PRACTICAL PLANNER NEWSLETTER
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More Info:

- **Publications:** Funding the Cure, a book on using charitable giving techniques to benefit a loved one with Multiple Sclerosis. Available shortly from Demos Medical Publisher www.demosmedpub.com.
- **Seminars:** August 9 Saddle Brook NJ "Home Ownership - Practical Legal, Tax, and Other Planning Implications" 732-249-5100. Suitable for attorneys, CPAs, financial planners and real estate brokers.
- **Freebies:** Summaries added for lead and checklist articles, and spaces between paragraphs based on reader recommendations. Thanks Charlie and Sid.

Creative solutions that coordinate all your planning goals:
· Estate · Tax · Business · Personal
·Financial ·Asset Protection

PLANNING POTPOURRI

Contributions Don't Have to be Reduced if You Receive Insubstantial Gifts: T-shirts, sweatshirts with charity logos are de rigueur at walk-a-thons, bike-a-thons and other charitable events. While these might motivate donors, do these ubiquitous small gift items impact contribution deductions? Yup. The general rule is that you have to reduce the amount of your contribution deduction by the fair value of any gift item received from the charity. However, a couple of exceptions are permitted to reduce the reporting burden on charities and taxpayers alike. The gift item (premium) can be ignored for tax purposes if your donation is $50 or more (adjusted annually for inflation -- $89.00 in 2007) and the value of the gift item is not more than 2% of your donation. You donate $100 and receive a key chain worth $1.90, no problem. Alternatively, if you donate $25 or more (adjusted annually for inflation -- $44.50 in 2007) and the gift item qualifies as a low cost article, it can be ignored. This is an item bearing the organizations name or logo which has a wholesale value of $5.00 or less (adjusted for inflation -- $8.90 in 2007). You donate $100 and receive a Jacket worth $25.00 at retail, but which the charity purchased for $8.50, it can be ignored. Rev. Proc. 90-12, 92-49, and 2006-53.

Waiver of a Spousal Right of Election: State law gives a spouse the right to claim a minimum portion of their deceased spouse's estate. For many couples, a standard part of the prenuptial agreement dance is to agree to forgo (waive) this right. But to waive your claim against your spouse's estate you have to know what you are waiving. That requires disclosure of financial data. New Jersey, for example, requires "full and fair disclosure" NJSA Sec. 37:2-38. Ed told his fiancée Stacey he was worth about $850,000 and Stacey's lawyer asked for more financial info. Ed told her that's all the info she's getting and sign the agreement or the marriage is off. Whoa, don't think Host Chris Harrison, would have liked this guy on The Bachelor! On later insurance applications Ed indicated he was worth $6M. The law says a pre-nup is not enforceable without full and fair disclosure. An argument that Stacey should be equitably estopped from claiming this was set aside. The lesson is simple, if you want a waiver and prenup to hold, disclose. *In Re Estate of Shinn*, App. Div. A-3819-O5T5, 6/20/07. PP

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PRACTICAL PLANNER

Martin M. Shenkman, CPA, MBA, JD

HIPAA-POTAMUS ADVENTURES

Federal law protects the privacy of your medical records, but those restrictions create problems for powers of attorney, trusts, and shareholder agreements where changes are dependent on demonstrating that an agent, shareholder or other person is disabled.

What is HIPAA: HIPAA is the affectionate acronym for the Health Insurance Portability and Accountability Act of 1996. HIPAA, as amended (it takes multiple efforts to perfect such complexity), protects your rights to your medical info, "Protected Health Information," or PHI for short. HIPAA assures you access to your medical information, while simultaneously preventing others who should not have access to it from obtaining it. These rules have broad implications to a wide range of personal, estate planning, and business transactions.

Why It's So Important: Addressing HIPAA, and how your medical info should be disclosed generally, are vitally important. If you're ill, can your daughter-in-law, the genius doc, get to see your patient chart to monitor your care? If you're a successor trustee, and the current trustee is forgetting to pay insurance premiums and respond to correspondence, can you replace her? Your partner is disabled and you need to take over your professional practice, how can you obtain the requisite physician letter mandated in your shareholders' agreement to demonstrate his incompetence trigger the replacement provision? HIPAA needs to be addressed.

When Info Can Be Disclosed: Your health info should be disclosed for medical treatment, payment, and health care operations (no authorization or release is needed). Your medical info should be disclosed to you (prior to HIPAA a patchwork of state and local rules governed this). Your personal representative should have access to your info. A court can order disclosure. The Secretary of the Department of Health and Human Services can access health info for enforcement purposes.

