W H E R E T H E R E ' S A W I L L

Don't worry ... be HIPAA!
or, why every health care power of attorney (and some property powers) may need revising

By Dan W. Holbrook

By now most Americans have encountered the new privacy rules governing medical information. What was Congress thinking? And what's the effect on estate planning?

First, don't blame Congress - it's the bureaucrats at the Department of Health and Human Services (HHS). Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996 to give employees greater ability to retain health insurance coverage between jobs. Since health plans would need to transmit medical information, Congress authorized HHS to issue regulations governing electronic exchange of information. Several years later, detailed final regulations were issued, giving covered entities until April 14, 2003, to comply. Many in the medical community waited until shortly before the effective date to begin responding, in the not unreasonable hope that anything so cumbrous would be deferred (or withdrawn) by the new Bush administration. They were wrong.

The result of this wait-and-see attitude is that the new regulations are often poorly understood. Especially troubling to the medical community are the Draconian penalties: $100 fine for each disclosure violation; up to $50,000 and a year in prison for a "knowing" violation; $100,000 and five years for providing or obtaining information under false pretenses; and $250,000 and 10 years in prison for wrongful use of the information for commercial advantage. In response, any uncertainty about the law has often been resolved in favor of non-disclosure: "Sorry, can't talk to you about your parent/child/spouse. Oh, you have a power of attorney? Sorry, still won't talk, until my lawyers review the power." HIPAA hysteria!

Attorneys routinely prepare durable powers of attorney for health care (DPAHCs) for clients under the Tennessee Durable Power of Attorney for Health Care Act of 1990, Tenn. Code Ann. §34-6-201, et seq. In order for an agent to act on behalf of an incapacitated principal, the agent must have reasonable access to medical records. Tenn. Code Ann. §34-6-206 quite explicitly grants the agent the same rights as the principal to access medical information, except to the extent limited by the DPAHC itself. As a person "with authority to act on behalf of an individual who is an adult" under "applicable [state] law," the agent under any DPAHC constitutes a "personal representative" for purposes of HIPAA and must, with certain exceptions, be treated as if he or she stands in the shoes of the principal. 45 CFR §164.502(g)(1) and (2). Thus, most HIPAA experts believe existing standard form DPAHCs should suffice to allow such access. But legal arguments may be useless against a wary health care provider who refuses to disclose needed information.

Accordingly, it's just good business for every DPAHC to refer specifically to HIPAA and to track the exact language of the regulations. Here is a sample form for a DPAHC[1]:

> **HIPAA Authority. I intend by this power of attorney to designate the individual or individuals who shall have authority to act on my behalf in making decisions related to my health care. In exercising such authority, my agent shall constitute my "personal representative" (as defined in 45 CFR §164.502(g)(1)) and be treated as I would for all purposes of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 USC §1320d and 45 CFR §§160 and 164, and as such shall (1) have access to all my "individually identifiable health information," including any "protected health information" (as those terms are defined in the regulations under HIPAA at 45 CFR §160.103), verbal or written; (2) possess, without limitation, my right of access to inspect and obtain a copy of protected health information about me as required by HIPAA at 45 CFR §164.524; and (3) possess, without limitation, my right to an accounting of disclosures of protected health information as required by HIPAA at 45 CFR §164.528. My agent's exercise of the powers under this Paragraph shall not be deemed events: (1) in which treating my agent as personal representative could endanger me for purposes of 45 CFR §164.502 (g)(5)(i)(B) or (2) in which it is not in my best interest for my agent to be treated as my personal representative for purposes of 45 CFR §164.502(g)(5)(ii). This authority applies to any information governed by HIPAA and may not be revoked except by revocation of this**

> **document as provided herein, which revocation may not be made by an extrinsic document unless such document specifically refers to this power of attorney.**

Other HIPAA problems in estate planning

The language above, although pragmatic, is really just window dressing. More serious issues arise where medical information is needed to trigger some change in fiduciaries.

(1) Springing Powers of Attorney. Under the Tennessee Uniform Durable Power of Attorney Act, Tenn. Code Ann. §34-6-102, one can draft any power of attorney (usually for property management, not for health care) to become effective only upon disability or incapacity. Most commonly, the trigger to "spring" the power is an affidavit of a physician. This presents a catch-22: the power of attorney is not effective without the physician's affidavit, but the physician might not discuss the case without a valid power of attorney. The solution may be either to avoid springing powers altogether, or else to include in the power an immediately effective (non-springing) power to access medical records for the purpose of springing all other powers. All existing springing powers of attorney may be useless until revised for HIPAA. Here is a sample form [2]:

> **HIPAA Authority. Pursuant to 45 CFR §164.508, and solely for the purposes of making a determination of my disability and obtaining an affidavit of such disability by a physician, I authorize any health care provider to disclose to the person named herein as my agent, by mail, fax, electronic transmission, or verbally, any pertinent individually identifiable health information, including any protected health information, sufficient to determine whether I am by reason of illness or mental or physical disability unable to give prompt and intelligent consideration to financial matters. This consent is valid until revoked by me in writing making specific reference to this Authorization, which written revocation shall constitute an "expiration event" for purposes of HIPAA.**

(2) Successor Executor or Trustee. Most wills and trust documents name a successor executor or trustee in the event of disability of the prior named fiduciary. But how can the successor establish the incapacity of the prior fiduciary without access to medical records?

One solution is to provide in the document that any person serving as fiduciary is deemed to grant HIPAA authority to the successor fiduciary to access such medical records as may be necessary to establish disability for purpose of succession.

But to what extent can a testator/trustor bind an executor/trustee to release such fiduciary's sensitive medical information? Should every individual serving as executor/trustee be required to sign a HIPAA consent upon assuming office? Clearly we've yet to comprehend all the ripples of HIPAA.

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1. These forms are offered as guidance only, and the author disclaims any responsibility for their accuracy or completeness.

2. The second form differs from the first in part because the agent under the springing power does not become a HIPAA "personal representative," if at all, until the power is sprung. Until then, the principal and agent are treated as separate entities. Since the principal cannot rely on the personal representative provisions of 45 CFR §164.502, he must permit health care providers to disclose to the third party agent by executing an authorization described under 45 CFR §164.508.

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