

# Frequently Asked Questions and Answers About HIPAA Privacy Regulations

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*This information supplements the Zimmer Law Firm Special Report entitled "New Privacy Regulations Affect Basic Estate Planning Documents -- How to Protect Your Family Under New HIPAA Privacy Rules. For a copy of that Special Report, contact The Zimmer Law Firm.*

## **1. I thought my Durable Health Care Power of Attorney and Living Will authorize release of medical information. Why do I need this new form?**

The new HIPAA regulations require that there be a specific appointment of a Personal Representative to receive Protected Health Information. This person can be the same person named as your Health Care Power of Attorney, if you wish. A literal reading of the HIPAA regulations is that the Personal Representative appointment should be made in a separate document that meets the new requirements, and not as part of a Durable Health Care Power of Attorney form. There is a likelihood that a medical care provider will not accept the health care power of attorney as a HIPAA appointment if it follows the HIPAA regulations. Better safe than sorry.

In addition, health care powers of attorney written before April 14, 2003, probably don't include the specific HIPAA wording. Plus, you may want people other than your health care agent to have access to information.

## **2. How can I be sure that a form will be accepted?**

A form that meets the requirements of the HIPAA law should be acceptable by anyone; there is no legal reason why it should be rejected. Of course, no one can guarantee that a form will be accepted in every situation no matter what. This is no different than the situation for the last 14 years or so since health care powers of attorney and living wills became legal under new statutes in Ohio. There is no legal requirement for a doctor or hospital to honor those documents, even when they are on state-recommended forms. But having the forms dramatically improves your chances of having your wishes honored because a doctor or hospital can follow your wishes without fear of being criminally prosecuted or successfully sued for doing so.

This new law has created an administrative monstrosity. Until the bugs are shaken out, there may be some issues. But there is no doubt that you are better off having a HIPAA form than not. Furthermore, it is clear that in order to be fully protected under HIPAA, a universally applicable form with a succession of possible HIPAA Personal Representative appointees instead of just one or two people, is best. If you are healthy and a health care provider requests you to sign its own form, no problem. If you are mentally or physically impaired and unable to sign their form, then having a universal form in effect with "fail-safe" successor Personal Representative appointments will be a definite advantage. There will be a legal basis to force the disclosure of the information, and the health care provider will legally be in a difficult position if it refuses.

In addition, there is a HIPAA abuse hotline that has been established just for such reasons so that the government can police the situation. We will provide this for you in case you need it.

### **3. Why is this an estate planning issue instead of a medical-legal issue?**

This is certainly a medical-legal issue. But because it impacts those people who will be carrying out your estate planning, it is also an estate planning issue. That is, if a HIPAA Authorization is not available then your health care power of attorney agents, property power of attorney agents, and successor incapacity Trustee under your living trust (if you have one) will be powerless to help you. They need to have medical certifications about your health as a condition to becoming legally appointed as your agent or Trustee. That makes HIPAA an estate planning issue which will no doubt be a surprise and big concern to many people.

### **4. Can't I get a HIPAA form elsewhere, on my own, instead of from a lawyer?**

This is impossible to control. This is a confusing area of law that has received a lot of attention in the health care industry. A Google search on the internet of the term "HIPAA" yields 943,000+ hits. Searching those results for the term "authorization" limits the results to "only" 69,700 web pages. If you explore the sites or read the lengthy and confusing regulations, you'll quickly see the value of having forms prepared by someone who has already sorted through the issues for you.

### **5. Won't my doctor provide me with a HIPAA Authorization Form when I need one?**

This could be the most dangerous misunderstanding about HIPAA. It is true that any health care provider is free to establish or request you to use its own forms. But your doctor's forms may not be in your best interest, for at least three reasons. First, it may not apply to other doctors or health information custodians. It becomes impractical if not impossible to get HIPAA forms signed in advance by each and every physician who may treat or consult a patient. Why play Russian Roulette with your medical information and personal well-being?

Second, doctor forms may be limited to just one or two persons to receive Protected Health Information ("PHI"). What if the named person(s) are deceased or incapacitated or otherwise unavailable? What if the named persons are not the people who will have the need for PHI years down the road? If your HIPAA form is not automatically coordinated with your other estate planning documents and your personal wishes, then it will be out-of-date.

To be safe, a "universal form" should be used that is meant to be honored by any doctor, hospital, etc. It should include fail-safe successor PR appointments that coordinate with those persons appointed as fiduciaries to manage your affairs. This means your HIPAA form will always be coordinated with your estate planning. Plus, a good form should also give the patient the right to name additional specific persons to receive PHI.

Third, one cannot control or predict the circumstances under a HIPAA form will be needed because the need could arise suddenly and without warning, as in the case of a medical emergency. If the patient has not yet signed a HIPAA form it may be too late to use the form offered by the doctor or hospital because he/she will no longer have the legal capacity to sign.

All things considered, a universally applicable HIPAA form with fail-safe appointment of HIPAA Personal Representatives that coordinates with your estate plan documents is the best way to be prepared.

*Attorney Barry Zimmer focuses his law practice in estate planning, estate settlement, asset protection planning and business entity planning. He conducts seminars throughout southwestern Ohio on estate planning topics and delivers Continuing Education programs for financial professionals. If you would like more information about any of these topics or HIPAA, 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](http://www.zimmerlawfirm.com).*

*These materials reflect 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 the basic issues. Do not base your own estate planning on the contents of this writing alone. Review your estate planning goals and needs with a qualified estate planning attorney.*