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HEALTH CARE LAW
FOULSTON SIEFKIN ISSUE ALERT

New Interpretive Guidelines for Patient Rights Conditions of Participation

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On April 15, 2010 President Obama, recognizing that many hospital visitors do not fall within the definition of the traditional nuclear family, issued a Memorandum on Hospital Visitation to the Secretary of Health and Human Services. The Memorandum directed Secretary Sibelius to initiate appropriate rulemaking to insure that hospitals participating in Medicare and Medicaid "respect the right of patients to designate visitors" who would "stand equal to immediate family members." In addition, the Memorandum directed HHS to issue new guidelines under the Patient Rights Condition of Participation to guarantee that advance directives are respected and that patient "representatives" have the right to make informed health care decisions.

As a result of the Memorandum, HHS promulgated a new visitor rights regulation effective January 18, 2011 and issued new Interpretive Guidelines for the Patient Rights Condition of Participation. The interpretive guidelines are effective for surveys taking place on or after December 2, 2011. The Interpretive Guidelines extend certain patient rights to the patient's representative, including the right to receive the Patient Rights Notice; the right to participate in a plan of care; the right to make informed treatment decisions; the right to receive information on and to formulate advanced directives; the right to have a family member notified of the patient's admission; and the right to have visitors and a "support person." Attendant to these extensions of patient rights is a requirement for policy development and documentation criteria.

Patient Notice of Rights

Every hospital has a Patient Rights Notice document. The document itself should be reviewed to determine if changes are needed to reflect the Interpretive Guideline criteria.

Provision of Patient Notice

Upon admission, each inpatient is provided a Notice of Patient Rights. Under the new Interpretive Guidelines, this Notice must be provided not only to inpatients, but to patients who are outpatients, same day surgery patients, emergency department patients, or patients on observation status. The Notice must be

Continued on Page 2

provided at the earliest opportunity to the patient or to his or her representative. Policies regarding providing the Notice may need to be modified to include the expanded provision and documentation requirements.

Plan of Care

While patients have always had the right to participate in their plan of care, that right is now extended to the patient's representative. The hospital must develop policies and procedures which include the representative in this process, as well as documentation criteria.

Informed Consent

Attendant to the right of a patient to participate in his or her plan of care is the right to make informed decisions about the care itself. That right, if not prohibited by state law, is now extended to the patient's representative. The patient and his or her representative must be informed about and must be able to make decisions about the patient's health status, care planning, treatment options, discharge planning, and the right to request or refuse treatment. Again, policies and procedures should be amended to reflect the criteria for patient and representative consent to treatment, refusal of treatment, and appropriate documentation. Additionally, the Interpretive Guidelines indicate that physician-owned hospital disclosures and notice of physician availability within the hospital must be disclosed under and will be enforced under the Patient Rights provision on informed consent.

Advanced Directives

Patients have long been provided notice of the right to make an advance directive, which now includes naming a representative (if not prohibited by state law) and support person. Psychiatric advanced directives, as noted in the Interpretive Guidelines, should be utilized to consider and provide insight into patient wishes, even when state law does not provide for such directives. As with the provision of the Notice of Patient Rights, the information regarding advance directives should now be provided at inpatient admission, outpatient admission, observation status, same day surgery, or emergency room treatment. Policies and procedures may need modification to conform to the expanded obligations and to guide documentation requirements.

Notification of Admission

The patient rights Condition of Participation has always permitted notification of a family member when a patient is admitted. That notification is now extended to the patient's representative. As with the other changes in the Interpretive Guidelines, polices and documentation criteria may need modification. Documentation criteria includes that the patient was asked (no later than the time of admission) whether a family member or representative notified of admission; whether the patient declined notification; the date, time and method of notification if requested; and if the patient was incapacitated, the steps taken to identify family members or a representative, and provide notification to the family member/representative, and to the patient's physician.

Visitation

Visitation policies must address the inpatient and outpatient setting; must describe established visitation restrictions or limitations on visitation which are clinically necessary or reasonable; and must provide for training of hospital staff who play a role in facilitating visitation. Visitation should not be unnecessarily

restricted or limited, and cannot be denied on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability and patients may designate a support person for visitation. The support person and the patient representative may be different if that is the patient's wish. The hospital must ensure that all visitors enjoy full and equal visitation privileges consistent with the patient's preferences. Patients/representatives and support persons must be notified of their visitation rights. There must be a "notice" of visitation rights and the hospital should make appropriate changes to visitation policies and procedures necessary to conform to this regulatory change and the Interpretive Guidance, as well as establish criteria for documentation.

Patient Representative

Hospitals must have a "representative" policy that includes determining when the patient has a representative to exercise the patient's rights as appropriate under state law. The naming of a "representative" for the exercise of patient rights is perhaps the biggest change made by the Interpretive Guidelines. Under the Guidelines, patients who are not incapacitated and who are able to communicate have the right (unless prohibited by State law) to verbally or in writing designate a representative for the purposes of exercising the patient's rights as described above, including the right to consent to treatment. If the patient is incapacitated or is unable to communicate, and has an advance directive, the hospital must treat the individual named in the advance directive as the representative. However, when the patient is incapacitated or unable to communicate and there is no advance directive, the representative (unless prohibited by state law) can "self-designate" and the hospital, except in particular situations, must accept that designation without subjecting the self-stated representative to any verification process. The hospital may require verification when more than one individual designates him or herself as the patient's representative, when treating the individual as the patient's representative without verification would violate state law, or when the hospital has reasonable cause to believe that the individual is falsely claiming to be the patient's spouse, domestic partner, parent or other family member. Hospitals must establish policies and procedures to facilitate a swift and non-discriminatory resolution of disputes. Hospitals must also document in the patient's health record the refusal to treat an individual as the patient representative and the specific basis for that decision. Hospitals must also have processes in place to assure the patient or his representative is given sufficient information on the patient's health status, diagnosis and prognosis.

The issue of the representative's status in the informed consent process is the issue that appears most problematic. In Kansas, substituted consent by next-of-kin is accepted as a matter of custom and practice; there is no specific legal prohibition or endorsement of next-of-kin consent. For an incapacitated adult, a guardian is legally authorized to consent to treatment, as is an attorney-in-fact under a durable power of attorney for health care decisions. Health care decisions may also be made pursuant to other advanced directives. The legal acceptance of representative consent within this framework is unknown. With minors, who inherently lack capacity to consent to treatment-absent a specific statutory exception-the parents are the legal decision-makers. However the guidance indicates that absent a state law prohibition, a person in loco parentis (acting as the parent) can be the "representative." These issues will require analysis of hospital policy, current practices, the law, and the attendant risks.

For Further Information

If you have questions or want more information, you should contact your legal counsel to ensure compliance with the new interpretive guidelines for patient rights conditions of participation. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Marta Fisher Linenberger is available to assist you. Marta Fisher Linenberger can be reached at (785) 233-3600 or **mlinenberger@foulston.com**. If you are looking for general health care counsel you may contact Scott Palecki at (316) 291-9578 or **spalecki@foulston.com**.

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