

**SPECIAL REPORT**

# MIEC Claims Alert

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## **California Confidentiality of Medical Information Act:** Rules for privacy and release of medical information

**Please Note:** *The Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations differ from some California requirements. Where there are differences, the more stringent statute or regulation controls. In addition, the CMIA is not the only statutory protection of medical information in California; the Security Breach Notification Law requires business to notify California residents of breaches of unencrypted, computerized personal information, including medical information [Civil Code §§1798.29, 1798.82, 1798.84] The disclosure shall be made in the most expedient time possible. MIEC policyholders who are aware of a breach or a suspected breach of information should contact the MIEC Claims Department for assistance.*

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*The California Confidentiality of Medical Information Act (CMIA) is found at California Civil Code Section 56, et. seq. It defines who may release confidential information, and under what circumstances. It also prohibits the sharing, selling, or otherwise unlawful use of medical information. Medical information is defined as “any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care or health care service plan regarding a patient’s medical history, mental or physical condition or treatment.” [Civil Code §56.05(g)] With some exceptions, a patient or his/her representative must authorize a release of medical information.*

### **Application of the Confidentiality of Medical Information Act**

The Act applies to a “provider of health care, health care service plan, or contractor,” as well as to a business which has been specifically organized to maintain medical information, or to provide hardware or software designed to maintain medical information. [Civil Code §§56.06, 56.10] A “health care service plan” is defined as any entity regulated by the Knox-Keene Health Care Service Plan Act of 1975. A “contractor” is “any person or entity that is a medical group, independent practice association, pharmaceutical benefits manager, or a medical service organization and not a

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1 “Contractor” does not include pharmaceutical benefits managers licensed pursuant to the Knox-Keene Health Care Services Plan Act of 1975.

health care service plan or provider of health care.” [Civil Code §56.05(c) and (d)]

### Health care service plans must assure confidentiality

California’s Health & Safety Code §1364.5 mandates that health care service plans must protect the security of patient medical information. Among the requirements, health care plans must have available to all enrollees a written statement to describe how the plan maintains the confidentiality of enrollees’ medical information, how and for what purposes medical information may be collected, the circumstances under which medical information may be disclosed without prior authorization, and how patients may obtain access to their records.

### Valid authorization required for disclosure

In general, a person or entity covered by the Act “shall not disclose medical information” regarding a patient, enrollee or subscriber of a health care service plan without first obtaining a written authorization. [Civil Code §56.10(a)] Nor may a patient’s information be shared, sold, used for marketing, or used for a purpose that is “not necessary to provide health care services to the patient” unless, and only to the extent “expressly authorized by the patient.” [Civil Code §56.10(d)]

The CMIA requires that written authorization for the release of medical information be either handwritten by the signer or printed in at least 14-point type. The authorization must also be clearly separate from any other wording on the same page.

The patient’s signature must “serve no other purpose than to execute the authorization.” The form must be signed and dated. Allowed signatories are: (1) the patient, (2) the patient’s legal representative if the patient is a minor or incompetent (unless the minor could give legal consent to the care and treatment which is the subject of the information, in which case the minor must give written authorization), (3) the patient’s spouse or financially responsible person, but only for the purpose of processing an application for dependent health care coverage and the patient will become an enrolled spouse or dependent, and (4) the beneficiary or personal representative of a deceased patient.

The authorization must include: the specific uses and limitations on the types of medical information to be disclosed; the name or functions of the health care provider, health care service plan, pharmaceutical company, or contractor that is being allowed to disclose the

information pursuant to the authorization; the names or functions of those persons or entities authorized to receive the information; the specific uses and limitations on use of the information by the authorized recipients; the expiration date of the authorization; and a notice that the signer is entitled to a copy of the form (see **Figure 1**). [Civil Code §56.11]

There are many exceptions to the general rule requiring written patient consent, which are described below.

