

Will "HIPAA" Sabotage Your Estate Plan?

You may have recently noticed that your doctor, other health care providers and pharmacy now ask you to sign a receipt for their "Notice of Privacy Practices".

The reason for this is a new law - - one intended to protect your personal information from identity theft or public disclosure - - which, unfortunately, also dramatically impairs your estate plan in several unforeseen and unintended ways.

The Health Insurance Portability and Accountability Act ("HIPAA") was passed by Congress to provide a secure way for health information to be passed from one health provider to another, or from health providers to insurance companies and to individuals (including the person whose information is involved).

HIPAA strictly limits the disclosure of your medical information by virtually every physician, dentist, psychiatrist, nurse, other health care provider and pharmacist, and imposes fines of up to \$250,000 as well as jail time for up to 10 years, in the event any health information is wrongfully disclosed.

Why HIPAA Affects Your Estate Plan

Statistically, there's better than a 50% chance you'll someday suffer a serious accident or illness and become unable to handle your financial and medical decisions. In that event, your estate plan documents provide for a successor to take over for you. Your Living Trust and your Durable Power of Attorney for Property ("Estate and Personal Planning Uses") take care of your financial decisions. Your Advanced Health Care Directive (previously two documents known as the "Durable Power of Attorney for Health Care" and "Living Will") takes care of your health care and treatment decisions.

Your successor decision makers cannot step in and make decisions for you unless they first obtain two doctor letters certifying your inability to make decisions yourself. If your successor can't get these letters, he or she may instead have to go to court to declare you "incompetent" - - in what can be an expensive, lengthy and embarrassing conservatorship proceeding. Furthermore, your health care decision makers will urgently need access to your medical information in order to make critical health decisions for you!

Clearly, you would prefer for your successors to have immediate, hassle-free access to your medical records so they may obtain the doctor letters, avoid court and handle your important matters right away. Unfortunately, HIPAA can prevent your successors from getting the medical records and doctor letters they need and force them to go into court!

California Law Complicates the Matter!

Along the way, California decided to pass its own version of HIPAA, known as the California Confidentiality of Medical Information Act ("CMIA"). This contains even stricter privacy protection rules and potentially exposes health providers to even greater penalties and to lawsuits. Normally, federal law supersedes or "preempts" state law, but in this case HIPAA provides that more restrictive state laws are to control! So, now we've been stuck with *two*, great big, complicated laws!

Sorting out all this intertwined law and figuring out how to respond to it has been a huge process for health providers and for us. That's why you haven't heard from us, even though the new law became effective in April of 2003. Over the past two years, we have attended numerous continuing education programs, and spent over 100 hours doing legal research! Fortunately, the health care providers are only now starting to seriously implement HIPAA, so we haven't run into any significant problem in getting a client's medical information so far - - but it *will* be a real problem in the immediate future!

Isn't an Authorization to Release Medical Information Sufficient?

Our policy has always been to thoroughly research new laws and develop practical solutions we feel confident are going to work, rather than to immediately jump in and recommend estate plan changes. For example, we have already seen numerous estate planners advise their clients to merely sign an "Authorization to Release Medical Information" and tell their clients that's all they need to take care of the problem - - but that's *wrong!*

First of all, neither HIPAA nor CMIA provide one standard "form" for such authorization. And relying on an authorization form provided by a specific health care provider, a government authority or agency, or even one attorney speaking at a continuing education program may be a big mistake! We have critically examined the exact wording of the law, and almost all forms we've seen are inadequate!

Many planners creating HIPAA authorizations fail to include certain required disclosures to the signing party and fail to refer to specific terminology of the Act, thereby threatening the validity and acceptance of the authorization by third parties holding your medical information. Furthermore, many HIPAA authorizations do not properly consider the more restrictive requirements of CMIA, such as the requirement of a specific size type, a completely separate document, identification of the specific uses of the medical information and a specific termination date for the authorization! Worse yet, many authorizations are overly broad and may give others access to your medical information when it's not yet necessary or appropriate!

Most importantly, very few planners have considered the impact of HIPAA and CMIA on your other estate plan documents. Your Living Trust, Will, Durable Power of Attorney for Property and Advance Health Care Directive all should be updated to include provisions that will permit your successor trustee or agent to sign a valid authorization on your behalf if you become disabled and your authorization is invalid due to changes in the law, or because it's too old or simply can't be located.

These documents also need to provide a set of alternate or back-up procedures if your authorization or the one signed by your successor trustee or agent can't be properly implemented, even though it may be valid. For example, your doctor might refuse to honor your authorization because he may question your legal capacity at the time it was signed or he narrowly interprets the kind of information permitted to be released and decides to withhold some important item. Or, because he's scared off by all the severe penalties, he may refuse to write a letter stating you are incapacitated. If you don't have a back-up procedure in your estate plan documents to cover these kinds of events, then you may be forced into a court conservatorship!

As if all of this isn't complicated enough, we also have to consider what may happen if you're disabled or deceased and one of your successor trustees or agents then becomes incapacitated. How will your documents permit the next named successor to step in immediately if they don't have a proper Authorization to Release Medical Information from the first successor who can no longer act? We have come up with a practical mechanism to deal with this issue so, again, you can avoid going to court.

KM&O Amendment Package Now Available

We've put together a package of upgraded documents that will enable your estate plan to continue to function smoothly, as intended, should you or one of your successor trustees or agents ever become incapacitated because of illness or accident. This package includes an Authorization to Release Medical Information, an Amendment to your Living Trust, a Codicil to your Will, a new Power of Attorney for Property and a new Advance Health Care Directive.

We have specially discounted the cost of this package for a limited time only, so you'll want to take advantage of it right away!

Please note: this amendment package is designed for use only with our Kavesh, Minor & Otis Living Trust plan. If you have a Living Trust plan which was drafted by someone else, you may need to first upgrade your plan to our "model" in order to take advantage of the special discount.

These HIPAA changes are critically important to every estate plan - - including yours! That's why we strongly recommend that you keep your plan up to date by calling us and obtaining this important amendment NOW!