Volume 4, Issue 3

December 2011

VA LAW

OFFICE OF REGIONAL COUNSEL

Copyrighted Material

Not Completely Off-Limits

Sometimes VA employees seek to use copyrighted material whether for treatment or educational purposes in the workplace. Reasons for usage may vary from using a popular sitcom in a discussion group to using well-known psychological tests or copying articles to teach residents. No matter how noble the reason or innocent the intention, every use should be carefully analyzed to protect against copyright infringement.

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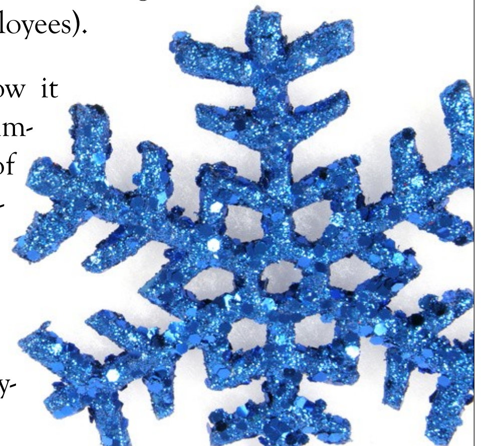
The "fair use" exception is a legal principle that confers a privilege to use copyrighted material in a reasonable manner without an owner's consent. Section 107 of the Copyright Act, 17 United States Code (USC), codifies the defense against copyright violation. One may use and reproduce a copyrighted work "for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research" provided the use is fair. In determining fairness, the courts will consider four elements: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the work used, and the effect on the potential market.

The first element considers the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. The doctrine of "fair use" is more liberally applied in non-commercial and non-profit educational situations. Government agencies, such as VA and its components, are generally recognized as nonprofit entities. Many of the potential uses of copyrighted material at a VAMC will be for nonprofit education purposes (i.e., teaching residents, treating Veterans, educating employees).

What the copyrighted work is and how it will be used is also considered. For example, showing images that consist of charts, tables, drawings, algorithms, diagrams, schematics, and slide stains that contain information on hepatic diseases, treatment strategies, and prognostic factors is informational and factual, rather than creative or original, in nature.



The amount and substantiality of the portion used in relation to the copy-

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What to Do When a Patient Refuses to Leave . . .

While nearly all VA nurses and physicians are familiar with patients who choose to leave our medical centers against medical advice, VA nurses and physicians are increasingly facing the challenge of the patient who is medically ready for discharge but who refuses to leave the hospital, thereby staying against medical advice. The complicated dynamics posed by such patients present both legal and ethical challenges, yet are not recent or novel. In 1913, The New York Times reported the following about a patient who refused to leave a Massachusetts hospital after a 17 month stay: "PATIENT INSISTS ON CURE. – Won't Leave Hospital and Arrested for Trespassing."

The reasons why a patient might seek to stay in the hospital against advice are nearly limitless and include secondary gain (e.g., shelter, meals, attention, financial benefits, or avoidance of legal problems) and personal turmoil (e.g., fear of leaving the hospital or other psychosocial stress, homelessness, and a lack of access to pain medications). Often, patients who do not want to leave the hospital believe that they are being "forced" to do so against their will. Such patients (or their families) may react with anger and inadvertently or intentionally cause a certain amount of turmoil at the medical center.

VHA has not issued a specific directive on the "difficult to discharge" patient – meaning a patient who is medically stable and no longer in need of acute inpatient care. Each of these patients brings a unique combination of medical, institutional, ethical and legal issues, thereby making necessary a patient-by-patient analysis of the legal issues. Moreover, VA faces a different combination of medical, institutional, ethical and legal issues than do our non-VA counterparts. For example, both the financial leverage (i.e., "leave or you will start being personally billed for your healthcare costs") as well as the legal imperative (i.e., "leave or you will be forcibly evicted or arrested for trespass") that non-VA hospitals and healthcare providers can apply to deal with the difficult to discharge patient are often either ineffective, counterproductive, or unavailable to VAMCs dealing with these patients. Couple that difficulty in gaining a means to effectively encourage these patients to leave with the ever-increasing demand for VA care, and the potential significance of this problem becomes all the more apparent.

