



PROGRAM MATERIALS

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Estate Planning and The Role of HIPAA Authorizations, DNRs and Durable Medical Power of Attorneys

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Estate Planning and The Role of HIPAA Authorizations, DNRs and Durable Medical Power of Attorneys.

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Disclaimer

The information is current as of the date of the initial presentation and is not meant to constitute legal advice.

Agenda

- Estate Planning Considerations – Forms & Laws
- Appreciate why decision-making capacity is material.
- Learn how to avoid common pitfalls and create a checklist for client and personal use.
- Conclusion

Estate Planning Considerations

Forms, Laws, Asset Protection

Threshold Issue

- Whether the patient has decision making capacity to provide informed consent and sign the DNR (as well as the other documents).
- Other circumstances arise when the patient does not have their DNR on him/her or they don't have one in place, which is not uncommon in the event of an emergency or when the patient goes to a new hospital or other provider.

45 CFR § 164.508 - Uses and disclosures for which a [HIPAA] authorization is required.

- **(a) Standard: Authorizations for uses and disclosures**—(1) *Authorization required: General rule.* Except as otherwise permitted or required by this subchapter, a [covered entity](#) may not [use](#) or disclose [protected health information](#) without an authorization that is valid under this section. When a [covered entity](#) obtains or receives a valid authorization for its [use](#) or [disclosure](#) of [protected health information](#), such [use](#) or [disclosure](#) must be consistent with such authorization.
- **(2) Authorization required: Psychotherapy notes.** Notwithstanding any provision of this subpart, other than the transition provisions in [§ 164.532](#), a [covered entity](#) must obtain an authorization for any [use](#) or [disclosure](#) of [psychotherapy notes](#), except:
 - **(i)** To carry out the following [treatment](#), [payment](#), or [health care](#) operations:
 - **(A)** [Use](#) by the originator of the [psychotherapy notes](#) for [treatment](#);
 - **(B)** [Use](#) or [disclosure](#) by the [covered entity](#) for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or [individual](#) counseling; or
 - **(C)** [Use](#) or [disclosure](#) by the [covered entity](#) to defend itself in a legal action or other proceeding brought by the [individual](#); and
 - **(ii)** A [use](#) or [disclosure](#) that is required by [§ 164.502\(a\)\(2\)\(ii\)](#) or permitted by [§ 164.512\(a\)](#); [§ 164.512\(d\)](#) with respect to the oversight of the originator of the [psychotherapy notes](#); [§ 164.512\(g\)\(1\)](#); or [§ 164.512\(j\)\(1\)\(i\)](#).

HIPAA Authorization Form

- Sample:
<https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/consumer-protection/hb300-Authorization-Disclose-Health-Info.pdf>

HIPAA Authorization Forms

- Be proactive and include all persons who may have access or who may be contacted. Expressly exclude individuals or entities that you don't want included.
- For uses or disclosures of a decedent's health information not otherwise permitted by the Privacy Rule, a covered entity must obtain a written HIPAA authorization from a personal representative of the decedent who can authorize the disclosure.
- A decedent's personal representative is an executor, administrator, or other person who has authority under applicable State or other law to act on behalf of the decedent or the decedent's estate. See 45 CFR 164.502(g)(4), as well as guidance on personal representatives available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html>, for more information.

Health Information of Deceased Individuals

- “The HIPAA Privacy Rule applies to the individually identifiable health information of a decedent for 50 years following the date of death of the individual.
- The Rule explicitly excludes from the definition of “protected health information” individually identifiable health information regarding a person who has been deceased for more than 50 years. See paragraph (2)(iv) of the definition of “protected health information” at § 160.103.”

Do Not Resuscitate (DNR)

- Examples of types of DNRs include the following:
- **Do not attempt resuscitation (DNAR).** Essentially the same as a DNR; however, some healthcare organizations use DNAR instead of DNR.
- **Out-of-Hospital DNR.** Enables patients to direct health care professionals in the out-of-hospital setting to withhold or withdraw specific life-sustaining treatments in the event of respiratory or cardiac arrest. This is separate from a hospital DNR and may include, as it does in Texas for example, a “location in which health care professionals are called for assistance, including long-term care facilities, in-patient hospice facilities, private homes, hospital outpatient or emergency departments, physician’s offices and vehicles during transport.”
- **Allow Natural Death (AND).** This is common in palliative care situations and alerts providers that the patient wishes to remain as comfortable as possible without suffering as the individual expires naturally.
- **Do not intubate (DNI).** This alerts the providers that the patient does not want to be placed on a ventilator or have a breathing tube inserted if they cannot breathe on their own.
- **Specified DNRs.** Tailored DNRs that exclude one type of life saving measure but not another. As mentioned above, it is helpful to distinguish nuances. For example, if the situation is related to the terminal illness then the DNR applies; however, if someone with a terminal illness has surgery and needs to be resuscitated as an acute event related to the surgery and not the terminal condition such as cancer (even when cancer is in remission, it is still a terminal condition) then the 30-day clause would apply.
- **Comfort Care, End-of-Life or Portable Life-Sustaining Treatment Orders.** Specific to end-of-life care, including hospice and palliative care.
- **NOTE: State Laws are important in this area of law.** For out-of-hospital DNRs, notably, first responders are almost always required to initiate life support unless a valid DNR order is in place and presented to them. Many states are now incorporating DNR status into a portable medical order called Provider Orders for Life Sustaining Treatment. **For example,** Texas has both in-hospital and out-of-hospital DNRs. Prior to the passage of Texas SB 11 in April 2018, in-hospital DNRs were more lax. Before SB 11, it was technically possible for a physician to enter a DNR order without a patient’s or a surrogate’s consent. For the past seven years, physicians must ensure that patients meet specific criteria to avoid being at legal risk for a criminal misdemeanor.

