This article addresses physicians’ delegation of medical services to unlicensed individuals pursuant to CRS § 12-36-106(3)(l). It covers Board of Medical Examiners Rules regarding such delegation and clarifies that other non-physician health care providers provide services pursuant to separate legal authority.

Physicians delegate a wide variety of medical services pursuant to CRS § 12-36-106(3)(l) (also referred to as the “statute”). The statute allows physicians to delegate medical services other than the prescribing of drugs to a person “qualified by experience, education or training,” as long as the act is performed “under the personal and responsible direction and supervision” of a physician. Unless otherwise specified, this article refers to individuals providing medical services pursuant to the authority of CRS § 12-36-106(3)(l) as “delegatees.”

The Colorado State Board of Medical Examiners (“BME”) promulgated rules (“Delegation Rules”) governing the provision of delegated medical services to delegates pursuant to the statute. The Delegation Rules became effective January 30, 2003. They address many issues, including the
situations and individuals covered by the Delegation Rules and the responsibilities of physicians delegating medical services pursuant to CRS § 12-36-106(3)(l).

The legal responsibilities of physicians delegating medical services pursuant to the statute are often confusing, in no small part because a variety of other types of non-physician health care providers perform medical services pursuant to a morass of statutes and regulations. The provisions of CRS § 12-36-106(3)(l) apply only to those non-physician health care providers who are not otherwise licensed, registered, certified, or legally authorized to perform the medical service in question, and who instead are acting pursuant to the authority of a delegating physician's license to practice medicine. Therefore, to understand whether the physician responsibilities outlined in the BME Delegation Rules are applicable, it is important to understand the authority under which a non-physician health care provider is acting.

This article clarifies which individuals are and are not "delegatees." It also addresses the legal requirements that apply when the person performing a delegated medical service is a "delegatee."

**BME Delegation Rules**

CRS § 12-36-106(3)(l) provides that a license to practice medicine is not required for

> the rendering of services, other than the prescribing of drugs, by persons qualified by experience, education, or training, under the personal and responsible direction and supervision of a person licensed under the laws of this state to practice medicine, but nothing in this exemption shall be deemed to extend or limit the scope of any license, and this exemption shall not apply to persons otherwise qualified to practice medicine but not licensed to so practice in this state.

In 2002, the BME decided to address the relationships and responsibilities implicated by this statutory provision through rulemaking. This decision was made after the BME reviewed many complaints regarding delegated medical services over the years and concluded that "in some instances, delegation was performed without adequate supervision or documentation of training, and in several cases delegation seemed to be administrative only, without clear involvement of the delegating physician." To respond to these concerns, the BME held a rulemaking hearing in August 2002 to consider draft rules governing the delegation of medical services pursuant to CRS § 12-36-106(3)(l). Due to the wide variety of situations covered by the draft rules and the extensive oral and written commentary from public participants in the rulemaking hearing, the hearing was continued. On November 14, 2002, the Delegation Rules were adopted as amended. Entitled "BME Rules Regarding the Delegation and Supervision of Medical Services to Unlicensed Health Care Providers Pursuant to CRS § 12-36-106(3)(l)," the Delegation Rules are also known as BME Rule 800. The Delegation Rules became effective January 30, 2003.

**Definition and Clarification Of "Delegatees"

During the comment period and rulemaking hearings regarding the Delegation Rules, it was apparent that there is confusion in both the health law community and medical community about: (1) the many types of "delegatees" who provide services pursuant to the statute; and (2) the different types of health care providers who are authorized under other provisions of law to provide either independent or supervised medical services. Because of public confusion regarding the situations in which CRS § 12-36-106(3)(l) does and does not apply, the Delegation Rules devote almost as much space to a discussion of the scope of the rules as they do to an interpretation of the statute.

**General Delegatees Exclusions**
Two fundamental principles significantly limit the number of individuals and situations covered by the Delegation Rules. Individuals subject to these exclusions would not be considered delegatees.

First, a person performing services that do not constitute the practice of medicine is not a "delegatee." The practice of medicine is defined statutorily.3 The Delegation Rules clarify that acts such as gathering data or communicating a physician's message or order to another person do not constitute the practice of medicine. People whose duties are limited to these types of acts are not acting as "delegatees" and, therefore, the Delegation Rules do not apply to them.4

Second, a person who is qualified to perform the medical services in question under some provision of state law other than CRS § 12-36-106(3)(l) is not a "delegatee." Colorado law recognizes numerous exceptions to the general rule that medical services must be performed by a licensed physician. That is, many people are licensed, certified, or registered in "limited fields of the healing arts" under state law.5 Some such "limited fields of the healing arts" permit independent practice by the non-physician provider, while others may practice only subject to supervision. The basic principle is that as long as an individual's practice is limited to the scope of his or her respective license, registration, or certification, a practitioner of a limited field of the healing arts is acting pursuant to the regulatory authority governing that practice (not pursuant to CRS § 12-36-106(3)(l)). Consequently, such a practitioner is not bound by the terms of the Delegation Rules.

However, when a practitioner of a limited field of the healing arts performs an act beyond the scope of authorized practice, he or she crosses the line and becomes a "delegatee" governed by CRS § 12-36-106(3)(l). The types of practices and issues related to limited practitioners of the healing arts and the Delegation Rules are discussed in further detail below.

