December 5 – 6, 2016
Riverside

The 24-Hour Hold
An Enigma Wrapped in a Mental Health Riddle

M. Steven Lipton
December 6, 2016
CHA Behavioral Health Symposium
Overview

- Quick review of the basics of involuntary detention
- Understanding EMTALA vs. involuntary detention
- The Health & Safety Code §1799.111 hold -
  - What is it?
  - How does it work?
  - What are the advantages?
  - What are the disadvantages?
  - What are the imponderables?
- Open Discussion and Q and A

Disclaimer No. 1

- This presentation is intended to provide information regarding psychiatric detention laws and involuntary holds
- The presentation does not constitute legal advice, or its application to the delivery of emergency health care services
- Attendees should consult with their own legal counsel and/or risk management for advice and guidance
A Prayer for our Mental Health

When this session is over –
• Will I find help or descend into deeper despair?
• Will I marvel that I have an alternative or cringe that my alternative may not work?
• Will I see a clearer path or more obstacles in the road?
• Will I wonder how we got to where we are?

Psychiatric EMC v. 5150 Hold

• Nothing in EMTALA addresses involuntary holds —
  • Involuntary detention is a state process
  • EMTALA overrides conflicting state law, but not more stringent state laws that do not conflict with EMTALA
EMTALA surveyors often use the involuntary hold as a proxy in determining the presence of a psychiatric EMC. Are they wrong?

Similarities, but not congruence -

1. Psychiatric EMC is based on a clinical judgment of an ED physician or other qualified professional designated by the medical staff.
2. A 5150 hold is based on probable cause by a peace officer or a county-authorized professional as a legal mechanism to take a person involuntarily to a designated facility for an assessment of his/her behavioral health condition.
Psychiatric EMC v. 5150 Hold

Similarities, but not congruence -

• A psychiatric EMC may not meet the probable cause standard for a 5150 involuntary hold
• A 5150 involuntary hold does not always mean that a person has a psychiatric EMC
• A determination that a patient’s psychiatric EMC is stabilized does not itself alter the status of a 5150 involuntary hold
• Documentation must be clear as to whether the ED physician has determined if the psychiatric EMC is stabilized

Stabilization — Psychiatric Emergency Condition

When is a psychiatric emergency condition stabilized?

• EMTALA regulations: when no material deterioration is likely, within reasonable medical probability, to result from or occur during the transfer of the patient to another medical facility
• Interpretive Guidelines: psychiatric patient is “stable” when he/she is protected and prevented from injuring or harming himself/herself or others
• This is a clinical decision!!!
Introduction to the 1799.111 Hold

Disclaimer No. 2

• §1799.111 is an orphan law in the family of involuntary hold laws —
  • §1799.111 was added to the law in 1996 and amended in 1997, 2007 and 2009
  • There is no state agency or county department that has authority to interpret §1799.111
  • There are no cases interpreting or applying §1799.111
  • There are no Attorney General opinions interpreting or applying §1799.111
The 1799.111 Hold

• The humble origins —
  • What is it?
  • Where did it come from?
  • Where do I find it?
  • Who can use it?
  • How does it work?

• Where is it?
  • An immunity statute to hold an ED patient in a non-designated hospital

• Where did it come from?
  • An alternative to a 5150 hold for ED personnel in non-designated hospitals

• Where do I find it?
  • The immunity provisions in the Health & Safety Code related to the State emergency medical systems law (not LPS or Licensing!)
### The 1799.111 Hold — Who Can Use It?

#### 24-Hour Hold
- An ED physician
- Other licensed professional staff in a non-designated hospital

#### 72-Hour Hold
- Peace officer
- Attending staff of a designated facility
- County-designated mobile crisis team member
- Other county-designated professional persons

---

### The 1799.111 Hold
How Does it Work?
1799.111 — Conditions of Use for a Hold

- A hospital – acute or psychiatric, that is NOT a county-designated facility, and
- The licensed professional staff, or physician providing emergency services in any department of the hospital —

"shall not be civilly or criminally liable for detaining a person if all of the following conditions exist during the detention"

1799.111 — Conditions of Use for a Hold

(1) The person cannot be safely released from the hospital because, in the opinion of the treating physician, or staff psychologist, the person, as a result of a mental disorder, presents a danger to self, others or is gravely disabled
(2) The hospital staff, treating physician, or appropriate licensed mental health professional, has made and documented repeated unsuccessful efforts to find appropriate mental health treatment for the person

- Telephone calls beginning at the “earliest possible time” the physician has determined that the person is medically stable for transfer

When does documented and repeated unsuccessful efforts to find placement begin?