### Mandatory disclosure of information

Civil Code §56.10, paragraph (b) says that medical information *must be released* when compelled: (1) by court order, (2) by a board, commission or administrative agency for purposes of adjudication, (3) by a party to a legal action before a court, arbitration, or administrative agency, by subpoena or discovery request, (4) by a board, commission or administrative agency pursuant to an investigative subpoena, (5) by lawful search warrant, or (6) at the “request” of the coroner. The patient or patient’s representative must also be given access to inspect or get copies of medical records upon payment of reasonable clerical costs and certain other

conditions. [Civil Code §56.10(b), Health & Safety Code §123100, et. seq.]

Civil Code §56.10(b)(8) requires provision of confidential medical information to the coroner, “when requested in the course of an investigation by the coroner’s office for the purpose of identifying the decedent or locating next of kin, or when investigating deaths that may involve public health concerns, organ or tissue donation, child abuse, elder abuse, suicides, poisonings, accidents, sudden infant deaths, suspicious deaths, unknown deaths, or criminal deaths, or upon notification of, or investigation of, imminent deaths that may involve organ or tissue donation pursuant to §7151.15 of the Health & Safety Code, or when otherwise authorized by the decedent’s representative. Medical information requested by the coroner under this paragraph shall be limited to information regarding the patient who is the decedent and who is the subject of the investigation or who is the prospective donor and shall be disclosed to the coroner without delay upon request.”

### Discretionary disclosure of information

There is a very long detailed list of persons and/or entities to which medical information

may be disclosed, and circumstances which justify voluntary disclosure without a patient’s written authorization.

Civil Code §56.10(c) says that a health care provider or health care service plan *may disclose* medical information without patient authorization under the following circumstances:

- 1) To other health care providers, health care service plans, contractors, or other health care professionals/facilities for purpose of diagnosis or treatment of the patient. This includes radio or other transmission between emergency personnel “in an emergency situation.”
- 2) To entities responsible for the payment for health care services for the patient, such as an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, or contractor. Information released must be limited to the extent necessary to determine payment. If the patient is unable to consent and no other arrangements for payment have been made, information may be disclosed to a governmental authority to the extent necessary to determine

eligibility for payment, and to other health care providers or health care service plan to assist them in obtaining payment.

- 3) To a person or entity that provides billing, claims management, medical data processing or other administrative services for health care providers, health care service plans, or entities listed in (2) above.
- 4) To “organized committees and agents of professional societies or of medical staffs of licensed hospitals, licensed health care service plans, professional standards review organizations, independent medical review organizations and their selected reviewers, utilization and quality control peer review organizations . . . , contractors, or persons or organizations insuring, responsible for, or defending professional liability that a provider may incur,” if those entities are engaged in “reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.”

- 5) A “private or public body responsible for licensing or accrediting” a health care provider or health care service plan may “review” medical information in the possession of a health care provider or health care service plan. However, disclosure is limited to “review” of information; no patient-identified information may be removed from the premises and further disclosure is prohibited.
- 6) To the county coroner in course of an investigation for “all purposes” not already included in the “mandatory disclosure” provisions.
- 7) To “public agencies, clinical investigators, including investigators conducting epidemiologic studies, health care research organizations, and accredited public or private nonprofit educational or health care institutions for bona fide research purposes.” However, this information may not be further disclosed by the recipient in any way that would disclose the patient’s identity.
- 8) If a health care provider or health care service plan has “created medical information as a result of employment-related health care services to an employee, [which was] conducted at the specific prior written request and expense of the employer,” information may be disclosed to the employee’s employer. However, *only* “that part” of the information that (A) is *relevant* in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the *patient has placed in issue* his or her medical history, mental or physical condition, or treatment; *provided* that the information may only be used for that proceeding, or (B) *describes functional limitations* of the patient that may entitle the patient to leave from work for medical reasons or limit the patient’s fitness to perform his or her present employment, *provided that no statement of medical cause* is included in the information disclosed.
- 9) Absent notification in writing of an agreement to the contrary, to a “sponsor, insurer, or administrator of a group or individual insured or uninsured plan or policy that the patient seeks coverage by or benefits from,” *if* the information was “created by” the health care provider or health care service plan as a result of services “conducted at the prior written request and expense” of the sponsor, insurer or administrator for the purpose of evaluating an application for coverage or benefits.
- 10) For the purpose of administering a health care service plan, information may be disclosed by a health care provider to a health care service plan, or among health care providers.
- 11) Medical information may be disclosed to an “insurance institution, agent or support organization” under the Insurance Information and Privacy Protection Act [*Insurance Code §791, et. seq.*], if the insurance institution, agent or support organization has “complied with all of the requirements for obtaining the information” in that Act.
- 12) Information “relevant to the patient’s condition, care, and treatment” may be provided to a probate court investigator “in the course of an investigation” to determine the need for a conservatorship, and to a probate court investigator, probation officer, or domestic relations investigator who is “engaged in

