

# Effective Advocacy for Hospital Patients

It is likely that many attorneys will receive the following desperate plea for help from a client, friend, or relative. For example, a client's eighty year old husband has spent seven days in a hospital following a stroke and the client has been contacted by a hospital discharge nurse or planner and informed that her husband is being discharged to home the next day.

The client is panicked. Since she is eighty years old herself, and uses a walker, she is unable to provide the total assistance that will be required by her husband in his current condition. Thus, she will be required to obtain home care services for her husband or place him in another care facility. How to determine which of these options best suits her, and the most expeditious manner of obtaining that goal, will be discussed below.

## *1. Understand the Historical Background*

It is important to understand that a modern day hospital does not serve the same function that it did during the greater portion of the client's life. In fact, the word "hospital" should no longer be used. Over the last eight years, medical institutions have specialized their services and functions based on the level of care provided. What we have familiarly called "hospitals" are generally referred to in Medicare Part A Hospital Insurance parlance as "Acute Care Facilities." Acute care means that "the individual's condition medically warrants skilled services and the need for such skilled services constitutes the primary purpose of the total care furnished the individual."

The segregation of medical institutions by levels of care has resulted in the proliferation of sub-acute care facilities. The imminent discharge of the client's husband from the hospital, an acute care facility, may now allow him to obtain sub-acute care. Medicare Part A coverage for sub-acute care is subject to several conditions, one of which is that the Medicare beneficiary must receive "skilled care" on a daily basis. Therefore, sub-acute care is designed for the client who no longer needs skilled care as the primary purpose of the total care, but rather requires skilled care as a major purpose of the total care, but also requires unskilled services (i.e., hygiene assistance) the remainder of the time.

Ideally, when an elderly patient nears the point when he or she will no longer need Acute Care, medical professionals evaluate the patient for the appropriateness of sub-acute care. After a period of sub-acute care, many elderly patients return home under the care of a community home care agency. If the "hospital" patient desires to return directly home rather than obtaining in-patient sub-acute care, Medicare beneficiaries are often entitled to home care services from nurses, therapists and home health aides.

Finally, practitioners should be aware that "hospital" administrators must juggle the continued fiscal viability of their institution against the health care needs of patients covered by Medicare Part A Hospital Insurance. This may often create conflicts potentially injurious to the patient. For example, under Medicare Part A Hospital Insurance's prospective payment system or PPS "hospitals" may keep the difference between the Medicare prospective payment and the "hospital's" actual operating cost. This can be dangerous to the elderly patient since, pursuant to these regulations, "hospitals" face a loss if the person remains beyond the prospective payment period.

## *2. Obtain the Necessary Information*

Before taking any action, the first step should be the determination of the client's health care goals. Clients have very specific opinions about care options, which will mandate certain strategies. In this case, the client has stated that she cannot care for her husband at home. Therefore, her options include obtaining and maximizing home care services, relocation of her husband to an assisted living facility, or separation from her husband by his need for long term care in a nursing facility.

Probably the most important fact to determine is the client's current medical condition. The type of notice provided to your client concerning the impending discharge must also be examined. Medicare beneficiaries have very specific notice rights, which we will address in a moment.

The current lengths of hospitalization, as well as prior hospitalizations within the last two years, are valuable in evaluating the client's potential personal financial liability to the "hospital" in excess of Medicare Part A Hospital Insurance coverage. For the same reason, it is important to determine whether your client carries Medicare Supplemental Insurance.

## *3. Know the Law*

Probably the most important, and perhaps the most under utilized provision in State law regarding Hospital Patient Rights is N.J.A.C. 8:43G-4.1. This statute contains a laundry list of patient rights that N.J.A.C. 8:43G-4.1 imposes as a condition of licensing. It states hospital administrators be "responsible for developing and implementing policies to protect patient rights and to respond to questions and grievances pertaining to patient rights."

