

# Medical Records Access & Privacy in California

## Medical Records Access & Privacy in California (Updated January 2010)

The following question and answer series will address both California and federal law regarding patient access to medical records and privacy protections for medical information. These two sources of law both complement and sometimes conflict with one another. The “Pre-emption Issues” section of each question attempts to reconcile any differences. The “Short Answer” following each question provides a brief analysis without citations to the law.

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**Question 1:** Where is the law on accessing medical records and the privacy of medical information?

### SHORT ANSWER

Under California law, when an advocate is assisting a client with obtaining her/his medical records, PAHRA (full name below) will apply. If the advocate is challenging the dissemination of a client’s personal health information by a health care provider, an HMO, a health care clearinghouse, or an employer, the advocate should first turn to CMIA (full name below). If the dissemination of personal health care information is by an insurance company, the Insurance Information and Privacy Protection Act—not discussed at length in this document, but noted at the end—should be reviewed first. Personal health information held in records of a state agency is governed by IPA (full name below). After turning to the appropriate body of California law, the advocate should always check to see whether the particular relevant state law provisions are pre-empted or modified by the federal law, HIPAA (full name below).

## CALIFORNIA LAW

This analysis reviews three main sources of California law regarding access to and privacy of personal health information. Laws regarding access to medical records in California can be found in the Patient Access to Health Records Act (PAHRA) at Health and Safety Code §§ 123100 – 123149.5. The Confidentiality of Medical Information Act (CMIA) Civil Code § 56 *et seq.*, covers disclosure of medical information by health care providers, Knox-Keene regulated health plans (e.g. HMOs), health care clearinghouses, and employers. The Information Practices Act of 1977 (IPA) Civil Code § 1798 *et seq.*, applies to records, including those which contain personal health information, maintained by a state agency. To determine which laws and therefore which part of the following analysis to apply to a particular client's circumstances, an advocate should first figure out what kind of entity she or he is dealing with. PAHRA is the primary place to look when the issue is an individual's access to his/her medical records. CMIA is primarily aimed at protecting an individual's health information from unauthorized disclosures to third parties. IPA generally imposes limitations on the right of governmental agencies to disclose personal information about an individual.

These California laws are attempts to make health information more accessible to the people who are the subject of the information and to rein in some of the dissemination of private health information. The California legislature has expressed a preference in favor of an individual's right of access to information regarding a health condition and one's own health care.<sup>1</sup> That preference extends to people who are responsible for making health care decisions for another person.<sup>2</sup> The legislature also recognizes that current technologies threaten the right to privacy, necessitating protection of individuals' privacy.<sup>3</sup>

## FEDERAL LAW: HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) includes a national set of legal requirements created to ensure greater privacy protection relating to the furnishing of information by health plans, health care providers and others in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items.<sup>4</sup> These provisions of HIPAA were largely a response to some abusive practices regarding the dissemination of private health information and the fact that a number of states had little or no protections for the privacy of health information. The federal law itself is relatively broad; thus, resolving issues under HIPAA requires reviewing federal regulations at Title 45 C.F.R. Parts 160 and 164. In general, HIPAA aims to increase individuals' access to their medical records while decreasing unauthorized dissemination of personally identifiable health information.<sup>5</sup> The Health Information Technology for Economic and Clinical Health Act (HITECH ACT) of 2009, which was part of the

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<sup>1</sup> Cal. Health & Safety Code §123100.

<sup>2</sup> *Id.*

<sup>3</sup> Cal. Civ. Code § 1798.1.

<sup>4</sup> 42 U.S.C. §§ 1320d through 1320d-9 (amended to cover genetic information). Citations only to privacy provisions of HIPAA.

<sup>5</sup> See 45 C.F.R. § 160.202 Definition of *More stringent*.