Two General Types of Trusts

- **Revocable (aka “living trust”)** – can be changed after creation, transferring assets to a revocable trust can assist in avoiding probate. While a revocable trust is usually not public, probate is.
- **Irrevocable** – typically cannot be modified after creation. There are significant state law considerations. An individual cannot act as his/her own trustee either.
- Related type of trust is a **testamentary trust**, when a will creates an irrevocable trust.

Why create a trust?

- Transfer wealth to the next generation.
- Keep a family business or land in the family.
- Leave a legacy to a charity or school.
- Minimize estate taxes either for yourself or beneficiaries.
- Shield assets from creditors.*

*Timing rules apply. Fraudulent transfer of assets is something to ignore.

Pro-Active Estate Planning Tools

- 1. Wills:** A properly drafted and executed will is the foundation of any estate plan. Business owners should clearly outline who will inherit the business's real estate and other assets to prevent disputes among heirs. In Texas, a will can specify whether the probate should proceed with independent administration, simplifying the process.
- 2. Living Trusts:** A revocable living trust is an excellent way for business owners to keep their real estate out of probate. When real estate is transferred into the trust, the business owner can retain control over it during their lifetime. Upon death, the trust can distribute the real estate directly to beneficiaries without court involvement, thereby avoiding probate.
- 3. Transfer on Death Deed (TODD):** [Texas allows for the use of Transfer on Death Deeds](#), which are a simple way to transfer real estate to beneficiaries without the need for probate. The TODD designates who will inherit the property upon the owner's death, and the deed automatically takes effect, bypassing the probate process entirely.
- 4. Family Limited Partnerships (FLPs) or LLCs:** Another strategy to manage the transfer of real estate within a family business is to place the property into a family limited partnership or a limited liability company (LLC). This allows the business owner to pass on the real estate through shares or membership interests, reducing estate taxes and protecting the property from creditors.

Decision Making Capacity

The Intersection of Decision Making Capacity, Informed Consent, and Competence.

- “Medical decision-making capacity is the ability of a patient to understand the benefits and risks of, and the alternatives to, a proposed treatment or intervention (including no treatment).”
- “**Capacity** is the basis of informed consent.” Informed consent is considered a decisional right.
- **Competency is a global assessment and a legal determination made by a judge in court. Capacity, on the other hand, is a functional assessment regarding a particular decision.**

Decision Making Capacity (DMC)

- Four elements of decision making capacity
 - Understanding
 - Reasoning
 - Alternatives
 - Communication

10 Myths About DMC

1. Decision-making capacity = competency.
2. Against medical advice = lack of decision-making capacity.
3. There's no need to assess decision-making capacity unless a patient goes against medical advice.
4. Decision-making capacity is all or nothing.
5. Cognitive impairment = no decision-making capacity.
6. Lack of decision-making capacity is permanent.
7. Patients who have not been given relevant information about their condition can lack decision-making capacity.
8. All patients with certain psychiatric disorders lack decision-making capacity.
9. All institutionalized patients lack decision-making capacity.
10. Only psychiatrists and psychologists can assess decision-making capacity.

Informed Consent

- If someone does not have decision making capacity, what happens?
 - Examples include pediatric patients who are not emancipated minors (with certain exceptions depending on state law) and individuals who are deemed by a physician not to have DMC.
- Surrogate decision makers step into the place of the patient and make decisions based on:
 - (1) substituted judgment; and
 - (2) best interests of the patients.
- Surrogates can be declared by legal documents, statute, or facts and circumstances (e.g., a patient presents in the ER who is unconscious and has no decision making capacity, yet the provider does not have a legal document or a statutory representative present).

Dementia versus Alzheimer's Disease

Alzheimer's disease is the most common type of dementia. It is a progressive disease beginning with mild memory loss and possibly leading to loss of the ability to carry on a conversation and respond to the environment. Alzheimer's disease involves parts of the brain that control thought, memory, and language.

Dementia is a term used to describe a group of symptoms that affect intellectual and social abilities enough to interfere with daily function.