**Other Delegatee Exceptions**

In addition to these two general exclusions from its scope, CRS § 12-36-106(3)(l) also carves out a specific exception to the delegated services provision regarding persons otherwise qualified to practice medicine but not licensed to practice in Colorado. The Delegation Rules further expound on this exception. Delegation of medical services to three categories of persons is not allowed, regardless of the individual's qualifications and abilities to perform the service. These persons would fall within the BME's applicable licensing authority by their education, training, and experience.

"Otherwise Qualified" to Practice Medicine: A person who is "otherwise qualified" to be licensed by the BME to practice medicine, but who is not so licensed, may not be a delegatee.6 This specifically includes a physician with an inactive, lapsed, suspended, revoked, restricted, or surrendered license. It also includes a physician licensed in another state or country, but without a Colorado license.

This provision is designed to prevent a person who either chose not to apply to the BME for a license or whose license was revoked from avoiding licensure requirements by claiming to be acting as a delegatee. It is unknown whether the BME would consider adopting a procedure to allow some sort of variance from this rule or special authorization from the BME if such persons wished to serve as delegatees for certain services without representing to patients that they are physicians.

Physician Assistants: A physician assistant ("PA") has received education and training to perform many medical services that licensed physicians perform. A PA holds his or her own license, which is issued and regulated by the BME. A person otherwise qualified to be licensed by the BME as a PA but who is not so licensed may not be a delegatee.7 As with physicians, this includes a PA with an inactive, lapsed, revoked, suspended, restricted, or surrendered license, as well as anyone licensed as a PA in other states. Again, it might be appropriate to allow requests for a variance from this rule, on a case-by-case basis.
Physician Training Licensees: A medical school graduate who holds a physician training license, pursuant to CRS § 12-36-122.8 may not be a delegatee. A physician training licensee also is prohibited from delegating any services to a delegatee. The physician training licensee is not in the same situation as a fully licensed physician who is participating in a training program; if fully licensed, a resident or fellow may delegate services to a delegatee.

Physician Responsibility for Delegatee Qualifications

Under the Delegation Rules, it is the responsibility of the physician, before delegating services, to ensure that the delegatee has the necessary education, training, or experience to perform the delegated services. If requested by the BME, the physician must be able to document the basis for his or her conclusion that the delegatee was so qualified. As with any regulatory compliance, the physician should ensure that the delegatee’s personnel file contains appropriate records on which the physician’s decision was based. Documentation may include copies of diplomas, certifications, credentialing by bona fide agencies or institutions, or degrees from bona fide training programs. It also may consist of records evidencing that the physician has directly observed the “repeated and successful performance” of the delegated task by the delegatee.

In some situations, a delegatee does not work in the physician’s office, such as when a physician delegates to a staff person at a hospital or other licensed health care facility. In that situation, the physician may rely on the institution’s internal verification mechanisms to document the delegatee’s training and qualifications.

There is no question that most physicians believe that the person to whom a service is delegated is qualified to perform the service. However, the Delegation Rules have made documentation of those qualifications on request a requirement. Presumably, a physician could face disciplinary action by the BME regarding his or her license to practice medicine if documentation could not be produced or was lacking in some fashion. It is necessary for physicians to ensure that obtaining such documentation or recording their observations of delegatee performance are part of their office policies and procedures and are incorporated into their regulatory compliance plans.

Types of Delegated Medical Services

Only certain types of medical services may appropriately be delegated. The Delegation Rules specify three criteria for delegation and provide two prohibitions.

The delegated services must be consistent with the delegating physician’s education, training, experience, and active practice of medicine. It is reasonable to expect that the physician would delegate a task only if it was a normal part of the physician’s regular practice; otherwise, it would be an ordering of services that the physician would not otherwise offer, not a delegation.

Additionally, the physician may delegate only services that he or she is insured to perform and has not been legally restricted from performing. The Delegation Rules are clear that the delegatee is held to the same standards of performance and care as the physician would be if he or she performed the service. Thus, if the physician’s license or liability insurance has been restricted to exclude certain services, it would be inappropriate for the doctor to then have one of his or her office staff provide those services, because the physician could not supervise something he or she is not licensed to do.

Although the rest of the Delegation Rules tend to be fairly specific on requirements for delegation, the final criterion for permitted types of delegated medical services is a more subjective standard. The Delegation Rules state that

[d]eleagted services must be the type that a reasonable and prudent physician would find within the scope of sound medical judgment to delegate; therefore, delegated services
should be routine, technical services not requiring the special skills of a licensed physician.  

Thus, to determine if any given service is within the scope of permissible delegation, the application of this criterion is dependent on an interpretation of professional standards and required skills.

A major prohibition on delegated services, contained in both the Delegation Rules and CRS § 12-36-106(3)(l), is that the prescribing of drugs may not be delegated. The Delegation Rules clarify that the "prescribing of drugs" does not include a delegatee ordering a prescription refill in accordance with refill protocol developed by the delegating physician (or other supervising physician in an office). Thus, it is permissible to delegate this limited prescription-related service.

Finally, the Delegation Rules also state that a delegated service cannot be delegated by the delegatee to another person. It is the physician’s responsibility to ensure that his or her delegatee is appropriately qualified to perform the delegated services. Therefore, permitting that delegatee to delegate the task to another would remove the physician from the ultimate delegation decision.