- determining” the need for an initial or continuation of a guardianship.
- 13) To an organ procurement organization or tissue bank “processing the tissue of a decedent for transplantation,” but only information related to the decedent donor for the purpose of aiding the transplant may be disclosed.
  - 14) Medical information may also be disclosed “when otherwise specifically authorized by law,” including but not limited to voluntary reporting to the Food and Drug Administration to report adverse events related to drug products or medical devices, and reports of suspected child abuse or neglect.
  - 15) “Basic information” may be disclosed to a state or federally recognized disaster relief organization for responding to disaster welfare inquiries. (Basic information includes the patient’s name, city of residence, age, sex, and general condition.)
  - 16) For the purposes of “encoding, encrypting, or otherwise anonymizing data,” information may be disclosed to a “third party.” The third party must ensure
    - no further disclosure or unauthorized manipulation of data that reveals individually identifiable information.
    - 17) For purposes of “disease management programs and services” as defined by Health & Safety Code §1399.901, information may be disclosed to a “disease management organization” or to an entity contracting with a health care service plan to monitor or administer a chronic disease management program, if certain requirements are met.
    - 18) To a local health department as permitted by state and federal law for the purpose of preventing or controlling disease, injury, or disability, including the reporting of disease, injury, vital events (such as birth or death), or legally authorized public health surveillance, investigations, or interventions.
    - 19) A psychotherapist may disclose information “consistent with applicable law and standards of ethical conduct” if he or she believes in good faith that the disclosure is “necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims” and the disclosure is made to a “person or persons reasonably able to prevent or lessen the threat, including the target of the threat.”
    - 20) To a county social worker, a probation officer, or any other person who is legally authorized to have custody or care of a minor for the purpose of coordinating health care services and medical treatment provided to the minor. This includes medical information concerning the diagnosis and treatment of a mental health condition of a minor when reasonably necessary for the purpose of assisting in coordinating the treatment and care of the minor; it does not include psychotherapy notes. [At the time of publication of this newsletter, amendments to this subdivision may be effective which also authorize communication with “foster care public health nurses.” If you are involved in the care and treatment of a minor for whom a governmental representative is responsible, you are urged to consult the latest version of this statute.] [*Civil Code* §§56.10(c)(20), 56.103]

- 21) Information may be disclosed to an employee welfare benefit plan for billing, claims management, medical data processing, or other administrative services related to persons receiving medical care under the plan, if certain conditions are met. *[Civil Code §56.10(c)(21)]*
- 22) Information relevant to an incident of elder or dependent adult abuse may be given to an investigator from an adult protective services agency, a local law enforcement agency, the office of the district attorney, the office of the public guardian, the probate court, the Bureau of Medi-Cal Fraud, or an investigator of the Department of Consumer Affairs, Division of Investigation who is investigating a known or suspected case of elder or dependent adult abuse. *[Civil Code §56.10(c)(22), Welfare and Institutions Code §§15610.15, 15633.5]*
- 23) A health care provider may also use or disclose medical information to a public or private entity authorized by law to assist in disaster relief efforts. *[Civil Code §56.1007(e)]*

Before releasing medical information without a patient's authorization, physicians and their staff must know who is requesting the information, and for what purpose the information is being requested. The persons and entities listed above are entitled to medical information *only* for the specific purposes outlined in the Civil Code section.

