

## EMTALA

# Do The New Revisions To The EMTALA Interpretive Guidelines Allow California Physicians To Send Non-Physician Representatives To The ED For Consults?

By *Lowell C. Brown, Sarah G. Benator, Patricia Kosich, Arent Fox LLP\**

As the economics of medical practice change, so do physician approaches to taking emergency department (ED) call duty. Increasingly, physicians are using allied health professionals (AHPs) to respond to calls on their behalf. Is this permissible under the Emergency Medical Treatment and Labor Act (EMTALA)? Under California law? The answer to both is yes, provided certain requirements are satisfied.

Avoiding an EMTALA violation is more difficult than before, however, as very recent revisions to the EMTALA Interpretive Guidelines have narrowed considerably the circumstances under which an AHP may perform call panel response services. Essentially, it is the ED physician, not the call panelist, who decides whether or not it is acceptable for an AHP to respond to call. When the ED physician wants the on-call physician to respond, the on-call physician must respond. Call panelists need to accept this in order for the system to run smoothly.

## Background

Previously, the EMTALA Interpretive Guidelines provided that an AHP—such as a physician assistant (PA), nurse practitioner (NP), or orthopedic technician—could present to the ED on behalf of an on-call physician (as long as that practice was acceptable under state scope of practice laws). Of course, the on-call physician has always been ultimately responsible for the individual/patient, regardless of who responded on the on-call physician's behalf.

On March 21, 2008, the Centers for Medicare and Medicaid Services (CMS) issued an advance copy of revisions to the Interpretive Guidelines affecting EMTALA. Although the changes were immediately effective, the changes posted there are not yet on the CMS website, making it easy to overlook such changes when searching for answers on this question. The official CMS document showing the changes can be found at <http://www.cms.hhs.gov/surveycertificationgeninfo/downloads/SCLetter08-15.pdf>.

## The Revision

The revisions to the Interpretive Guidelines affect a number of EMTALA issues; of interest to this issue is that CMS has narrowed the circumstances under which a non-physician representative may respond for the on-call physician. *See* Code of Federal

Regulation § 489.24 (j)(1) Interpretive Guideline regarding the availability of on-call physicians.

As a result of the revision, the decision as to who may respond is up to the treating physician (usually the ED physician) who requests assistance from a call panelist. The revision provides:

*"In the event that the treating physician disagrees with the on-call physician's decision to send a representative and requests the appearance of the on-call physician, then both the hospital and an on-call physician who fails or refuses to appear in a reasonable period of time may be subject to sanctions for violation of the EMTALA statutory requirements. ... It is only when the treating physician requests an in-person appearance by the on-call physician that a failure by the latter to appear in person may constitute an EMTALA violation." (Emphasis added.)*

### **California Law on Scope of Practice**

California state law limits the abilities of NPs and PAs to perform what would otherwise be the practice of medicine absent applicable standardized procedures and delegation agreements. On-call physicians who send non-physician representatives to perform medical screening examinations, therefore, must ensure that the practitioner has such authorizing documents in place, that such documents govern examinations of the type requested, and that the non-physician practitioner has been credentialed and privileged by the hospital's medical staff prior to appearing to do the evaluation.

Finally, of course, hospital policies and procedures must adequately address the practice and articulate the limitations described above.

### **Conclusion**

Some on-call physicians naturally will resist coming to the ED when they believe an AHP can do the job. If, however, ED physicians are reasonable in deciding when to insist on a physician appearing and when to accept an AHP, the on-call physicians probably have little room to complain. And now, resistance to the ED physician's judgment call places the hospital and the on-call physician at risk for an EMTALA violation.

Some physicians who work with AHPs may find the documentation and credentialing requirements of California law onerous. The law clearly requires such documentation and vetting, however, and requires that it be done prior to the delivery of patient care services.

\* Lowell C. Brown is a partner in Arent Fox LLP, and since 1985 has practiced corporate health law for institutional health care providers. He advises hospitals, health systems and other health care provider organizations in business, regulatory and medico-legal matters, with an emphasis on operational issues. Lowell is a nationally recognized and widely published expert on EMTALA. He has served in a number of professional positions, including President of the California Society for Healthcare Attorneys

Sarah G. Benator is a senior associate at Arent Fox LLP. Sarah advises a broad range of corporate health care clients in regulatory, operational, and medico-legal matters. She regularly advises health care organizations on peer review matters, practitioner credentialing, disciplinary hearings, state licensing, Medicare certification, Joint Commission accreditation, medical staff issues, EMTALA, medical records, and consent and confidentiality. Sarah is a member of the Board of Directors of the California Society for Healthcare Attorneys and is the Editor-in-Chief of the *California Health Law News*.

Patricia Kosich is a mid-level associate in the health care practice group at Arent Fox LLP. She regularly advises health care organizations on peer review matters, practitioner credentialing, medical staff corrective actions, state licensing, Joint Commission accreditation, medical staff bylaws, and EMTALA. She specializes in issues related to Allied Health Professionals. Her practice also encompasses consent, confidentiality and mental health law matters. Her work has included health care transactional matters with hospital, medical group, surgery center, and physician clients on compliance with federal and state laws, including Stark Phase I and II, anti-kickback, false claims, HIPAA, California's "baby-Stark" and anti-kickback laws, Medicare and Medi-Cal reimbursement issues, as well as hospital mergers, acquisitions and divestitures.