HIPAA, CMIA, DPA, AHCD, and POLST's, Oh My!

There are a considerable number of acronyms in estate planning. Below is a description of those acronyms and what they are and mean.

✚ WHY DO I NEED A HIPAA AND CMIA AUTHORIZATION?

When the principal has an existing Advance Health Care Directive (AHCD) or Power of Attorney for Health Care, the **Authorization for Use and Disclosure of Protected Health Information ("HIPAA-CMIA")** document may be used as a stand-alone document to *grant the agent rights over the health information and medical records of the principal when incapacitated*.

An agent's ability to access health information has been made more challenging by passage of the privacy regulations (45 C.F.R. Parts 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d), also known as "HIPAA."

Even though pre-existing Advance Health Care Directives and Powers of Attorney For Health Care *may* be legally sufficient to grant the agent authority over the principal's health information, medical professionals want more explicit reference to the statutes to address their goal of making only mandatory or permitted disclosures. That is, because medical professionals have become more cautious about releasing information after the passage of the regulations, more reassurance has to be given to them that the principal has indeed granted the agent the rights regarding the use and disclosure of the principal's health information. *For these reasons it is important to have an up to date and current HIPAA form.*

The explicit reference to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d) and the California Confidentiality of Medical Information Act (CMIA) (Civil Code § 56 et seq.) should allay the disclosing parties' concern about complying with these laws. This document explicitly refers to HIPAA and CMIA to make clear that the principal intends to give the agent full access to and authority over the principal's health information.

The HIPAA-CMIA document aims to make clear that the agent is to be treated like the principal, that is, as the principal's "personal representative" regarding the

principal's health information. This document is not drafted to be "Valid Authorization" as that term is used in HIPAA, because such documents are meant to be drafted by the "covered entities." Rather, this document should both (1) enable the "covered entities" to treat the agent as if the agent were the principal, and (2) enable the agent to sign a "Valid Authorization" created by the "covered entities."

⬇ WHAT IS AN ADVANCE HEALTH CARE DIRECTIVE (AHCD)?

"Advance Health Care Directive" or "Advance Directive" means **either an individual health care instruction or a power of attorney for health care** (Prob. C. §4605.) The Power of Attorney for Health Care is a written instrument that *authorizes an agent to make health care decisions for the principal* (Prob. C.§4629.)

The current laws do not use the term "durable" power of attorney for health care, the power of attorney for health care covered in the Health Care Decisions Law (Prob. C. §4600 et seq.) is durable in that it is not affected by the principal's subsequent incapacity.

The Advance Directive includes a power of attorney for health care and may include various other provisions, including individual health care instructions, as well as provisions for personal care, anatomical gifts, and designation of physicians.

The Health Care Decisions Law introduced the term "Advance Health Care Directive" or simply "Advance Directive" to refer both to a power of attorney for health care and any individual health care instruction (Prob. C. §4605.) A Power of Attorney for Health Care is a written instrument designating an agent to make health care decisions for the principal (Prob. C. §4629), whereas an individual health care instruction is a patient's written or oral direction concerning a health care decision (Prob. C. §4623.) As may be done in the Advance Health Care Directive, a single document may include both a power of attorney for health care and one or more individual health care instructions (Prob. C. §4671(a).)

In summation, the advance directive allows the individual power to control his or her own health care, including the right to have life sustaining treatment withheld or withdrawn, which is fundamental right. (Prob. C. §4650(a).)

⬇ WHAT IS A "DPA" AND WHAT DOES IT DO?

A **Durable Power of Attorney**, like a nondurable power of attorney, is a **written authorization to an agent, referred to in this context as an "attorney-in-fact," to perform specified acts on behalf of a principal** (Prob. C. §4022 ("power of attorney" is a written instrument executed by natural person having capacity to contract that grants authority to attorney-in-fact)).

The characteristic that distinguishes a Durable Power of Attorney from other powers of attorney is that the durable power is not normally terminated if the principal becomes incapacitated (Prob. C. §4124; see also Civ. Code § 2356(a)(3),(b) (unless coupled with an interest in the subject of the agency, a nondurable power is terminated by the incapacity of the principal, except as to third persons without actual knowledge of the principal's incapacity)).

An internet form or store-bought form in which you select or handwrite in provisions, which are often seen in "do it yourself" or "paralegal" estate planning may be subject to termination in the event of incapacity and then trigger a Conservatorship proceeding in court which is very expensive and time consuming and can be avoided by proactive planning with an attorney.

➕ A POLST?

A **POLST** is the acronym for "**Physician Orders for Life-Sustaining Treatment**" and is **a legal form that gives seriously ill patients more control over their end-of-life care**, including medical treatment, extraordinary measures (ventilator, feeding tube) and CPR.

As always, I appreciate your referrals and your business and look forward to working with you and showing you ways to protect and maximize your wealth and assets and discuss your estate planning needs with you further.

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