

## HHS advises how to handle patient info for lawsuits

### Physicians should check HIPAA privacy rules when subpoenaed for patient records.

WASHINGTON—Recently published federal guidance helps clarify when and how physicians should release patient information when it is requested for litigation.

The information spelled out in this new advice from the Health and Human Services Dept. falls under the Health Insurance Portability and Accountability Act's patient privacy protections. ➔

For example, a physician who is not party to a lawsuit should know before giving up records that HIPAA requires that a good-faith effort be made to inform the patient that his or her medical records have been requested. The request could come via subpoena, discovery, board of medicine inquiry or other legal process. The patient also must be given sufficient time to respond, object or try to limit the scope of the request.

In many cases, a copy of the subpoena or request can serve as adequate notice.

But the privacy regulation left open the question of whether it is OK to release protected health information even if the notification was sent to the patient's lawyer and not directly to the patient, said Sharon Lee Johnson, an attorney at Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson in Miami.

The answer is yes, notification to the lawyer will suffice, according to the new guidance, which was published as an addition to HIPAA frequently-asked-questions materials.

Doctors still can try to get signed authorization from the patient before releasing the information, but the law does not specifically require that.

But these requirements are suspended if the physician is a party to the litigation. Examples include a doctor suing for reimbursement or being sued for medical liability. At this point, the

disclosure of patient health information would fall within the purview of the privacy regulation's health care operations provisions, which apply to day-to-day business activities rather than its litigation rules.

Physicians responding to a court order also can ignore the notification requirements under HIPAA.

But it is always a good idea when releasing patient information for any reason to fully document the disclosure in patient records, Johnson said.

As is true with any disclosure of patient health information, the law requires physicians to strive to ensure that they are providing only the most relevant information, the minimum necessary, as detailed in the request. In some cases, that could include the entire record if justified by the request.

Physicians also should know that HIPAA provides a regulatory floor, not a ceiling. If state laws provide more privacy rights to the patient, they trump the federal statute, Johnson said.

—AMA News, February 7

## Corporate Affiliate Program

Fellow members,

I am pleased to join the NHMS team in the initiation of a new benefits program to increase the value of your membership. In keeping with the mission and goals of the Medical Society, we have developed a Corporate Affiliate Program (CAP) which, through increased relations with corporate entities will pass along discounts on products and services to our membership. I will be looking to engage with vendors in a wide range of markets that will appeal to members at the professional and personal level.

In order to ensure that we establish a CAP base that is beneficial to our members, I ask that you help the effort. A survey will be sent to you shortly that will request names of companies you would recommend to others as well as types of service providers you're in need of. Through working together to identify product and service discounts that will be

of value, we will be able to create a program that is mutually beneficial to us as members and to the companies that are eager to approach us as consumers.

Working with companies that are recommended to us by other members will make it easy for you to trust that they will be the best in their market. I urge you, once a company is on board, to look to them before others when considering a new vendor. Guaranteeing the success of the program will also produce indirect benefits for us all, like increased Society membership and the ability to maintain reasonable dues.

Please keep an eye out for your survey in the mail. In the meantime, if you would like to discuss the CAP or have immediate suggestions, please call me at (603) 224-1909 or email Peter. Edwards@nhms.org. I look forward to working on this with you.

Peter Edwards, MD

Consultant

Corporate Affiliate Program

## Asset protection planning for physicians in New Hampshire

New Hampshire is in the midst of a medical malpractice crisis due in large part to skyrocketing insurance costs. High insurance rates may prevent doctors from purchasing enough insurance coverage to cover a large jury verdict. As a result, many physicians are concerned about protecting their personal assets from a medical malpractice award in excess of their insurance coverage. Although President Bush is driving for caps on medical malpractice awards, and the New Hampshire legislature is considering over a dozen bills on medical malpractice reform, New Hampshire physicians may not want—or be able to afford—to wait for a government solution. Instead, you can take action on your own to place assets beyond the reach of your creditors. The complexity of such a plan—known as an “asset protection plan”—can range from very simple to extremely complicated, depending on the nature and extent of your assets, your budget, and your pain threshold for dealing with lawyers and paperwork.

The first step in asset protection planning is avoiding a “fraudulent” transfer. Assets that you transfer fraudulently are still available to your creditors. You can’t transfer assets to put them beyond the reach of a known creditor, or to make yourself insolvent. If you’re already being sued, or are about to be sued, it’s too late to do any legitimate planning.

New Hampshire law affords some automatic asset protection to its residents. The state’s “homestead exemption” protects up to \$100,000 of the equity in your home from your creditors. If you’re married, your spouse also has homestead rights in your residence, so up to \$200,000 of equity is protected.

New Hampshire law also protects your IRA, 401K and other qualified retirement plan assets from your creditors. This means that creditors cannot reach any of your retirement savings, as long as the assets remain within the retirement plan. Life insurance cash values and commercial annuities generally enjoy unlimited protection too.

Purchasing an umbrella liability insurance policy is a simple way to obtain additional creditor protection. The umbrella coverage applies when you exceed the limits of your primary auto

or homeowner’s policy. It’s important to remember, however, that liability insurance won’t cover everything for which you might be sued, including malpractice and “intentional torts” such as sexual harassment. Even if coverage is available, your personal assets will be exposed to the extent a claim exceeds the limits of your policy.

