Hospitalization Of Non-Resident Aliens: Current Issues Facing Hospitals

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Consider the following real scenarios:

- A patient presents at the emergency room in a diabetic coma. The hospital provides treatment and stabilizes the patient pursuant to state and federal law. But the patient is in need of regular dialysis treatments which can be appropriately provided on an outpatient basis. However, the patient is uninsured and the hospital suspects that the patient is in the country illegally. Can the hospital discharge this patient?
- A Russian man frequently presents at the hospital with a pregnant woman in active labor. The woman speaks Russian and is not related to the man who brought her to the hospital. The hospital delivers the baby. The baby is born an American citizen. The hospital determines that the Russian man has been advertising online in Russia for pregnant women to come to Florida for child birth. The Russian man is paid a fee by the pregnant women. The hospital receives no reimbursement for the delivery of the baby though it can seek reimbursement from Medicaid for care provided to the baby. What can the hospital do about this?

If you are reading this article to learn the answer to these questions, then sorry to disappoint. There are no easy answers. The treatment and discharge of undocumented aliens is a problem facing hospitals today, especially in Florida where some experts estimate there may be between 700,000 to 850,000 undocumented aliens currently residing in the state. Care to undocumented aliens places financial pressures on an already overburdened emergency healthcare system. Oftentimes, hospitals are obligated to continue providing care to undocumented aliens after stabilization because without such measures, the patient faces a life threatening situation. Additionally, hospitals cannot legally or ethically discharge a person, regardless of immigration status, who clearly would not be stable — particularly when he or she has nowhere to go. Compounding the problem, there exists no requirement under current federal or Florida law for a rehabilitation facility or skilled nursing facility to accept these patients.

Under The Emergency Medical Treatment and Active Labor Act (EMTALA) at 42 U.S.C. § 1395dd, hospitals that receive Medicare funding and have emergency treatment facilities must treat all patients who have emergency medical conditions and who present themselves to the emergency department, regardless of insurance status or the ability to pay. EMTALA imposes the following duties on hospitals: (i) provide a medical screening examination to determine if an individual has an emergency medical condition within the capability and capacity of the hospital, and (ii) stabilize such an emergency condition. A woman in active labor is considered to have an emergency medical condition. Assuming the patient is a difficult to discharge undocumented alien, the Medicare Conditions of Participation for Hospitals mandate that a hospital must transfer or refer the patient for followup or ancillary care when he or she does not have the capacity for self care. *See* 42 C.F.R. 482.

A hospital may seek reimbursement from the federal government for emergency medical treatment rendered to an undocumented alien.[1] However, no payment source currently exists for the follow up or ancillary care that an undocumented alien may need.

Nursing homes and other long-term care facilities have recognized that Medicaid funding will not be available for undocumented aliens and generally refuse to accept them from hospitals. As a result, many hospitals are faced with patients who require long-term care and are in the country illegally such as the patient described in scenario one above. One alternative available to a hospital is to attempt to repatriate such patients to their home countries for further care and treatment. In order to accomplish a successful medical repatriation, without court intervention, the hospital should obtain the patient's consent and should work through the consulate of the home country. The hospital generally pays for the costs of transportation, including air ambulance flights in the most serious cases. However, without the consent of the patient, this process can be almost impossible.

There is one reported case in Florida where a hospital sought court approval to send a patient who required long-term care back to his home country, but it does not necessarily provide a precedent for other hospitals. In the case Martin Memorial Medical Center, Inc. v. Gaspar Montejo, No. 00-344-CP, slip op. 528 (Fla. Cir. Ct. Prob. Div. June 27, 2003), an undocumented alien was brought to the hospital after suffering a severe head injury in an automobile crash. The patient survived and was adjudicated incapacitated by the circuit court in Martin County and his cousin was appointed his guardian. The patient continued to improve and ultimately his condition stabilized to the point that he was ready for discharge. Unfortunately, his family would not allow him to be discharged home and there was no long-term facility willing to accept him due to his immigration status. The guardian initially agreed with the hospital that the patient should return to his native country of Guatemala. To the extent that the patient could understand, he also stated that he wanted to go home.