American Recovery and Reinvestment Act (2009), amended certain provisions of HIPAA related to privacy.<sup>6</sup>

### PRE-EMPTION ISSUES

HIPAA standards, requirements, or implementation specifications that are contrary to a provision of state law generally preempt the conflicting provision of state law.<sup>7</sup> Where state law exists and no similar federal law exists, the state law would not be in conflict and therefore, would not be preempted.<sup>8</sup> In any event, there are a number of exemptions from the general preemption rule. Contrary state law is not preempted by HIPAA if:

- The *Secretary*<sup>9</sup> makes a determination that the state law<sup>10</sup>:
  - Is necessary to prevent fraud and abuse related to the provision of or payment for health care,<sup>11</sup>
  - Is necessary to ensure appropriate State regulation of insurance and *health plans* to the extent expressly authorized by statute or regulation,<sup>12</sup>
  - Is necessary for State reporting on health care delivery or costs,<sup>13</sup>
  - Is necessary for purposes of serving a compelling need related to public health, safety, or welfare or<sup>14</sup>
  - Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any substances that are deemed controlled substances by State law.<sup>15</sup>
- The provision of State law relates to the privacy of individually identifiable *health information* and is *more stringent* than the relevant HIPAA standard, requirement, or implementation

<sup>6</sup> See Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (Feb. 17 2009) (“HITECH ACT”).

<sup>7</sup> 42 U.S.C. § 1320d-7(a)(1); 45 C.F.R. § 160.203.

<sup>8</sup> 65 Fed. Reg. 82,581 (Dec. 28, 2000).

<sup>9</sup> Words and phrases that are in *italics* are terms defined in HIPAA or one of the California statutes. Their definitions can be found in the footnotes following their use in this analysis and/or the law cited in that footnote. The term “Secretary” here refers to the Secretary of the U.S. Department of Health and Human Services.

<sup>10</sup> Note that the first five exemptions require a determination by the Secretary while the last three do not.

<sup>11</sup> 42 U.S.C. §1320d-7 (a)(2)(A)(i)(I); 45 C.F.R. §160.203(a)(1)(i).

<sup>12</sup> 42 U.S.C. §1320d-7 (a)(2)(A)(i)(II); 45 C.F.R. §160.203(a)(1)(ii). “Health Plan” means an individual or group plan that provides, or pays the cost of, medical care, as defined in HIPAA. 45 C.F.R. §160.103.

<sup>13</sup> 42 U.S.C. §1320d-7 (a)(2)(A)(i)(III); 45 C.F.R. §160.203(a)(1)(iii).

<sup>14</sup> 42 U.S.C. §1320d-7 (a)(2)(A)(i)(IV); 45 C.F.R. §160.203(a)(1)(iv).

<sup>15</sup> 42 U.S.C. §1320d-7 (a)(2)(A)(ii); 45 C.F.R. §160.203(a)(2).

specification.<sup>16</sup> More stringent standards are those that provide patients with better access to their information or require covered entities (record keepers)<sup>17</sup> to follow narrower guidelines regarding information disclosures to third parties.<sup>18</sup>

- The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.<sup>19</sup>
- The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.<sup>20</sup>

Under the HIPAA provisions, health plans are broadly defined to include ERISA-covered plans, health insurance issuers, and HMOs, as well as Parts A and B of the Medicare program, the Medi-Cal program, issuers of Medigap policies, veterans' health care programs, CHAMPUS, Healthy Families, MRMIP, and the Indian Health Services.<sup>21</sup>

HIPAA provisions will pre-empt some provisions of PAHRA and CMIA. Some provisions of the Insurance Information and Privacy Practices Act may no longer have effect due to HIPAA provisions in regard to health insurers. HIPAA pre-emption would be a consideration with the programs run by state agencies and governed by IPA. HIPAA will only pre-empt IPA as it pertains to records of protected health information. Potential HIPAA conflicts with the other listed programs are beyond the scope of this issue brief.

In recognition of the strong likelihood of conflicts between California law and HIPAA and the need to coordinate the state's compliance, the state established the California Office of Health Information Integrity (CalOHII) (formerly the California Office of HIPAA Implementation). CalOHII has reviewed California laws with respect to HIPAA, and CalOHII analyses are cited throughout this issue brief.

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<sup>16</sup> 42 U.S.C. §1320d-7 (a)(2)(B); 45 C.F.R. §160.203(b). "Health information" means any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. 45 C.F.R. §160.103.

