ARTICLE:

HIPAA and Will Contests

By Daniel B. Evans

A prior article published in this newsletter ["What Estate Lawyers Need to Know About HIPAA and 'Protected Health Information'" (PBA RPPT Newsletter, No. 56, p. 6 (Winter 2004), https://secure.nameservers.com/pabar.org/membersonly/13/nletters/rpptwinter2004.pdf] provided an overview of the patient privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These regulations impact on durable powers of attorney, advance health care declarations, revocable trusts and other estate planning documents and practices. However, HIPAA continues to apply even after the death of the patient and can affect will contests and other post-death litigation that might require a decedent's medical records.

Background

Section 262 of the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, created a new 42 U.S.C. §1173. This Section granted the Secretary of Health and Human Services broad discretion in adopting standards to enable health information to be exchanged electronically, as well as security standards for health information. Section 264 of HIPAA required the Secretary to promulgate regulations addressing the uses and disclosure of "individually identifiable health information." Those regulations became effective on April 14, 2003, and are found at 45 C.F.R. §164.500 *et seq.*

The regulations apply generally to "protected health information," which is defined quite broadly by 45 CFR §164.501 and 42 USC §1171(6). It seems to include *any* information about an individual's medical condition or treatment, transmitted in *any* form (including orally). The regulations specifically apply to the protected health information of deceased individuals. 45 CFR § 64.502(f).

Medical records are often needed in will contests to prove lack of "testamentary capacity," or to prove "weakened intellect" when undue influence is alleged. Similar evidence may also be needed if there are disputes about gifts or other transactions during the decedent's lifetime and the capacity or mental state of the decedent at the time of the gifts or other transactions. Outside of the Orphan's Court, medical records may be needed by an executor in actions against third parties for physical injuries to the decedent or wrongful death.

HIPAA regulations specifically state that health care providers do *not* necessarily need to comply with subpoenas (and federal law will trump state law in this case). So how can one get the medical records?

Permitted Disclosures

The three types of permitted disclosures of protected health information that are the focus of this article, and which are discussed in more detail below, are:

- "Valid authorizations" executed by an executor or administrator of an estate;
- Orders and subpoenas issued by a court or administrative tribunal; and
- Other lawful processes accompanied by "qualified protective orders."

The regulations also contain a number of very specific circumstances under which certain kinds of "protected health information" can be disclosed. The exceptions that specifically deal with the death of an individual allow a doctor, hospital or other "covered entity" to use or disclose protected health information, or to disclose relevant information about a decedent for the following reasons or under the following circumstances:

- "To notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual," that the individual has died. 45 CFR §164.510(b)(1)(ii). (As explained below, the phrase "personal representative" is not limited to the executor or administrator of an estate, but also includes other persons who, under state law or the regulations, have the power to make medical decisions for the individual. Also, because of the way the regulations are arranged, this exception for post-death notifications seems to be subject to a general requirement that the individual "is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the disclosure," although it is not clear how that requirement would apply to post-death notifications to the next of kin.)
- To comply with various civil and criminal laws, including reporting "vital events such as birth or death" (45 CFR §164.510(b)(1)(ii)) and to law enforcement "if the covered entity has a suspicion that such death may have resulted from criminal conduct" (45 CFR §164.512(f)(4)).
- To a coroner or medical examiner "for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law." 45 CFR §164.512(g)(1).
- To funeral directors, "consistent with applicable law, as necessary to carry out their duties with respect to the decedent." 45 CFR §164.512(g)(2). (The same regulation also provides, "If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health

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information prior to, and in reasonable anticipation of, the individual's death.")

- To "organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye or tissue donation and transplantation." 45 CFR §164.512(h).

Valid Authorizations

Protected health information (other than psychotherapy notes) can also be disclosed in accordance with a "valid authorization" signed by the individual. 45 CFR §164.508.

