Complex Patient Discharges:
Your Limited Legal Toolkit and Other Strategies

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1

Agenda

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1. Hospital Obligations to Safely Discharge Patients
2. Barriers to Discharge and Risks of Extended Stays
3. Legal Strategies
4. Non-Legal Strategies

2

Hospital Obligations to Safely Discharge Patients

Federal Requirements

- Condition of Participation – Patient's Rights (42 CFR § 482.13(b))
- Condition of Participation – Discharge Planning (42 CFR § 482.43)
- Joint Commission
  - RI 01.02.01 patient right to participate in place of care, treatment and services
  - PC 04.01.03 discharges based on assessed needs
  - PC 04.01.05 inform patient of follow-up care, treatment and services before discharge

3

3

Hospital Obligations to Safely Discharge Patients (cont.)

California Requirements

- California's Written Discharge Planning Process (CA HSC § 1262.5)
  - Includes specific requirements for homeless patients discharge planning, including:
    - A written homeless patient discharge planning policy and process in their discharge policy;
    - A process to identify a post-discharge destination; and
    - A requirement that hospital offer certain enumerated services prior to discharge (e.g., food, clothing, transportation, vaccinations, etc.).
- Los Angeles City Ordinance No. 179913

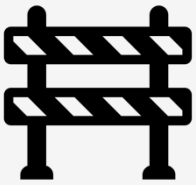
Hospital Policies!!

4

4

Barriers to Discharge

1. There is no accepting facility/can't discharge home
2. Patient refuses to discharge
3. Patient has a decisionmaker but the decisionmaker refuses to consent to the discharge plan/facility
4. Patient lacks capacity and does not have a decisionmaker
5. There is no insurer or other payer available to pay for the accepting facility



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Risks of Unnecessary Extended Lengths of Stay

Risk to community, staff, other patients

Financial cost/liability to the hospital

Incorrect care setting; risk to patient

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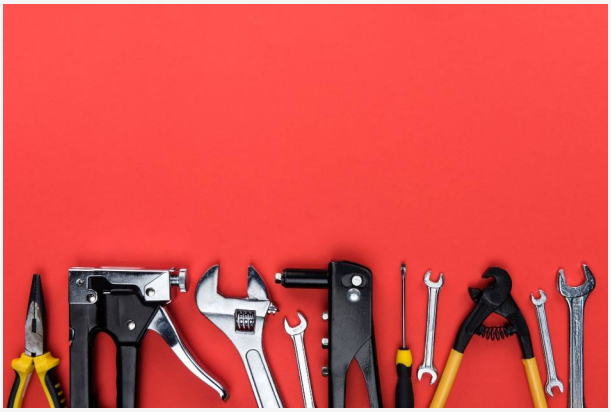
Toolkit for Difficult Discharges



- Early detection and escalation
- Strong documentation
- Re-evaluate amenities
- Provision of items and services
- Patient financial liability
- Conservatorship
- Trespass
- Probate court relief
- Unlawful detainer

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7

Real Headlines!

1. Judge Rules That Hospital Can't Evict Quadriplegic
2. Despite State Law, San Diego Hospitals Accused of "Patient Dumping"
3. Women Legally Evicted From Hospital Bed

