

Fraud (cont. from page one)

The Criminal Investigative Service runs the Civilian Health and Medical Program of the Uniformed Services—CHAMPUS.

New Kid on the Block—HIPAA

In addition to the possibility that a billing fraud investigation will emanate from any one of several places, there is now the Health Insurance Portability and Accountability Act (HIPAA). In effect since 1996, HIPAA signifi-

cantly strengthened the government's grip on fighting health care fraud and abuse.

Built on the existing enforcement efforts of the DOJ and HHS, HIPAA adds new teeth by:

- creating a new criminal provision for health care fraud, theft or embezzlement in connection with health care offenses, false statements related to health care offenses and obstruction of criminal investigation;
- extending injunctive relief related to health care offenses (including freezing of assets);
- establishing forfeitures for

federal health care offenses;

● strengthening the ability of federal health care programs to exclude convicted health care providers;

● establishing the Medicare Integrity Program, which authorizes HHS to contract with private companies to carry out fraud and abuse investigations, cost report audits, utilization review and provider payment determinations;

● requiring establishment of a program that provides a nexus for the coordination of federal, state and local law enforcement investigations, evaluations and audits.

What This Means For You

According to the DOJ, health care fraud is its highest white-collar crime priority. Given this rapt attention by the federal government and the increasingly harsh penalties involved in fraudulent billing, you should ensure that you understand the actions that constitute this crime.

In this enforcement climate, you may just find there is no such thing as an honest mistake. The best advice: if you have any questions, consult your personal attorney.

Too Sick to Have a Say

In the first of this two-part series, the author reviews the ins and outs of the living will and durable power of attorney—legal documents that can keep you in control of your life even after an incapacitating illness or injury leaves you literally speechless.

FIRST IN A SERIES

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Up until the last 25 years or so, dying was a relatively simple issue. Medicine, however, has made incredible technological advances that are now extending the lives of people who, in the past, may have died within hours or days of a life-threatening illness or trauma.

Today, such patients may be kept alive indefinitely. Whether you approve or disapprove of such life-extending measures is a matter of personal choice. And you can hold on to that choice if you plan ahead with a living will or durable power of attorney.

You have undoubtedly heard a story about someone who is

extremely ill, unable to communicate in a coherent way and is being kept alive by a machine. His family, already grief-stricken over his condition, is now left to struggle with life and death issues.

His doctor, for a variety of reasons, is reluctant to "unplug" him. Perhaps you shake your head in empathy, pondering how you would handle such a situation for your own sake and that of your family.

In advance, here's the lesson to be learned:

● If you want to have at least some control over what happens to you when you are too ill to communicate your wishes, you should sign a living will or durable power of attorney for health care. Do it as soon as possible.

● Before you do that, however, you should learn what your state law spells out, or consult an attor-

ney. Each state has different provisions regarding those documents.

● Avoid a guardianship if possible. This is a relatively easy matter, since you eliminate the need for a guardianship if you have signed either a living will or power of attorney, or both. A court will appoint a guardian to make your decisions for you only in those documents' absence.

● Under certain conditions, some states allow a surrogate to make health care decisions for you. Again, signing a living will or power of attorney document is preferable because it tends to keep things clearer and simpler for everyone involved. Find out if your state has a surrogate law.

The living will

Usually a short document that employs certain legal language, the living will tells a patient's physician not to use specified

death-delaying procedures. In some states, you can create a list of the procedures you don't want used; in others, you can check off procedures you don't want used from a pre-printed list.

While most states permit living wills, not all death-delaying procedures may be withheld, with the extent of the limitations varying from state to state. Most states, for example, allow you to request that a heart-lung machine be withdrawn if you have a terminal illness. Other states will go further, though, allowing you to use your living will to tell your doctor not to give you food or water.

As you may have already surmised, the legal meaning of a terminal condition is key to the contents of a living will. The term's definition, or the actual term used, varies from state to state, but it usually refers to an incurable health problem that will lead to death in a matter of hours or days. In a true terminal condition case, the use of life support will only prolong imminent death.

Most states put that critical decision in the hands of the patient's personal or attending physician, while others may require a committee of physicians to rule on the

(See **Too Sick** page three)

Too Sick (cont. from page two)

question of terminal illness. In the vast majority of cases, the family doesn't make that decision.