The regulations also specify that, for purposes of disclosure, the patient's "personal representative" is treated in the same way as the patient, meaning that the personal representative has the same rights and powers as the patient to protected health information. The definition of "personal representative" includes those who have the authority to act on behalf of an adult or emancipated minor "in making decisions in relation to health care," (45 CFR §164.502(g)(2)) and a parent, guardian, or other person acting *in loco parentis* to an unemancipated minor with respect to protected health information relevant to health care decisions that may be made by that person under applicable law (45 CFR §164.502(g)(3)).

For decedents, the regulations state:

> If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation. 45 CFR §164.502(g)(4).

The phrase "relevant to such personal representation" means that the covered entity could require the executor or administrator to explain why the medical records were being sought, and could deny the request if the covered entity concluded that the request was not relevant to the duties of the executor. 20 Pa.C.S. §908(a) says that the executor is not a party in interest to an appeal from the Register of Wills on the probate of a will, so it could be argued that the medical records necessary to the appeal are not "relevant" to the duties of the executor. The author is not aware of any case in which a covered entity has taken that position, and would be surprised if it were ever raised.

Despite arguments that could be raised about the effect of the phrase "relevant to such personal representation," the executor or administrator of an estate should be able to obtain medical records that are relevant to the administration of the estate, including any disputes concerning the validity of the will, the validity of lifetime transfers by the decedent, or any claims by or against the decedent's estate upon the execution of a "valid authorization" as defined by 45 CFR §164.508(c). (For details on the form and content of a valid authorization, see "What Estate Lawyers Need to Know About HIPAA and 'Protected Health Information,'" *supra*.)

If the executor doesn't want to request the medical records needed for a proceeding in the Orphans' Court (which would be true if, for example, the executor is also a beneficiary with interests adverse to the production of the medical records), then a party will most likely need an order from the Orphans' Court (see discussion below) directing the production of the records.

In a will contest before the Register of Wills, there is no appointed executor because no letters have yet been granted. In that case, it might be possible for the Register to appoint an "administrator *ad litem*" with power to request the records. Otherwise, it will most likely be necessary to get a subpoena from the Register, perhaps with a "qualified protective order" (discussed below).

Court Orders

The HIPAA regulations specifically allow disclosures required in judicial proceedings. 45 CFR §164.512(e). However, the regulations draw a distinction between "an order of a court or administrative tribunal," with which the covered entity can comply (45 CFR §164.512(e)(1)(i)) and "a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal," with which the covered entity can comply only if there is "reasonable assurance" that a "qualified protective order" has been sought (45 CFR §164.512(e)(1)(ii), (iv), and (v)). (The requirements for a qualified protective order will be discussed below.)

In a proceeding before the Orphans' Court, obtaining an order to the court to require the production of medical records should not be a problem for any party if the medical records are relevant to a dispute before the court. A potential issue might arise as to whether a subpoena of the Register of Wills carries the same weight.

The Register of Wills is sometimes described as a "quasi-judicial" office. Even if the Register is not a "court" within the meaning of the HIPAA regulations, Pennsylvania law specifically empowers the Register of Wills to issue subpoenas (20 Pa.C.S. §903), and the Register should at least be considered an "administrative tribunal." However, the author has encountered at least one covered entity that, on advice of counsel, refused to comply with a subpoena of the Register of Wills to provide medical records to party to a will contest before the Register.

Because the Orphans' Court (and not the Register) has the power to enforce the subpoenas of the Register (cf., 20 Pa.C.S. §905), it is quite likely that practitioners will encounter more and more doctors, hospitals and nursing homes refusing to comply with subpoenas of the Register. The covered entity runs a risk in complying with a subpoena that might not meet the requirements of HIPAA because the penalties for violating HIPAA can

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be severe. (Under 42 U.S.C. §1177, as added by Section 262 of HIPAA, a person violating the privacy provisions of HIPAA can be fined not more than $50,000 and imprisoned not more than one year.) However, there appears to be little to lose for the covered entity in requiring either an enforcement order from the Orphans' Court or a qualified protective order (discussed below).