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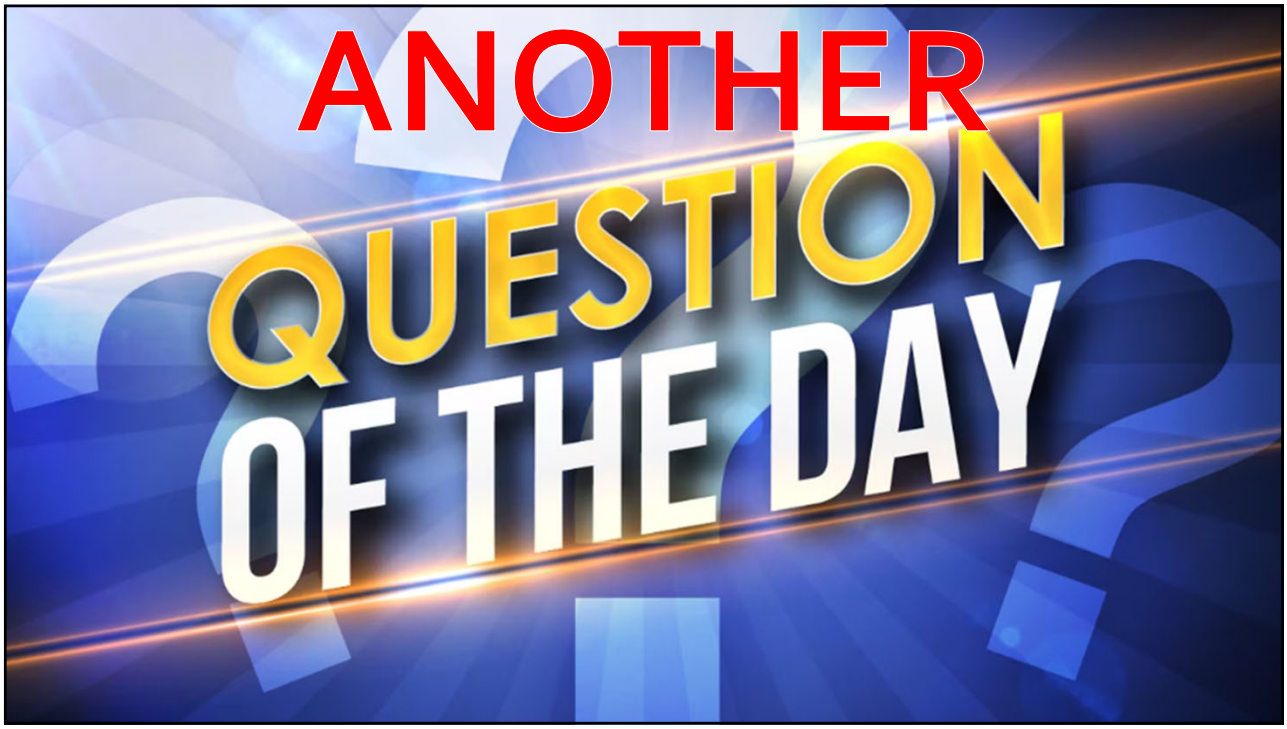

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TRUE OR FALSE?

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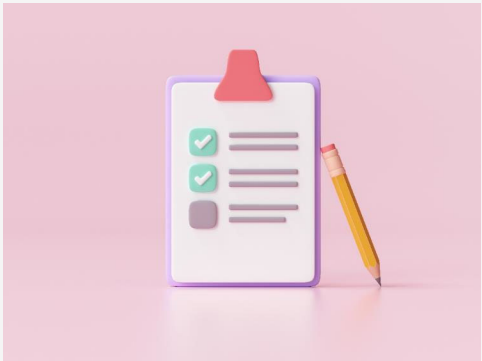
California law prohibits patients from staying in the hospital after they have been discharged

FALSE



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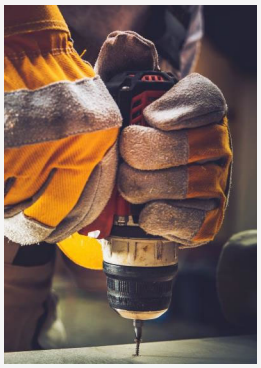
Legal Tool: Conservatorship



Public Guardian Conservatorship

- Probate: Per court order, involved in all aspects of their clients' lives, including financial, housing, medical. (Cal. Prob. Code § 2920)
- LPS: Per court order, responsible for directing mental health treatment and placement. (Cal. Welf. & Inst. Code § 5000 et seq.)

