

HIPAA Privacy Rule Adds Hurdles to Administration of Estates

By RENÉE C. VIDAL

If you have obtained birth or death records from the Pennsylvania Department of Health's Bureau of Vital Statistics within the last few months, you have undoubtedly learned that it has become more difficult. The increase in "security" of birth and death records is a result of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, which mandated the adoption of national standards for electronic health transactions, as well as Federal privacy protections for individually identifiable health information, referred to as protected health information.

In response to the HIPAA mandate, the U.S. Department of Health and Human Services enacted regulations in the form of the Privacy Rule, which became effective on April 14, 2001 and required compliance by April 14, 2003 for most entities covered by the rule. The Privacy Rule applies to health plans, health care clearinghouses, and health care providers who conduct certain

health care transactions electronically. These covered entities are required to implement standards to protect and guard against the misuse of protected health information. Protected health information is information that is generally individually identifiable health information that is transmitted by, or maintained in, electronic media or any other form or medium that relates to 1) past, present or future physical or mental health or condition of an individual; 2) provision of health care to an individual; 3) payment for the provision of health care to an individual; or 4) the information identifies or provides a reasonable basis to believe it can be used to identify an individual.¹

The requirements of the Privacy Rule apply to a state health agency, such as the Pennsylvania Department of Health, if the agency provides health benefits, operates clinics, or transmits health information electronically in connection with a trans-

¹ 45 CFR 164.501.

action covered by HIPAA that causes it to be a covered entity.² Because the HIPAA regulations require covered entities to evaluate practices and implement safeguards to limit unnecessary or inappropriate access to and disclosure of protected health information, obtaining death or birth certificates has become increasingly difficult for practitioners who assist clients in administering estates. A visit to the Department of Health's website³ reveals several hurdles to obtaining birth or death records for clients. To obtain birth records, the person making the request must be the person named on the record, a legal representative of that person or an immediate family member. Persons eligible to obtain death records include the legal representative of the decedent's estate, an immediate family member or an extended family member who is able to show a direct relationship to the decedent. It does not include the attorney for the estate.

These restrictions are intended to comply with the HIPAA regulations. Although there are certain circumstances under which protected health information may be dis-

² 45 CFR 160.103.

³ www.health.state.pa.us.

Online Resources, continued

are located at http://www.courts.state.pa.us/judicial-council/local-rules/bucks/bucks_04orphan.pdf, and Montgomery County Orphans' Court Rules are located at http://www.courts.state.pa.us/judicial-council/local-rules/montgomery/montgome_04orphan.pdf.

Although each county takes a different approach to making content available, one constant is the fact that Internet content evolves continu-

ously, with new information being added to websites with little or no fanfare on a daily basis. In a practice which, by definition, is county-specific, it is encouraging to note that many Pennsylvania Orphans' Courts and Registers of Wills have embraced Internet technology and are making content and information available to estate planning practitioners and the general public.

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HIPAA, continued

closed,⁴ such information is generally protected and only disclosed when authorized by the individual who is the subject of the information or that person's personal representative.⁵ The HIPAA regulations require that a personal representative with legal authority to act be treated the same as the individual for purposes of the Privacy Rule.⁶ A personal representative is a person legally authorized to make health care decisions on another person's behalf or legally authorized to act on behalf of a deceased individual or the individual's estate.⁷ Thus, personal representatives include executors, administrators, persons with health care powers of attorney and parents, guardians and persons acting *in loco parentis* for unemancipated minors.⁸

⁴ For example, disclosures of protected health information may be made without authorization from the individual or personal representative to a coroner or medical examiner for the purpose of identifying a deceased person, determining the cause of death or other duties authorized by law and to a funeral director as necessary to carry out their duties with respect to a decedent as is consistent with applicable law. 45 CFR 164.512(g)(1)-(2).

⁵ 45 CFR 164.502(b); 164.514(d).

⁶ 45 CFR 164.502(g); see 45 CFR 164.510(b) for situations where a person is involved in an individual's health care, but is not expressly authorized to act on the individual's behalf.

⁷ 45 CFR 164.502(g)(2)-(4).

⁸ 45 CFR 164.502(g).

To ease procedures in administering estates, preparation of an authorization form to be executed by executors or administrators of estates will save time and hassle if death or birth records are needed. The authorization for disclosure should specifically:

1. state that it authorizes disclosure of necessary birth and death records of the decedent or direct relatives of the decedent,

2. state the names of the persons or organizations who will receive the information,

3. state that the purpose of the request is for the administration of the decedent's estate,

4. notify the executor/administrator of his/her right to refuse to sign the authorization,

5. be signed and dated by the executor/administrator,

6. be written in plain language,

7. include an expiration date or event (such as upon approval of the accounting or execution of a family settlement agreement),

8. notify the executor/administrator of the right to revoke the authorization at any time in writing and how to exercise that right and any applicable exceptions to that right under the Privacy Rule, and

9. explain the potential for the information to be re-disclosed by the recipient and no longer protected by the Privacy Rule.⁹

⁹ 45 CFR 164.508(c).

Report of the Chair, continued

The Education Committee, chaired by Judy Stein, continues to put on interesting programs. The Section's next Quarterly Meeting will be on October 7, and the CLE topic will address the split dollar rules. And, although not formally a committee, I want to again publicly thank Kevin Gilboy for the "Tax Tips" that he shares with us at each Quarterly Section Meeting. While on the topic of CLE programs, please save the date of December 10, when the Section's Annual Meeting, with its CLE program, will be held.

And, as you can read for yourself, the Publications Committee, chaired by Susan Collings, puts out a top-drawer Newsletter. I know I speak for the entire Section when I thank Susan, her Committee members, and especially the authors who write such high quality and timely pieces.

So, I have said it before, and I will say it again: The bulk of services you receive as a Section member is provided by the Committees. I have mentioned many of them in this column. There are many other services that are being provided by these Committees, by the other standing Committees (like Elder Law and Taxation) and by other Section members who serve as liaisons or members of ad hoc committees and task forces. Thanks to all who serve the Section.