Obviously, another key to a living will is to sign it while you are still able. But it doesn't go into effect until you are unable to communicate health care decisions. While you can still communicate, your living will does not apply, even if you have a terminal condition.

Once you fill out a living will, you should sign and date it. If you already have a personal attorney, that person can easily do the leg work, leaving you to read the document over and approve the language before you sign. Often, two people unrelated to you must witness this signing by signing the document themselves. From that point on, the living will speaks clearly for you if and when you are no longer able to communicate decisions about your health care.

The catch is that a physician may be under no obligation to follow your wishes, however. Remember, this is not a cure-all. If, for example, your physician has an ethical dilemma over ending death-delaying procedures, the law in your state may allow him or her to ignore your living will. In such a case, your physician is usually required to transfer your care to another physician who is willing to follow the requests in your living will.

It's always wise to talk with your personal physician after you fill out your living will to get his or her views on the use of death-delaying procedures. It's also a good idea to give your physician a copy of your completed and signed living will, accompanied with a note about the location of the original.

Make sure you understand the aforementioned limitations of a

living will before you sign one. A living will is not designed to make decisions for a seriously ill person who is not in a terminal condition.

Let's say, for example, that patient X has a stroke and lapses into a coma. His doctor concludes he will not come out of that condition, which medical professionals describe as a persistent vegetative state. However, even though patient X is in an essentially permanent coma, his heart and lungs continue to function on their own. He could remain alive for many years in this state and, even without food or water, it would still take a considerable period of time for him to die.

Although patient X has a living will, he is not in a terminal condition. In addition, his state prohibits a person from using a living will to request that food and water be withdrawn if that measure would result in death. So, even if the patient's living will were effective in his case, the physician still could not use it to stop food and water, even through a tube. The result? Patient X may be alive in a vegetative state for many years. If he has a family, that period of limbo could be torture for his spouse, children and close relatives and friends

Patient X may not have wanted to remain alive in his condition, but now he has no recourse. In his case another document, a durable power of attorney, would have been a big help.

Power of attorney

Under a power of attorney, you give someone else the authority to act on your behalf. In effect, that person becomes your attorney, a person who does for you what you would have done for yourself, such as signing a document.

Powers of attorney are common and very versatile. They can be very broad, allowing the attorney to take virtually any action on

your behalf. Or, they can be very narrow, allowing the attorney to do only one thing, such as selling your car.

A power of attorney historically has had a drawback: it was automatically revoked when the person granting the power became disabled. To rectify this seeming paradox, state legislatures have made certain powers of attorney long-lasting, or durable. Those remain effective even if you become disabled, so they serve as alternatives, or supplements, to living wills and guardianship proceedings.

Some states now have laws for durable powers of attorney for health care, for example. Like a living will, a health care power is a document that must be signed by you.

In most states, the signing also must be witnessed. Unlike a living will, a health care power does not give instructions to your physician. Instead, you appoint someone else to make your health care decisions and those are often not limited to life and death decisions. Your attorney, for example, may also have the right to have a physician administer specific kinds of psychiatric treatment. Your attorney can also be given the power to use all death-delaying procedures available if you are in a vegetative state or have a terminal illness.

Common sense dictates that whom you choose as your attorney for health care power is of paramount importance. One factor to consider is whether the person has the maturity or psyche to make such difficult decisions.

You also must have confidence that whom you choose will carry out your wishes to the letter. It makes sense to choose someone close to you such as your spouse, but you should discuss the matter together before you make a choice; you need to know what his or her views are beforehand.

Don't assume anything.

It's also wise to name a successor attorney at the same time you make your first choice because that person can act for you if your first choice can't. When your first choice is incapacitated for some reason, or dies unexpectedly, your power of attorney will be useless without a successor agent.

If you want to change attorneys or directions as to your health care, you have that right. You can simply revoke your designated health care power and create a new one, but to avoid any confusion, you should clearly and unequivocally revoke the old document. You just write the word "revoked" across it—or tear it up and dispose of it.

Should you have both?

If you live in a state that allows a living will and health care power of attorney, the latter usually overrides the former if you have signed both. If that's your situation, it's to your advantage, since the health care power covers more potential situations.

This begs the question: why, then, bother with a living will at all? The simple answer is it could pay to have both. You could, for example, be terminally injured in another state that does not allow a health care power.