So, what's a VAMC care team to do when confronted with a patient who attempts to remain against all reason and medical advice? The answer is most often found in clinical practices (e.g., patient education and comprehensive care team approaches to discharge planning) and facility approaches (e.g., removing the televisions and individual phones from such a patient's room) and not in legal remedies (e.g., court orders of eviction and arrests for criminal trespass).

To be most effective in preventing and addressing difficult to discharge patients, clinical practices and facility

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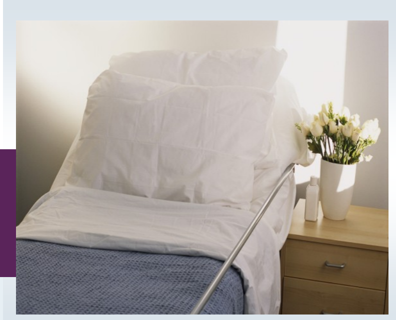
approaches must consider discharge planning – early and often. Although not directly controlling for VA providers, the Medicare Conditions of Participation for Hospitals (42 CFR § 482.43 - Discharge Planning and 42 CFR § 482.13 (b)(2) - Patient Rights) and the Joint Commission Accreditation Standards Elements of Performance (See JCAHO 2006 Hospital Accreditation Standards, Elements of Performance for PC.15.10 and JCAHO Standard P.C. 15.20) provide guidance as to the standards of care for discharging patients so as to best avoid any ethical quandaries or legal liability for wrongful discharge. In sum, these Conditions and Standards require participating hospitals to timely provide a discharge planning evaluation which addresses the likelihood of the patient needing post-hospital services and counsel the patient or any surrogate decision makers as to the available resources for those services, while respecting patient and family preferences when possible.

Under these Standards, as in VA, written discharge instructions in a form the patient can understand are required to be given to the patient and/or those responsible for providing continuing care. In addition, VA's statement of Patient Rights and Responsibilities (http://www.patientadvocate.va.gov/Rights.asp), which adopts a mutual respect approach by alerting patients that they have the responsibility and will be "expected to respect other patients, residents and staff and to follow the facility's rules," is also worthy of consideration when seeking tools to remind a difficult-to-discharge patient of their obligations and responsibilities as a VA patient.

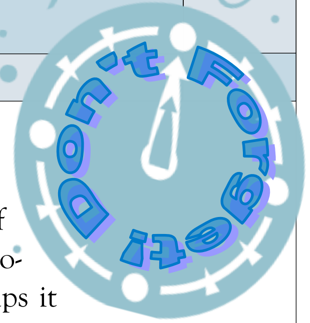
Should clinical practices and facility approaches not result in the difficult-to-discharge patient voluntarily leaving, legal approaches might be considered after consultation with Regional Counsel. Most jurisdictions recognize that a competent, medically stable patient has no legal right to refuse discharge, nor is there a requirement that a patient consent to discharge. Of course, evicting a patient who will not leave, even in complete accordance with the law, creates the potential for significant public perception concerns that might well interfere with VA's core mission, making the question of what to do with such a patient a unique challenge on which Regional Counsel is available for consult.



Take Away:

- While the reasons people refuse to leave are limitless and sometimes difficult to ascertain, determining the reason for the resistance to discharge may prove helpful in managing these patients and formulating a plan for safe discharge.
- Communication among team members and with the patient and his/her family is crucial in effectuating discharge of these patients.
- Discharge is generally lawful if the patient is medically cleared with a coordinated and communicated discharge plan in place; however, please consult with Regional Counsel before seeking to "forcibly" remove a patient who has been discharged and persists in their desire to stay in the hospital.

Ethics Reminders . . .



Completing any required financial disclosure reports will probably not be on your list of New Year's Resolutions. However, with the ease of use of the electronic Financial Disclosure Management (FDM) system and the feeling of satisfaction upon completion, perhaps it should be.

