

## *Avoiding HIPAA Problems With Estate Planning Documents*

The Health Insurance Portability and Accounting Act of 1996 (HIPAA) has severely restricted the dissemination of health information. The objective of protecting privacy is admirable; however, in many cases, HIPAA establishes an unwanted roadblock to family members and friends of patients. The purpose of this article is to address common problems caused by HIPAA and how to avoid them with estate planning documents. This article is not intended to be a complete discussion of the provisions of HIPAA.

HIPAA prohibits the disclosure of protected health information by covered entities unless authorization has been granted, in which case, information can be transmitted to the patient, a personal representative (validly appointed) or, in much more limited circumstances, to family/friends. Information may be disclosed for public policy reasons and more commonly for treatment, payment and health care operational issues. A discussion of the prior sentence should help set the stage for the specific estate planning concerns.

### *Protected Health Information and Covered Entities*

Generally, protected health information concerns the past, present and future physical or mental condition of a specific individual, although it also may relate to the payment for health care services. It is most often created by the health care provider. The protected information may concern either a living or deceased individual. In addition to health care providers, health plans are also considered covered entities under HIPAA.

### *Patient Authorization*

A general release or consent to disclosure usually fails to qualify under HIPAA and a well intending friend or family member will be prohibited from obtaining perhaps critical information. Generally, HIPAA requires that a valid authorization;

- include a specific and meaningful description of the information to be disclosed,
- name the person authorized to request information,
- name the person to whom information can be disclosed,
- state a purpose for the request (or state that it is at the request of one with authority),
- set an expiration date of the authorization (or state that there is no specific expiration), and
- be signed and dated by the individual or a validly appointed personal representative, and, in the latter case, reflect such representative's capacity.

Additionally (although generally stated in this article), a valid authorization must contain statements to put the individual on notice of;

- the individual's right to revoke the authorization and how to do so,
- the ability or inability to condition treatment, payment or enrollment eligibility for benefits, and
- the potential that the information disclosed in accordance with the authorization may be subject to re-disclosure and no longer protected by HIPAA.

For estate planning purposes, HIPAA more often restricts the flow of helpful information than conceals private information. Thus, the issue becomes how does one grant to another the authority to obtain information while satisfying the provisions of HIPAA.

The simplest way to satisfy HIPAA is to execute a Health Care Proxy in which an individual grants to another the authority to obtain information and make health care related decisions. A problem with such a solution is that a Health Care Proxy only becomes effective if the grantor of the authority is determined to lack capacity to make or communicate health care decisions.

With people living much longer these days, the point at which one lacks capacity to make health care decisions has become blurred in many instances. For example, in the case of an individual with Alzheimer's disease, it is nearly impossible to pinpoint the time of loss of capacity. Moreover, how can one establish that an individual lacks capacity if that individual's health information is protected by HIPAA?

A prudent solution is to execute a Durable Power of Attorney in addition to a Health Care Proxy. Such a Power of Attorney can be drafted to have immediate effect therefore obviating the need to prove a disability and such a Power of Attorney can be drafted to satisfy the requirements of HIPAA.

Even with a Durable Power of Attorney and a Health Care Proxy, HIPAA would prohibit the dissemination of information after a person's death as both of these documents become void at such time, yet HIPAA continues to apply. To obtain health information post-death a Will must satisfy HIPAA too. In a Will, the decedent can grant to the Executor the right to obtain the information. I further recommend inclusion of HIPAA language in one's Revocable Trust to enable the Trustees to obtain HIPAA protected information.

The rigid requirements of HIPAA need not establish a roadblock that prevents the dissemination of helpful medical information, but proper planning is required. I recommend the inclusion of HIPAA specific language in one's Health Care Proxy, Durable Power of Attorney, Will and Revocable Trust to ensure that family members and friends can obtain the information necessary to help.

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