

Personal Representatives Who are they? How do you deal with them?

When a person other than the patient is making decisions on the use or release of PHI for the patient you need to be very sure that person qualifies as a Personal Representative under HIPAA. Just being a caregiver does not satisfy the requirements of a personal representative. Multiple State and Federal laws may need to be considered in addition to HIPAA.

Understanding and having a policy for dealing with personal representatives in advance of a problem will help your office avoid issues and possible legal situations. If you deal with minors and/or seniors frequently advanced training for employees on handling questions will help them avoid unpleasant experiences.

Under HIPAA, a person authorized under State or other applicable law (e.g., tribal or military law) to act on behalf of the individual in making *health care related decisions* is the individual's "personal representative." In order to determine if a person is a personal representative under HIPAA, you must first understand multiple State laws that define who can act on behalf of a patient and under what circumstances.

Personal representatives may include the following:

- Person authorized/ordered by the court
- Parent(s) of juveniles under 18 years of age with some exceptions
- Person, other than parent, acting *in loco parentis* (of minor). Foster parents may or may not be personal representatives. The State may retain that right. Check with State law.
- Guardian as defined by State law
- Person with health care power of attorney. The health care power of attorney document should define the scope of the personal representation with respect to access to individually identifying health information. The individual may also be referred to as the "health care agent" or "health care attorney-in-fact"
- Executor/Administrator of Estate (of deceased person)

In general, the scope of the personal representative's authority to act for the individual under the Privacy Rule derives from his or her authority under applicable State law to make health care decisions for the individual. Where the person has broad authority to act on the behalf of a living individual in making decisions related to health care, such as a parent with respect to a minor child or a legal guardian of a mentally incompetent adult, the covered entity must treat the personal representative as the individual for all purposes under the Rule, unless an exception applies. (See below with respect to abuse, neglect or endangerment situations, and the application of State law in the context of parents and minors).

HIPAA requires a Covered Entity to verify the authority of personal representatives

While State law defines who is a “personal representative”, the HIPAA Privacy Rule does require healthcare practices to verify a personal representative’s authority under that law. Your authorization form should contain a section that asks the personal representative to state their authority. The only way you can ensure the authority exists is to have some documentation to that effect in your records.

You may choose to share information about immediate care with a caregiver. This does not mean that caregiver has the authority to make decisions about the access, release and use of all of the patient’s PHI to others.

- If someone signs saying they have a Power of Attorney, you should have a copy of the PA for your records.
- If a foster parent says they have authority under the laws of your State, verify the law.
- If a person states they have authority to act for a senior patient, ask for the legal authority. Even if a patient has dementia that does not authorize a child or other person to make decisions for them without the proper legal authority.

Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the representation.

- For example, a person with an individual’s limited health care power of attorney regarding only a specific treatment, such as use of artificial life support, is that individual’s personal representative only with respect to protected health information that relates to that health care decision - The covered entity should not treat that person as the individual for other purposes, such as to sign an authorization for the disclosure of protected health information or to authorize release of all PHI to another entity.
- If a person has a general power of attorney to manage financial issues for the patient, this does not allow the person to make health related decisions unless they are specifically mentioned. Therefore they are not authorized to control the use or release of PHI.
- When the power of attorney states the person can make health decisions if the patient is not physically able to make them for themselves, you would not allow that person to make decisions that the patient could make if they were present. Likewise do not allow this person to authorize the use or disclosure of PHI.

Acting as a personal representative for a deceased patient is a little different.

In the case of a deceased patient where the person has authority to act on behalf of the deceased individual or his estate, which does not have to include the authority to make decisions related to health care, the covered entity must treat the personal representative as the individual for all purposes under HIPAA. State or other law should be consulted to determine the authority of the personal representative to receive or access the individual’s protected health information (PHI). Executors and Administrators have the authority to make decisions related to the use and disclosure of PHI. If there is no will and no one has been appointed by the court, State law usually defines who the personal representative will be.

Who must be recognized as the Individual’s Personal Representative?