As the New Year approaches, be reminded that VA financial disclosure filers – either SF-278 for public financial disclosure (PFD) report filers or OGE-450 for confidential financial disclosure (CFD) report filers – have a few important dates to keep in mind:

- **December 31, 2011**, is the deadline for completion of the one-hour mandatory ethics training—available through TMS.
- **February 15, 2012**, is the deadline for CFD filers to complete their OGE 450 submissions. (PFD filers can look forward to completion of their process in May, 2012)
- **May 15, 2012**, is the deadline for PFD filers to complete their PFD Report (SF-278).

Copyrighted Material

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righted work as a whole is the third factor used to determine fair use. For example, showing a five minute clip of a movie, as opposed to the entire movie, would lend itself to the intent of the Fair Use Doctrine.

Lastly, the effect of the use on the potential market for or value of the copyrighted work is the final and most important factor. For example, the use of an old movie which frequently runs on free television channels, as opposed to showing a new hit movie just out of the movie theaters, would be an important factor in the determination. This element also considers the extent to which it will be shown (i.e., five Veterans in treatment as opposed to an auditorium of residents). A more expansive use (i.e., regularly showing the images to all medical residents in rotation at the VAMC each year as opposed to a limited number of times to a limited number of medical residents) may deter purchase of the copyrighted work and thus result in harm to the copyright owner.

On a related note, if an educator creates a new work incorporating portions of copyrighted works (i.e., PowerPoint presentation) there are more stringent standards. The Conference on Fair Use (CONFU) issues Fair Use Guidelines for Educational Multimedia which is intended for public libraries and schools, but has been interpreted by the VA Office of General Counsel as applying to VA as well since we are also a non-profit entity. These guidelines provide that educators may use multimedia projects for a period of up to two years after the first instructional use with a class. The motion media can be used for up to 10% or three minutes, whichever is less, in the aggregate of a copyrighted motion media work. Ten percent, but in no event more than twenty seconds of music, lyrics and music videos may be used. Up to 10% or 1000 words, whichever is less, of a copyrighted work consisting of text material may be used as part of an educational multimedia project.

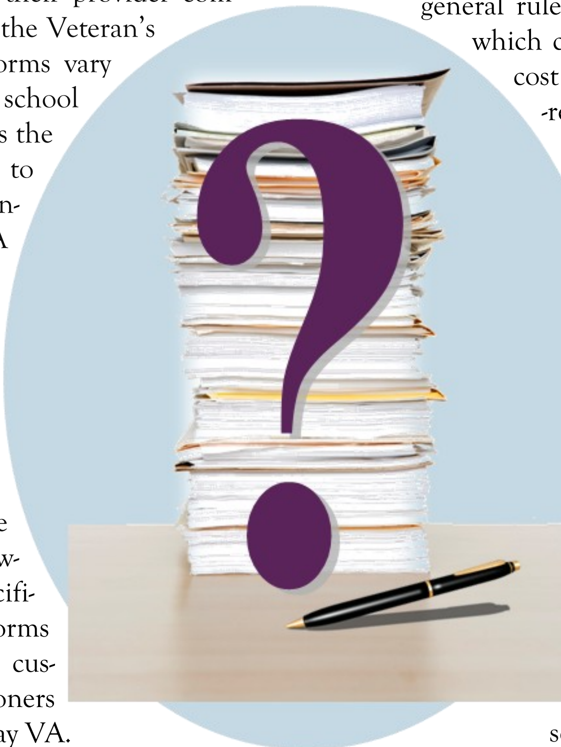
If it is determined that the work is covered by the Fair Use doctrine it is still prudent to keep the number of copies and length of excerpts at the minimum necessary for the VA needs. When the excerpts/copies are no longer necessary they should be destroyed. Also be sure to credit the sources and display the copyright notice (©) and copyright ownership information.

Any questions concerning copyrighted material should be directed to your local Regional Counsel Representative.

So Your Patient Wants a Medical Statement?

