Discharged With Care

BY MONIQUE PATTON WOODY

Risk management and effective mental health discharge planning.

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TAKEAWAYS >>

- What may matter most is whether the mental health treatment center and health care providers exercised reasonable care regarding discharge planning even if their decisions led to negative consequences.
- Any high-quality discharge plan must address ongoing treatment, medication management, and monitoring. No postdischarge placement should take place without a plan that ensures the patient will continue with treatment.
- Hospital attorneys should advise their clients to consider implementing a discharge model such as the POST approach, which covers various aspects of a patient's placement, outpatient services, support system, and treatment plan.

FAR TOO OFTEN, MY COLLEAGUES AND I FIELD CALLS AND INQUIRIES FROM hospitals regarding patients with mental illness and in need of discharge placement for various reasons, including homelessness, inability to live independently, or a need for transitional programming before returning to independent living. However, in these matters, placement is but one piece of the puzzle. Discharge planning for patients with mental illness also requires a careful safety assessment and evaluation of medication compliance and community and family supports. When sufficient attention is not paid to each of these components, any discharge is simply the beginning of another admission for yet another mental health crisis.

Many patients with mental illness are closely acquainted with the "revolving door" approach to mental health assistance. To illustrate, a patient will present to a hospital emergency room for a mental health crisis, is admitted for any number of days, discharged with a prescription that no one ever ensures is filled or taken, and directed to a shelter that provides few resources other than a bed and a roof. A short time later, sometimes days, that same patient returns to the emergency room for another mental health crisis. It can be a never-ending cycle. Even in cases where involuntary-commitment petitions are filed in mental health court,[1] if the hospital and treatment team elect to discharge the patient rather than proceed to an involuntary commitment hearing, the commitment petition is withdrawn and the court's involvement ceases unless and until the patient is involuntarily admitted again.[2]

By failing to engage in proper discharge planning, including following appropriate and professional intervention to achieve stability, a hospital can easily subject itself to potential liability if the discharged patient experiencing mental illness causes harm to themselves or someone else. Effective mental health discharge planning requires far more than handing the patient a couple of discharge papers and a prescription. Hospitals and mental health facilities have a "duty to exercise reasonable care to protect [patients] against foreseeable injury."[3] In determining whether hospitals

1. 405 ILCS 5/3-601.
2. See *id.* at § 5/3-604 (petitions for involuntary commitment only serve to permit the hospital to keep the patient in the hospital against their will pending a commitment hearing pursuant to Article VIII of the Mental Health Code; hospitals and their physicians can and do sometimes determine that a patient no longer meets involuntary commitment criteria after the filing of a commitment petition).
3. *Williams v. State*, 65 Ill. Ct. Cl. 106, 109 (2013).

ISBA RESOURCES >>

- Joseph T. Monahan, *Three-Legged Stool of Mental Health Treatment*, Mental Health Matters (Nov. 2021), law.isba.org/3OzMYWx.
- Susan Dawson-Tibbits, *Powers of Attorney: Pitfalls and Best Practices Part 2—Powers of Attorney for Health Care*, Trusts & Estates (June 2020), law.isba.org/3yhoXyu.
- ISBA Free On-Demand CLE, Brush up on Mental Health Law (recorded May 2020), law.isba.org/3NjQcwy.

BY FAILING TO ENGAGE IN PROPER DISCHARGE PLANNING, INCLUDING FOLLOWING APPROPRIATE AND PROFESSIONAL INTERVENTION TO ACHIEVE STABILITY, A HOSPITAL CAN EASILY SUBJECT ITSELF TO POTENTIAL LIABILITY IF THE DISCHARGED PATIENT EXPERIENCING MENTAL ILLNESS CAUSES HARM TO THEMSELVES OR SOMEONE ELSE.

and mental health facilities have met this standard, courts consider "whether medical personnel made reasonable decisions at the time of examination and treatment."[4] The key is whether reasonable care was exercised by the hospital and medical professionals in rendering their ultimate judgment, not merely whether the judgment ultimately proved to be wrong.[5]