- Telephone calls must begin at the “earliest possible time” the physician has determined that the person is medically stable for transfer
- “In no case shall the contacts ... begin after the time when the person becomes medically stable for transfer”
1799.111 — Conditions of Use

(3) The person is not detained beyond 24 hours; and
(4) There is probable cause for the detention.

1799.111 — Conditions of Use for a Hold

(5) If the person is detained beyond 8 hours -

• Discharge or transfer for further evaluation or treatment has been delayed due to the need for continuous and ongoing care, observation or treatment by the hospital; and

• In the opinion of the treating physician or staff clinical psychologist, the person, due to mental disorder, is still a danger to self/others or gravely disabled.
A hospital – acute or psychiatric, that is NOT a county-designated facility, and

The licensed professional staff, or physician providing emergency services in any department of the hospital —

“shall not be civilly or criminally liable for the actions of the person detained up to 24 hours ... after that person’s release from the detention at the hospital ...” if the following conditions are met:

(1) The person has not been admitted to a license acute or psychiatric hospital for evaluation or treatment under Welfare & Institutions Code Section 5150; and
(2) The release from the hospital is authorized by a physician or staff clinical psychologist –
   • Based on a face-to-face examination of the detained person
   • The person does not present a danger to self or others or is gravely disabled

(2) If the release is authorized by a staff clinical psychologist –
   • He/she must first consult with the physician
   • If a dispute, detention must be maintained unless the “hospital’s medical director” overrules the physician opposing release
   • The psychologist and physician must document their findings, concerns or objections in the patient record
The hospitals must comply with all state laws and regulations relating to seclusion and restraint, and psychiatric medications for psychiatric patients.

The detained person retains his/her legal rights regarding consent for medical treatment.

The person must be credited for time detained if he/she placed on a subsequent 5150 hold.

Documentation: CHA has adopted Form 12-12 in the Mental Health Manual for documentation of a 1799.111 hold.

Minors: Can a physician apply a 1799.111 hold for a minor?
The 1799.111 Hold — Are There Advantages To Using It?

1799.111 — Advantages?

• No County involvement in the process
• Does not require the paperwork on an application for a 5150
  • But must document the patient record
• Lacks the stigma of a 5150 hold
1799.111 — Advantages?

• Provides treatment alternative and flexibility to the ED physician based on patient condition
• Person can be released without County involvement
• May help in obtaining authorization for post-stabilization services?
• Immunities

The 1799.111 Hold — Disadvantages and Imponderables
1799.111 – Disadvantages?

- What happens if the 24-hour period expires and no transfer?
  - Is there legal authority to continue detention of person?
  - Can county-authorized personnel write a 5150?
  - Are you required to release/discharge the person (what are the EMTALA consequences?)

1799.111 – Imponderables?

- If you find placement, can you transfer a person under a 1799.111 hold to a designated facility if the person refuses to consent to the transfer?
- Will CDPH/CMS treat a 1799.111 hold different than a 5150 hold for EMTALA purposes?
- If a patient arrives on a 5150 hold placed by law enforcement, and the custodial officer leaves the hospital
  - Is the 5150 hold still valid?
  - Can you treat the 5150 as lapsed?
  - Can you convert the patient to a 1799.111 hold?
A Tale of Two Counties
or
If You’ve Seen One County, You’ve Seen One County

1799.111 – Imponderables?

LA County Department of Mental Health

Question: May a non-LPS designated facility detain or release an individual under a 5150 if the detaining authority has left the facility?

Answer: DMH has no authority to require detention or permit release

DMH Advice: Consult your legal counsel regarding the legal obligations and statutory authority for continuing or releasing detention

Source: FAQs regarding changes in LAC DMH procedures related to WIC 5150 detention, Questions 6 and 8, September 28, 2015
1799.111 – Imponderables?

Orange County Behavioral Health Services

- A 5150 hold on a person in a non-designated facility “remains in place only so long as a Designated Individual remains in the facility.”
- If a Designated Individual leaves the facility, there is no hold, but the hospital may consider a 1799.111, but...
- “[T]he patient will need to be placed onto an involuntary hold to transport to the Designated Facility if the client remains unwilling to accept treatment.”

Source: November 14, 2016 Letter to Orange County Hospitals

1799.111 – So Where Are We?
Questions and Discussion?

Thank you

M. Steven Lipton
slipton@health-law.com