Although there would be no guarantee in such an event, the state you're in might well adhere to your living will. If you had only health care power, a physician in another state might be constrained from following the instructions of the person you have named as attorney in your health care power. Or your agent might be unwilling to act, may be deceased or otherwise unavailable to act if, for example, he or she were out of the country.

Plan (cont. from page one)

voluntary contributions. In addition, because the contributions to the plan are not subject to social security tax, the employer often can save enough in taxes to offset the cost of administration. Of course, the employer can match all or a portion of the employee's contributions, but is not obligated to do so.

A flex plan must specify the types of expenses that can be reimbursed from the flex account. The most popular types of flex accounts are medical and dependent care.

A medical account can be used to reimburse almost any type of medical expense not covered by the employer's health policy, including deductibles and co-payments, non-covered expenses (such as routine checkups), medications and vision care (including the purchase of glasses).

Dental expenses that are not covered can be included in the same flex account as medical expenses, or there can be a separate dental account.

A dental expense flex account can be combined with a direct reimbursement program, in which employees pay all or a part of the

cost of their own reimbursements with before-tax dollars.

A medical flex account cannot be used to pay the employee's share of the basic health insurance premium. However, a premium conversion feature can be included in the same plan as a flex account, in order to allow employees to pay the insurance premium with before-tax dollars.

The second most popular type of flex account is the dependent care account. This type of account allows the employee to pay the cost of caring for a child or other dependent with before-tax dollars, generally up to a maximum of \$5,000 a year.

In addition to traditional day care centers, the cost of caring for a child in the employee's home—hiring a nanny, for instance—may be eligible for reimbursement. Although child care is the most common use of a dependent care flex account, the account can also be used to care for other dependents, such as a disabled spouse or elderly parent, so long as the care is necessary to enable the employee to work.

In conjunction with the establishment of a flex plan, an employer

may give employees the right to elect other forms of non-taxable benefits.

Flex plans often are used to enable employees to purchase additional life insurance with before-tax dollars. Beginning in 1998, employers also can allow employees to pay for parking or mass transit passes with before-tax dollars.

(Technically, this cannot be part of

The worst aspect of flex plans: employees must decide at the beginning of the year what amount to be credited to their flex account and cannot change that amount unless there is a "change in family status."

a flex plan, but it can be made part of an overall program of flexible before-tax benefits.)

The worst aspect of flex plans: employees must decide at the beginning of the year what amount to be credited to their flex account and cannot change that amount

unless there is a "change in family status."

An employee who gets married or has a child during the year could generally change his or her flex account decision to take the change into account. Change for the sake of change, however, is not allowed.

Furthermore, under the IRS's "use it or lose it" rule, an employee must spend the entire amount in his or her flex account on qualified expenses during the year or forfeit the unused portion—this is why a lot of employees with unused flex account balances wind up buying glasses or having checkups in December.

This aspect of flex plans makes it necessary for an employee to consider carefully what level of medical or dependent care expenses he or she anticipates during the year before making the annual decision. Despite this drawback, companies with flex plans have found that, so long as employees understand the rules, the benefits of flex plans far outweigh the disadvantages.

As a result, flex plans are rapidly becoming a standard part of every employer's benefit program—as indispensable as basic medical coverage.

Too sick to have a say

In Part I of this series, the author described living wills and durable powers of attorney, two documents that help you keep control of your health decisions even after you've been incapacitated by illness or injury. Part II looks at health care guardianships and surrogates.

SECOND OF TWO PARTS

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In most states, if you become incapacitated from illness or injury and don't have a signed

living will or durable power of attorney for health care, your fate will probably rest in the hands of a judge who will appoint a guardian.

There may be a surrogate law that applies in some states. In either case, another person will be making life and death decisions for you. While a guardianship or a sur-

rogate can work for you, the best advice is to sign a living will or durable power of attorney. To cover yourself for the broadest range of potential situations, sign both.

Guardianships

The bottom line on guardian-

ships is this: avoid them if possible. The procedure involved in the probate court to set up and administer a guardianship can be time-consuming, lengthy and expensive.

It could take several months before a formal hearing is even held. Meanwhile, nearly everyone involved will have his or her own attorney and own attorney's bills.

And while a judge will make a good-faith effort to determine what a patient's wishes are—or would have been—there is no guarantee the eventual decision will, in fact, reflect them. In other words, if a guardianship becomes necessary, you are rolling the dice on your fate.

