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Nursing Home Catch-22 Case Has Implications for Release of Deceased Patient Records of All Healthcare Providers

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It's a common scenario: A Florida nursing home resident dies, and his or her spouse, surrogate, proxy, or attorney requests the resident's medical records. However, if the nursing home releases the records, it might be violating federal law. If it doesn't, it violates Florida law. A federal court recently noted this "Catch-22" and declared the Florida law invalid. Below, we explain the court's decision, what it means for Florida nursing homes, and its broader implications to all Florida healthcare providers.

Conflicting Laws

Florida Statutes Section 400.145 provides that nursing homes "shall furnish to the spouse, guardian, surrogate, proxy, or attorney in fact . . . of a former resident . . . a copy of that resident's records which are in the possession of the facility." Also, "Copies of such records . . . may be made available prior to the administration of an estate, upon request, to the spouse, guardian, surrogate, proxy, or attorney in fact."

However, the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides that nursing homes may only release medical records to a patient or his/her personal representative. 45 C.F.R. 164.502(a)(1), (g)(1). When a patient is deceased, "personal representative" means an "executor, administrator, or other person [who] has authority to act on behalf of a deceased individual or of the individual's estate." 45 C.F.R. 164.502(g)(4).

Thus, a person authorized under Section 400.145 can be – but is not always – the same as the personal representative under HIPAA. As a result, Florida law requires nursing homes to release medical records even though doing so might violate federal law.

The Federal Court's Decision

On December 2, 2011, the United States District Court for the Northern District of Florida

concluded that Section 400.145 is contrary to HIPAA and, therefore, invalid. *Opis Management Resources, LLC v. Dudek*, No. 11-400 (N.D. Fla. Dec. 2, 2011). The Court described the following scenarios:

A decedent's spouse, for example, could seek [protected health information] for any number of reasons . . . . A spouse could be trying to establish paternity, or her rights to life insurance. These goals do not conform to HIPAA's purpose to protect privacy and act in the interest of the patient.

Id (internal citations omitted). States are generally free to pass their own privacy laws, but "provisions of state law which are contrary to HIPAA are preempted unless that state law is 'more stringent.'" *Opis Management*, No. 11-400 slip op. at 3 (citing 45 C.F.R. § 160.203). Because the Court found section 400.145 provides less protection than HIPAA, not more, it concluded that the state law is preempted.

What This Means for Nursing Homes

Because of the Court's ruling, section 400.145 is enjoined and AHCA cannot currently sanction nursing homes for failing to abide by it. Therefore, nursing homes in Florida should only release a deceased resident's medical records to a personal representative of the estate, executor, administrator, or other person authorized to act on behalf of the deceased patient or the deceased patient's estate. If no such person exists, the nursing home should wait for a court to appoint an appropriate person.

However, the District Court's decision could be appealed, so nursing homes and their counsel should continue to monitor the issue.

Broader Implications to All Florida Healthcare Providers

Family requests for medical records of deceased patients often occur outside of the nursing home context. The healthcare provider is in a difficult position – while providers would often want to help out the grieving family and provide the requested records, HIPAA is clear that this should not be done until a personal representative has been appointed by the probate court. Providers now have a Florida case supporting their refusal to provide the records before a personal representative is appointed.

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While the District Court's decision is limited to Section 400.145, similar laws may also be preempted. One example is Florida Statutes Section 766.104, which requires reasonable investigations before a party may file a medical malpractice suit. Section 766.104 states, "subsequent to the death of a person and prior to the administration of such person's estate, copies of all medical reports and records . . . that are in the possession of a health care practitioner" shall be made available to the deceased person's spouse, parent, adult child, guardian, surrogate, proxy, or attorney. Given the parallel between Sections 400.145 and 766.104, it's probable that HIPAA preempts Section 766.104 too. However, this will not be known until a legal challenge is brought.