**Required Level of Physician Supervision**

As noted above, CRS § 12-36-106(3)(l) requires that the delegated services be provided under the "personal and responsible direction and supervision" of a licensed physician. The statute does not expressly state that the supervising physician must be the physician who delegated the specific service to the non-physician delegatee. However, the Delegation Rules discuss this supervision requirement at length.

Under the Delegation Rules, one or more licensed physicians must agree to provide the required direction and supervision for the delegatees. This agreement need not be in writing, but it must be explicit as to responsibility for direction and supervision. This provision permits a group of doctors in the same practice to supervise each other’s delegatees and would be consistent with the statute. It would seem inherent in this provision that the physician who directs that services be provided to his or her patient by a delegatee is not necessarily providing all of the supervision for that delegated service. Further, it appears that an agreement among doctors providing supervision to the delegatees would include an understanding as to the nature of the services each would be delegating and the qualifications of the delegatees.

The direction and supervision must be sufficient to limit the need to exercise the judgment required of a physician. This tracks with other language of the Delegation Rules concerning the type of services that may be delegated: routine and technical services not requiring the special skills of a licensed physician.

The direction and supervision must provide ongoing inspection, evaluation, advice, and control. This requirement correlates with the physician’s responsibility to ensure the qualifications of the delegatee and his or her responsibility and liability for the acts of the delegatee. The delegated services are to be in the context of a physician/patient relationship, and the physician must be the individual who makes any patient care decisions.

Moreover, ongoing care by a delegatee without physician involvement in the care decisions is not appropriate. Therefore, a physician must not let delegation of services reach the point where the delegatee is seeing the patient for new complaints or symptoms or making new decisions as to necessary treatment without the physician’s directed care.

A key requirement for delegation is the physical presence of the physician. The Delegation Rules state that, as a general principle, appropriate direction and supervision requires that "a delegating physician" should be on the premises when the delegated services are performed and should be readily available, if needed. Although the term "premises" is not defined, presumably the
physician would not need to be in the same room when the delegated services are performed by
the delegatee, but he or she must be physically available to step in and provide direct care if the
situation requires. This certainly requires that the physician be on site, and not merely reachable
by telephone or pager.

In a practice where physicians have agreed to provide supervision and direction to each other’s
delegates, each physician could provide this on-site presence. Thus, the use of the term "a
deleagting physician" is not intended to be restricted to the specific physician who delegated the
service to a delegatee. If, by contrast, the Delegation Rules required the actual presence in the
office of the specific physician who delegated the services to a delegatee, such a provision would
be an onerous requirement for some physician practices.

Under the Delegation Rules, there is one exception to the general rule on presence in the office.
A delegating physician may establish a detailed written protocol for the specific delegated
services and protocol for emergencies that might develop. If the physician has such protocols in
place, he or she does not need to be present on the premises, provided the delegating physician
is available to attend to the patient in person within thirty minutes of being called. This allows a
physician to be at a hospital or other nearby location while regular patient care is continuing in his
or her office through delegatees. The Delegation Rules do not address what information and
direction should be included in the written protocol.

Practitioners Not Subject To Delegation Rules

Practitioners of limited fields of the healing arts and others are outside the reach of the Delegation
Rules. As discussed below, these include: (1) independent practitioners of a "limited field of the
healing arts" and (2) licensees practicing only with supervision.

Independent Practitioners

Practitioners of a "limited field of the healing arts" may engage in acts that otherwise would fall
within the broad definition of the practice of medicine without licensure as a physician.
Practitioners with an independent scope of practice include, but are not limited to, dentists,15
podiatrists,16 optometrists,17 chiropractors,18 and acupuncturists.19

These practitioners must "confine themselves strictly to the field for which they are licensed and
to the scope of their respective licenses."20 When such practitioners are licensed to practice
independently, with no requirement for physician supervision, they clearly are outside the purview of the Delegation Rules.

Some independent non-physician health care providers are authorized to delegate their services
to unlicensed individuals. For example, podiatrists, dentists, and physical therapists are
authorized to delegate podiatric, dentistry, or physical therapy services to qualified individuals
with appropriate supervision. The statutory language governing each profession’s authority to
delegate varies.21 Most important, an individual performing services pursuant to delegation by
one of these individuals is not a "delegatee" for purposes of the Delegation Rules because the
individual is operating pursuant to a different legal authority.

Licensees Practicing
With Supervision

Also exempt from BME licensure and from the Delegation Rules is any practitioner "licensed or
registered under any law of this state to practice a limited field of the healing arts."22 Notably,
some practitioners of limited fields of the healing arts practice under authority of a state license,
certificate, or registration, but also are subject to the supervision of a physician. Such
practitioners would not be considered "delegatees" pursuant to the Delegation Rules.
For example, Colorado’s respiratory therapists are licensed health care providers, but their care must be provided under the overall direction of a medical director who is a licensed physician. Even when acting within the scope of the respiratory therapist’s licensure, he or she must act under the direction of a physician who is responsible for the therapist’s work. Nevertheless, the Delegation Rules and requirements of CRS § 12-36-106(3)(l) do not come into play unless a respiratory therapist performs acts that are outside the scope of respiratory therapy.

Similarly, practical nurses, also known as "trained practical nurses," "licensed vocational nurses," or "licensed practical nurses," may practice "practical nursing" only under the supervision of a dentist, physician, podiatrist, or professional nurse. A practical nurse is licensed by the Colorado Board of Nursing, which would determine the requisite supervision pursuant to generally accepted standards of practice. The supervision of a practical nurse would not be governed by the Delegation Rules, because the practical nurse is a licensed practitioner and not a delegatee.

