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Special Report **New Privacy Regulations Affect Basic Estate Planning Documents**

How to Protect Your Family Under New HIPAA Privacy Rules

BY

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**IN ASSOCIATION WITH THE AMERICAN ACADEMY OF ESTATE PLANNING
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The most significant development of 2003 affecting estate planning has its origins in a federal law passed in 1996 aimed primarily at the health insurance and health care industries. That law threatens the effectiveness of many estate plans already in effect unless consumers take action before it is too late.

The privacy provisions of the Health Insurance Portability and Accountability Act of 1996, commonly known as "HIPAA," became effective April 14, 2003. For consumers, the main impact of the regulations is new rules about the release of medical information to someone other than the patient. This change has a major impact on basic estate planning goals.

How can this be so? When we think of "estate planning," what typically comes to mind is planning for the management and transfer of wealth after death. There is another important issue that often does not receive enough attention. That is the management of one's affairs after becoming legally incapacitated, commonly called disability or incapacity planning.

Here's the problem created by HIPAA. In order for commonly used legal documents to become effective for incapacitation planning, a written medical certification of the incapacitating mental or physical

condition of the patient must be provided by at least one or two physicians. But the HIPAA privacy regulations prohibit the release of such information to anyone other than the patient unless the third-party provides a HIPAA-compliant authorization for release of Protected Health Information (PHI) already signed by the patient. If that form is not already in existence and signed, then there may be no one authorized to receive PHI about the patient at a time when it is critically needed. That makes the patient's legal documents for incapacitation planning useless. The typical legal documents used for incapacitation planning are a Durable Health Care Power of Attorney, a Living Will, a Durable Property Power of Attorney, and a Living Trust.

The HIPAA regulations also apply to release of medical information to someone other than the patient in circumstances not related to incapacitation planning. Therefore, this critical new law impacts every adult and child. Failure to comply with HIPAA is causing problems for many unsuspecting consumers who are totally in the dark about the law and how it may affect their carefully laid out estate plans. Others are unwittingly falling victim to HIPAA because of misconceptions and myths that are being spread.

This Special Report is a project of THE ZIMMER LAW FIRM to make the public aware of the impact of the HIPAA privacy regulations, and how to take simple but effective steps to avoid the harsh impact of the law. The following story illustrates the problems with HIPAA and sets the stage for understanding the solution.

A Sad but Familiar Story....

Sally waited nervously for Dr. Brown. She was worried about leaving her elderly mother home alone. She seemed to have gotten a lot worse in the last few months and Sally could hardly take care of her any more.

Dr. Brown diagnosed senile dementia, or possible early stage Alzheimer's Disease, about 2 years ago. Either way, Mom was never going to get better, he said. He suggested that Sally see a lawyer to get Mom's legal affairs in order. The last year had been more difficult than Sally could ever have imagined. It was clear that Sally could not put this day off any longer.

Sally worked with her lawyer to make a Property Power of Attorney, funded revocable Living Trust, and Durable Health Care Power of Attorney and Living Will for Mom. The lawyer assured her that these are the legal documents that Sally would need to manage all Mom's affairs if she became too sick to manage her affairs herself. The lawyer explained that to trigger these legal documents for Mom's incapacitation planning she would need to get a written Medical Certification of Mom's condition from Dr. Brown and one other physician. By taking Sally's Affidavit as Successor Trustee and Power of Attorney supported by those Medical Certifications to all Mom's financial institutions, she could manage Mom's finances. She could also take over Mom's medical care. But the attorney warned that the Powers of Attorney and Living Trust would be useless without the Medical Certifications.

Sally Learns About HIPAA After it is Too Late

When Sally finally got to see Dr. Brown, she explained the situation and showed him the Medical Certification forms her lawyer had prepared for him and the consulting neurologist who had been assisting with Mom's care. Dr. Brown said he would do what he could to help. All he needed from

Sally, he said, was Mom's "HIPAA Authorization for Release of Protected Health Information," so that he could release Mom's medical information to her.

Sally had never heard of HIPAA and her lawyer had not mentioned it. Dr. Brown continued, "I'm afraid I cannot give you any information about Mom's medical condition or sign the Medical Certifications unless you have a HIPAA Authorization signed by Mom. If I were to do so, I would be violating the law and could be penalized."

Sally had to think fast. "What about Mom's Durable Health Care Power of Attorney? She appointed me as her Health Care Power of Attorney. Doesn't that give me the legal right to get this information?"

"Even though Mom's Health Care Power of Attorney form seems to meet the requirements of Ohio law, it does not meet the requirements of HIPAA, which is a federal law," Dr. Brown replied. "HIPAA sets up medical information disclosure requirements that didn't exist before. Under HIPAA, you need a certain kind of authorization so that as Mom's doctor I can give you the medical information you are requesting."

