

## HOME HEALTH AND HOSPICE NEWS

*Federal and Texas legal issues affecting home health agencies and hospices, provided as a free service to our clients and friends.  
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### HOSPITAL DISCHARGE PLANNING: MEDICARE RULES ON REFERRALS TO HOME HEALTH AND HOSPICE

Much confusion exists over the applicable Medicare requirements for hospital discharge planners regarding referrals to extended care providers such as home care and hospice. While the tension between the basic freedom of choice provision and obligations of hospitals regarding referrals remains high, home care and hospice providers are questioning whether they have any legal basis for approaching a hospital they believe is impermissibly excluding them from the discharge planning process.

### PATIENT FREEDOM OF CHOICE

The basic "freedom of choice" language is in the Medicare Statute, and states that Medicare beneficiaries have the freedom to choose among Medicare providers in receiving covered services. Social Security Act ("SSA") §1802(a). While the law protects a beneficiary's right to choose, it does not impose any duty on a provider to protect that freedom of choice. Rather, obligations imposed on hospitals in the context of referring patients for posthospital extended care services are found in a different part of the Medicare law, governing discharge planning, and its implementing regulation. SSA, §1861(ee)(2)(D); 42 CFR §482.43(c)(6), (7).

State licensing rules also impose requirements on providers to protect patient freedom of choice and access to providers (but those rules are not the subject of this newsletter). In addition, the Medicare regulation applies to hospitals only, not to individual physicians or other entities making referrals.

### HOSPITAL OBLIGATIONS TO HHAS

Hospitals are required, as a condition of participation ("COP") in Medicare, to engage in discharge planning for patients for whom discharge planning has been requested and, for those patients who are identified as needing posthospital extended care services, to provide lists of the available, Medicare-participating home health agencies ("HHAs") and skilled nursing facilities ("SNFs") in the relevant geographic area, that request in writing that the hospital include them on the provider lists furnished to patients. Thus, HHAs that wish to be included on a hospital's discharge planning list must make their request to the hospital in writing. It is important to note

that the requirement to provide lists does not extend to hospice providers. CMS regulators have explained that they felt constrained by the statute to include HHAs and SNFs only.

### HOSPITAL OBLIGATIONS TO HOSPICES

With respect to hospice referrals, the CoP does require that a hospital inform patients of the freedom to choose among participating providers, and expressly prohibits a hospital from specifying or otherwise limiting the qualified providers that are available to the patient.

In addition, the preamble to the regulation indicates that CMS "expect[s] the discharge planner to facilitate patient choice in any posthospital extended care services as part of the discharge planning process even though the statute does not require a specific list beyond HHAs and SNFs." Within the hospital community, there has been a varied interpretation of the term "facilitate."

It would appear that having a "short list" or a "preferred provider" list of hospices would not be in compliance with the CoP (with the exception that if the patient is in a managed care plan, the available providers may be limited). At a minimum, short of furnishing a list of hospice providers, hospitals should inform the patients of their freedom of choice and direct them to the local hospice trade association, CMS, DADS, the yellow pages, or other applicable sources of information on area hospices.

Providers that believe they are being inappropriately excluded from a hospital's discharge planning process should consider approaching the hospital with the regulatory language and preamble, to try to persuade the hospital to comply with its obligations. Because the regulation is a condition of participation subject to survey, hospitals should be willing to take appropriate steps to ensure they are in compliance with those conditions.

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