Clarification of Roles: Professional Nurses and Physician Assistants

Special clarification is needed regarding certain practitioners, because of confusion stemming from the words used to describe their professions. Specifically, the terms applicable to professional nurses and PAs are readily confused with the terminology applicable to delegatees. The mistake is unfortunate, because professional nurses and PAs are highly trained and licensed professionals who do not act as delegates.

Professional Nurses

Colorado’s professional nurses (also known as "registered nurses" or "RNs") are authorized to perform both "independent nursing functions" and "delegated medical functions" pursuant to the authority of their own licenses issued by the state’s Board of Nursing. The Delegation Rules clarify that the use of the term "delegated medical functions" should not be confused with the "delegation of medical services" pursuant to CRS § 12-36-106(3)(l).

That is, even when a professional nurse is rendering "delegated medical functions" instead of "independent nursing functions" pursuant to the Nurse Practice Act, that nurse is not a "delegatee" and is not subject to the Delegation Rules. Professional nurses are highly trained and are examined pursuant to standards established by law. They are licensed and regulated by the Board of Nursing.

Delegatees, in sharp contrast, act only under the authority of the supervising physician’s license and only perform delegated services. Delegatees are entrusted to perform the task at hand not by virtue of training recognized by a state licensing board, but by virtue of a supervising physician’s judgment that they are appropriately qualified by "experience, education or training."

Like podiatrists, dentists, and physical therapists, professional nurses delegate nursing tasks to unlicensed individuals. The Board of Nursing has promulgated extensive rules governing such delegation, including special procedures for delegation of nursing services to qualified personnel who administer medication in schools and licensed child care facilities. The Delegation Rules specify that a nurse’s decision to delegate nursing tasks to an unlicensed individual is in no way governed by the Delegation Rules.

Physician Assistants, Medical Assistants, and Physician Extenders

PAs (physician assistants) are also highly trained and rigorously qualified professionals, whose practice also should not be confused with that of a delegatee. PAs and physicians are licensed
and governed by the BME and disciplined under the same statutory provisions. PAs may perform any act constituting the practice of medicine for which PAs are qualified and supervised, including the prescribing of drugs. PAs are even authorized to delegate services to a delegatee, inasmuch as PAs may perform acts constituting the practice of medicine, as long as their practice conforms with BME Rule 400.32

By contrast, an individual physician or institution determines a delegatee’s qualifications; a delegatee may perform a more restricted set of services, and a delegatee may not re-delegate.33 Despite these significant distinctions, delegatees are easily confused with PAs for a variety of reasons.

First, until the Delegation Rules were promulgated in November 2002, "delegatees" who acted pursuant to CRS § 12-36-106(3)(l) were often called "physician extenders."34 This label was unfortunate, because the term "physician extender" not only sounds like the term "physician assistant," but has been used synonymously in some contexts.35 The Delegation Rules substitute the term "delegatee" for "physician extender."

Second, "medical assistants" constitute a significant proportion of those who would constitute "delegatees." Again, this term has similarities to "physician assistant," although medical assistants' functions and qualifications are significantly different. In Colorado, as in most states, health care providers known as "medical assistants" may be certified by private nonprofit or for-profit organizations,36 but they are not licensed, registered, or certified under state law. Therefore, medical assistants may provide medical services only as "delegatees" pursuant to CRS § 12-36-106(3)(l).

Third, the statutory language surrounding the practice of PAs37 is readily confused with the language surrounding the use of "delegatees."38 Both PAs and "delegatees" perform acts or services "delegated" by physicians, and both must act pursuant to the "personal and responsible direction and supervision" of a physician. The Medical Practice Act ("MPA")39 appears to recognize the possible confusion between delegatees and PAs, because it specifies that the subsection governing PAs "shall not apply to any person who performs delegated medical tasks" pursuant to CRS § 12-36-106(3)(l).40 Nevertheless, the MPA contributes to this confusion.

For example, the phrase "personal and responsible direction and supervision" is statutorily defined exclusively for PAs. However, the MPA remains silent regarding the meaning of those same words used earlier in the same statutory section with regard to "delegatees."41 The new Delegation Rules fill in the gap by providing guidelines for the personal and responsible direction and supervision of delegatees acting pursuant to CRS § 12-36-106(3)(l).

By omitting any reference to the term "physician extender," the Delegation Rules may reduce some of the confusion in this area. Unfortunately, the MPA uses similar phrases to describe distinct types of practitioners; the rulemaking process cannot resolve all of these problems.

**Certain Practitioners Can Become Delegatees**

In essence, any health care provider acting pursuant to specific legal authority under state law other than CRS § 12-36-106(3)(l) is not a "delegatee" as that term is used in the Delegation Rules. The question often arises whether a practitioner of a limited field of the healing arts may engage in acts *beyond his or her scope of practice* by acting as a delegatee under the authority of CRS § 12-36-106(3)(l).

**Practice Beyond One’s Authorized Scope**
In 1977, the Colorado Attorney General issued an opinion ("1977 AG Opinion") confirming that CRS § 12-36-106(3)(l) must be interpreted to allow delegation to practitioners of limited fields of the healing arts. According to the 1977 AG Opinion, any other interpretation leads to the ludicrous result that a person who has no training or license in a limited field of healing arts could render any services pursuant to [CRS § 12-36-106(3)(l)] provided they were performed under the personal and responsible direction and supervision of a licensed physician; whereas a person who is licensed and qualified in a limited field of healing arts could not.