"Okay," Sally said, "give me a form and I'll get Mom to sign it so you can complete the Medical Certifications."

"Unfortunately," replied Dr. Brown, "it's too late that since Mom is legally incompetent to sign legal documents any longer. Plus, her Health care Power of Attorney would have to authorize appointment of a Personal Representative to receive Protected Health Information under HIPAA. Since the Power of Attorney was written before HIPAA it doesn't meet the HIPAA rules. Plus, the HIPAA form must be separate from the Power of Attorney. I'm sorry."

Sally called her lawyer in a panic. The lawyer didn't know anything about HIPAA and there apparently was no way to get around the law. If Sally can't get the doctors to sign Medical Certifications because of HIPAA, then she would have to open a Probate Court Guardianship for Mom. The court would take control of all Mom's assets and finances. Although Sally would likely be the person appointed as Guardian, the process would be long, costly and burdensome, and humiliating to Mom.

"Great," thought Sally. "On top of everything else I am dealing with to take care of Mom, now I have this problem, too. This isn't the way I thought it would happen. What will go wrong next?"

What Sally and Her Mother Could Have Done to Avoid This Result

Sally, Dr. Brown and Sally's mother are fictitious, but the story is all too real. It is unfolding daily across the country. Sometimes the facts may vary, but the theme is always the same.

The solution for Sally and her mother would have been a "HIPAA Authorization for Disclosure of Protected Health Information." This 2 or 3 page form would have been the key to unlocking Mom's medical information so that Sally could legally become her Power of Attorney Agent and Successor Incapacity Trustee.

The new regulations issued under the Act have caused turmoil throughout the medical industry, as doctors, hospitals, nursing home facilities, and other “Covered Entities” are now subject to sanctions and monetary fines for the unauthorized disclosure of “Private Health Information”. Fearing the heavy hand of the government, health care providers have clamped down on the release of medical information to *anyone* other than the patient. You have probably been bombarded with disclosure forms by your health care providers and pharmacy as a result, to acknowledge that you have been given a copy of their privacy policy about release of your medical information.

Who needs your medical information other than you?

If you should become incapacitated, the availability of your medical information may be critical. While those who wrote this law probably had the best of intentions, HIPAA restricts release of medical information even to those persons you really want to have that information on your behalf, unless certain rules are met.

All adults should have legal documents that go into effect if and when they become incapacitated due to mental or physical impairments. As explained above, these commonly include a Durable Power of Attorney for Health Care, a Living Will, and a Durable Power of Attorney for Property. These legal documents are each triggered by a person’s declining health or illness, or an injury. They require one or more written, informed medical opinions in order for them to become legally effective. Without such medical statements, these documents are useless and the agents under these documents are powerless. (Sometimes a Property Power of Attorney is effective without a Medical Certification, but this is the exception rather than the rule.)

The HIPAA privacy regulations may affect your estate planning in another way. The funded revocable Living Trust is a very popular method to do estate planning due to its flexibility and planning options, avoidance of living probate and death probate, and estate-tax savings benefits. In setting up a trust, the Trustmaker appoint persons to manage the trust affairs upon becoming incapacitated due to mental or physical impairment. They are known as Successor Trustees. Just like the Health Care Power of Attorney agent and the agent under the Property Power of Attorney, the appointment of the Successor Incapacity Trustee requires written medical certification of your incapacitation from at least one or two physicians. In the absence of such written medical opinions, the Successor Trustee(s) have no power or authority to act.

Some examples of HIPAA at work.

To illustrate the alarming consequences of this new law, imagine you have a child or grandchild attending college out of town. One day you get a call from a hospital in that college town. The caller inquires whether the student has a HIPAA Authorization form. Worried that the call from the hospital is about a serious accident or illness, you reply that you don’t know what a HIPAA Authorization form is and anxiously ask if anything is wrong. Rather than giving you any information, the caller from the hospital apologizes and abruptly hangs up. When you call back to follow up, nobody will tell you anything because of the HIPAA rules. How would you feel?

Even telling a hospital visitor the room number of a patient is considered by some be a violation of patient privacy protected under these new rules! The Chicago Tribune newspaper ran an article at page one on August 11, 2003 explaining that priests and ministers can no longer get a

list of their parishioners at the hospitals so they can make visits. As a result older church members are upset when they get out and ask their clergy why they did not visit.

Your spouse may be treated no differently than a stranger, as demonstrated by this true story.

A husband drove his wife to the hospital for minor surgery. After they arrived they realized they forgot some papers at home. Husband left his wife at the hospital to check in while he went back home to get the papers. When he returned to the hospital, they refused to tell him what room his wife is in because it would violate hospital privacy rules.