The minimum documentation required in a patient's hospital discharge summary is governed by N.J.A.C. 10:52-2.11. This section applies when a patient is transferred to another facility or is to receive home care. The minimum documentation includes "pertinent finds of history," "therapeutic modalities," "plan of care or therapy," "medications," and "recommendations for follow-up care." The discharge summary should also contain recommendations for "further medical care..."

Most elderly clients will be Medicare beneficiaries, and as such they enjoy federal due process protections beyond State law. Specifically, Medicare beneficiaries are not personally liable for hospital services not covered by Medicare unless they receive sufficient notice. Because Medicare pays so very little to hospitals, in order to remain profitable, hospitals discharge Medicare patients while they still qualify for hospital level care. Up until July of 2007, a person's only method of objecting to a discharge was to ask for a notice (which they were not told they had a right to ask for) and say, "I object to the discharge plan."

Since no one was told about their right to a notice, few patients objected to an early discharge. As of July 1, 2007, substantial protections have been put in place. Therefore, no Medicare beneficiary can be discharged from a hospital without first getting the following:

- a. A notice within 2 days of admission to the hospital outlining your Medicare Rights.
- b. Within 2 days of discharge the hospital must give out a second Medicare Rights notice (unless the admission is three days or less).
- c. If you object to the discharge decision, you have a right to an immediate review by a Quality Improvement Organization. You cannot be discharged during the review process.

- d. To start a review, you (or I) must call Healthcare Quality Strategies, Inc. at (732) 238-5570 and request the review.

#### *4. Strategies for Success*

##### *a. Review Goals*

Your strategy must first be guided by the client goals, to the extent the client's legal options allow. In this case, the client has determined that her goal is to place her husband in a nursing home.

##### *b. Evaluate Your Exposure to Liability*

It is likely that the client will be threatened, both indirectly and directly by hospital staff. Clients have been told that the Hospital will put their loved one in an ambulance and send them home, or, even worse, sent to a nursing home of the hospital's choosing. The client's wife, children, brother, sister, niece, nephew and agent-in-fact, will all be threatened with personal financial liability to the facility, whose charges may run as high as \$1,000.00 per day. Your knowledge regarding the material laws will assist you in evaluating the seriousness of these threats.

If the proposed discharge is to the client's home and inadequate health care assistance has not been obtained or cannot be, the practitioner must put the facility on notice of the danger inherent to the proposed discharge.

Clients must be advised about their personal liability for debts of a relative or principal. However, liability to the hospital also depends on insurance status. For example, if you have not been advised by a hospital discharge nurse that your loved one has been discharged from Medicare, and you or your loved one has not received the proper written notice; the hospital's financial threat is baseless. Moreover, if, for a variety of reasons, you have no funds that are available to creditors, the financial threat is also baseless.

##### *c. Make the Hospital Fulfill Its Statutory Responsibilities*

By requiring the hospital to fulfill its responsibilities at discharge, you will maximize your loved one's health care benefits, and you will gain time. On behalf of your loved one, require the hospital to strictly adhere to the Patient Rights Statute and demand, in writing, strict compliance with the specific patient rights. If appropriate, the hospital should be advised that the patient cannot be safely discharged because they have not had "sufficient time before discharge to have arrangements made for health care needs after hospitalization."

The letter should also reflect that the patient's safe discharge is conditioned on the hospital satisfying these minimal rights. If the hospital complies with the request the information can be used by the lawyer to maximize home care benefits or Medicare Part A Skilled Nursing benefits. On the other hand, if the hospital fails to comply with the request, the failure to do so may expose the hospital and treating physician to a claim of negligent discharge. At a minimum, the hospital's failure to meet your loved one's minimal rights may provide a defense for the client against the hospital's claim for charges uncovered by Medicare.

The strategies ensure that the client in our example has time to find an adequate facility for her husband. However, it is vitally important that she seeks such a facility. The client cannot rely on hospital staff to make an adequate placement. However, the client should consider obtaining the services of an elder law attorney or Geriatric Care Manager to assist this search.