If your spouse doesn’t have the same liability concerns that you do, you might consider transferring some of your assets (including your residence) to him or her. If you’re sued, your creditors can’t reach assets owned solely by your spouse. The downside to this strategy is that you no longer manage or control the property you give to your spouse. If you divorce, the assets will belong to your spouse (subject to a property settlement). However, if divorce isn’t a concern, and you expect your spouse to share the use and control of the transferred property, this is a good, low-cost asset protection option.

Establishing a trust, and transferring assets to it, also can put assets beyond the reach of your creditors. For the past decade, “offshore” asset protection trusts have been in vogue. Clients establish trusts in a “debtor friendly” foreign

jurisdiction, such as the Cook Islands, and transfer their assets to them. These trusts allow clients to continue to use and enjoy the transferred assets, but (at least in theory) protect the assets from the clients’ creditors. However, administrative complexity (where exactly are the Cook Islands?), expense and recent U.S. judicial attacks on the efficacy of these trusts make them useful only for the adventurous.

In recent years, a handful of US states—but not New Hampshire—have adopted laws allowing individuals to set up “domestic” asset protection trusts. New Hampshire residents can create such trusts in the states that permit them. Domestic asset protection trusts generally are easier and less expensive to establish and maintain than foreign trusts. However, a domestic asset protection trust may not provide the same level of asset protection as an offshore trust.

Finally, two less exotic strategies available to New Hampshire residents include irrevocable trusts and limited liability companies. If you transfer assets to an irrevocable trust, and you neither control the trust as trustee nor retain an interest in the trust as a beneficiary, your creditors can’t reach the trust assets. But neither can you. ➔

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Your spouse, however, can be a beneficiary, and in some cases, the trustee.

A limited liability company is similar to a partnership, except none of an LLC's members is personally liable for the LLC's liabilities. If an LLC member is sued individually, his creditors can't attach any of the LLC's assets. LLCs are now the entity of choice to hold commercial and rental real estate in New Hampshire.

The estate plan of any New Hampshire physician should include some element of asset protection planning. The nature and extent of the asset protection plan should be based on your liability exposure, income and net worth, and you should integrate the plan with your other financial and estate plans. Using a variety of asset protection strategies will provide the most protection and, hopefully, some peace of mind.

—Amy K. Kanyuk, Esq.,  
McDonald & Kanyuk, PLLC  
Concord, New Hampshire

## Understanding Medicare's coverage of an Initial Preventive Physical Exam

Starting January 15, 2005, Medicare will cover an initial preventive physical exam (IPPE) for beneficiaries during the first six months of Part B coverage. To be eligible their enrollment benefit must begin on or after January 1, 2005.

### Things to know:

The patient does not have to be new to your practice, but does have to be new to Medicare, within their first six months of coverage.

### What needs to be included in the IPPE?

- Comprehensive medical and social history
- Review of risk factors for depression
- Review of patient's level of safety and functional ability

- Exam including measurement of height, weight, BP, visual acuity
- An EKG (required)
  - If the primary care physician or qualified NPP refers the beneficiary to an outside physician or entity for the EKG service, the primary care physician or qualified NPP will incorporate the results of the EKG into the beneficiary's medical record to complete the IPPE
  - Both components of the IPPE, the examination portion and the EKG, must be performed for either of the components to be paid
- Education, counseling, appropriate referral, based on above
- A brief, written plan (such as a checklist) given to patient for obtaining screening and other preventive services that are paid for separately under Medicare B benefits IPPE

**If not sure of eligibility status, have patient sign an ABN indicating that Medicare may not cover the visit. →**



## Benefits Corner

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### Tips for a Successful Resolution

***It's time to put your resolution for a healthier lifestyle into action. Many resolutions fall by the wayside within months, but it doesn't have to.***

**Make a realistic and specific plan.** Put together an action plan that fits your lifestyle so changes you make are easy and convenient. Instead of telling yourself, "I want to lose 10 pounds," jot down a plan on how you will shed those unwanted pounds. A specific action plan will guide you toward your goal. If you decide to exercise more, define it further such as "I will attend the Step class at the gym on Mondays, Wednesdays and Fridays at 6:00 P.M."

**Evaluate "why" you want to change.** Permanent change comes strictly from within you! A change in behavior just to please others will not create a permanent lifestyle change, you must be true to yourself.

**Make a journal.** In a journal, jot down your goals and priorities (remember to be realistic!) A journal provides a "reality check" on paper because you can refer back to it.

**Be creative.** Leading a healthy lifestyle doesn't mean you are destined to live in the gym and eat tofu! Bike rides with the kids do count.

**Plan for setbacks.** Obstacles are just a part of life. Don't get discouraged. What's important is how you deal with the situation.

**Educate yourself.** Knowledge is power. Read books, magazines, and journals that will teach you about proper nutrition and exercise.

**Build a support system.** A fitness partner is truly a wonderful means of motivation. Find one person or a group of people that share your goals. If possible, include your family members, they can support your efforts in integrating your healthy lifestyle into your daily life.

**Consult your doctor.** Talk with your doctor prior to beginning any exercise program and heed these recommendations.

**The most important thing to remember is—have fun!** A commitment to a healthy lifestyle shouldn't be boring or make you feel deprived. Look for successes, even small ones and reward yourself for making progress. Remember, this is a life-long endeavor and changes don't happen overnight. You'll soon realize however, there's nothing more powerful than the feeling of good health!