Caselaw and lawsuits

There is no shortage of cases demonstrating that a failure to dedicate the necessary time and resources to develop and implement an appropriate discharge plan can prove to be more costly—in both time and financial resources—than hospitals or mental health facilities anticipate, even if the facility is successful in the end. In 1999, an Illinois hospital was ordered to pay $6.5 million in damages after the hospital failed to properly evaluate a patient and denied her admission for treatment; she later committed suicide.[6] In *Novak v. Rathnam*, a father sued the psychiatrist and psychologist who approved the discharge of a patient from a mental health facility; the patient then traveled to Florida where he shot and killed the plaintiff's daughter.[7] In *Jinkins v. Lee*, a patient fatally shot himself in the head after being discharged from a state mental health facility, and the decedent's administrator sued two medical professionals for wrongful death claiming they failed to properly diagnose and treat her late husband's mental illness, which included a significant history of multiple suicide attempts and homicidal ideation.[8]

In recent years, hospitals have been required to respond to lawsuits filed against them for alleged negligent discharge planning. In October 2020, a widow filed a lawsuit against a hospital in Madison County alleging that the hospital failed to properly evaluate and admit her husband who presented to the hospital experiencing hallucinations, paranoia, and suicidal ideations; the hospital prescribed the husband some medication and discharged him. He allegedly committed suicide that night by hanging himself.[9] In late 2021, the attorneys for a 24-year-old college student announced the filing of a lawsuit against a New Lenox hospital for what they alleged was a "negligent discharge."[10] According to the lawsuit, the student presented to the hospital due to experiencing symptoms consistent with psychiatric illness. Various news outlets reported that the hospital did not admit him and instead discharged him, at which point local police officers transported the student to a parking lot and instructed him to walk alongside a busy street.[11] The student wandered into traffic, was struck by a vehicle, and suffered permanent brain damage.

Hospitals, mental health facilities, and practitioners will not always accurately forecast every issue that may arise postdischarge. The key is that hospitals and practitioners should engage in a thorough analysis of the potential risks of discharge and implement plans that minimize the risk of postdischarge liability. Attorneys offering risk-management advice to their hospital and practitioner clients would do well to ensure that all mental health discharge planning is thorough and effectively aimed toward achieving long-term stability. This not only decreases the likelihood of another mental health crisis requiring hospital intervention in the short term, but also potentially insulates the hospital from liability for negligence in failing to create an appropriate discharge plan.

Discharge planning

Discharge planning has been defined by the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) as "the process to prepare a person for return or reentry to the community, and the linkage of the individual to essential community treatment, housing and human services."[12] From the moment a patient presents to a mental health facility, the treatment team (including physicians, psychiatrists, psychologists, social workers, therapists, family members, and attorneys) should be conducting clinical assessments of that patient's needs, capacity, insight into his or her illness, potential treatment plans, and aftercare services needed upon discharge. Mental health treatment planning does not lend itself well to a one-size-fits-all approach. In all cases, the best possible outcomes for patients depend on treatment professionals who have the resolve and forethought to begin crafting clinically appropriate discharge plans that address the patient's specific levels of need, ability to adhere to a treatment plan, severity of illness, and other related needs to ensure long-term stability.