The hospital contacted the Guatemalan consulate in order to find the patient an appropriate receiving facility and to assist with arrangements for his return trip. When the guardian later tried to prevent the discharge and transport, the hospital sought a court order in the guardianship proceedings allowing them to transfer the patient home without the guardian's consent. After a lengthy hearing, the guardianship judge authorized the patient's transfer to Guatemala. Part of the court's order required the guardian to "refrain from frustrating the hospital's discharge plan to relocate (Jimenez) back to Guatemala under the authority and guarantee of the Guatemalan Ministry of Health." Ten days following the order, the hospital flew him to Guatemala and he was admitted to a rehabilitation facility.

The guardian appealed the order, arguing that the guardianship judge did not have the jurisdiction to deport a person; that deportation is the sole responsibility of the federal courts. The

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Fourth District Court of Appeal agreed, but the patient was already back in Guatemala. Thereafter, the guardian filed suit for false imprisonment related to the transporting of the patient back to Guatemala. *See* Montejo v. Martin Mem'l. Med. Ctr., Inc., 874 So.2d 654 (Fla. 4th Dist. Ct. App. 2004). However, the hospital ultimately prevailed in the false imprisonment suit.

Martin Memorial establishes that a hospital cannot ask a state court judge to order that a patient who refuses to give consent to return to his home country or is unable to give consent be forced to return. There is no reported federal case on this issue and in the wake of this decision, hospitals have begun pursuing other available options to affect a safe discharge in similar situations involving undocumented aliens.

One suggestion is to use the current immigration laws as a sword – attempting to prompt U.S. Immigration & Customs Enforcement (ICE) to take action to investigate the patients and initiate deportation proceedings. An underlying issue in many of these cases, though, is how the hospital determines that the patient is in the country illegally and what the hospital can do with that information, considering, federal and state patient privacy laws. The Health Insurance Portability and Accountability Act (HIPAA) and its state counterparts are extremely protective of hospital records and make no exception for release of information contained therein for immigration-related matters. In our experience, Immigration and Customs Enforcement (ICE) has not been very interested in intervening to investigate these types of cases. Some health care attorneys have recently suggested filing an action seeking a writ of mandamus to force the federal government to act. To date there are no reported cases regarding this remedy.

The lack of interest by ICE makes the second scenario described above, relating to pregnant women from foreign countries coming to the U.S. to deliver their babies so they become automatic American citizens, almost impossible to resolve.

When hospitals are faced with these issues, a case by case analysis is needed. At this time, it appears that these matters can be most easily resolved by facilitating transport of the patient back to his or her home country, but this can only be accomplished easily with the consent of the patient. Although the transportation costs add to the hospital's expense, many hospitals will find this option much less expensive than providing uncompensated care to the patient for an extended period of time.

Endnotes

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1 Effective July 1, 2010, the Agency for Health Care Administration (AHCA) instituted a new "stabilization" standard to determine whether it would reimburse hospitals for the services they provide to undocumented aliens to treat an emergency medical condition. This rule was subsequently challenged by approximately twenty hospitals in an attempt to invalidate the new "stabilization standard" based on AHCA's failure to appropriately follow rulemaking procedures. On December 24, 2012, the Division of Administrative Hearings (DOAH) issued a Final Order invalidating AHCA's new "stabilization standard" as an unadopted rule and ordered AHCA to cease any reliance upon this unadopted rule. Though AHCA has announced its intention to appeal this Final Order, many industry experts believe that the findings of fact in the Final Order are well supported in the record and the conclusions of law are in accordance with Florida law. In the event that AHCA does not overturn DOAH's Final Order on appeal, all hospitals will stand to benefit from this ruling.