New HIPAA Law Prevents Physicians From Disclosing Protected Health Information to Patient's Family or to Successor Trustees

Clients Need to Take Action Now

If You Have a Living Trust, You Now Need A HIPAA Form

The United States Congress recently stirred things up in the estate planning world by passing privacy laws that seriously impact successor trustee clauses and powers of attorney. Most Living Trusts rely on letters of incapacitation obtained from licensed physicians in order to activate the powers of the successor trustee and the Durable Powers of Attorney. However, because of the new privacy provisions of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 45 CFR §§ 160, 164, (affectionately referred to as HIPPA), physicians, hospitals, nursing homes facilities and insurance companies may not issue confidential health information or write vital letters of incapacitation for use by your successor trustee or attorney in fact without special written authorization, as required by HIPAA.

The primary purpose of HIPAA is to protect personal information in an era where identity theft is rampant and private information is becoming more and more public. As the most recent January 2004 revisions to HIPPA now stand, any physician, hospital, insurance company, nursing home facility, or organization, who discloses "individually identifiable health information" to non-authorized parties is subject to steep fines and possible imprisonment ranging from $100 to $250,000 and ten years in prison.

As a result physicians will only write "letters of incapacitation" for your successor trustee if you have an up-to-date, signed and notarized HIPAA form. If your Living Trust was created before January 2004, then you do not have this required HIPAA form because it was only recently passed into law.

The following illustration will describe why the HIPAA form is so important: For example, Mrs. Jones, who already has a living trust, is no longer able to handle her financial affairs because of the progression of Alzheimer's disease. According to Mrs. Jones' Living Trust, in order for her successor trustee to take over the administration of the trust assets, her trustee must first obtain two "letters of incapacitation" written by two licensed physicians. However, Mrs. Jones' Living Trust was created
prior to January 2004, and she does not have the HIPAA form as required by the new law. As a result, the physicians, fearing severe fines or imprisonment, refuse to write the letters for the trustee without the HIPAA form. The problem is further complicated because Mrs. Jones now has Alzheimer's disease and no longer has the capacity to sign a HIPAA form. The unfortunate result of this serious dilemma is that the trustee must now go to Probate Court to have the successor trustee formally appointed. The delay and expense of this costly court proceeding could have been avoided if a HIPAA form would have been available to the physicians.

The new law poses an interesting problem for successor trustees or attorneys-in-fact, since they cannot become "acting agents" until after they have obtained "letters of incapacity". Specifically, your Living Trust requires the trustee to first obtain those letters of incapacitation before the he or she can begin to act on your behalf. However, without the written HIPAA authorization form, physicians will no longer write the letters of incapacitation.

Physicians have a tremendous disincentive to assist patients by writing letters of incapacitation without properly drafted HIPAA Authorization forms. And, without letters of incapacitation many individuals and families will have to go to the probate court and incur substantial unnecessary legal fees in order to have the successor trustee appointed. This problem is easily avoided with the HIPAA Authorization form. Therefore, all clients must now have HIPAA authorization forms to avoid a "living probate", conservatorship, or unnecessary court proceedings in the event of incapacitation. A Durable Power of Attorney alone is not enough.

To solve this problem, each client with a Living Trust is being advised to create a HIPAA Authorization form which should be signed and placed in a safe place, or in the client's Estate Planning Binder, in the sections entitled Advance Health Care Directive or Physician's Directives.

All existing clients who established their living trusts prior to January 2004, are advised to create HIPAA forms as soon as possible.

In order to provide our existing clients with this newly required document, Citadel Law Offices will be offering customized HIPAA Authorization forms to all clients for a total of $125 for each married couple, or $95 for an individual. (These low fees are relatively modest compared to the $300 to $400 charged by many law firms who provide HIPAA forms).

For your convenience, when you request your new HIPAA forms from Citadel, you can save money by taking the forms to your Certified Citadel Estate Planner, CCEP, or by coming directly into Citadel Law Offices for notarization where there will be no charge for the notary public service.

Your Living Trust and estate planning documents were designed to save you and your family time and money, but because some laws do occasionally change, you must periodically update some of your documents. Because of this recent change in the law, adding a HIPAA Authorization form to your Living Trust and Estate Planning documents will help insure that your Estate Plan remains up-to-date and effective. Fortunately, the HIPAA Authorization form is simple and should only take a few minutes of your time to complete and sign.

To order your new HIPAA Authorization form, please fill out the enclosed HIPAA Form request card and mail it to Citadel Law Offices, no postage required. Please be sure to enclose either a check or credit card number for payment.

Within days after receiving your HIPAA Form request card, we will promptly create your new HIPAA forms and mail them to you for your signature. You may then take them to any Notary Public, or you may bring them into Citadel Law Offices or your CCEP for notarization without charge. If you would like to come into the office, please call to schedule an appointment prior to your visit.

If you have any concerns or questions regarding the new HIPAA law, please contact your Certified Citadel Estate Planner, or call Citadel Law Offices directly at 949-852-8181.