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4. *Id.* at 109.
5. *Id.*
6. Janan Hanna, *Hospital Gets $6.5 Million Tab in Suicide*, Chicago Tribune (Jul. 28, 1999), law.isba.org/3HNdmtW.
7. *Novak v. Rathnam*, 106 Ill. 2d 478 (1985) (case was on appeal as both defendants refused to testify citing the Confidentiality Act; and was later dismissed based in part on claims barred by *res judicata*, and in part, because the discharge occurred approximately one year prior to killing).
8. *Jinkins v. Lee*, 209 Ill. 2d 320, 321-26 (2004).
9. See Complaint in *Woodside v. Rahul Bansal, M.D. and Granite City Illinois Hosp. Co., LLC d/b/a Gateway Reg'l Med. Ctr*, No. 2020L 001435 (Cir. Ct. Madison County); Marian Johns, *Psychiatrist Sued Over Patient's Suicide Following Hospital Discharge*, Madison–St. Clair Record (Oct. 26, 2020), law.isba.org/3bsk2rn.
10. Clifford Law Offices, *UIC Transfer Student From Jordan Sues Silver Cross Hospital & New Lenox Police Dept.* (Nov. 3, 2021), law.isba.org/3boStch.
11. See, *e.g.*, Stacey Baca, *Jordanian Student's Mother Suing New Lenox Police, Silver Cross Hospital After Brain Injury*, ABC 7 (Nov. 3, 2021), law.isba.org/3ydKY0S; TJ Kremer III, *Lawsuit Blames Silver Cross, Police for Man's Injuries: Report*, Patch (Nov. 4, 2021), law.isba.org/3OA0n0N.
12. See U.S. Department of Health & Human Services, Evaluability Assessment of Discharge Planning and the Prevention of Homelessness (Sept. 21, 2005), law.isba.org/3nar0Ef.

Attorneys providing risk-management advice to hospitals and mental health facilities should advise that the first step in any discharge plan is to conduct a risk assessment that evaluates the patient's capacity for self-care and likelihood of self-harm or harm to others in the immediate postdischarge period. This assessment must be more than a determination that the patient has not made a suicidal or homicidal ideation or physical threat within the past 24 hours; medical professionals should also closely analyze subtle signs of unresolved mental health issues, as many mental health patients can credibly present temporary stability just to be released from the hospital. Information on the patient's history of treatment compliance, behavioral patterns, and availability of outside supports can all be of value here. This critical first step sets the tone for the evaluator in determining what kind of community interventions will be needed. Information for this assessment can be gathered from mental health and social work professionals who have worked with the patient during their stay. If there is a release of information, you may also gather information from mental health and social work professionals who are familiar with the patient. Family members and friends can also prove to be an abundant source of information as they often have the most intimate and longstanding experience with the patient.

Family members and confidentiality

Prior to January 2022, under the Illinois Mental Health and Developmental Disabilities Confidentiality Act, all communications regarding a mental health patient are confidential, *including* the fact of the patient's admission into the hospital.[13] Thus, unless the patient authorizes disclosure or an exception applies, hospitals and professionals are prohibited from sharing information with family members regardless of the level of a family member's involvement prior to the patient's hospitalization. Given the then-mental state of the patient, it is exceedingly rare for a patient with unresolved mental illness to grant authorization for disclosure. Typically, there are no applicable exceptions permitting hospitals to speak with family members regarding the patient's care. Effective Jan. 1, 2022, Senate Bill 1970 (SB 1970) seeks to resolve this issue. Under SB 1970, the Confidentiality Act was amended to permit hospitals to provide qualifying family members with limited information regarding discharge planning details.

To qualify, the family member must: 1) provide proof of identity to the hospital; 2) provide a written statement attesting that there are no pending order-of-protection or domestic-relations matters; and 3) demonstrate significant involvement in meeting the patient's health care needs.[14] Significant involvement can be demonstrated by evidence that the patient and family member reside at the same address or that the family member assists in filling psychotropic medications and can provide the name of the prescribing provider; regularly assists in attending mental health appointments; holds the health insurance policy that covers the recipient's mental health care; or is an adult parent, spouse, sibling, or grandchild of the patient.[15]

Additionally, the treatment team must determine that the patient lacks capacity to make a reasoned decision regarding disclosure, the patient is not at risk of abuse or neglect as a result of the disclosure, and that disclosure is in the best interest of the patient.[16] With the benefit of an exchange of information from a family member, hospitals are then able to obtain a full and reliable picture of the recipient's severity, patterns, and mental health history.

The POST model

Following a risk assessment, attorneys should instruct their mental health professional clients to conduct a needs assessment based upon the determinations made during the patient's stay, history, and risk assessment. A helpful tool for covering a patient's full needs upon discharge is POST:

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placement, outpatient services, support system, and treatment. POST stands for the four critical areas of discharge planning that can work to ensure long-term stability for individuals with mental illness.