Frequently, VA providers are asked to provide medical opinions relating to a Veteran's condition. The reasons for these opinions vary - some Veterans need a note for work or support for a disability claim, while others may be seeking substantiation for an ongoing lawsuit. How the Veteran is requesting the medical documentation be provided will dictate if, and how, we can respond.

Veterans oftentimes request that their provider complete various prewritten forms on the Veteran's behalf. The purpose of these forms vary widely, from insurance forms to school forms and anything in between. As the provider of choice, VHA seeks to meet all of our patients needs, including filling out any non-VHA medical form requested by the Veteran. Neither statute (38 C.F.R. 17.38(a)(1)(xiv)), nor VA policy (VHA Directive 2008-071, *Provision of Medical Statements and Completion of Forms by VA Health Care Providers*) defines what constitutes a form, nor does it require that it be a government form. However, this requirement does specifically exclude the completion of forms for examinations if a third party customarily pays healthcare practitioners for the examination but will not pay VA.



Sometimes though, the Veteran is not seeking a form, but an actual medical letter or statement instead. The same rationale does not apply to medical statements. Except when requested by VBA, or when done in support of a VA disability claim, medical statements should never be given to a patient outright. In fact, there is nothing in VHA Directive 2008-071 that allows clinicians to provide a medical statement to the Veteran (*i.e.,* an actual letter). However, the clinician *can* provide a descriptive medical statement *in the electronic health record* concerning diagnosis, prognosis, and assessment of function of an existing medical condition, disease, or injury.

One reason for the limitation against providing medical statements is that this can make the clinician susceptible to being called as a witness in the Veteran's lawsuit, and VA employees are generally prohibited from giving opinion or expert testimony in purely private matters to which VA is not a party. The time taken away from the VA's mission cannot be justified and can be misconstrued as the VA staff favoring one private litigant over another. Moreover, the factual information needed by the Veteran can already be found in the medical records. There are exceptions to this general rule, and requests for medical statements which could support a claim for medical care cost recovery, e.g., auto accidents and work-related injuries, and other situations involving litigation, i.e., "*Touhy*" cases, should be brought to the attention of the facility Privacy Officer or Regional Counsel.

Whether requesting a form or a descriptive note in the electronic health record, the Veteran must provide a VA Form 10-5345a, *Individuals Request for a Copy of Their Own Health Information*, and local procedures must be followed for obtaining this authorization. The Veteran is then responsible for forwarding the medical documentation to the requesting entity. If the Veteran requests that the form be sent directly to the requester (*e.g.,* insurance company, etc.) then the Veteran must instead fill out VA Form 10-5345, *Request for an Authorization to Release Medical Records of Health Information*.

Clinicians should not be coerced in any way to complete forms, or to render statements or medical opinions that they are not comfortable making. The clinician should never go beyond their expertise or knowledge of the patient. Clinicians may seek the expertise of other services when requests for information extend beyond the scope of expertise of the clinician. If the clinician does not feel confident and competent in providing the requested documentation, then they should not do so. If the request cannot be transferred to a more appropriate clinician for completion then the patient should be sent a letter explaining the reasons why we cannot comply with the request.

EMTALA

According to the latest data available from the Census Bureau, 49.9 million Americans (16.3 percent) were without health insurance coverage in 2010. Moreover, as many as twenty states reduced or restricted Medicaid benefits in 2010, while thirty-nine states cut or froze reimbursements for doctors and hospitals. Given these realities it perhaps should not be surprising that VAMCs are not infrequently facing demands/requests by private facilities, ambulance services and non-Veterans to provide care in accordance with the Emergency Medical Treatment and Active Labor Act (EMTALA)(42 USC 1395dd et seq.).

EMTALA requires hospitals that participate in Medicare to provide screening, examination, and stabilization of emergency medical conditions and women in labor prior to transferring them to another facility. In sum, EMTALA governs when and how a patient in a participating hospital may be (1) refused treatment or (2) transferred from one hospital to another when she/he is in an unstable medical condition. EMTALA is primarily, but not exclusively, a non-discrimination statute designed to prevent hospitals from rejecting patients, refusing to treat them, or transferring them to VA, "charity hospitals" or "county hospitals" if patients are unable to pay or are covered under the Medicare or Medicaid programs.