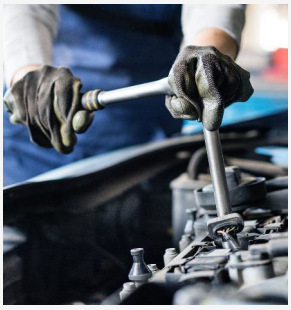
BUT:

- "Conservator of last resort"
- Argue nursing facility cannot require person to sign conditions of admission (Cal. Welf. & Inst. Code § 14110.8)

11

11

Legal Tool: Trespass



Entering or remaining on someone else's property without permission or a right to do so is a misdemeanor (Cal. Penal Code § 602)

BUT:

- Defense that right and/or consent to be on the property
- Law enforcement discretion

12

12

Legal Tool: Probate Code 3200

A petition may be filed to determine that a patient lacks the capacity to make a *health care decision* concerning *specified treatment* for an existing or continuing condition, and further for an order authorizing a designated person to make a health care decision on behalf of the patient. (Cal. Prob. Code § 3201)

BUT:

- May not be available if legal decisionmaker
- Requires extensive resources
- Takes a long time
- Uncertainty on how court will rule
- Still need decisionmaker, post-acute placement and payor

13

13

Legal Tool: Probate Code 4766

A petition may be filed to determine whether the acts of an agent or surrogate are consistent with the patient's desires, or whether the patient's desires are unknown or unclear, to determine whether the acts are in the patient's best interest. (Cal. Prob. Code § 4766)

BUT:

- Requires convincing a judge that decisionmaker is not acting in the patient's best interest.
- Need a new decisionmaker
- New placement and payor!
- Reputational risk!
- Requires extensive resources.
- Takes a long time.
- Uncertainty on how court will rule.

14

14

Legal Tool: Unlawful Detainer

To prevail in an unlawful detainer action, the hospital has to establish that: (1) it owns the property; (2) the patient remained on the property after their right to occupy the property ended; (3) the hospital did not give them permission to continue occupying the property; and (4) the patient is still occupying the property. (Code Civ. Proc. § 1161, subd. (1).)

BUT:

- Reputational risk!
- Intermediate steps that can be taken earlier, with lower risk and lower costs.
- Must have a facility and payor!!
- Can come back through the ED.

15

15

Key Takeaways on Legal Tools

- California laws are not intended to address complex discharges
- Takes time (4 to 12+ months)
- Requires extensive resources, including provider and staff participation
- Outcome is uncertain
- A win is not always a win

16

16

Early Detection

From Day 1:

- ✓ Confirm anticipated LOS and clinically appropriate placement upon discharge
- ✓ Identify legal or surrogate decisionmaker
- ✓ Identify potential barriers to discharge
- ✓ Confirm coverage
- ✓ Enroll in Medi-Cal
- ✓ Consider ALWP, HCBA or other waiver programs

17

17

Regular Meetings

Meet regularly with **interdisciplinary team** to confirm discharge plan and address potential barriers.

Regular **family meetings** to discuss discharge planning:

- ✓ Establish expectations that must meaningfully and reasonably engage in discharge planning process
- ✓ Manage expectations and be clear about timelines
- ✓ Be respectful, professional and collaborative
- ✓ Seek to understand where patient/family is coming from (e.g., why are they reluctant to discharge?)

18

18

Escalate

Develop escalation process to ensure key stakeholders and consultants (e.g., administration, legal, communications, social work, ethics) are involved sooner rather than later.

19

19

Document Document Document

- ✓ Ensure clear documentation that: (i) patient no longer meets inpatient criteria; (ii) patient is safe for discharge; and (iii) placement is appropriate and available.
- ✓ Ensure document <u>all</u> discharge planning discussions with patient/decisionmaker/family as well as any divergent views, their refusal to participate and/or refusal to consent to appropriate safe discharge.
- ✓ Ensure all required coverage and appeal notices are provided (e.g., IM, Notice of Non-Coverage, etc.).
- ✓ Document and track all placement efforts.
- ✓ May be necessary to provide written notice to family of expectations where continue to refuse discharge options.