<sup>17</sup> HIPAA uses the un-descriptive term "covered entity" to describe a wide variety of individuals and entities that may hold an individual's personal health information in its records. For ease in reading, this issue brief utilizes the term "record keeper" where HIPAA would employ "covered entity."

<sup>18</sup> 45 C.F.R. §160.202; Pub. L 104-191, § 264(c)(2) (uncodified section of HIPAA). *See also* 45 C.F.R. § 160.202 definition of "more stringent."

<sup>19</sup> 42 U.S.C.A. §1320d-7(b); 45 C.F.R. §160.203(c).

<sup>20</sup> 42 U.S.C.A. §1320d-7(c); 45 C.F.R. §160.203(d).

<sup>21</sup> 45 C.F.R. § 160.103 (definition of *Health Plan*).

## Question 2: How does a person get his/her records?

### SHORT ANSWER

An individual should make a written request for her/his medical records. A health care provider has fifteen (15) days to provide copies of written or electronic records as well as X-rays, ECGs, EEGs, or EMGs. A provider may charge reasonable copying costs, but these must be based on the actual cost of making and providing the copies, including supplies, labor, and postage. The copying costs set forth under PAHRA are probably legally sound as long as they do not exceed the actual costs of providing the copies. California provisions allowing a free copy of medical records to support an eligibility appeal for public benefits programs such as Medi-Cal, social security disability insurance, and SSI benefits remain in effect. A provider may provide a summary of medical records in lieu of the actual records only if the individual has agreed to a summary in advance.

### CALIFORNIA LAW

Upon written request and payment of reasonable clerical costs, an adult patient of a *health care provider*, a minor patient authorized by law to consent to medical treatment, or the *patient's representative* is entitled to inspect the patient's medical records.<sup>22</sup> A patient is allowed to inspect her/his records during business hours within five working days after the provider receives the written request.<sup>23</sup> The patient or patient's representative may be accompanied by one other person of her/his choosing.<sup>24</sup>

The patient or the patient's representative is also entitled to obtain copies of all or any portion of the medical records by presenting a written request to the health care provider specifying which records are to be copied.<sup>25</sup> A provider may require the patient to pay copying fees, not to exceed twenty-five (\$.25) cents per page, or fifty (\$.50) cents per page of microfilm, plus any additional reasonable clerical costs incurred in making the records available.<sup>26</sup> The wording of the statute implies that a provider could demand payment before providing the copies. The health care provider must send the copies within fifteen days after receiving the written request.<sup>27</sup> The provider may require reasonable verification of identity prior to permitting inspection or copying of the records.<sup>28</sup>

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<sup>22</sup> Cal. Health & Safety Code § 123110(a). See Question 8 below for a more detailed discussion of special rules for minors and minors' health records. PAHRA defines "health care provider" as a health facility, clinic, home health agency, physician or surgeon, podiatrist, dentist, psychologist, optometrist, chiropractor, marriage and family therapist, or clinical social worker, all licensed as described in Cal. Health & Safety Code §§ 123105(a)(1)-(12); PAHRA defines "Patient's representative" as "a parent or guardian of a minor who is a patient, or the guardian or conservator of the person of an adult patient, or the beneficiary or personal representative of a deceased patient." Cal. Health & Safety Code § 123105(e).

<sup>23</sup> Cal. Health & Safety Code § 123110(a).

<sup>24</sup> *Id.*

<sup>25</sup> Cal. Health & Safety Code § 123110(b).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Cal. Health & Safety Code § 123110(g).

Copies of X-rays or tracings from ECGs, EEGs, or EMGs need not be provided if the originals are sent to another health care provider upon written request of the patient or patient's representative and within 15 days after receipt of the request.<sup>29</sup> The request must include the name and address of the health care provider to whom the records are to be delivered.<sup>30</sup> A health care provider may charge the patient or patient's representative reasonable costs, not to exceed actual costs incurred, for transferring these records.<sup>31</sup>