### Outpatient psychotherapy treatment records

Civil Code §56.104 (part of the Confidentiality of Medical Information Act) prevents a provider of health care, health care services plan, or contractor from making discretionary release of records “specifically relate[d] to the patient’s participation in outpatient treatment with a psychotherapist” without patient authorization, unless certain requirements are met.

When asked to release a copy of records related to outpatient psychotherapy, a provider of health care, a health care services plan, or contractor must have either: (1) a patient’s written authorization for release of the information; or (2) a written request from the inquiring party, that must include the elements itemized below.

MIEC legal counsel suggests that those who wish to obtain outpatient psychotherapy

records ask the patient to sign an authorization (**see Figure 1**). The signed authorization nullifies the requirement to send a written request to the patient’s psychotherapist, as mentioned in item (2) above.

If authorization cannot be obtained from the patient, and records related to the patient’s outpatient psychotherapy are requested, the written request must state all of the following: (1) The specific information requested and its intended use; (2) the length of time the information will be retained; (3) a statement that the information will not be used for any purpose other than its intended use; and (4) a statement that the information will be destroyed or returned to the health care provider upon expiration of the length of time specified (**see Figure 2**). *[Civil Code §56.104(a)]* The requesting party must then send a copy of the written request to the patient unless the patient has signed a “Waiver of Notice.” *[Civil Code §56.104(b)]*

Notwithstanding the above, however, discretionary disclosure of information related to outpatient psychotherapy may still be made to the following categories of persons or entities for the following purposes: (1) to “providers of health care, health care service plans,

contractors, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient.” [Civil Code §§56.104(e)(1), 56.10(c)(1)]; (2) when requested by law enforcement or the target of a threat reported by a psychotherapist, a psychotherapist may disclose information which is “clearly necessary to prevent the serious and imminent threat” disclosed by the psychotherapist’s prior warning; and (3) information from a psychotherapist when requested by an agency investigating child or elder/dependent adult abuse or neglect. [Civil Code §§56.104(e)(2), (e)(3)]

### **Disclosure to friends, relatives and personal representatives**

A provider, health care service plan or contractor may disclose to a family member, other relative, domestic partner, or a close personal friend of the patient, or any other person identified by the patient, the medical information directly relevant to that person’s involvement with the patient’s care or payment related to the patient’s health care. A provider may also disclose the patient’s location, general condition, or death to notify or assist in the notification, identification or location of a family member, personal representative of the

patient, domestic partner, or another person responsible for the care of the patient.

If the patient is available and has the capacity to make health care decisions, the information above may be disclosed only if: the patient agrees, the patient is provided with an opportunity to object and does not object, or the health care provider “reasonably infers from the circumstances, based on the exercise of professional judgment,” that the patient does not object.

If the patient is not available or incapacitated, or an “emergency circumstance” exists, the health care provider, health care service plan or contractor “may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the patient, and if so disclose that information relevant to that person’s involvement in the patient’s medical care. Professional judgment and experience with common practice may also be used to make reasonable inferences of the patient’s best interests, to allow a person to pick up prescriptions, medical supplies, x-rays or other forms of medical information. [Civil Code §56.1007(a)-(d)]

A psychotherapist may only disclose information under the above circumstances if

the patient agrees, or if the patient has not expressed an objection when provided with the opportunity to object to the disclosure. [Civil Code §56.1007(c)(2)]

### **Patient inspection, addenda to records**

Health & Safety Code §123110 provides that any adult, minor authorized by law to consent to treatment, or patient representative may inspect the patient’s medical records upon presentation of a written request and payment of reasonable clerical costs. The inspection must be allowed within five working days after receipt of the written request. Copies of records may be obtained by written request and payment of certain costs, and the records must be transmitted within 15 days after receiving the written request. (The copies must be provided free of charge upon proof that they are needed to support an appeal for eligibility for a public benefit program, unless the patient is represented by a private attorney.)