Qualified Protective Orders

When there is no executor or administrator and there is no court order, a covered entity is still allowed to disclose protected health information if the covered entity "receives satisfactory assurance" as described in 45 CFR §164.512(e)(1)(iv) of this section, that "that reasonable efforts have been made" to secure a "qualified protective order" that meets the requirements of 45 CFR §164.512(e)(1)(v). 45 CFR §164.512(e)(1)(ii)(B).

A "qualified protective order" means an order of a court or of an administrative tribunal or a stipulation by the parties:

> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.
>
> 45 CFR §164.512(e)(1)(v).

A covered entity receives "satisfactory assurances" if the covered entity receives a written statement and accompanying documentation demonstrating:

> (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
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> 45 CFR §164.512(e)(1)(iv).

A covered entity may also disclose protected health information in response to a subpoena or other lawful process if the covered entity itself makes reasonable efforts to seek a qualified protective order. 45 CFR §164.512(e)(1)(vi).

Both of the "reasonable assurances" described in 45 CFR §164.512(e)(1)(v), as well as the "reasonable efforts" described in 45 CFR §164.512(e)(1)(vi), seem oddly inconclusive. The first alternative, that the parties have agreed to a qualified protective order, only requires a certification that the order has been *presented* to the court or administrative tribunal, but doesn't require that the court or administrative tribunal actually enter or approve the order. Similarly, the second alternative requires a certification that the party seeking the protected health information has *requested* an order from a court or administrative tribunal, but it does not require that the court or tribunal actually issue the order. Finally, the covered entity could make "reasonable efforts to seek" an order without ever actually obtaining an order.

Regardless of how odd the definitions of "reasonable assurances" and "reasonable efforts" may seem, the regulations seem to mean what they say, and a covered entity can comply with a subpoena or other lawful process that is not an order of a court or administrative tribunal if either: (a) the parties stipulate to "qualified protective order" and then certify to the covered entity that the stipulation has been presented to the court or tribunal, or (b) one of the parties petitions the court or administrative tribunal for a qualified protective order and then certifies to the covered entity that the petition has been filed.

In the case in which the author encountered a covered entity that refused to comply with a subpoena of the Register of Wills, the author obtained a stipulation of the parties (and their counsel) to a qualified protective order and filed the stipulation with the Register of Wills along with a form of order for the Register to sign approving the stipulation and directing the parties to comply with its terms. The author took the position that the Register had the authority to enter the order because the order was ancillary to the power to issue subpoenas under 20 Pa.C.S. § 903, as well as part of the Register's inherent power to regulate the conduct of the parties in matters before him. The Register apparently agreed, because the order was signed.

Summary

HIPAA privacy regulations have caused a certain amount of confusion and uncertainty and may very well cause even more in the future. However, it appears that it should be possible to obtain medical records needed for disputes in the Orphans' Court or before the Register of Wills in at least one of the following ways:

- A "valid authorization" signed by the executor, administrator, or (if necessary) administrator *ad litem* appointed by the Register of Wills. 45 CFR §§164.508 and 164.502(g)(4).
- An order of the Orphans' Court. 45 CFR §164.512(e)(1)(i).
- A subpoena of the Register of Wills (if the Register is considered a "court or administrative tribunal"). 45 CFR §164.512(e)(1)(i).
- A subpoena of the Register of Wills, together with a stipulation of the parties to a "qualified protective order" and a certification to covered entity that stipulation has been filed with the Register of Wills. 45 CFR §§164.512(e)(1)(ii), (iv), and (v).
- A subpoena of the Register of Wills, together with a petition to the Register for a "qualified protective order" and a certification to covered entity that petition has been filed with the Register of Wills. 45 CFR §§164.512(e)(1)(ii), (iv), and (v). ■