A patient, former patient or patient's representative is entitled to a single copy, at no charge, of the relevant portion of the patient's records, upon presenting to the provider a written request, and proof that the records are needed to support an eligibility appeal for public benefit programs such as Medi-Cal, social security disability insurance benefits, and SSI/SSP benefits.<sup>32</sup> Only records covering services rendered from the time of the patient's initial application for benefits up through the date of a final determination are included.<sup>33</sup> Records requested under this provision must be provided within thirty days of receiving the written request.<sup>34</sup> Except for nonprofit legal services attorneys, private attorneys who are paying the patient/client's costs may not use this provision.<sup>35</sup> If the appeal for benefits is successful, the health care provider may bill the patient for the copies of the records based on the cost schedule above.<sup>36</sup>

Rather than provide direct access to the patient's entire medical records, a health care provider is allowed to provide a summary of the records.<sup>37</sup> The provider generally must make the summary available within ten (10) working days, but the provider can request up to thirty (30) days.<sup>38</sup> A provider can charge no more than a reasonable fee based upon actual time and cost for preparation of the summary.<sup>39</sup> A provider still must provide X-rays, ECGs, EEGs, or EMGs as noted above.<sup>40</sup>

A health care service plan (i.e. HMO), must disclose medical record information to a patient or the patient's representative in the manner set forth above.<sup>41</sup> California has a separate provision for access to mental health records which is discussed in Question 6 below.

Individuals may make a written request to a health care clearinghouse to obtain a free copy of any medical profile, summary, or information that the clearinghouse maintains.<sup>42</sup>

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<sup>29</sup> Cal. Health & Safety Code §123110(c).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Cal. Health & Safety Code § 123110(d)(1),(2).

<sup>33</sup> *Id.*

<sup>34</sup> Cal. Health & Safety Code § 123110(f).

<sup>35</sup> Cal. Health & Safety Code § 123110(d)(3).

<sup>36</sup> Cal. Health & Safety Code § 123110(e).

<sup>37</sup> Cal. Health & Safety Code § 123130(a).

<sup>38</sup> *Id.*

<sup>39</sup> Cal. Health & Safety Code § 123130(f).

<sup>40</sup> Cal. Health & Safety Code § 123130(e).

<sup>41</sup> Cal. Civ. Code § 56.10(b)(7). This section is part of the Confidentiality of Medical Information Act (CMIA), Cal. Civ. Code § 56 *et seq.* which covers confidentiality of medical information held by health care providers, health care service plans, and contractors. For the purposes of this issue brief, the application to health care service plans, i.e. HMOs, is of particular relevance.

Individuals have a right of access to their personal information maintained by state agencies.<sup>43</sup> Individuals also have the right to know that state agencies have these records and to know how to access them.<sup>44</sup> The agency must allow the individual to inspect his/her active records within 30 days of a request or within 60 days if the records are inactive and in storage or geographically dispersed.<sup>45</sup> The individual or a person of his/her choosing has the right to inspect all information within the records and request copies within 15 days of the inspection.<sup>46</sup> The agency may charge ten cents (\$0.10) per page, but not charge for searching for and reviewing the documents, unless otherwise established by statute.<sup>47</sup> However, the state agency need not disclose personal information to the individual if the information pertains to certain law enforcement activities, or relates to the individual's physical or psychological condition and the disclosure would be detrimental to the individual.<sup>48</sup>

### FEDERAL LAW: HIPAA

With few exceptions, HIPAA provides an individual the right to inspect and obtain a copy of his/her *protected health information* contained in medical records and billing records of health care providers and health plans.<sup>49</sup> (For exceptions and reasons why access may be denied, see Question 6.) Record keepers must document which records are subject to an individual's access and must designate a person or office responsible for receiving and processing requests for access.<sup>50</sup> The record keeper must allow the person to inspect or obtain a copy of records, or both,<sup>51</sup> and it must provide the information in the format requested if it is readily producible in such format; or, if not, in a readable hard copy form or other mutually acceptable form.<sup>52</sup> Effective February 17, 2010, the HITECH Act amends HIPAA so that where the record keeper uses or maintains an electronic health record with respect to protected health information of an individual, the individual has a right to obtain a copy of this information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific.<sup>53</sup>

<sup>42</sup> Cal. Civ. Code § 56.07.