When Info May Not Be Disclosed: If your doc believes that the disclosure of your health info might endanger your life, jeopardize your physical safety, or cause you or another person (e.g., someone else mentioned in your records) substantial harm, they can refuse in their professional judgment to disclose the info.

What Info Can be Disclosed: Not all information has to be disclosed. Medical providers should only disclose the minimum info necessary to achieve the purpose of the requested disclosure. To protect and limit the scope of what is disclosed you should clearly delineate in any document you execute directing disclosure the specific purpose of the disclosure so that this can be determined. On the other hand, if you're looking to have a child help you with medical decisions, you may expressly want no limit. In such cases broad authorization to release all info should be stated. Be careful with "standard" authorization for the release of PHI, it may be too broad, or too narrow, depending on your objectives.

Mental Health Info: Psychotherapy notes are not required to be released. 45 CFR 164.524(a) (1). So don't worry Tony, Dr. Jennifer Melfi's notes are safe (even when you asked her out while separated from Carmela!).

Empowering an Agent to Release Your PHI: There are a

(Continued on page 2)

CHECKLIST: HIPAA AUTHORIZ.

In order to have your medical information released or to provide someone access to it, you need to formally authorize the physician, hospital or other medical provider to do so. This checklist will help you properly complete such an authorization.

A medical provider ("covered entity") cannot disclose your Protected Health Information (PHI) without your authorization to do so. Exceptions are provided that permit disclosure for treatment, payment, and health care operations. You, as a patient, have the right to authorize the release of your PHI. Someone who qualifies as your HIPAA personal representative can also authorize the release of your PHI. There are a number of specifics requirements to address to make such an authorization valid. 45 CFR 164.508.

√Writing: The authorization should be in writing. The authorization should acknowledge that you are making it voluntarily and that your treatment, payment and health plan eligibility should not be affected whether or not you authorize the release of information.

√What: It should describe the health information to be dis-

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... HIPAA-POTAMUS ADVENTURES

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myriad of circumstances in which you might want to have an agent ("personal representative" in HIPAA jargon) act on your behalf with regard to HIPAA matters, including authorizing the release of your PHI. 45 CFR 164.502(g) (2). A personal representative can act with the same authority as if he or she were standing in your shoes. A key issue affecting a myriad of planning issues and documents is what is required of someone to be your HIPAA Personal Representative. "In general, the scope of the personal representative's authority to act for the individual under the Privacy Rule derives from his or her authority under applicable law to make health care decisions for the individual". This definition is quite nettlesome. If a person has broad authority to make health care decisions for another person (a parent for a minor child, or a legal guardian for an incompetent adult) that person should be treated as stepping into the shoes of the minor or ward for HIPAA purposes. Exceptions may apply in instances of abuse or under state law. "Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the representation."

Can Your Agent Under your Power of Attorney Be Your Personal Representative: Your agent under your financial power of attorney is not always clearly empowered to make health care related decisions. Although paying medical bills may constitute making decisions related to health care, is it sufficient? The ability to obtain PHI will be limited to those matters pertaining to paying medical bills. How broad of a medical decision making authority should an agent under a power be granted? At what point might the financial agent's authority conflict with your health care agents? If the only health care decision is the payment of medical bills is that sufficient? If an agent is to make the financial decisions as to paying medical bills, will the agent be entitled to adequate info to decide?

Your Executor is Your HIPAA Personal Representative: An executor of acts on behalf of the decedent.

Can a Successor Trustee be Your Trustee's Personal Representative: In the context of a trust agreement, a mechanism could be included mandating that all trustees grant a limited authorization to successor trustees for the purpose of determining if they, the predecessor trustee, are unable to serve, or that those serving as a trustee must, as a condition of serving, provide a release of their PHI to the successor trustees named or appointed under the particular trust. A HIPAA release authorization must acknowledge that the person giving it (i.e., the trustee) can revoke it. There is no assurance it won't be revoked and the mechanism defeated. Perhaps the trust could provide that if the trustee revokes it, then that revocation constitutes a termination of the trustee's position as a trustee. Can the successor trustee meet the requirement of making "health care decisions" for the predecessor trustee so that the successor will be the predecessor HIPAA personal representative? The successor would be granted the authority to make one decision that could be characterized as health care related — whether the predecessor trustee was capable of serving as trustee. If this constitutes a sufficient health care decision then the authorization requirements of 45 CFR 164.508 may be met. To minimize the offense to any person agreeing to serve as trustee, the disclosures could be limited to the minimum information necessary to make this determination. This process raises another issue in that the trust document itself might have to be disclosed. A separate trustee authorization document could be created that embodies the HIPAA related mechanisms.

