October 2012
A Publication of Law Bulletin Publishing Company
Chicago Lawyer®
Volume 35 Number 10 • chicagolawyermagazine.com

MedMal Matters > column

Hospitals send patients to lawyers

By Thomas A. Demetrio
Corboy & Demetrio

By Kenneth T. Lumb
Corboy & Demetrio

The American Medical Association (AMA) said health systems in Maryland refer injured patients to lawyers. The AMA, on its amednews.com website, reported earlier this year that roughly two dozen hospitals operated by MedStar Health, LifeBridge Health and the University of Maryland Medical System increasingly refer patients to specific plaintiff lawyers.

MedStar Health discusses with patients "what happened during treatment" and works toward a resolution, and when appropriate, proposes a settlement, the AMA website says. If MedStar is unable to settle, however, it takes the "unlikely step" of offering the patient the name and phone number of a plaintiff lawyer. A MedStar spokesperson said the company has kept a list of attorneys for referral to patients since 2005. The list was created by contacting about 25 attorneys the hospital worked with or knew to be highly respected.

MedStar said providing attorney referrals to patients helps resolve cases more quickly by preventing complaints from turning into "long legal nightmares." It claims that where a patient's injuries are significant, the company is more comfortable knowing that the patient received independent, outside legal advice.

Many hospitals and health-care experts extol the virtues of hospital-supplied lawyer referrals: quicker resolution and lower expenses reduced attorney fees. Many of the Maryland hospitals profiled in the article specifically request that the lawyers they recommend to patients reduce their fees. Critics of the process worry that patients will be misled by hospitals and that attorneys on a hospital's referral list may have a conflict of interest. Colorado defense attorney Karen McGovern said she wonders why a patient would ever accept a referral from a hospital. The AMA website says McGovern said there is a reason that hospitals recommend particular attorneys: "What I suspect is that this is an attorney who doesn't push the cases to trial and settles for lower amounts. Is that attorney going to make up the difference by going after the doctor?"

The most striking aspect of the AMA's discussion of this issue is the notion that it is an "unlikely step" for a hospital to ensure that a patient has competent legal counsel to help make what may be the most important decision in that patient's life. The article reported that when asking unrepresented, injured patients to settle their cases, all of the hospitals queried employed, competent in-house or outside legal counsel to advise the hospital. Only when the patient refused to settle did the hospitals suggest an attorney from a predetermined list. Except in cases where the damages are clearly minor and temporary, however, every patient should have a lawyer.

Medical negligence litigation is an adversarial process, but there are boundaries to behavior when a party or its lawyer deals with an unrepresented potential plaintiff.

In the early 1990s, Allstate Insurance Co. crossed that line and was prosecuted in multiple states for the unauthorized practice of law. A 2001 article in *Trial* magazine says Allstate's trouble stemmed from a plan to maximize profits by having its claims adjusters establish "trust-based relationships" and "act as advocates" for unrepresented claimants injured by the negligence of an Allstate insured. After winning the claimant's trust, the article reported, the adjuster would then make a low-ball offer. Allstate knew from its own statistics that by claiming to represent a claimant's interest and discouraging legal representation, Allstate could settle claims for one-third to one-half the average settlement. By "duping unrepresented claimants into accepting disadvantageous settlement offers," courts found, Allstate not only engaged in the unauthorized practice of law but created serious conflicts of interest by representing its insureds and the claimants injured by the insureds.

There is no indication that any hospital profiled in the AMA article committed any of Allstate's sins. But why even risk the appearance of a conflict? In the vast majority of medical negligence settlement negotiations, the only way to ensure a fair and enforceable result is to ensure that both sides are represented. A patient should have a lawyer to ensure that the proposed number is fair, based upon the facts and the law applicable to the case. That analysis may include expert analysis of future medical treatment and the cost of that treatment or an expert analysis of future lost wages or lost earning capacity. How is the average layman supposed to weigh these factors without his own lawyer?

Procedural factors also militate in favor of ensuring a patient is represented before settlement discussions begin. If not, who will resolve liens or claimed subrogation interests? Who will advise the patient as to the net amount he or she will receive after lienholders are reimbursed? A plaintiff's decision to settle is not an informed one if he or she does not know what the net amount of the settlement will be. A case involving a minor or a disabled adult or a wrongful death case simply cannot be settled without a lawyer. These cases require court approval of the settlement and the distribution of the proceeds. Will the hospital's lawyer or risk manager open an estate and have a guardian appointed for the minor or disabled adult? Of course not. ■

TAD@corboydemetrio.com
KTL@corboydemetrio.com