Health & Safety Code §123111 allows any “adult patient” to “provide to the health care provider a written addendum with respect to any item or statement in his or her records that the patient believes to be incomplete or incorrect.”

The addendum is limited to 250 words per alleged incomplete or incorrect item in the patient's record, and it must clearly indicate in writing that the patient wants the addendum to be part of the medical chart.

The physician must "attach the addendum to the patient's records" and must include it whenever the health care provider "makes a disclosure of the allegedly incomplete or incorrect portion of the patient's records to any third party." Health care providers are protected from liability under this code section for any "defamatory or otherwise unlawful language" written in the addendum and subsequently included in the medical record. *[Health & Safety Code §123111]*

### **Negligent or intentional disclosure penalties**

Anyone who wrongfully discloses medical information may be penalized. Violation of the CMIA that results in economic loss or personal injury to a patient is punishable as a misdemeanor. *[Civil Code § 56.36]* The patient may recover compensatory damages for economic loss and "personal injury," punitive damages (limited to \$3000), attorney's fees (limited to \$1000), and costs of litigation. *[Civil Code §56.35]*

Even patients who have not suffered injury because of the disclosure may recover nominal damages of \$1000. A person or entity that negligently discloses medical information also will be liable for an administrative fine or civil penalty not to exceed \$2,500 per violation.

*[Civil Code § 56.36]*

A licensed health care professional (physician, nurse, pharmacist, dentist, etc.) "who knowingly and willingly" obtains, discloses or uses medical information in violation of the Act is liable for an administrative fine or civil penalty of up to \$2,500 for the first violation, \$10,000 for the second, and \$25,000 for the third and subsequent infractions of the law. (For unlicensed personnel, the fine or penalty is up to \$25,000 for each violation.) If done for financial gain, the fines are \$5,000 for the first violation, \$25,000 for the second, and \$250,000 for the third and subsequent violations, plus "disgorgement of any proceeds or other consideration" obtained because of the infraction. (For unlicensed personnel, the fine or penalty is up to \$250,000 from the initial violation.)

*[Civil Code §56.36(a) thru (c)]*

The defendant is entitled to an affirmative defense if all of the following are established:

- The defendant is a covered entity or business associate, as defined by HIPAA;
- The defendant has complied with any obligations to notify all persons entitled to receive notice regarding the release of the information of records;
- The release of confidential information was solely to another covered entity or business associate;
- The release of information was not an incident of medical identity theft;
- The defendant took appropriate preventive actions to protect the confidential information or records against release consistent with the defendant's obligations under state law and HIPAA, including but not limited to: developing and implementing security policies and procedures; designating a security official who is responsible for developing and implementing its security policies and procedures, including educating and training the workforce; encrypting the information and protecting against the release or use of the encryption key and passwords;
- The defendant took reasonable and appropriate corrective action after the



release of information and the covered entity or business associate that received the information destroyed or returned the confidential information without unreasonable delay, consistent with any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system;

- The covered entity or business associate that received the records or information did not retain, use, or release the information further; and
- Actions were taken to prevent future breaches. [*Civil Code §56.36(e)*]

The civil penalty actions may not be brought by patients, but must be sought by a governmental officer, including the attorney general, district attorney, county counsel, city attorney, or state public health officer. [*Civil Code §56.36(f)*]

### Storing, destroying records

The Confidentiality of Medical Information Act requires that health care providers, health care service plans, pharmaceutical companies and contractors, who “create, maintain, preserve, store, ‘abandon’ destroy, or dispose of” medical information do so in a manner that preserves the information’s confidentiality, or they will be subjected to

the penalties described above for wrongful disclosure.

