

ELDER LAW

New Advance Directive for Release of Medical Records

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The hallmark of the elder law practice is that it is crisis driven. Most clients wait until they are in immediate need of hospitalization, home care or nursing home care to seek legal assistance. Their legal options would have been greater if they had consulted with an attorney earlier. Elder law attorneys exhort their clients who do seek assistance early on, to execute advance directives. These are documents that appoint an agent to ensure the orderly management of financial and medical decision-making in the event of disability at some point in the future. These advance directives include the durable power of attorney and health care proxy. Clients who do not execute advance directives risk costly and time-consuming guardianship litigation if they lose capacity in the future.

**'Mougiannis v. North Shore'**

Domenica Mougiannis is a classic elder law client who sought counsel before a crisis. She signed a durable power of attorney and health care proxy in January 1997 naming her daughter as agent. Several years later, when she was unable to manage her own affairs, she was admitted to North Shore Hospital for bedsores and a hip fracture. Unfortunately, when her agent made a request for medical records, it was denied. Her agent was told that the durable power of attorney and health care proxy were not sufficient authority under HIPAA regulations to allow the hospital to release the records. The agent was advised by the hospital to initiate a guardianship proceeding, under Article 81 of the Mental Hygiene Law.

After her mother's discharge from the hospital, the daughter made a written request for copies of her mother's medical records. The hospital's counsel wrote back and rejected her request. The hospital argued that the authority under the health care proxy ended with the hospital discharge and that the authority under the durable power of attorney did not extend to medical matters.

The daughter then claimed to have received a billing statement that showed reimbursement to a doctor at North Shore for treatment of a fractured jaw of Domenica Mougiannis. Since her mother was admitted to the hospital for bedsores and a hip fracture, the daughter was surprised to find this entry for a condition that she had never been notified of. This revelation suggested to the daughter a possible explanation for the hospital's refusal to release her mother's medical records.

The daughter then commenced an Article 78 proceeding seeking the release of the medical records, *Matter of Mougiannis v. North Shore-Long Island Jewish Health System, Inc.*

Prior to the enactment of the health care proxy statute in New York in 1991, it was common to grant medical decision-making authority within the durable power of attorney. Now, pursuant to General Obligations Law §5-1501, the statutory short form of a durable power of attorney contains the following language prominently in the "CAUTION" section at the beginning of the document:

"THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS. YOU MAY EXECUTE A HEALTH CARE PROXY TO DO THIS."

The court in *Mougiannis* ruled that a durable power of attorney executed prior to HIPAA lacked the authority to delegate health care decision-making authority. There is also an Attorney General's Opinion from 1984 (84-F16) reaching a similar conclusion.

**Health Care Proxy**

In contrast to the durable power of attorney, the authority of the agent under the health care proxy does not commence until a medical determination has been made that the patient lacks the capacity to make health care decisions. In this case, North Shore Hospital agreed that Domenica Mougiannis lacked that capacity. North Shore Hospital based its refusal to release the medical records upon Public Health Law §18. Under that statute, medical records can only be released to a "qualified person" defined as "...any properly identified subject, or a guardian appointed pursuant to article eight-one of the mental hygiene law..." It was the hospital's position that the daughter was neither a patient or a guardian of the patient and therefore was not a "qualified person".

Nassau County Supreme Court Justice William R. LaMarca rejected this position by the hospital. The court based its conclusion upon Public Health Law §2982(3) relating to the health care proxy:

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"Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care." He went on to state that: "It is the judgment of this court that the validly executed Health Care Proxy qualifies the petitioner to make informed medical decisions about her mother's care and to stand in stead of the "subject" for the purpose of requesting access to past medical records which may have great bearing on present day treatment determinations." The judge reiterated this in his conclusion when he said "Petitioner, a validly appointed Health Care Proxy, is deemed a "qualified person" for the purpose of requesting access to the 'subject's' health care information..."

The hospital also relied unsuccessfully upon HIPAA as a justification for its denial of access to the medical records. The hospital argued that HIPAA was enacted to protect the confidentiality of health information and that the hospital faced sanctions if it improperly released the information. This argument failed to recognize the substantive right created by HIPAA to allow patients access to their own medical records.

The court decided the case on the narrow grounds that the hospital's decision failed to give appeal rights to the patient's daughter after rejecting her request for medical records. The hospital had erroneously determined that the daughter had no standing to make the request and the hospital made no further analysis. The hospital was ordered to process the daughter's application. The hospital was given the opportunity to determine whether the request falls within an exception to release, such as a finding that the release of the information requested would cause substantial and identifiable harm to the patient.

The hospital specifically called attention to the fact that it could have released the information if the patient had signed a specific release form as authorized by HIPAA regulations.

Practitioners may wish to erase any doubt on this issue by having their competent clients sign a HIPAA RELEASE FORM at the same time that they sign their other advance directives. In an excess of caution, practitioners should consider the use of an advance directive such as the following:

### HIPAA Release Form

I, \_\_\_\_\_, hereby authorize the release of my individually identifiable protected health information to \_\_\_\_\_ my "personal representative" pursuant to 45 C.F.R. § 164.502(g) (2).

I intend that my "personal representative" be treated as I would, with respect to my rights regarding the use and disclosure of my individually identifiable protected health information and/or any other medical records.

I authorize any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other health care provider, insurance company, Medical Information Bureau, Inc. (or other healthcare clearinghouse), or any other health care provider that has provided treatment or services to me or that has paid for or is seeking payment for such services; to give, disclose and release to my "personal representative", without restriction, all of my individually identifiable health care information and medical records regarding past, present or future medical or mental health conditions, to specifically include but not be limited to all information relating to the diagnosis and treatment of HIV/Aids, sexually transmitted diseases, mental illness and drug or alcohol abuse. This authorization shall supersede any prior agreement I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. This authorization has no expiration date and shall not require any reauthorization by me at any particular time interval and may be revoked by me in writing and delivered to my health care provider.

\_\_\_\_\_  
(signature)

\_\_\_\_\_  
(date)

### Conclusion

The *Mougiannis* decision is a victory for advance planning. It reaches the conclusion that an agent under a health care proxy stands in the place of the patient for HIPAA and Public Health Law §18 purposes, in regard to a request for the release of the medical records. In light of this decision, an agent under a health care proxy should have access to the medical records of the patient. It would still be wise, to have clients also sign a HIPAA Release Form and to dispel any remaining doubt, HIPAA release language should also be included in the health care proxy form.