For example, a man watching a

television news report about someone being kept alive by a respirator casually remarks to his wife that he wouldn't want to end up that way. A month later, he is in exactly that situation after a car accident.

A judge appoints a guardian, but the guardian does not have the authority, without court approval, to request removal of death-delaying measures. So the guardian requests permission, but in some states a judge will require strong evidence that the patient is in a terminal state before granting such authority.

At a hearing, the judge also wants testimony from family and friends to help him determine whether the patient would discontinue treatment if he or she were able to decide.

The incapacitated patient's wife duly testifies about her husband's remark a month ago, but even that may not be enough to convince a judge that the man would want to withdraw use of a respirator.

Had he specified in a living will or durable power of attorney that he did not want to remain on a respirator, the chances would be far greater that his wishes would be carried out—simply because he made those wishes unequivocally clear when he was able.

The procedure for appointing a guardian varies from state to state. But it usually starts when a relative or friend of the patient, or the patient's physician, formally requests that a court appoint a guardian.

Don't expect your physician, no matter how long-standing the relationship, to make such a decision in the absence of a living will or health care power. There is little doubt that without either or both of those documents, a physician will act very cautiously.

He or she may make no decision at all until a guardian is appointed and given the legal authority to make decisions on a

Some facts about age

Just under 9 percent of U.S. dentists responding to the ADA's 1996 Survey of Dental Practice were 65 years old or older.

Other facts gleaned from the survey:

- Fully two-thirds (66 percent) of U.S. dentists ranged in age from 40 to 64 years.
- 26 percent were under 40 years old.
- Just 2 percent were under 30.
- 43 percent of responding dentists had graduated from dental school before 1975.
- 43.5 percent graduated between 1975-86.
- 13.7 percent had graduated since 1986.

patient's behalf. Only in the case of a minor might a child's parents have the legal authority to make life-and-death decisions without a judge's approval. For adults, a guardianship proceeding will likely be the only way.

First, the court will appoint an interim guardian, or a *guardian ad litem*. This person steps in for the patient and recommends at a formal hearing whether a health care guardian should be appointed.

This interim guardian also often comments on what the scope of a permanent guardian's power should be. In some states, a judge has more discretion over the decision to withdraw life support, as in cases in which a patient is not terminal but in an irreversible coma. In such a case, the testimony of one or more physicians would probably be required.

Surrogates

As the title implies, a surrogate is a substitute for you, usually in the absence of a living will, health care power or health care guardian.

In some states, a surrogate may be an alternative to a health care guardian, however. Usually, a surrogate can act only if a patient has a "qualifying condition."

Under most surrogate laws,

Only in the case of a minor might a child's parents have the legal authority to make life-and-death decisions without a judge's approval.

that means the patient is terminal or is in a persistent vegetative state. In that case, a surrogate can make health care decisions without getting court approval, but only if a terminal patient is incapable of making decisions for himself and there is no other recourse such as a living will or health care power.

Each state's laws spell out who can be, and should be, the surrogate. A parent of an unmarried, childless patient, for example, is generally given top priority to act as the surrogate. Second priority is often given to a sibling.

If the patient has a living parent and sibling, the parent would make health care decisions for the patient. But if the parent were unable to act, or was unwilling to do so, the sibling would then act as surrogate.

The drawbacks to a surrogate are two-fold. First, only some

states have surrogate laws.

Second, someone else is making your decision for you on how to die.

Even when the surrogate is a longtime spouse or an adult child who knows you intimately, there is no guarantee he or she will really know what your wishes would have been because you did not make the decision when you were able. That level of control comes only with a living will or health care power.

Durable Power for Property

Many states allow various durable powers of attorney, such as that for property. This directs a person appointed by you to handle some or all of your property.

A durable power for property could be limited to selling one piece of real estate, but it usually allows the appointee to manage, invest or sell all of your property.

In any case, you will likely want to choose someone whose business judgment you trust. You may feel most comfortable naming someone very close to you, such as your spouse. If you have durable powers for health and property, you should also consider naming different people to carry out each task.

Referred to as property management power for short, this provision in some states is achieved through a standard form. In other states, however, the power must be custom written. In either case, you sign the document, which in most situations should then be notarized.

A property management power can be non-durable, which automatically revokes it if you become incapacitated. But for most situations, you will want a durable property management power because it will remain intact if you do become incapacitated—when you will likely need it most.