20

20

Patient Financial Liability

- ✓ Consider administrative discharge and issuance of bill reflecting private payment obligation.
- ✓ Ensure notice to patient/decisionmaker/family is clear about financial responsibility.
- ✓ **Before demanding payment**, ensure appeal rights exhausted and non-payment by plan.
- ✓ Consider asset search to determine whether even have assets to recoup.
- ✓ Ensure leadership approves of payment demands, and referral to collections in accordance with policy before implementing this strategy.

21

21

Re-Evaluate Non-Essential Amenities

- ✓ May consider removal of non-essential amenities, like television, WIFI access, hot/interesting meals, private room—**but only consider if clear that such amenities are encouraging or enticing patient to remain at the hospital** (i.e., don't remove for the sake of removing).
- ✓ Hospital obligations, like nutritionally appropriate meals, nurse staging, rounding, etc., should continue with appropriate documentation of services and changes in condition.

Strategy Risks:

- Discrimination Claim – make sure apply removals uniformly without regard to patient classification, payor status or disease state; note special protections for patients in protected classes.
- Malpractice Claim – make sure to continue to meet applicable standard/duty of care.

22

22

Provision of Non-Covered Items or Services

- ✓ Can the hospital pay cost of items and services, including transportation, DME, home care, sitter, or post-acute facility placement?
- ✓ If so, must have long-term strategy and ***note risks***.

- ✓ **Strategy Risks:**
  - Fraud and abuse law/beneficiary inducement prohibitions (however, certain safe harbors or exceptions may apply; e.g., item or services that do not induce referrals or influence the receipt of care or are of "nominal value"; e.g., local transportation)
  - Medicare/Medi-Cal rules (e.g., anti-supplementation)
  - Non-Profit/501(c)(3) Requirements

23

23

A combination of these strategies work 99% of the time!

24

24

Case Study - Mrs. Smith

- Mrs. Smith develops gangrene, requiring amputation of her lower left leg
- Mrs. Smith is admitted to the California Hospital in September 2022
- Mrs. Smith is medically cleared for discharge on October 15, 2022
- Mrs. Smith appeals her discharge to her managed care plan, and then to DMHC
- As of May 1, 2023, Mrs. Smith asserts that she is not required to discharge as her appeal is still pending
- Mr. and Mrs. Smith have been enjoying their private room, movie marathons and Uber Eats

25

25

Case Study - Mrs. Smith

What tools should have been used/can be used to support the appropriate and expeditious discharge of Mrs. Smith?

- ❑ Early detection
- ❑ Regular Meetings
- ❑ Escalate
- ❑ Documentation
- ❑ Patient Financial Liability
- ❑ Re-Evaluate Non-Essential Amenities
- ❑ Provision of Non-Covered Items or Services
- ❑ Legal Action

26

26

Case Study - Mrs. Smith

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What happens if my health plan, my doctor, or other hospital staff informs me my health plan will no longer pay for me to remain in the hospital?

Call your health plan to appeal the decision, and ask for an expedited review. You can stay in the hospital until your review is completed. However, you may be responsible for the bill if your health plan's appeal decision denies continued payment for medical treatment in the hospital. Your health plan must give you a decision within 3 days, or sooner if needed. You should also call the Help Center and state that your problem is urgent if your health plan does not expedite your appeal review or the appeal decision denies continued payment for medical treatment in the hospital and you want the Department to decide if your continued treatment in the hospital should be covered. If you are in a Medicare Advantage plan, visit Livanta's website or call 1-877-588-1123. If you are in a Medi-Cal managed care plan, review the DMHC Resource List for the appropriate ombudsman information or call 1-888-452-8609.