Change the facts any way that you want. This could just as easily happen when your Power of Attorney agent or Trustees need information about you. The chilling effect of the HIPAA rules could paralyze them. The bottom line is, if you need medical information about any member of your family or a loved one – or if they need medical information about you -- and a signed HIPAA form is not available, it will quickly become apparent how devastating these new rules can be. But there is good news...

The “Universal, Coordinated” HIPAA Solution.

The solution to this problem is to be prepared before it is too late. If you and your family members execute a special document called an “Authorization for Disclosure of Protected Health Information” before the need arises, then there will be no legal obstacle for the release of Protected Health Information to your power of attorney agents, successor trustees, or anyone else you name in the Authorization.

This Authorization must meet specific requirements set forth in the new HIPAA regulations in order to be honored. You can’t expect just any form to do the trick. For example, the traditional style medical release forms used for years and years before HIPAA will not meet the specific HIPAA requirements. Nor will your pre-HIPAA Durable Health Care Power of Attorney and Property Power of Attorney satisfy the rules in and of themselves, as best we know at this time.

To truly protect yourself in all events, the HIPAA form should be “**universal**” and be **coordinated** with any estate plan that you have in place. In other words, that it should not be limited to only one doctor, medical office or hospital. It should have universal application to all doctors and medical care providers – past, present and future. Nor should it be limited as to any particular person(s) to receive Protected Health Information (“PHI”). It should be designed so that no matter what happens there will always be some person available to receive your PHI. Preferably, those people should include at least those persons nominated as your Executors, Trustees, and Power of Attorney Agents.

To illustrate, some doctors are providing HIPAA forms that allow the doctor to release your PHI to a named individual. If for example you name your husband, John, as your HIPAA Personal Representative to receive PHI and John is not available or is deceased or incapacitated, the form is useless. If you need PHI from a different doctor, the form will not apply because it is not addressed to any one except the first doctor.

In contrast, a Universal HIPAA Form applies to anyone who has your PHI. Additionally, measures should be included to minimize or eliminate the possibility that you will outlive the Authorization. Thus, if your first choice of who will receive your PHI is not be available, there should be alternate persons named who can step in for the appointees under the HIPAA Authorization who are unable or unwilling to act for you. Since the need for PHI often arises in a situation for which estate planning documents may also apply, such as incapacitation, then coordinating the HIPAA Authorization to allow release of PHI to people named to act on your behalf under your estate plan makes great sense.

We urge every adult to secure universal HIPAA Authorization Forms that are coordinated with his or her estate planning documents. All parents of minor children or children at college should secure HIPAA forms for the children, also. In addition, care should be taken to make sure that the HIPAA forms, and your Health Care Power of Attorney and Living Will are safely stored and available without hassle at a moment's notice no matter where you are, any time of the day or night.

Attached are some Questions and Answers about HIPAA that should shed more light on this law and why the universal, coordinated HIPAA form is so important.

*The Zimmer Law Firm is making universal, fail-safe HIPAA Authorization Forms available to the public at minimal cost. The Firm has also made special arrangements for storage of HIPAA forms, the health care power of attorney, and the living will for 24 hour a day access anywhere there is telephone service, at a modest cost. Ohio Durable Health Care Powers of Attorney and Living Will forms with the latest recommended provisions are also available for Ohio residents. Call (513) 721-1513 or toll-free at 1-866-799-4050 for order forms or more information, or to request the Firm's **Frequently Asked Questions and Answers About the HIPAA Privacy Regulations.***

About Barry H. Zimmer, Attorney

Attorney Barry Zimmer is a frequent speaker on living trusts and estate planning. He conducts seminars throughout southwestern Ohio on estate planning topics and delivers Continuing Education programs for financial professionals. A Charter Member of the American Academy of Estate Planning Attorneys, he has devoted his law practice exclusively to estate planning and estate administration since 1993. His firm has prepared more than 2000 trust-based estate plans since then and has assisted hundreds with estate administration. He graduated from the University of Cincinnati College of Law in 1979 and received his BA from U.C. in 1976, Phi Beta Kappa and Magna Cum Laude. If you would like more information about Estate Planning, Living Trusts, Trust Administration, HIPAA or other estate planning matters, please call The Zimmer Law Firm at (513)721-1513 or Toll-Free at 1-866-799-4050. Or visit the firm's website at www.zimmerlawfirm.com.

The American Academy of Estate Planning Attorneys is a member organization serving the needs of attorneys committed to providing their clients with the best in estate planning. Through the Academy's comprehensive training and educational programs, it fosters excellence in estate planning among its members and helps them deliver the highest possible service to their clients.

This Report reflects the opinion of Barry H. Zimmer and The Zimmer Law Firm. It is based on our understanding of the law, and is intended as a simple overview of basic issues. We recommend you do not base your own estate planning on the contents of this Report alone. Review your estate planning goals and needs with a qualified estate planning attorney.