<sup>43</sup> Cal. Civ. Code § 1798.24(a).

<sup>44</sup> Cal. Civ. Code § 1798.32.

<sup>45</sup> Cal. Civ. Code § 1798.34(a).

<sup>46</sup> Cal. Civ. Code § 1798.34(b).

<sup>47</sup> Cal. Civ. Code § 1798.33.

<sup>48</sup> Cal. Civ. Code § 1798.40.

<sup>49</sup> 45 C.F.R. § 164.524(a)(1); 45 C.F.R. § 160.103 (defines "protected health information" as "individually identifiable health information" that is transmitted or maintained in any form or medium, including electronically, subject to certain exceptions, and defines "individually identifiable health information" as identifiable health information as health information (separately defined), including demographic information collected from an individual, and that: i) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and which either identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual.)

<sup>50</sup> 45 C.F.R. § 164.524(e).

<sup>51</sup> 45 C.F.R. § 164.524(c)(1).

<sup>52</sup> 45 C.F.R. § 164.524 (c)(2)(i).

<sup>53</sup> HITECH Act Section 13405(e)(1), Pub. L. No. 111-5 (Feb. 17, 2009).

The record keeper must act on a request for access no later than 30 days after the receipt of the request.<sup>54</sup> For information not maintained or accessible on-site, action must be taken within 60 days.<sup>55</sup> The record keeper may request one 30-day extension if it cannot comply with or deny the request within the applicable 30 or 60 day period. However, a written statement of the reasons for the delay must be delivered to the requesting party within the original 30 or 60 day period.<sup>56</sup>

The record keeper must provide timely access, arranging for a convenient time and place to inspect or obtain a copy of the information, or mailing the copy of the information at the individual's request.<sup>57</sup> The parties may discuss the scope, format, and other aspects of the request for access as necessary to facilitate timely access.<sup>58</sup>

The keeper of the records may provide a summary or explanation instead of direct access to the information if the individual agrees in advance to the summary or explanation and the fees imposed for such summary or explanation.<sup>59</sup> The summary would appear to have the same time limits as for other access, as set forth above.

If a copy, summary or explanation of the information is requested, the record keeper may impose a reasonable, cost-based fee, for the cost of copying, including supplies and labor, postage and preparing the explanation or summary agreed to by the individual.<sup>60</sup> Under Section 13405(e)(2) of the HITECH Act (again, amending HIPAA and effective February 17, 2010), any fee that the record keeper may impose for providing a copy, summary or explanation of such information in an electronic form may not be greater than the record keeper's labor costs in responding to the request.<sup>61</sup> Neither the regulations, nor the comments accompanying the publishing of the regulations clarify whether fees must be paid before copies are released to the individual.

### **PRE-EMPTION ISSUES**

According to CalOHII, HIPAA preempts California law pertaining to copies of X-rays and patient access to summaries and explanations.<sup>62</sup> Contrary to state law, HIPAA does not allow providers alone to deny a patient access to X-rays or tracings derived from ECGs, EEGs, or EMGs because the originals of these already have been transmitted to another health care provider at the patient's or representative's request.<sup>63</sup> Therefore, regardless of whether the provider has already sent these documents to another health care provider, the provider must give access to the patient upon request.

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<sup>54</sup> 45 C.F.R. § 164.524(b)(2).

<sup>55</sup> 45 C.F.R. § 164.524(b)(2)(ii).

<sup>56</sup> 45 C.F.R. § 164.524(b)(2)(iii).

<sup>57</sup> 45 C.F.R. § 164.524(c)(3).

<sup>58</sup> *Id.*

<sup>59</sup> 45 C.F.R. § 164.524(c)(2)(ii).

<sup>60</sup> 45 C.F.R. § 164.524(c)(4).

<sup>61</sup> HITECH Act Section 13405(e)(2), Pub. L. No. 111-5 (Feb. 17, 2009).

<sup>62</sup> *CalOHII, HIPAA PREEMPTION ANALYSIS, Patient Access To Health Records Act*, 16-17 (January 27, 2010), at [http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#CalOHI\\_LEGAL\\_RELATED\\_POLICY](http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#CalOHI_LEGAL_RELATED_POLICY). (Look under 2003-24 on this Webpage.) [hereinafter *CalOHII PAHRA Analysis*].