Placement. Some patients will have the capacity and ability to live in their own apartment or community setting either individually or with family. Other patients will have a greater level of need and will need to reside either in a group or nursing home or more structured setting. In any case, every discharge should be to a placement that is safe, clinically appropriate, and conducive to treatment-plan adherence.

Outpatient services. Most, if not all, patients will require continued outpatient services upon discharge depending upon their own unique circumstances. Some patients may be experiencing substance addiction or medical problems exacerbated by their mental illness. So, outpatient services can include individual, group, or some other form of therapy, drug and alcohol treatment, or related medical service treatment. Individuals living with mental illness often lack the capacity to obtain mental health treatment, let alone tend to a host of other comorbid issues and conditions. An effective discharge plan

13. 740 ILCS 110/2; *id*. at § 110/3.
14. Pub. Act 102-0372 (eff. Jan. 1, 2022) (adding 740 ILCS 110/5.5).
15. *Id*.
16. *Id*.

will implement the necessary community resources and minimize barriers to getting coordinated and integrated care outside of the hospital setting.

Support system. Family members and friends are not just a source of information for medical and mental health providers, they are key components to an individual's long-term success in treatment-plan adherence. From helping with managing medications to providing transportation to appointments to providing emotional support, a patient's support system is vital to that patient's success. Mental health and social work professionals should, to the extent practicable, include family members and friends in the discharge planning process—especially given the changing legal landscape permitting hospitals to speak with family. This group is equipped to provide unique insights on treatments and resources that could have a marked impact on the patient's outcomes.

Treatment. Probably the most important component of any discharge plan is the ongoing treatment, medication management, and monitoring. Hospitals and mental health facilities often identify a postdischarge placement without considering a plan for ensuring that the patient will continue to adhere to a treatment plan. This crucial step should not be overlooked. Once a patient becomes destabilized due to a lack of adherence to treatment, not only do patient and care professionals risk returning to square one, but in some cases, it also can become increasingly difficult to find new medication regimens that effectively manage a patient's mental health symptoms. This results in more frequent, increasingly costly, and lengthier hospital stays—the very opposite of what all parties intended.

Holding patients accountable

You may be thinking "Sure, this sounds great. But we can't make anyone do anything once they are not in the hospital." To address this conundrum, hospital attorneys can look to the Assisted Outpatient Treatment (AOT) order. An AOT is a court order that outlines the parameters of the patient's discharge plan and is entered near the time of discharge.[17] The AOT integrates the terms of the patient's discharge plan into the initial order and is in effect for up to 180 days (with the potential to be extended, if necessary).[18] An AOT's enforceability mechanism lies in its ability to require the patient to comply with the order/treatment plan or be placed back into the hospital for treatment.[19] Thus, the AOT is a tool that can be used to hold patients accountable and incentivize adherence to the treatment plan. The idea is that, after adherence to the treatment plan for the duration of the AOT, the patient can become sufficiently stabilized that he/she is likely to continue to improve.

Few things in life are truly permanent and managing mental illness can be a journey of peaks and valleys. Attorneys for hospitals and treatment centers should advise their clients to become invested in crafting multidimensional discharge plans that consider the recipient's need for medication compliance and monitoring, necessary postdischarge community supports, and dedicated family members who can assist in maintaining stability with the appropriate clinical supports. Comprehensive and effective discharge planning is not only beneficial for patients, it can also: benefit hospital clients by slowing the revolving door of high-acuity patients who frequently utilize hospital emergency rooms for mental health crises; decrease litigation associated with the filing of commitment petitions; and lessen the risk of liability for wrongful death or negligent discharge should a patient cause harm to himself or someone else postdischarge.

While it can require some logistical acrobatics to put the necessary resources in place, all hospitals and mental health facilities should strive for "goodbye" and not "see you later."

17. 405 ILCS 5/3-801.5.
18. *Id.* at § 5/3-801.5(g); *id.* at § 5/3-813(b).
19. *Id.* at § 5/3-801.5(b).