Face to Face Encounters: Avoiding Liability for Abandonment

Elizabeth E. Hogue, Esq.
Office: 877-871-4062
Fax: 877-871-9739
E-Mail: ElizabethHogue@ElizabethHogue.net

Providers are at risk for legal liability when they terminate services to patients. Termination of services has historically been warranted by the following circumstances, among others: violence or threatened violence, noncompliance by patients and/or primary caregivers, inability to provide adequate assistance, or inappropriateness for services. Providers are understandably concerned about the possibility of legal liability associated with the termination of beneficial services.

Specifically, they frequently express concern about the possibility of liability for abandonment of patients. The Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services (DHHS), the primary enforcer of fraud and abuse prohibitions, has indicated that abandonment of patients may also constitute fraudulent conduct.

Providers now have new concerns regarding liability for abandonment in light of requirements for face to face encounters. Specifically, providers may not be paid for services rendered if patients have not had appropriate face to face encounters with physicians during required time periods. It is important, therefore, for providers to understand how to terminate services without liability for abandonment.

Practitioners often speak of abandonment as though it is equivalent to termination of services. On the contrary, patients who want to hold providers liable for abandonment must show that:

1. Providers unilaterally terminated the provider/patient relationship;
2. Without reasonable notice;
3. When further action was needed.

Patients who fail to prove any one of these requirements are likely to lose their lawsuits against providers.

The second requirement of abandonment provides a key basis for avoiding liability for abandonment. Providers will not be liable for abandonment as long as they give patients reasonable notice prior to termination of services. The key question is: what is "reasonable" notice, especially in view of new face to face encounters?

Many providers historically viewed thirty days as the minimum number of days required for reasonable notice. This period of time is too long for most patients, including patients who have not had required face to face encounters. A more reasonable period of time for most patients, unless a specified period of notice is mandated by state statute or regulation, is probably one to three days.

After staff members agree upon a reasonable notice period, patients and attending physicians should receive verbal and written notice. Written notices should be hand-delivered to patients' homes. Although it is desirable, it is unnecessary to obtain a signature verifying receipt. Written notices to physicians should be faxed to them.

When the date for termination of services arrives, providers must terminate care as planned. Practitioners are sometimes tempted to continue in the face of pleas from patients, physicians, and/or family members. Providers must bear in mind, however, that their organizations, whether for-profit or not-for-profit, simply cannot afford to render unlimited amounts of uncompensated care. The

consequence of lack of attention to fiscal limitations may be the disruption or unavailability of care to many patients.

Finally, providers can defeat claims of abandonment if patients for whom services are discontinued need no further attention. How do providers know whether further attention is needed? Is this requirement as subjective as it appears? On the contrary, judges are likely to make retrospective determinations about whether further attention was needed. The basis for such determinations will probably be whether patients were injured as a result of termination.

In other words, the law is likely to conclude that no further attention was needed, so long as patients are not injured as a result of termination of services. What kind of injury must patients prove? Can patients who attempt to prove emotional damage only as a result of termination of services by case managers win lawsuits?

The "good news" for providers is that courts generally require proof of physical injury or damage before they will find providers liable for abandonment. Providers must, therefore, take appropriate steps to make certain that patients are not physically injured as a result of termination of services. In rare instances, appropriate action may include sending an ambulance to take the patient to the nearest hospital. If the patient refuses transport by ambulance, the patient will have been contributorily negligent or will have assumed the risk, so providers are likely to avoid liability.

Now is the time for providers to educate themselves about the possibility of liability for abandonment. Positive steps must be taken in order to prevent this type of legal liability in view of the uncertainty of the impact of requirements for face to face encounters.

(To obtain a complete set of policies and procedures to use in order to prevent liability for abandonment, send a check for $105.00 that includes shipping and handling made out to Elizabeth E. Hogue, Esq. to Fulfillment, 107 Guilford, Summerville, SC 29483.)