<sup>63</sup> *Id.*

HIPAA is also contrary to state law regarding summaries and explanations. California law allows record keepers to provide summaries and explanations at the provider's discretion.<sup>64</sup> In contrast, HIPAA allows summaries and explanations in lieu of actual access to the records, but only if the individual agrees to this alternative in advance.<sup>65</sup>

CalOHII has determined that California law pertaining to accessing fees and obtaining free records from health care providers is not contrary to HIPAA and must be followed.<sup>66</sup> The fifteen day period for a provider to make copies available under California law should prevail over HIPAA's thirty-day period since the state law is not contrary to the federal law and likely would be judged more stringent.<sup>67</sup>

California law which allows HMO members and their representatives access to medical information remains in effect.<sup>68</sup> However, HIPAA prohibits the disclosure of medical information by health care providers, health care clearinghouses, and HMOs to outside parties or in situations that California law would have permitted.<sup>69</sup>

The provisions of California law relating to access to personal information held by state agencies runs afoul of some HIPAA provisions. Since HIPAA requires that the copying costs be related to the actual costs of providing copies, the charge of ten cents per page for copies may not be allowable if it is more than the actual cost of producing the copies.<sup>70</sup>

Releasing personal health information may have an adverse effect on certain people when they view disturbing information about themselves. HIPAA does not allow a state agency to decide whether to release information based on whether the information about a person's physical or mental condition will be detrimental to that person.<sup>71</sup> HIPAA only allows for such an assessment to be made by a health care professional.<sup>72</sup> Therefore, California law allowing a state agency to make this determination cannot prevail.

**Question 3:** Can a patient make changes to the information in his/her file?

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<sup>64</sup> Cal. Health & Safety Code §123130(a).

<sup>65</sup> 45 C.F.R. § 164.524(c)(2)(ii).

<sup>66</sup> *CalOHII PAHRA Analysis*, *supra* note 62, at 14-15, 18-19.

<sup>67</sup> Compare 45 C.F.R. § 164.524(b)(2) with Cal. Health & Safety Code § 123110(b) under 45 C.F.R. § 160.203.

<sup>68</sup> *CalOHII, HIPAA PREEMPTION ANALYSIS, Confidentiality of Medical Information Act*, 36 (June 23, 2006), at [http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#completed\\_preemption](http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#completed_preemption) [hereinafter *CalOHII CMIA Analysis*]. See also note regarding CMIA in footnote 41.

<sup>69</sup> See *CalOHII CMIA Analysis*, *supra* note 68, at 40-55, 59-69, 71-76.

<sup>70</sup> *CalOHII, HIPAA PREEMPTION ANALYSIS, Information Practices Act of 1977*, 106 (Dec. 29, 2004), at [http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#completed\\_preemption](http://www.ohi.ca.gov/calohi/HIPAA/Legal.aspx#completed_preemption) [hereinafter *CalOHII IPA Analysis*].

<sup>71</sup> *CalOHII IPA Analysis*, *supra* note 70, at 130-131.

<sup>72</sup> 45 C.F.R. § 164.524(a)(4).

## SHORT ANSWER

An individual has a right to request amendment or correction of health information that s/he feels is inaccurate. Either an adult or a minor may request changes to his/her medical records. The record keeper must inform the individual of how to make such a request and where to address the request. The request should be in writing. The requested amendment must be of a “reasonable” length. A record keeper which is covered under PAHRA must act on the request within 60 days. The record keeper may request a 30-day extension of this time period if the individual is provided a written statement of the reason for the delay and the date by which the request will be completed. A health plan or other entity covered by IPA must rule on the request within 30 days. If the record keeper denies the request, the denial must be in writing and include the basis for the denial, information on how to challenge the denial, and how to make a complaint about the denial. These same provisions would apply to health information held by a state agency.

