



Powers of Attorney, Health Care Directives, and Substitute Decision Makers Frequently Asked Questions

In this document, unless the context indicates otherwise, "member(s)" includes licensed pharmacist(s) and pharmacy technician(s).

BACKGROUND

This document is intended to provide guidance to members with respect to scenarios that are commonly encountered in the context of powers of attorney, health care directives, and substitute decision makers.

This document is intended to supplement the *Guidelines for Pharmacists and Pharmacy Technicians Respecting Powers of Attorney, Health Care Directives and Substitute Decision Makers*, available online [here](#) (the "Guidelines"). Please see the Guidelines for more information regarding situations where members must determine who is authorized to make treatment decisions for individuals who are unable to make these decisions themselves, as well as for further discussion regarding the application of *The Health Care Directives and Substitute Health Care Decision Makers Act* (the "Substitute Decision Makers Act"), *The Powers of Attorney Act, 2002* (the "POA Act") and *The Health Information Protection Act* ("HIPA") to these situations.

FREQUENTLY ASKED QUESTIONS

- 1. The siblings of my deceased patient want prescription information of the deceased patient for a claim to an insurer to settle the patient's debts and estate. The deceased patient has no will or expression of estate. Can I provide my deceased patient's prescription information to the siblings?**

There are two scenarios in which a deceased patient's prescription information (which is the patient's personal health information or PHI) can be released to the siblings where the patient has no will or expression of estate (in which case the patient has died "intestate"):

- (a) You can disclose PHI to a personal representative of the deceased patient for a purpose relating to administration of the deceased's estate (such as to claim to an insurer to settle debts and the estate) (s. 27(4)(e)(i) and s. 56(a) of HIPA). Where a patient has died intestate, various persons are entitled to apply to be the deceased's personal representative, including the deceased's siblings. It will be important to determine whether someone has in fact been appointed as the individual's personal representative, and if so, to obtain a confirmation (such as a copy of the letters of administration) for your records.
- (b) You can disclose PHI to a member of the deceased patient's immediate family (or to someone with whom the deceased had a close personal relationship), provided that (a) the PHI relates to services recently received by the deceased patient; and (b) such disclosure is made in accordance with your policies, procedures, and ethical practices (s. 27(4)(e)(ii) of HIPA).

In all cases, disclosure should only be made where there is a legitimate need-to-know and should be limited to the minimum amount of PHI that is reasonably necessary to meet the relevant purpose (s. 23(1) of HIPA).

2. The daughter of my deceased patient is an attorney under a power of attorney granted by my deceased patient. The daughter wants the drug profile of my deceased patient. Can I provide my deceased patient's drug profile to the daughter?

Under the POA Act, the authority of an attorney under a power of attorney ends when the grantor dies (s. 19 of the POA Act). As a result, the daughter would no longer be an attorney under the power of attorney after her mother has passed away. However, it is important to note that someone who was an attorney under a power of attorney will often also be the executor under the deceased's will. Please see the scenarios discussed in Question #1 for the circumstances in which the PHI of a deceased patient can be released.

3. My patient has two adult children, one of whom is a stepchild. Neither child is an attorney under a power of attorney, and the patient does not have a health care directive or personal guardian. Both children have requested access to my patient's prescription information: (a) can I provide my patient's prescription information to both children; and (b) can the children make a health care decision on behalf of the patient?

(a) There are a few options for release of the patient's PHI to the children:

- a. If the patient has capacity, you can ask for the patient's written or verbal consent to release the patient's PHI to the children. With the patient's consent, you can release the patient's PHI to both children (s. 27(1) of HIPA). You should document the consent for your records.
- b. Regardless of whether the patient has capacity, you can release the patient's PHI to the patient's next of kin or someone with whom the patient has a close personal relationship, provided that: (i) the PHI relates to health services currently being provided to the patient; (ii) the patient has not expressed a contrary intention to such disclosure; and (iii) such disclosure is made in accordance with your professional and ethical obligations (s. 27(2)(c) of HIPA).
- c. If the patient does not have capacity, you can release the patient's PHI to the child who qualifies as a substitute decision maker (as the "nearest relative") under the Substitute Decision Makers Act if they require the information to make a health care decision on behalf of the patient (s. 27(4)(d) of HIPA). Please see the Guidelines for a more detailed discussion of how to determine whether someone is a "nearest relative".

