeholders during the workgroup meetings, EMS licensed personnel have been employed as medical assistants by physicians and health care facilities for many years. Reportedly 30% of EMS personnel work as medical assistants under delegation of a physician in a private practice or hospital emergency department. In addition, hospitals reportedly allow medical assistants to perform activities related to medical care and treatment that *exceed the scope of practice* of an Emergency Medical Technician.

In 2019 and 2021, the Legislature amended the EMS law to make clear that licensed EMS personnel could not be prohibited from rendering medical services in a hospital or other health care facility setting if the person was an *employee* of the hospital or health care facility, the activity being delegated was *authorized* by the hospital or health care facility, and the medical services were *delegated by a physician* pursuant to BOLIM's or BOL's laws.²

C. LD 1858.

The reported impetus for LD 1858 as originally drafted was to ensure that persons who have been employed as medical assistants and working under delegation in *non-hospital and non-health care facilities* (i.e. private medical practices) for years – and who also happen to have an EMS license – were not prohibited by EMS law from continuing to do so. Due to concerns expressed by EMS staff regarding LD 1858, the Committee passed the amended version and directed this review and report.

II. BOLIM and BOL Guidance and Recommendations.

A. EMS and BOLIM/BOL laws should be clear that a person is either acting within their scope of practice as a licensed EMS professional or they are acting as a medical assistant acting under the delegation of a physician or physician assistant³ – *they cannot do both concurrently (i.e. at the same time).*

For example, a EMT on an ambulance run with a patient pursuant to their EMS license cannot – at the same time and moment – act as a medical assistant under the delegation of a physician and perform a service that is not within the scope of their EMT license. While BOLIM and BOL believe that the law is already clear on this point, EMS staff conveyed concerns about it – to include the preceding hypothetical situation.

Recommendation 1: The Committee may want to consider adding language to the EMS statute to require photo identification badges be worn to identify the individual either as an EMS licensee or as a medical assistant and unless otherwise provided by law⁴ include language that EMS licensees cannot simultaneously act as EMS-licensed personnel and a medical assistant under delegation.

B. BOLIM/BOL laws regarding delegation should fully align. The BOLIM law regarding delegation by physicians and physician assistants requires “control” while BOL's law regarding physician assistants requires “control” but physician delegation requires “direct control.”

Recommendation 2: The Committee may want to consider amending BOL's statute 32 M.R.S. § 2594-A to delete the word “direct” when referring to physician control of activities being delegated. The term “direct” does not appear in BOLIM's statute and implies that the delegating

² 32 M.R.S. § 85(7) <https://legislature.maine.gov/statutes/32/title32sec85.html>.

³ As previously indicated, the current EMS statute regarding delegation only refers to physicians.

⁴ For example, “The Jackman Project” which authorizes EMS licensed personnel to work in a clinic pursuant to protocols approved by the EMS Medical Direction Board.

physician must be physically present which could impact access to care by patients who are seen in rural locations without a physician on site via telehealth.

C. The EMS statute limits delegation of activities to EMS-licensed personnel to *physicians*. Both BOLIM's and BOL's statutes⁵ specifically provide physician assistants with the authority to delegate activities related to medical care and treatment to medical assistants.

Recommendation 3: The Committee may want to consider amending the EMS statute regarding delegation to include references to BOLIM's and BOL's laws regarding physician assistant delegation.

D. BOLIM and BOL laws regarding delegation could be further clarified by adding language to explicitly include specific limitations.

Recommendation 4: The Committee may want to consider amending BOLIM and BOL statutes regarding delegation as follows:

Physician Delegation Language:

Assistants; delegating authority

This chapter may not be construed as prohibiting a physician or surgeon from delegating to the physician's or surgeon's employees or support staff 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, the activities being delegated do not – unless otherwise provided by law – require a State license, registration or certification to perform, the physician has the appropriate training or experience to perform the activities being delegated, the physician ensures that the person being delegated the activities has the appropriate training, education, or experience to perform the delegated activities, and the physician ensures that the person to whom the activities are delegated performs them competently and safely. The physician delegating these activities to employees or support staff, 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. This section may not be construed to apply to registered nurses acting pursuant to [chapter 31](#) and licensed physician assistants acting pursuant to this chapter and [chapter 36](#).

When the delegated activities are part of the practice of optometry as defined in [chapter 34-A](#), then the individual to whom these activities are delegated must possess a valid license to practice optometry in Maine, or otherwise may perform only as a technician within the established office of a physician, and otherwise acting solely on the order of and under the responsibility of a physician skilled in the treatment of eyes as designated by the proper professional board, and without assuming evaluation or interpretation of examination findings by prescribing corrective procedures to preserve, restore or improve vision.

⁵ BOLIM's statute is 32 M.R.S. § 3270-E <https://legislature.maine.gov/statutes/32/title32sec3270-E.html>.
BOL's statute is 32 M.R.S. § 2594-E <https://legislature.maine.gov/statutes/32/title32sec2594-E.html>.

Physician Assistant Delegation Language:

Delegation by physician assistant. *A physician assistant may delegate to the physician assistant's employees or support staff or members of a health care team, including medical assistants, certain activities relating to medical care and treatment carried out by custom and usage when the activities are under the control of the physician assistant, the activities being delegated do not – unless otherwise provided by law – require a State license, registration or certification to perform, the person being delegated the activities has the appropriate training, education or experience to perform the delegated activities, and the physician assistant ensures that the person to whom the activities are delegated performs them competently and safely. The physician assistant who delegates an activity permitted under this subsection is legally liable for the activity performed by an employee, a medical assistant, support staff or a member of a health care team.*

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