Terms in red defined in the glossary at www.laweasy.com. For e-newsletter sign up at www.laweasy.com.

Conclusion: Almost every key estate document, and many key business documents, need to address HIPAA disclosure issues to assure that various trigger mechanisms (succession of fiduciaries, determinations of disability, etc.) work. PP

Review: Andrew Wolfe, CPA, JH Cohn, Roseland, NJ.

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...CHECKLIST: HIPAA AUTHORIZATIONS

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closed. This could be your entire medical record, or only specified components (e.g. records between certain dates). If you wish alcohol and drug treatment, HIV testing, and mental health information released (or not), expressly state so. The HIPAA paradigm is that only as much info as necessary should be disclosed. However, it would unreasonable to expect a medical provider to make this type of determination, so the authorization you sign should be explicit.

√Who: Which medical provider should make the disclosure? This could be a specific physician, hospital or a list of providers. A broader approach could be used to indicate a category of providers. For example, "any physicians, hospitals or other medical providers who have provided treatment, other medical services or payment for same, from June 1, 2004 through and including the date of this Authorization".

√Term: When does the authorization to disclose PHI expire? This could be: "upon a child attaining age 21", which might suffice for a minor's care. It could be "2 years from the signing of the authorization", which should be more than adequate for a life insurance application. "Upon the conclusion of my court case" may suffice for a litigation matter, although issues of appeals, etc. might warrant consideration in setting the parameters. "One year from death". This might be used in a health care proxy to assure the agent access to your records while alive, and possibly to evaluate post-death records without the need to qualify as the executor of your estate. If feasible for a trustee it might be "so long as serving as trustee of the [identify trust]".

√Revocation: A statement that you retain the right to revoke any authorization to disclose your PHI. Revocation is not binding until received. This minimizes the liability for disclosing information based on an authorization held prior to the medical provided (covered entity) actually receiving the revocation.

√Re-Disclosure: The release may state that certain information, such as HIV testing results, cannot be disclosed by the person receiving it. However, the release should also acknowledge that once other information is disclosed, it may thereafter be re-disclosed by the person receiving it without the HIPAA safeguards.

√Purpose: The purpose for the disclosure should be explained. This might be limited to the minimum information to determine whether you have the ability to function as a trustee or should be replaced, or only that information necessary to underwrite you for life insurance.

√Signer: If you are signing the authorization the signature line should merely state that you are the patient. If another person is signing for you, the authorization should state the person qualifies as your "personal representative under HIPAA 45 CFR 164.502(g)(2)", that they have authority to make health care decisions for you (which is required for them to be your HIPAA personal representative), and what is the scope of the representative's authority (is it limited or broad). PP

RECENT DEVELOPMENTS

Charitable Bequests Must Follow the Rules to be Deductible: A revocable living trust provided that the residue would pass in 4 equal shares to a son, a relative, and 2 charities. Each beneficiary was to receive 12.5% in 2006 and the remainder in 2016, when the trust was to terminate. If an individual beneficiary died before then his share would be distributed to the remaining beneficiaries. The estate tax return claimed a charitable deduction under Code Section 2055 based on the portion of assets anticipated to be distributed to the charities. The IRS denied the deduction stating that the trust was a "split interest trust" that divided the same property between charitable and non-charitable beneficiaries. No portion of a trust with charitable and non-charitable beneficiaries qualifies for an estate tax deduction unless the trust qualifies as a split-interest trust. *Galloway v. U.S.*, (CA 3 6/21/2007) 99 AFTR 2d Para. 2007-1115

Dissolved Corporation: A corporation which distributed asbestos was dissolved. Plaintiff sued the dissolved corporation which then sought to bring the decedent's employer into the case (implead). The employer argued that since the corporation had been dissolved it could not implead him. The court held that the dissolved corporation could sue or be sued (BCL Sec. 1006(a)(4)) so that the action to implead the employer was not barred by the dissolution. *Tedesco v. A.P. Green Industries, Inc.*, 8 N.Y.3d 243 (Feb. 22, 2007).

LLC Interest Not a Security: The plaintiff claiming he was defrauded on a real estate deal and argued that the LLC membership interests sold to him were investment contracts under the Exchange Act. Applying the analysis of *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) the court held that interests in an LLC were not a "security" since the claimant's control over the LLC checking account was inconsistent with a passive investor. *Endico v. Fonte*, 07 Civ. 2398