Furthermore, an electronic medical record system must protect and preserve the integrity of electronic information, and “automatically record and preserve any change or deletion of any electronically stored medical information.” The record of any change or deletion must include the identity of the person who accessed and changed the information, the date and time the information was accessed, and the change that was made. [*Civil Code §56.101*]

*MIEC’s legal consultant for this newsletter was Sonja Dahl, Esq., of Donnelly, Nelson, Depolo & Murray, Walnut Creek, California.*

### How to reach MIEC:

#### Phone:

Oakland: 510/428-9411

Honolulu: 808/545-7231

Boise: 208/344-6378

Alaska: 907/868-2500

Outside of area: 800/227-4527

#### Fax:

Loss Prevention: 510/420-7066

Oakland: 510/654-4634

Honolulu: 808/531-5224

Boise: 208/344-7903

Alaska: 907/868-2805

#### Email:

Lossprevention@miec.com

Underwriting@miec.com

Claims@miec.com

### MIEC on the Internet:

[www.miec.com](http://www.miec.com)

## Authorization for the Use or Disclosure of Health Information

1. I authorize \_\_\_\_\_  
to disclose my health information to (name and address of recipient):  
\_\_\_\_\_  
\_\_\_\_\_

2. This authorization applies to [check all that apply]:

Only the following records or type of information or specific dates of treatment:

\_\_\_\_\_  
\_\_\_\_\_

Any and all health information other than psychotherapy, including, but not limited to: mental health records protected by the Lanterman-Petris-Short Act, drug and/or alcohol abuse records, and conditions pertaining to sexually transmitted diseases, including AIDS. HIV test result information will NOT be released unless specifically requested (sign in box below if you wish to release this information).

All psychotherapy notes may be released, except as specifically provided below:  
Exclusions:

\_\_\_\_\_  
\_\_\_\_\_

Please release my HIV test results to the recipient listed in item #1.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

3. The receiver may use the medical information that is being released for the following purposes (*if you do not want to explain the purpose, write "At the request of the individual."*):

4. This authorization expires: (date) \_\_\_\_\_

## Your Rights

- I know that I may revoke this authorization to the extent that it has not already been relied upon. I may revoke this authorization by writing a statement that I withdraw my authorization for further release of the records.
- Any disclosure of information carries with it the potential for re-disclosure and that the information then may not be protected by federal confidentiality rules; however, California law prohibits the receiver from making further disclosure of my health information unless the receiver obtains another authorization from me or unless such disclosure is specifically required or permitted by law.
- I understand that authorizing the disclosure of this health information is voluntary. I do not need to sign this form to assure treatment unless the sole purpose of the treatment/examination/evaluation is to provide information to a third party.
- I have a right to receive a copy of this authorization.

Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

Print Name: \_\_\_\_\_

If not signed by the patient, please indicate the relationship:

- parent or guardian of minor patient (to the extent minor could not have consented to the care)
- guardian or conservator of an incompetent patient
- beneficiary or personal representative of deceased patient
- spouse or person financially responsible (where information solely for purpose of processing application for dependant health care coverage)

## Physician's Request for Release of Outpatient Psychotherapy Medical Information

Requesting Individual or Entity: \_\_\_\_\_  
(Name & Address) \_\_\_\_\_  
\_\_\_\_\_

I hereby request that \_\_\_\_\_  
(Name of the provider of healthcare, the health care service plan, or contractor)  
furnish out-patient psychotherapy medical information concerning \_\_\_\_\_  
(Patient's name)  
to the Requesting Individual or Entity.

This Request includes the release of any and all information pertaining to: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[For example ... "the patient's diagnosis and the number of visits, including the date of each visit."]

The information requested will be used for the limited purpose of: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The information will be kept until \_\_\_\_\_ at which time it will either be destroyed or returned to you.  
(Date)

Check one:

A copy of this Request was sent to the patient at the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

A copy of this Request was **NOT** sent to the patient, because he/she has signed a written waiver of the form in a signed letter to the Requesting Individual or Entity.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Print Name: \_\_\_\_\_