However, the 1977 AG Opinion emphasized that a person who is otherwise licensed in a limited field of the healing arts "cannot extend the scope of that license through the sham or subterfuge of a blanket authority to perform services not otherwise within the scope of that license by a physician." 44

Well after the 1977 AG Opinion was issued, the General Assembly amended CRS § 12-36-106(3)(l) (effective January 1, 1984), inter alia, to clarify that delegatees must be "qualified by experience, education, or training." 45 In light of this amendment, the Delegation Rules require that the person holding a limited license, certification, or registration may not perform medical services beyond the scope of that credential unless, in addition to complying with all other aspects of the Delegation Rules, the person has additional education, training, or experience qualifying him or her to perform the medical service in question.

For example, in certain hospitals, respiratory therapists may perform delegated medical services that are outside the scope of the practice of respiratory therapy. Such delegation would be permissible only if the particular respiratory therapist’s qualifications for the delegated task were in addition to those qualifications required for licensure as a respiratory therapist.

The logic behind this requirement is clear. Were respiratory therapy training enough for the task, the task would be within the scope of the respiratory therapist’s licensure. At the same time, the logic behind allowing the delegation with sufficient additional training also is apparent. Respiratory therapists, as other practitioners of limited fields of the healing arts, have medical training, and it would make little sense to exclude them from the pool of potential delegatees.

**Special Analysis for Emergency Medical Technicians**

A separate analysis applies when emergency medical technicians ("EMTs") perform tasks as delegatees that would otherwise be beyond the scope of their certification. Specifically, the Delegation Rules draw a distinction between an EMT seeking to practice beyond his or her scope in a pre-hospital care environment (such as an ambulance) and an EMT seeking to practice beyond his or her scope in an office or hospital setting.

To understand these distinctions, it is necessary to know about the process for defining an EMT’s scope of practice. The Colorado Department of Public Health and Environment ("CDPHE") certifies EMTs, but the BME determines the acts an EMT is authorized to perform. All such "acts allowed" must be performed under the medical direction of a licensed physician. 46 BME Rule 500 delineates the acts allowed for various levels of EMTs, including EMT–Basics, EMT–Intermediates, and EMT–Paramedics. 47

An individual physician-advisor may apply to the BME for a waiver to allow additional medical acts for EMTs under the physician’s supervision in special circumstances, based on established need. Any physician-advisor who obtains a waiver must maintain ongoing quality assurance of each EMT’s competency. 48 Were an EMT able to expand his or her scope of practice by acting as a delegatee pursuant to CRS § 12-36-106(3)(l), this waiver process would become meaningless and unnecessary.
However, the BME recognized that in certain circumstances, allowing physicians the discretion to use individuals with EMT training as delegatees would be beneficial. The Delegation Rules balance these interests by creating a distinction between EMTs in a pre-hospital setting, such as an ambulance (the classic setting for EMT practice) and those practicing in a hospital or office setting.

In the pre-hospital environment, an EMT may not rely on CRS § 12-36-106 (3)(l) and the Delegation Rules to expand his or her scope of practice. Instead, the waiver process set forth in BME Rule 500 (governing EMTs and their physician advisors) is required.49 However, in a hospital or office setting, an EMT, like any other practitioner of a limited field of the healing arts, may act beyond his or her scope of practice by acting as a "delegatee" pursuant to the statute.50

As with any other practitioner of a limited field of the healing arts, the delegating physician would have to establish that the particular EMT’s qualifications for the delegated task were in addition to those qualifications required for certification at the EMT’s level (whether basic, intermediate, or paramedic). Further, the delegating physician would have to ensure that the delegation was otherwise in compliance with the Delegation Rules.51

Medicare "Incident to" Delegation Rules

In physician offices, compliance with Medicare rules and regulations, which govern payment for a substantial portion of the physician’s services, is a significant concern. The Medicare rules on billing for the medical services of a non-physician provider that are incident to the services of the physician are a major source of confusion and questions. These Medicare rules are similar in many ways to the Delegation Rules, although each has its own place in a practice: one for assuring reimbursement for non-physician services and the other for determining whether the services can be rendered in the first place.

Under Medicare rules, for billing purposes, "incident to" services are treated as though they were provided by the physician. In other words, Medicare will pay for services provided by a non-physician incident to the services of the treating physician as though they were given by that treating physician if the services are: (1) an integral, although incidental, part of the physician’s professional services; (2) commonly rendered without charge or included in the physician’s bill; (3) commonly furnished in the physician’s offices or clinics; and (4) furnished under the physician’s direct supervision.52

To be considered as integral to the physician’s services, there must be an actual physician’s service to which the non-physician’s services are incident.53 The physician must perform an initial service for the patient and sufficient subsequent services to reflect the doctor’s active participation in and management of the course of treatment. However, the physician does not need to provide services at every patient visit where an "incident to" service occurs. This requirement is akin to the Delegation Rules provision that prohibits ongoing care by the delegatee without physician involvement.

Services are commonly rendered without a separate charge or included in the physician’s bill if the physician has a cost related to the service, such as an administrative fee for an injection.54 Services that are of a type not considered medically appropriate to provide in an office setting cannot be billed as "incident to" services.