In essence, the statute:

- imposes an affirmative obligation on the part of the hospital to provide a medical screening examination to determine whether an "emergency medical condition" exists;
- imposes restrictions on transfers of persons who exhibit an "emergency medical condition" or are in active labor, which restrictions may or may not be limited to transfers made for economic reasons;
- imposes an affirmative duty to institute treatment if an "emergency medical condition" does exist.

While EMTALA does not specifically apply to VA, it is VA policy to follow EMTALA's intent. VHA Directive 2007-015, "Inter-Facility Transfer Policy," requires all transfers in and out of VA facilities of in-patients or patients in the Emergency Department or Urgent Care Units be accomplished in a manner that ensures maximum patient safety and "is in compliance with the transfer provisions of EMTALA and its implementing regulations."

Please call Regional Counsel if you have any legal questions regarding this Directive or in response to any attempts by private facilities to have the VAMC provide care to a non-qualified Veteran under the auspices of EMTALA.

VA Law Remember . . . A Shout Out for VALaw!

Do you need help with a legal matter involving collections, procurement integrity, bioethics, subpoenas, loan guaranty, property damage & personal injury claims, rulemaking or any of the hundreds of other areas of law on which attorneys with the VA provide counsel to the VA every day? Please remember that VALaw is available to assist VA employees in performing their duties and can help you find a VA attorney to help with your query.

The mission of the Office of General Counsel (of which each and every Office of Regional Counsel is a part) is to identify and meet the legal needs of the VA. Its primary objective is to ensure the just and faithful execution of the laws, regulations and policies that the Secretary has responsibility for administering, and by so doing enable the Department to accomplish its mission of service to our Nation's Veterans.

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Ronda Cormier 713-383-2774
Ida Campbell (Legal Assistant) 713-383-2788)
Federal Tort Claims
Deanna Livingston 713-383-2765
Ida Campbell (Legal Assistant) 713-383-2788
All other matters
Erich Schwartze -713-383-2770
Jeff Linhart (Paralegal Assistant) 713-383-2765

South Texas Veterans Health Care System & Associated Clinics
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All other matters
Jennifer Hansen-210-616-8344

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Personnel, EEOC, MSPB & other labor matters
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All other matters
Jennifer Hansen-210-616-8344

Southeast Louisiana Veterans Health Care System & Associated Clinics
Personnel, EEOC, MSPB & other labor matters
Brandi Powell - 504-565-4956
Federal Tort Claims Act & other matters
Paul Cassou - 504 565-4948
Charles Caine - 504 565-4946

Alexandria Veterans Affairs Medical Center &Associated Clinics
Personnel, EEOC, MSPB & other labor matters
Brandi Powell - 504-565-4956
Federal Tort Claims Act & other matters
Patrick Keen – 318-990-5488
Charles Caine - 504 565-4946

Overton Brooks Veterans Affairs Medical Center &Associated Clinics
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Ouida Adams (Paralegal Assistant) (318) 990-5287

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All other matters
Erich Schwartze -713-383-2770

Vet Centers – Louisiana
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Brandi Powell - 504-565-4956
All other matters
Charles Caine - 504 565-4946

Veterans Benefit Administration
Houston VBA Regional Office
Loan Guaranty & other matters
Thomas Herpin - 713-383-2769
Virginia Musachia (Legal Assistant) 713-383-2780
Fiduciary & other matters
Janice Gilbert - 713-383-2768

New Orleans VBA Regional Office
Personnel, EEOC, MSPB & other labor matters
Brandi Powell - 504-565-4956
Loan Guaranty, Fiduciary & other matters
Paul Cassou - 504 565-4948

National Cemetery Administration
Houston & South Texas facilities
Personnel, EEOC, MSPB & other labor matters
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All other matters
Thomas Herpin - 713-383-2769
Louisiana facilities
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All other matters
Paul Cassou - 504 565-4948

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Have a question regarding this newsletter?
Have an idea for a topic for the next issue?

Email us!