WALL STREET JOURNAL ARTICLE ON NEW FEDERAL HIPAA LAW

Privacy Rules Snarl Estate Planning

Medical-Data Obstacles Exist in New Regulations for the Power of Attorneys

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Dow Jones Newswires

New rules protecting medical privacy are inadvertently jeopardizing some estate plans.

Last year, a new body of national privacy standards was enacted under the Health Insurance Portability and Accountability Act. Under the new HIPAA rules, doctors aren't allowed to talk freely about a patient's medical condition and they can be fined, or even jailed, for passing along private health information without consent. **Also, people who have named someone as trustee or successor trustee to a trust may want to add some protections to their plan. That creates the potential for significant problems for people who have granted someone the power of attorney to take care of their medical needs or finances in the event they are unable to do so themselves. Many people now need to revise their estate plans to get around the new rules.**

The problem arises when the power-of-attorney documents are drafted in such a way - or state rules require them to be drafted in such a way – that the power for someone else to act on your behalf only "springs" into action if you become incapacitated, and not one moment before. **That means that under the new HIPAA rules, the person to whom you assigned power of attorney may not have access to your health-care information and so may never, legally, be able to prove that you are incapacitated. If that person can't prove your incapacity, the power to act as your agent can't spring into action.**

"It's kind of a catch-22 in that, with the springing powers, that person's power comes into play with the incapacity," says Sharon Quinn Dixon, an estate-planning attorney in Miami. "But who's going to make that determination if they don't have access to the health-care information in the first place?"

Although such estate-planning problems are easy to fix, they will require another trip to an attorney's office. And people shouldn't expect their planner to contact them. Most estate planners say they are dealing with the issue as clients come in for checkups but not reaching out to affected clients. The first step is to review your power-of-attorney documents. A power of attorney is someone you have named to legally act on your behalf, as your agent, and make decisions for you. People often have two power-of-attorney documents: One that names someone to handle the finances and one that names someone to oversee the health-care decisions. (It might be the same person named in each case.)

The fix is simple: **You need to draft a new Financial Power of Attorney with the HIPAA release authorization – also called a HIPAA waiver – that allows the person named with the springing powers to have access to your medical information**. This will give that person the right to talk to your doctor and see your medical records – but not the right to act on your behalf until the springing powers take effect. Estate planners think it is possible that health-care providers are more willing to tell people designated with a medical power of attorney that their powers have sprung. But any sharing of medical information with an unauthorized financial power of attorney almost certainly will be viewed as a breach of the HIPAA rules.

For people with trusts and other managed entities, such as family limited partnerships, the concerns are a little different: How do your heirs oust a trustee or a successor trustee who no longer can take care of the trust? In the past, estate-planning attorneys often would say in the trust documents that if the trustee is ever determined by a doctor to be unable to manage the trust, he would step down. And heirs could count on calling the trustee's doctor and getting that information.

Not anymore. "Under HIPAA, if you ask the doctor, 'Is he capable of serving?' The doctor's going to say, 'I can't tell you that,'" says Michael L. Graham, an attorney with Graham & Smith LLP in Dallas. A HIPAA authorization form isn't going to solve this problem, because the person who signs the form has the right to revoke it at any time. So an incapable trustee, by law, could revoke the form the moment concerned heirs start nosing around his doctor's office.

Instead, people will need to redraft the trust documents to add language that protects their heirs from HIPAA privacy rules. One tactic says that if the trust beneficiaries or co-trustees are concerned about a trustee's capacity, they can demand that the trustee get a certification from the doctor proving he is capable of serving in that role. Any refusal to provide the proper documentation will be viewed as a resignation.

This solution isn't foolproof, however. One problem estate planners see with this strategy is that it could give beneficiaries the power to unnecessarily demand a trustee's medical records. "You're really empowering the beneficiary with a hammer with which they can harass the trustee," says Robert J. Morrill, an attorney in Wellesley, Mass. It's preferable to give this task to a co-trustee and leave the beneficiaries out of it, he says.

-**Put Your Trust in Order**

If you've created a trust or a power-of-attorney document, you may need to update it because of new federal health privacy regulations.
-Contact your attorneys to let them know you need to change your documents-don't count on them contacting you.
-Sign a new Financial Power of attorney with a HIPAA Release Authorization allowing the individual with power of attorney to have access to your medical information.
-Add language to trust documents allowing you to require a trustee or successor trustee to provide medical information proving their capacity.
-Sign a new Advance Health Care Directive and Directive to Physician with the HIPAA Release Authorization to allow your Power of Attorneys for Health Care to access your private medical information proving their capacity.