## CALIFORNIA LAW

Under PAHRA, any adult patient who inspects her records has the right to provide a written addendum of up to 250 words regarding any item or statement in her records that she believes to be incomplete or incorrect.<sup>73</sup> The addendum must clearly indicate in writing that the patient wishes the addendum to be made part of her record.<sup>74</sup> The health care provider must attach the addendum to the patient’s records and include that addendum whenever a disclosure of the allegedly incomplete or incorrect portion of the patient’s records is made to any third party.<sup>75</sup> If the addendum contains any defamatory or otherwise unlawful language, it will not, in and of itself, subject the health care provider to civil, criminal, or other liability.<sup>76</sup>

CMIA, pertaining to information held by health care providers, health plans, and health care clearinghouses, does not make provision for amending records. CMIA regulates the disclosure of medical information by health care providers, rather than the content of those records.

IPA permits an individual to amend the personal information held by state agencies.<sup>77</sup> Within thirty days of receiving a request to amend a record, the agency must either make the correction and inform the individual of the correction, or deny the request and inform the individual of the denial, the reason for the refusal, and the information needed to obtain a review of the agency’s refusal.<sup>78</sup> Note that a state agency has an affirmative duty to maintain accurate and complete records, and when it transfers a record outside of state government, the agency must make corrections or delete inaccurate information.<sup>79</sup>

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<sup>73</sup> Cal. Health & Safety Code § 123111(a).

<sup>74</sup> *Id.*

<sup>75</sup> Cal. Health & Safety Code § 123111(b).

<sup>76</sup> Cal. Health & Safety Code § 123111(c).

<sup>77</sup> Cal. Civ. Code § 1798.35.

<sup>78</sup> Cal. Civ. Code § 1798.35.

<sup>79</sup> Cal. Civ. Code § 1798.18.

## FEDERAL LAW: HIPAA

An individual (e.g., a patient) has the right to have a record keeper amend information in a record for as long as the information is maintained.<sup>80</sup> Accordingly, record keepers must allow requests to amend information.<sup>81</sup> Record keepers may require individuals to make requests in writing and to provide a reason for an amendment.<sup>82</sup> Record keepers must document the offices or titles of persons responsible for receiving and processing requests for amendments.<sup>83</sup> The record keeper must also retain a copy of such requests.<sup>84</sup>

Record keepers must act on a request no later than 60 days after receiving a request.<sup>85</sup> If they cannot act on the request within the time required, they may have a one-time 30-day extension, if they provide the individual with a written statement of the reasons for the delay and the date by which the request will be completed.<sup>86</sup>

If the record keeper accepts the amendment, the following requirements must be met:

- The amendments must be made to the information or, at a minimum, appended or provided by means of a link to the location of the amendment.<sup>87</sup>
- The individual must be informed in a timely manner that the amendment is accepted.<sup>88</sup>
- The record keeper must find out, from the individual requesting amendment, who needs to be notified of the amendment and get the individual's agreement to that notification.<sup>89</sup>
- The record keeper must make reasonable efforts to inform and provide the amendment, within a reasonable time, to persons who received information about the individual and need the amendment, as well as persons, including business associates, that the record keeper knows have information subject to the amendment and that may have relied or could foreseeably rely on such information to the individual's detriment.<sup>90</sup>

The record keeper may deny an individual's request for amendment, if it determines that the information or record:

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<sup>80</sup> 45 C.F.R. § 164.526(a)(1).

<sup>81</sup> 45 C.F.R. § 164.526(b)(1).

<sup>82</sup> *Id.*

<sup>83</sup> 45 C.F.R. § 164.526(f).

<sup>84</sup> 45 C.F.R. §§ 164.526(f), 164.530(j).

<sup>85</sup> 45 C.F.R. § 164.526(b)(2)(i).

<sup>86</sup> 45 C.F.R. § 164.526(b)(ii).

<sup>87</sup> 45 C.F.R. § 164.526(c)(1).

<sup>88</sup> 45 C.F.R. § 164.526(c)(2).

<sup>89</sup> *Id.*

<sup>90</sup> 45 C.F.R. § 164.526(c)(3).

