

Ohio Amends Law on Durable Power of Attorney for Health Care

Governor John Kasich signed Ohio Substitute House Bill 126 (“Sub. H.B. 126”), effective March 20, 2014, implementing various amendments to the Ohio law governing durable power of attorney for health care. Most notably, Sub. H.B. 126 increases an attorney-in-fact’s access to an individual’s health information, including protected health information (“PHI”).

Historically, an attorney-in-fact was vested with various authorities when an individual (“the principal”) temporarily or permanently lost the capacity to make health care decisions.

Sub. H.B. 126 provides that an attorney-in-fact may be permitted to access a principal’s health information *regardless* of whether the principal has lost the capacity to make informed health care decisions. This authority is effective upon the execution of the durable power of attorney instrument (or any other time, if specified). It is important to note that the ability to access health information *must* be expressly authorized in the instrument itself for this authority to become effective. *See* O.R.C. § 1337.12 and 1337.13.

What is a Durable Power of Attorney for Health Care?

- A legal instrument that empowers a named “attorney-in-fact” to make a variety of health care decisions, consistent with an individual’s wishes.
- Becomes effective when an individual is temporarily or permanently unable to make informed decisions regarding health care treatment.

What is a Living Will?

- A legal instrument that governs an individual’s wishes to withhold or withdraw life-sustaining treatment.
- Becomes effective only when an individual is unable to communicate due to permanent or terminal illness.

The Ohio Bar Association is expected to release a durable power of attorney (“DPOA”) for health care form that includes this new authority in compliance with Sub. H.B. 126.

Given the potential for an attorney-in-fact to have immediate (or early) access to an individual's health care information, including PHI, there are practical implications that warrant consideration:

- Previously executed DPOA instruments need to be evaluated for compliance with the amended law.
- Individuals contemplating execution of a DPOA for health care instrument need to decide if they want their attorney-in-fact to have immediate (or early) access to their health information, and plan accordingly.
 - For example, if the instrument authorizes immediate access to health information, individuals can consider imposing additional requirements upon the attorney-in-fact to safeguard any health information in their possession.
- Medical records departments in hospitals, clinics, and physician offices have the added responsibility to ensure that any disclosure of PHI to an attorney-in-fact is both in accordance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and related regulations and authorized by the governing DPOA instrument.

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