The requirement for direct supervision of the personnel rendering the "incident to" services means that the treating physician to whose services they are incident must be available for immediate assistance and direction. He or she must be in the office suite throughout the time during which the "incident to" service is performed.55 Presence in the same room is not required, but the "same suite" does not mean somewhere in the building; the physician must be in the same office area. This level of supervision would appear to be somewhat more restrictive than the "on the premises" requirement for physicians providing personal and responsible direction
and supervision to a delegatee under the Delegation Rules, because the Delegation Rules do not explicitly define "premises."

Medicare allows an exception to this supervision standard for physician-directed clinics, which are clinics or group associations where: (1) at least one physician is present at the clinic to perform medical services at all times the clinic is open; (2) each patient is under the care of a clinic physician; and (3) non-physician services are under the medical supervision of a clinic physician. Such a clinic can be an office of a group practice that meets the three criteria.

In a physician-directed clinic, the on-site supervision does not have to be by the treating physician who ordered the "incident to" service, but can be provided by another physician in the clinic. This Medicare rule is similar to the provision of the Delegation Rules, which permit any one of a group of physicians who have agreed to provide the direction and supervision for each other’s delegatees to be present on the premises. However, the Medicare rule is more restrictive than the Delegation Rules, because it does not permit supervision by an off-site physician by means of written protocol.

Generally, a physician who is in compliance with the Medicare rules for "incident to" services by personnel also would be in compliance with the Delegation Rules. However, there is a crucial difference between the two regulatory approaches regarding the on-site presence of the delegating physician. Under Medicare, it is mandatory for a supervising physician to be on-site (although it need not necessarily be the delegating physician). In contrast, under the Delegation Rules, on-site presence is not needed if appropriate written protocols and other safeguards are in place, such as the ability of the physician to attend to the patient personally within thirty minutes.

**Hypotheticals: Authority For Non-Physician Practitioners**

It should be clear that understanding the legal authority under which a non-physician health care provider acts is no simple task. However, it is critical for health law attorneys to be able to identify practitioners’ authority to act, because the supervisory and other responsibilities associated with different practitioners’ practices vary greatly. For example, the Delegation Rules discussed in this article apply only where an individual is acting as a delegatee and not pursuant to some other authority.

The following hypothetical scenarios are illustrative of some of the concepts discussed above. Taken together, the examples describe individuals who are and who are not delegatees and, thus, to whom the Delegation Rules would and would not apply.

**Hypothetical 1**

A parent, concerned that her child has developed pinkeye for the second time this month, calls her busy pediatrician’s office. The receptionist who answers the telephone listens to the description of the condition and offers to get back to the parent. Twenty minutes later, he calls back to inform the parent that a medical assistant has contacted the nearest pharmacy with a refill of the child’s eyedrop prescription. The child returns to preschool the next day and the teacher agrees to administer the eyedrops to the child every day at noon.

**Analysis:** The pediatrician’s receptionist is not a delegatee, because he is merely acting as an intermediary by communicating messages between the patient’s parent and the medical assistant, and this type of communication does not constitute the practice of medicine or provision of "services" as defined by the Delegation Rules. However, if the receptionist were to give medical advice based on protocols or other direction from the physician, he could cross the line and become a delegatee.
The medical assistant clearly is a delegatee. Notably, the medical assistant’s actions in the example may or may not be in compliance with the Delegation Rules. A delegatee may order a prescription refill only if he or she is operating pursuant to a written protocol-driven refill procedure developed by one or more supervising physicians. Finally, the preschool teacher who will administer the eyedrops is a nurse delegatee and is therefore not subject to the terms of the BME’s Delegation Rules. The teacher must instead comply with Board of Nursing rules regarding delegation.

**Hypothetical 2**

A man slips on ice and lands on a piece of broken glass, thereby straining his back and cutting his hand. He heads immediately to the doctor’s office. After determining that stitches are necessary, the doctor calls in her PA to sew up the wound and finish the appointment. The patient is surprised, because he had heard the PA’s license was revoked recently. The doctor assures the patient that the PA is able to perform these acts under the authority of the physician’s license. The doctor also refers the patient to a local chiropractor for chiropractic adjustment of his strained back.

**Analysis:** The physician is incorrectly assuming that a PA with a revoked license may perform services as a delegatee. In fact, a PA with a revoked license may not perform delegated services, pursuant to specific exceptions contained in the Delegation Rules. The chiropractor providing chiropractic adjustments is not a delegatee, because his services are well within the scope of practice for licensed chiropractors.

**Hypothetical 3**

A patient goes to the hospital for surgery. One of the hospital’s respiratory therapists inserts a central venous catheter to establish venous access for fluids and nutrition. A bit later, a person who happens to be a certified paramedic administers an intravenous antibiotic. Another person, whose nametag identifies him as an "EKG technician" comes by periodically to read the patient’s electrocardiogram ("EKG"). A surgical resident eventually comes in and operates.

**Analysis:** This surgical procedure involved two individuals who were delegatees, and two who were not. The respiratory therapist would be acting as a delegatee, because the placement of a central venous catheter for nourishment is not within the scope of practice for a respiratory therapist. The delegation would be permissible only if the particular respiratory therapist’s qualifications for the delegated task were in addition to those qualifications required for licensure as a respiratory therapist, and if the respiratory therapist were otherwise acting in compliance with the Delegation Rules.