DEPARTMENT OF Managed Health Care

Instructions | Notice Required by Law | Independent Medical Review (IMR)/Complaint Form

INDEPENDENT MEDICAL REVIEW (IMR)/COMPLAINT FORM

- FREE: The IMR/Consumer Complaint process is free.
- FAST: IMRs are usually decided within 45 days, or within 7 days if the health issue is urgent.
- SUCCESSFUL: Approximately 68 percent of patients receive the requested service through IMR.
- FINAL: Health plans must follow the IMR decision and promptly provide the service.

27

27

Case Study – Mrs. Smith

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28

28

Case Study – Mr. Smith

In-Home Supportive Services (IHSS) Program

The IHSS Program will help pay for services provided to you so that you can remain safely in your own home. To be eligible, you must be 65 year of age and over, or disabled, or blind. Disabled children are also potentially eligible for IHSS. IHSS is considered an alternative to out-of-home care, such as nursing homes or board and care facilities.

The types of services which can be authorized through IHSS are housecleaning, meal preparation, laundry, grocery shopping, personal care services (such as bowel and bladder care, bathing, grooming and paramedical services), accompaniment to medical appointments, and protective supervision for the mentally impaired.

29

29

Case Study – Mr. Smith

- Mr. Smith gets into a terrible motorcycle accident, and is admitted to hospital in Northern California on May 2
- Mr. Smith has a trach with vent, feeding tube, requires hemodialysis, CRE+
- Mrs. Smith is requesting all interventions
- Mr. Smith is stable for discharge to a post-acute facility – subacute or CLHF
- Only CLHF in Southern California will accept Mr. Smith
- Mrs. Smith refuses to agree to placement

30

30

Case Study - Mr. Smith

California Hospital Association

What tools should have been used/can be used to support the appropriate and expeditious discharge of Mrs. Smith?

- ❑ Early detection
- ❑ Regular Meetings
- ❑ Escalate
- ❑ Documentation
- ❑ Patient Financial Liability
- ❑ Re-Evaluate Non-Essential Amenities
- ❑ Provision of Non-Covered Items or Services
- ❑ Legal Action

31

31

Case Study – Mr. Smith

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General Acute Care Hospital (GACH)
- 24-hour inpatient care with medical, nursing, surgery, anesthesia, labs, pharmacy etc

Long-Term Acute Care Hospital (LTACH)
- Licensed as a GACH
- Don't have EDs
- Require extended length 2-4wks

Congregate Living Health Facility (CLHF)
- Residential home with max 18 beds
- Provides inpatient care, including ventilator support, support for disabled and terminally ill

Subacute level at a Skilled Nursing Facility (SNF)
- For patients who need more intensive treatment (e.g. tracheostomy care, tube feeing, inhalation therapy, OT/PT, etc)

Skilled Nursing Facility (SNF)
- Patients who primarily need skilled nursing care on an extended basis
- Skilled versus custodial

Residential Care Facility for the Elderly (B&C, ALF)
- ALF – 16+ beds
- B&C - 4-6 beds
- Can be licensed to care for dementia
- Can't treat medical conditions (tube feeding, bed sores)

California Department of Health Care Services
Home and Community-Based Alternatives (HCBA) Waiver
List of Participating Congregate Living Health Facilities
Current as of 04/13/2023

Facility (Business) Name	Capacity	Address	City	County	Zip Code	Telephone
George Mark Children's House	9	2121 George Mark Lane	San Leandro	Alameda	94578	(510) 346-4624
Carmen House	6	2863 Carmen Ave	Livermore	Alameda	94550	(925) 989-3345
Kalinga Care Home	6	1230 Vancouver	Livermore	Alameda	94550	(924) 583-5145
Palmdale Congregate Living	6	38702 12th Street East	Palmdale	Canoga Park	93551	(661) 575-9885
Palmdale Regional Congregate	6	733 Celtic Drive	Palmdale	Canoga Park		(661) 208-8008

32

32

Questions?

Raise your hand to ask a question.

33

33

Thank you!

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34

34