The following chart displays who must be recognized as the personal representative for a category of individuals:

If the Individual Is:

The Personal Representative Is:

An Adult or
An Emancipated Minor

A person with legal authority to make health care decisions on behalf of the individual

Examples: Health care power of attorney
Court appointed legal guardian

An Unemancipated Minor

A parent, guardian, or other person acting *in loco parentis* with legal authority to make health care decisions on behalf of the minor child

Exceptions apply. See the article on Minors.

Deceased

A person with legal authority to act on behalf of the decedent or the estate (not restricted to health care decisions)

Examples: Executor of the estate
Next of kin or other family member
Durable power of attorney

Parents and Unemancipated Minors

The Privacy Rule defers to State or other applicable laws that address the ability of a parent, guardian, or other person acting *in loco parentis* (collectively, “parent”) to obtain health information about a minor child. In most cases under the Rule, the parent is the personal representative of the minor child and can exercise the minor’s rights with respect to protected health information, because the parent usually has the authority to make health care decisions about his or her minor child.

Regardless of whether a parent is the personal representative, the Privacy Rule permits a covered entity to disclose to a parent, or provide the parent with access to, a minor child’s protected health information when and to the extent it is expressly permitted or required by State or other laws (including relevant case law). Likewise, the Privacy Rule prohibits a covered entity from disclosing a minor child’s protected health information to a parent, or providing a parent with access to, such information when and to the extent it is expressly prohibited under State or other laws (including relevant case law). Thus, State and other applicable law governs when such law explicitly requires, permits, or prohibits the disclosure of, or access to, the health information about a minor child.

The Privacy Rule specifies three circumstances in which the parent is not the “personal representative” with respect to certain health information about his or her minor child. These exceptions generally track the ability of certain minors to obtain specified health care without

parental consent under State or other laws, or standards of professional practice. In these situations, the parent does not control the minor's health care decisions, and thus under the Rule, does not control the protected health information related to that care. The three exceptional circumstances when a parent is not the minor's personal representative are:

- When State or other law does not require the consent of a parent or other person before a minor can obtain a particular health care service, and the minor consents to the health care service;

Example: A State law provides an adolescent the right to obtain mental health treatment without the consent of a parent, and the adolescent consents to treatment without the parent's consent and no other state law grants access anyway.

- When a court determines or other law authorizes someone other than the parent to make treatment decisions for a minor;

Example: A court may grant authority to make health care decisions for the minor to an adult other than the parent, to the minor, or the court may make the decision(s) itself.

- When a parent agrees to a confidential relationship between the minor and the physician.

Example: A physician asks the parent of a 16-year-old if the physician can talk with the child confidentially about a medical condition and the parent agrees.

Even in these exceptional circumstances, where the parent is not the "personal representative" of the minor, the Privacy Rule defers to State or other laws that require, permit, or prohibit the covered entity to disclose to a parent, or provide the parent access to, a minor child's protected health information. Further, in these situations, if State or other law is silent or unclear concerning parental access to the minor's protected health information, a covered entity has discretion to provide or deny a parent access to the minor's health information, if doing so is consistent with State or other applicable law, and provided the decision is made by a licensed health care professional in the exercise of professional judgment.

Few states have clear laws on dealing with parental access to the records of minors. Multiple state laws are usually involved. Most such laws were passed before HIPAA and therefore are not clear on how the two relate.

- Laws establishing when a minor can authorize treatment without parental approval - Under HIPAA this usually means the minor controls the use and release of the PHI related to that treatment. The minor's authorization is needed to release this information even to the parent. However another state law may give the parent access to the information even under these circumstances.
- State laws on mental health treatment or drug abuse may establish specific circumstances where parents can or cannot access records.

There are many different situations that can be involved. Read more about minors and the need to develop policies in advance on the release and use of PHI of minors.

Abuse, Neglect, and Endangerment Situations

When a physician or other covered entity reasonably believes that an individual, including an unemancipated minor, has been or may be subjected to domestic violence, abuse or neglect by the personal representative, or that treating a person as an individual's personal representative could endanger the individual, the covered entity may choose not to treat that person as the individual's personal representative, if in the exercise of professional judgment, doing so would not be in the best interests of the individual. For example, if a physician reasonably believes that disclosing information about an incompetent elderly individual to the individual's personal representative would endanger that individual, the Privacy Rule permits the physician to decline to make such disclosure.