The paramedic who administered an intravenous antibiotic would similarly be acting beyond the scope of the acts allowed for a paramedic under BME Rule 500. If the paramedic and her physician advisor chose not to go through the BME’s waiver process, the paramedic could act as a "delegatee," because she is acting in a hospital environment. The paramedic’s act would be permissible only if she: (1) had additional training qualifying the performance of this task; and (2) were otherwise in compliance with all aspects of the BME Delegation Rules. Notably, were the paramedic acting on an ambulance rather than in the hospital, she would first have to go through the waiver process set forth in BME Rule 500, and would not otherwise be permitted to perform this act, even as a delegatee.

The EKG technician in the hospital would not be a delegatee, because gathering data is not considered the practice of medicine. Thus, the EKG technician is not governed by the Delegation Rules.

Finally, the surgical resident is not a delegatee. She must either be a physician training licensee with a license issued pursuant to CRS § 12-36-122 or a fully licensed physician with a license issued pursuant to CRS § 12-36-107 or -107.6. If the surgical resident is a physician training
licensee, she cannot delegate pursuant to CRS § 12-36-106(3)(l) and the Delegation Rules. In this event, another physician in the hospital would have to oversee the respiratory therapist and paramedic performing acts beyond their scope.

Conclusion

In today’s world of decreasing reimbursement and increasing pressure to see more patients, physicians are seeking more cost-effective approaches to patient care. The delegation of medical services to delegatees is one way to keep medical costs down. However, the Delegation Rules make it clear that when using delegatees, physicians must be cognizant of their duty to ensure the qualifications of the person to whom they are delegating.

Further, physicians must make prudent decisions regarding the types of services to delegate and must make certain that appropriate direction and supervision are provided at all times. Most important, they must ensure that delegating medical services to delegatees enhances, rather than detracts, from the provision of safe and effective patient care.

NOTES


2. The official citation for the Rules is 3 C.C.R. 713-30. The full text is available on the BME’s website, http://www.dora.state.co.us/medical.

3. CRS § 12-36-106(1).

4. 3 C.C.R. 713-30, "Scope of these rules," at ¶1. When health care practitioners communicate through an intermediary, those practitioners have an obligation to use reasonable caution. A 1982 Colorado Attorney General opinion sheds some light on the steps a health care practitioner might take to ensure that the person acting as an intermediary is not performing medical services (and thus, pursuant to the Delegation Rules, is not acting as a "delegatee"). See Office of the Attorney General of the State of Colorado, Opinion No. RG NU AGAHU (March 24, 1982) (practitioner should take reasonable steps to ensure order is that of a physician and that intermediary is not issuing order; practitioner receiving information through an intermediary should ensure order is safe and appropriate).

5. The "practice of medicine" is defined by CRS § 12-36-106(1)(a) through (g). CRS § 12-36-106(2) clarifies that any person who is not so licensed, not exempted from licensing requirements under CRS § 12-36-106, and does any act constituting the practice of medicine is to be deemed to be practicing medicine without a license and could be subject to civil injunctive and even criminal proceedings. See also CRS §§ 12-36-129 and -132. The remainder of CRS § 12-36-106 is devoted to exploring the exemptions from physician licensing requirements by the many practitioners who are not licensed physicians but are specifically authorized by law to engage in acts that otherwise would constitute the practice of medicine.

6. 3 C.C.R. 713-30, "Scope of these rules," at ¶3(a).

7. Id. at ¶3(b).

8. CRS § 12-36-122 permits a medical school graduate serving in an approved internship, residency, or fellowship program in a Colorado hospital to practice under a physician training license from the BME for an aggregate period of up to six years without having to obtain a full license to practice medicine in Colorado.

9. 3 C.C.R. 713-30, "Scope of these rules," at ¶3(c).

10. CRS § 12-36-122(7)(c); 3 C.C.R. 713-30, "Scope of these rules," at ¶4.
11. 3 C.C.R. 713-30, “Services.”

12. Id.

13. Id.

14. 3 C.C.R. 713-30, “Personal and responsible direction and supervision.”

15. CRS § 12-36-106(3)(c). The practice of dentistry in Colorado is governed by CRS Art. 35, Title 12.

16. CRS § 12-36-106(3)(d). The practice of podiatry in Colorado is governed by CRS Art. 32, Title 12.

17. CRS § 12-36-106(3)(e). The practice of optometry in Colorado is governed by CRS Art. 40, Title 12.

18. CRS § 12-36-106(3)(f). The practice of chiropractic in Colorado is governed by CRS Art. 33, Title 12.

19. CRS § 12-36-106(3)(p). The practice of acupuncture in Colorado is governed by CRS Art. 29.5, Title 12.

20. CRS § 12-36-106(4).

21. See, e.g., CRS §§ 12-32-109(7) (podiatrists) (“The provisions of this article shall not be construed to prohibit, or to require a license for, the rendering of services under the personal and responsible direction and supervision of a person licensed to practice podiatry, and this exemption shall not apply to persons otherwise qualified to practice podiatry but not licensed to practice in this state.”); 12-35-111(1)(h) (dentists) (“Nothing in this article shall apply to the following practices, acts, and operations: . . . The performance of acts by a person under the personal direction of a dentist licensed in Colorado when authorized pursuant to the rules and regulations of the board or when authorized under other provisions of this article.”); 12-41-113(1) (physical therapists) (“A physical therapist may utilize the services of not more than three unlicensed individuals to assist in that therapist’s practice. Such individuals shall at all times be under the direct supervision of the physical therapist unless such individuals are physical therapist assistants who shall be under responsible direction and supervision of the physical therapist. . . . ‘direct supervision’ shall mean supervision that is on the premises where any such unlicensed individuals are practicing.”).

