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YOUR HEALTH POWER—TO UPDATE OR NOT TO UPDATE By Randy Spiro

Many people have signed a Durable Power of Attorney for Health Care naming a person to speak for them at the hospital if they are too ill to communicate. Such forms offer the signer the ability to sign a statement giving the agent/attorney-in-fact the ability to consider relief of suffering in determining whether or not to disconnect life support. What then may be wrong with an old health power?

Old health powers in many cases do not take into account a federal law called HIPPA. HIPPA protects a patient's health care information. Because of fears of being penalized under this law, physicians are reluctant to reveal patient information to a patient's family. But the health power if properly drafted, can allow the agent/attorney-in-fact to interact with the physician.

Why is this important? If a person has a revocable trust, he or she typically serves as the initial trustee (manager). The trusteeship changes on three events: death, resignation or incapacity. Many trusts say that two doctors' letters are needed to prove incapacity. The agent/attorney-in-fact is authorized under HIPPA to get private information on behalf of the patient, but only if the health power is properly drafted.

Proper drafting typically involves two areas that old health powers are unlikely to address. One is a specific statement in the health power waiving the patient's privacy rights under HIPPA (but only as to the designated agent/attorney-in-fact). The other is a signature line on most health powers that says the power is effective immediately (as opposed to later becoming effective upon the signer's incapacity).

Practitioners have been slow to attach HIPPA waivers to health powers because when the HIPPA legislation initially came out it was not immediately clear to many estate planning attorneys that such action was necessary. Also, prior to HIPPA, most signers of health powers preferred to leave blank the signature line saying that the power was effective immediately. Many signers liked the idea that the agent could only begin making health care decisions for them after incapacity occurred.

Many physicians have been told by their lawyers not to honor the authority of the agent under a health power unless the line making it effective immediately has been signed. The reasoning is that incapacity is a legal conclusion and the physician should not be put in a position where he or she has to determine whether or not the patient is sick enough to trigger the effectiveness of the health power.

If the line making the health power effective immediately has been signed, the physician does not have to worry whether or not he or she can disclose private information to the agent. Such physician is thus more willing to write a letter about the patient's health condition which can be used by the successor trustee proving that he or she has replaced the Creator of the trust as Trustee.