(b) If the patient does not have capacity, the child who qualifies as the "nearest relative" under the Substitute Decision Makers Act is entitled to make a health care decision on behalf of the patient. Please see the Guidelines for a more detailed discussion of how to determine whether someone is a "nearest relative". In the case of two adult children: (a) the decision of the oldest of the two is preferred; and (b) unless the

stepchild was adopted, the decision of the natural child is preferred over that of the stepchild (s. 15(3) of the Substitute Decision Makers Act).

In all cases, disclosure should only be made where there is a legitimate need-to-know and should be limited to the minimum amount of PHI that is reasonably necessary meet the relevant purpose (s. 23(1) of HIPA).

4. Who is entitled to make health care decisions for adults in group homes who do not have capacity?

There are a number of possible scenarios and individuals who may be entitled to make health care decisions for adults in group homes who do not have capacity. You will need to make a case-by-case assessment, but the following are some common examples of individuals who may have authority to make such health care decisions:

- (a) If the person has a personal guardian appointed under *The Adult Guardianship and Co-decision-making Act* (the "Guardianship Act"), the personal guardian may make health care decisions for the person if such decisions are specifically permitted under the court order appointing him or her as personal guardian (s. 24 of the Guardianship Act). You should ask for and keep a copy of the court order for your records.
- (b) If the person has made a health care directive that addresses the specific situation or appointed a proxy, the health care decision can be made in accordance with the health care directive or by the appointed proxy (s. 5 of the Substitute Decision Makers Act). You should ask for and keep a copy of the health care directive for your records. Please see the Guidelines for a more detailed discussion of health care directives and proxies.
- (c) If the person has not made a health care directive that addresses the specific situation, and no personal guardian or proxy has been appointed, the treatment decision falls to the "nearest relative" (ss. 15 and 16 of the Substitute Decision Makers Act). Please see the Guidelines for a more detailed discussion of how to determine whether someone is a "nearest relative".
- (d) If the person has not made a health care directive that addresses the specific situation, and no personal guardian, proxy, or nearest relative is available (and a reasonable attempt has been made to find a nearest relative), you may provide treatment to the extent reasonably necessary and in the best interests of the person if you believe the treatment is necessary and a second treatment provider agrees in writing that the treatment is needed (s. 16(4) of the Substitute Decision Makers Act).
- (e) If the individual is a professed member of a prescribed religious order, ecclesiastical authorities designated by prescribed religious orders may make health care decisions on behalf of the individual in certain circumstances (s. 17 of the Substitute Decision Makers Act).
- (f) Where no personal guardian, proxy, or nearest relative, is readily available to make a health care decision, "caregivers" can make health care decisions with respect to "day-to-day treatments" (s. 17.1 of the Substitute Decision Makers Act). Please see the *Guidelines for Pharmacists and Pharmacy Technicians Respecting Powers of Attorney, Health Care Directives and Substitute Decision Makers* for a more detailed

discussion of how to determine when someone is a "caregiver" and when they can make decisions for "day-to-day treatments".

5. The son of my patient is an attorney under a power of attorney granted by my patient. The son is requesting prescription information in order to file a tax return. Can I provide my patient's drug profile to the son?

You can release a patient's PHI to his or her attorney under a power of attorney for financial matters (including filing tax returns), provided that: (a) the power of attorney gives the attorney the authority to handle financial matters on behalf of the patient; (b) the PHI is required to manage the patient's financial affairs; and (c) the PHI released is limited to the minimum amount of PHI required to manage the patient's financial affairs (ss. 23(1), 27(1) of HIPA). You should ask for and keep a copy of the power of attorney for your records.

6. What if someone is both a "nearest relative" under the Substitute Decision Makers Act as well as an attorney under a Power of Attorney and (a) wishes to make a health care decision for a patient; or (b) wishes to access a patient's PHI?

(a) Where someone is both a "nearest relative" under the Substitute Decision Makers Act as well as an attorney under a power of attorney, the determining factor as to whether that person can make a health care decision is whether he or she is permitted to make a health care decision under the Substitute Decision Makers Act. As such, you have to look to the Substitute Decision Makers Act to determine if that person has authority to make a health care decision and not the power of attorney. Please see the Guidelines for a more detailed discussion of how to determine whether someone has authority to make a health care decision.

(b) Please see the options outlined in Question #3 and Question #5 for circumstances in which PHI can be released to a substitute decision maker or power of attorney.

This Frequently Asked Questions document is intended to provide general guidance only, and is not intended to be an exhaustive review of all requirements of the applicable legislation, or of all situations members may encounter. Members requiring assistance in interpreting these Frequently Asked Questions are encouraged to contact the Saskatchewan College of Pharmacy Professionals at 306-584-2292.