



Navigating the Health Care System: Nursing Home & Hospital Care Advocacy

By: Sanford J. Mall, JD, CELA



Elder law is a broad and varied practice. Care advocacy is an area of the practice that provides the elder law attorney with the opportunity to “do well by doing good.” Understanding how the health care system works and being aware of systemic weaknesses enables us to become effective advocates for our clients (as well as our loved ones). One poorly understood component of the health care system for elder clients and clients with disabilities is their Medicare beneficiary rights and how to advocate for getting the benefits they deserve when the system fails.

A Health Care System Challenge – Transition of Care

When a client transitions from one level of care or care setting to another there is often opportunity for elder law advocacy. Health care providers are under economic pressure to provide services for limited funding and frequently seek to transfer a patient from one care setting to the next to avoid having to expend additional resources without reimbursement. This pressure can result in nursing homes and hospitals making unsafe and inappropriate discharges. For example, when a patient over age 65 with traditional Medicare coverage is hospitalized the hospital receives a flat payment for the patient’s care based on the patient’s diagnosis. Accordingly, the hospital enjoys greater profits by discharging the patient in three (3) days rather than five (5). Further, health care providers who depend on Medicare to contribute to their livelihood are sometimes timid to request additional payment for fear of reprisal (even when the provider feels that a patient could benefit from an extended stay or additional services).

Discharge Planning – An Opportunity

An improper discharge occurs when the health care facility fails to provide effective discharge planning to assure a safe transition from one care setting to the next. Improper discharge also occurs when skilled nursing coverage under Medicare is terminated prior to the end of the benefit period without written notice being given to the beneficiary (or the beneficiary’s representative). Since the discharge process

frequently lacks adequate planning, patient and family are often unprepared for the transition. However, hasty, unsafe and inappropriate discharges can be prevented when the beneficiary (or his or her advocate) is aware of the providers’ planning and notice requirements and uses that knowledge to effectively advocate for an optimal level of care planning.

The requirement that written notice be given prior to discharge also serves to remind the patient (or advocate) of the discharge appeal process. Engaging in the discharge appeal process can provide the extra time needed to be better prepared and to help assure that proper consideration is given to the patient’s post-discharge care needs. Sometimes patients are given more time and added care and support merely by requesting it.

In other instances, requesting a discharge-planning meeting at the facility helps formalize the discharge process and forces the care provider to give added attention to the patient’s unique needs. Sometimes, appealing to the Medicare Quality Improvement Organization (QIO) is required. Often the facility fails to provide written notice prior to an attempt to discharge. In this situation requesting the written notice slows the discharge process. After the written notice is provided further advocacy can proceed as noted above.

A Medicare beneficiary is legally entitled to safe and appropriate discharge and transition planning and the hospital or nursing home is legally bound to comply with the beneficiary’s request. In many cases, the patient is further protected by not acquiring any financial obligation during the appeal process. The resulting benefits are obvious – a safer and more appropriate discharge plan, continued care until the delayed discharge occurs and no additional out-of-pocket obligation for the patient.

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State and Federal Laws Support Nursing Home Resident Rights

In addition to federal regulations, state law may also provide protection against improper discharges. For example, in Michigan, most nursing homes generally fall into one of three categories with respect to the source of payment for nursing home services other than private pay:

1. Fully certified to accept payment from Medicare and Medicaid for every bed in the facility;
2. Only partially certified for Medicaid, meaning only some of the beds are eligible for Medicaid payment.
3. Only Medicare certified (and accept no Medicaid payment); or

The resident's protection against involuntary discharge depends on which the type of nursing home in which he or she the resident is in resides. For example, assume the resident is in a nursing home that only accepts either Medicare or private pay. When his or her Medicare coverage ends, the nursing home has the right to discharge the resident subject to the discharge being safe and appropriate under Michigan law and under traditional Medicare regulations. In contrast, if the resident resides in a nursing home that is fully certified for both Medicare and Medicaid, it is improper to discharge the resident for having a change in the source of payment from Medicare to Medicaid.

Care Advocacy As Part of an Elder Law Practice

Navigating our health care system is confusing and often dangerous. It reminds me of the Mark Twain quote, "It ain't what we don't know that get's us into trouble, it's what we know for sure that just ain't so." Most of our clients (and us) still have faith that the health care system will work the way it should and that we will get the care we need and deserve. Unfortunately, the health care system is a complex maze of services, service providers and sources of payment. As a result, many priorities conflict with assuring optimal patient care.

As our society ages, the need for health care services is growing exponentially. More and more, our clients are in need of reliable information and effective advocacy in order to obtain the care and services they deserve. We should help our clients know the rules and recognize the patients'

and families' role in advocating for quality of care. Clients also need to know who to call for professional assistance when personal advocacy fails. Including care advocacy as an integral part of an elder law practice can be rewarding in many ways. Most importantly, it allows us to provide a real-time benefit to enhance the quality of life and quality of care for our clients. Hopefully, as more attorneys offer beneficiary rights and care advocacy services we will collectively force the system to change, making optimal care the norm. Remember, tomorrow that patient in need of care may be someone we love – or even us.

The author invites colleagues to contact him for additional information and advocacy checklists pertaining to hospital, nursing home and home health care beneficiary rights.

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