Physicians and AMA Considerations

- For physicians, *competence* is the ability to practice with reasonable skill and safety, which involves both cognitive and physical considerations.
- Although clinicians' responsibility and commitment to practice competently does not change throughout their professional careers, age-related changes can influence their ability to do so.
- Physicians are fiduciaries and must have the best interests of the patient, first and foremost.
- <https://journalofethics.ama-assn.org/article/competence-not-age-determines-ability-practice-ethical-considerations-about-sensorimotor-agility/2016-10>

Texas Rule 1.16 – Clients w/ Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests. *Tex. Disc. R. Prof. Cond. 1.16*

<https://casetext.com/rule/texas-court-rules/texas-disciplinary-rules-of-professional-conduct/client-lawyer-relationship/rule-116-clients-with-diminished-capacity>

Texas Bar – Attorneys

- “Crimes that subject a lawyer to compulsory discipline include barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or property; any crime involving misapplication of money or other property held as a fiduciary; and any attempted conspiracy or solicitation of another to commit any of these crimes.”
- “A disability is any physical, mental, or emotional condition that results in an attorney’s inability to practice law or to carry out his or her professional responsibilities. No substantive rule violation is required to find that an attorney has a disability.”
- If the CDC during a Just Cause investigation, or an evidentiary panel during the course of an evidentiary proceeding, believes that an attorney is suffering from a disability, the matter is forwarded to BODA for appointment of a district disability committee. The district disability committee determines whether the respondent is, in fact, suffering from a disability and, if so, indicates such to BODA, which then enters an order suspending the attorney for an indefinite period.

Should a physician or a lawyer represent to the court that they have capacity when they do not?

- **NO!**
- Includes an attorney representing clients in a tribunal setting.
- An attorney utilizing an expert witness or fact witness without disclosing to the court the individual's disability/diminished or lack of decision making capacity.
- Physician treating patients.

Common Pitfalls & Checklists

Landmines

- 1. Conflicting Interests Among Heirs:** One of the most common challenges in transitioning family business real estate is managing conflicting interests among heirs. For example, one heir may wish to sell the property for immediate financial gain, while another may want to keep the real estate as part of the ongoing business. A well-structured estate plan that outlines specific roles and duties for heirs can prevent many of these conflicts from escalating into legal disputes.
- 2. Business Valuation and Real Estate Appraisal:** Determining the fair market value of business-related real estate is essential in probate. Accurate appraisals are necessary to ensure that all beneficiaries receive their fair share. Business owners must plan regular appraisals of their business properties and clearly specify in their estate plans how to value the property upon their death.
- 3. Tax Implications:** Estate and property taxes can create a significant financial burden during the transition of real estate ownership. While Texas does not have a state estate tax, federal estate taxes may apply to large estates. Business owners can mitigate tax liabilities through tools like gifting, family partnerships, and trusts.

Succession, Governance, Inheritance

- Avoiding Family and Trustee Turmoil

If a trust has multiple beneficiaries — often called a “pot trust” because there’s one “pot of gold,” so to speak, for several beneficiaries to tap into — a distribution given to one may feel like it’s coming out of the others’ pockets. These “pot trusts” can be a significant source of family discord and litigation. It can sometimes become a race to the bottom with all beneficiaries jumping in requesting monies as they see the trust being depleted in favor of one or more other beneficiaries.

- **The remedy? Adding an “equalization provision” to the trust document stipulating that when the trust expires and the remaining assets are distributed, the total that each beneficiary has already received will be subtracted from that person’s share.**

Fraudulent Transfers

Section 548 of the U.S. Bankruptcy Code covers two categories of fraudulent transfers; actual fraud and constructive fraud.

- Actual fraud refers to the transfer of property “with the intent to hinder, delay, or defraud any entity to which the debtor was or become . . . indebted.”
- Constructive fraud refers to transferring property for “less than a reasonably equivalent value” (see: [11 U.S. Code § 548 - Fraudulent transfers and obligations](#)).

In [United States v. Frykholm, 362 F.3d 413](#), the 7th Circuit held that “a conveyance is fraudulent when the [debtor](#) receives less than a reasonably equivalent value in exchange for such transfer or obligation and the debtor was [insolvent](#) on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.”

Prudent Checklist Items

- Does the trustee, attorney, grantor and person executing the documents, including wills, amendments and codicils, have decision making capacity?
- HIPAA Authorization
- DNRs – in hospital and out-of-hospital
- Durable Medical Power of Attorney
- Power of Attorney – estate (if necessary, the person)
- Will
- Trust(s)
- Have documents been updated if people move to reflect state law.
- Depending on the type of documents and structures, are trustees, financial advisors, accountants, etc. consulted on at least an annual basis?

Conclusion

Parting Thoughts

- Be proactive.
- Have documents reviewed if a change of residence occurs or a change is needed.
- Avoid conflicts of interest.
- Get a medical opinion on capacity.
- Consider pros and cons, as well as potential downstream issues.

Thank You and Questions

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