22. CRS § 12-36-106(3)(m).

23. CRS § 12-41.5-103(4) and (6).

24. CRS § 12-38-103(8) and (9).

25. CRS § 12-38-103(4), (10), and (11). Note that CRS § 12-36-106(3)(j) allows nurses to practice what might otherwise be considered the practice of medicine without a license. The practice of professional nursing in Colorado is governed by CRS Art. 38, Title 12. Also note that some professional nurses in Colorado obtain specialized education or training and meet the Colorado Board of Nursing (“BON”) requirements for inclusion on the BON’s advanced practice registry as “advanced practice nurses.” CRS § 12-38-111.5. Where appropriate, advanced practice nurses are authorized to use the titles “certified nurse midwife,” “clinical nurse specialist,” “certified registered nurse anesthetist,” or “nurse practitioner.” CRS §§ 12-38-111.5(4) and -103(4), (10), and (11).

27. See CRS § 12-38-111; 3 C.C.R. 716-1, Chap. 1.

28. 3 C.C.R. 713-30, "Qualified by education, training or experience."

29. CRS § 12-38-132.

30. 3 C.C.R. 716-1, Chap. XIII; see §§ 7 and 8 governing the delegation of administration of medications in schools and child care facilities.

31. 3 C.C.R. 713-30, "Scope of these rules," at ¶2.

32. CRS § 12-36-106(5); 3 C.C.R. 713-7.

33. See CRS §§ 12-36-106(3)(l) (delegatees) and -106(5) (physician assistants); see also 3 C.C.R. 713-30 (delegatees) and 3 C.C.R. 713-7 (physician assistants).

34. Through the mid-1990s, the BME rules governing the delegation of medical services pursuant to CRS § 12-36-106(3)(l) used the term "physician extenders" and required physicians to file with the BME information regarding the employment of "physician extenders." Those rules were repealed in 1997, and the BME did not adopt new rules on this topic until the adoption of the Delegation Rules on November 14, 2002 (effective January 30, 2003). Additionally, until November 14, 2002, the term "physician extender" was used to describe those who perform delegated medical services pursuant to CRS § 12-36-106(3)(l) in BME Policy 20-13, which was amended on November 14, 2002, to comport with the new Delegation Rules and to delete the term "physician extender." See also Office of the Attorney General of the State of Colorado, Attorney General Opinion No. RG NU AGADU (Apr. 16, 1981) (referring to CRS § 12-36-106(3)(l) as it existed prior to its 1983 amendment and using term "physician extender" to refer to those acting under the authority of that statutory subsection); Office of the Attorney General of the State of Colorado, Attorney General Opinion No. RG NU AGAHU (March 24, 1982) (using same terminology).

35. See, e.g., McLean, "Crossing the Quality Chasm: Autonomous Physician Extenders Will Necessitate a Shift to Enterprise Liability Coverage for Health Care Delivery," 12 Health Matrix: The J. of Law-Medicine 239, 257-60 (Summer 2002) (using term "physician extender" to refer to any non-physician health care provider, including licensed health care providers such as nurse practitioners and PAs); Baldridge, "Physicians Versus Managed Care: Is it Time for Physician Unions?" 28 N. Ky. L.Rev. 65, 77 (May 2000) (same).

36. One of the more prominent of such organizations is the American Association of Medical Assistants, a private not-for-profit organization.

37. Acting pursuant to CRS § 12-36-106(5).

38. Acting pursuant to CRS § 12-36-106(3)(l).

39. CRS Art. 36, Title 12, is known as the "Colorado Medical Practice Act." CRS § 12-36-101.

40. CRS § 12-36-106(5)(h).

41. Compare CRS § 12-36-106(5)(b)(II) (defining "personal and responsible direction and supervision" for "purposes of this subsection (5)" governing PAs) with CRS § 12-36-106(3)(l) (using phrase "personal and responsible direction and supervision" with no definition of that phrase for purposes of this subsection (3)).

43. Id.

44. Id.

45. Colo. Sess. Laws 1983, ch. 131 at 537. The amendment specified that physicians cannot delegate the prescribing of drugs. It also added the words "or limit" to the phrase "nothing in this exemption shall be deemed to extend or limit the scope of any license."

46. CRS § 25-3.5-203(1)(a) and (b).

47. 3 C.C.R. 713-6. All BME rules are available on the BME website, http://www.dora.state.co.us/medical.

48. 3 C.C.R. 713-6, § 7.4.

49. 3 C.C.R. 713-6.

50. 3 C.C.R. 713-30, "Scope of these rules," at ¶5.

51. Id.

52. 42 U.S.C. § 1395x(s)(2)(A); Medicare Carriers Manual at § 2050.

53. Medicare Carriers Manual at § 2050.1(B).

54. Id. at § 2050.1(A).

55. Id. at § 2050.1(B).

56. Id. at § 2050.3.

57. 3 C.C.R. 713-6.