- Was created by someone other than the record keeper, unless the individual provides a reasonable basis to believe that the originator of protected health information is no longer available to act on the request amendment;
- Is not part of its records;
- Is not subject to the patient's inspection; or
- Is accurate and complete.<sup>91</sup>

If the record keeper denies the requested amendment, in whole or in part, the record keeper must provide a timely denial, written in plain language and containing:

- The basis for the denial;
- The individual's right to submit a written statement disagreeing with the denial and how the individual may file such a statement;
- A statement that, if the individual does not submit a statement of disagreement, the individual may request that the record keeper provide the individual's request for amendment and the denial with any future disclosures of the information that the individual is seeking to amend; and
- A description of how the individual may complain to the record keeper, including the name, or title, and telephone number of the contact person or office for the complaint, or to the Office of Civil Rights.<sup>92</sup>

The record keeper must permit an individual to submit a written statement disagreeing with the denial of an amendment, in whole or in part, including the individual's basis for disagreement.<sup>93</sup> The record keeper may set a reasonable limit to the length of a statement.<sup>94</sup> The record keeper may prepare a written rebuttal to the individual's statement, and a copy of the rebuttal must be provided to the individual.<sup>95</sup>

The disputed amendment, the denial, the statement of disagreement, and any rebuttal must be appended to or otherwise linked to the record or information at issue.<sup>96</sup> These documents or, at the record keeper's choice, a summary of the documents must be provided when the disputed record of information is subsequently disclosed.<sup>97</sup> Even if the individual has not submitted a written statement

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<sup>91</sup> 45 C.F.R. § 164.526(a)(2).

<sup>92</sup> 45 C.F.R. § 164.526(d).

<sup>93</sup> 45 C.F.R. § 164.526(d)(2).

<sup>94</sup> *Id.*

<sup>95</sup> 45 C.F.R. § 164.526(d)(3).

<sup>96</sup> 45 C.F.R. § 164.526(d)(4).

<sup>97</sup> 45 C.F.R. § 164.526(d)(5)(i).

of disagreement, she or he may request that the record keeper include the request for amendment and the denial or an accurate summary of the documents in future disclosures of the disputed record or information.<sup>98</sup> If, when disclosing the disputed information, the transmission method does not readily lend itself to including the additional documentation, the record keeper may separately submit the additional information concerning the dispute.<sup>99</sup> A record keeper receiving notice of an amendment from another record keeper must amend its records to reflect the new information.<sup>100</sup>

### PRE-EMPTION ISSUES

CalOHII's PAHRA analysis determines that HIPAA totally preempts California law regarding addenda to health information due to several points on which the laws are contrary to one another.<sup>101</sup> First, amendments under HIPAA are not always mandatory.<sup>102</sup> Also, California law limits the request for an amendment to adults, whereas HIPAA does not preclude a minor from requesting an amendment to a medical record.<sup>103</sup> PAHRA has no time limit within which the provider must include the amendment. HIPAA, on the other hand, has a 60-day time limit for covered entities to act on the amendment request.<sup>104</sup> Further, HIPAA does not require that an amendment request be written, as the State provision does.<sup>105</sup> HIPAA also requires that individuals be informed about the right to request amendment and how to do so, and the record keepers must also inform certain third parties of the amendment.<sup>106</sup> HIPAA also does not limit an amendment to 250 words or less as the State provision does.<sup>107</sup>

However, the CalOHII PAHRA analysis is problematic on a couple of points. Where California's law offers greater rights to make amendments than does HIPAA, California law should continue to take precedence.<sup>108</sup> The fact that California requires that an addendum be included in the medical record if requested is a more stringent requirement, allowing an individual greater rights, than HIPAA's regulations that allow a record keeper to deny a request to add an addendum to a medical record.<sup>109</sup> Furthermore, HIPAA allows the record keeper to require the individual to provide a reason for the amendment.<sup>110</sup> No such requirement appears in the California statute. Thus, in these two areas, California law should take precedence over HIPAA.

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<sup>98</sup> 45 C.F.R. § 164.526(d)(5)(ii).

<sup>99</sup> 45 C.F.R. § 164.526(d)(5)(iii).

<sup>100</sup> 45 C.F.R. § 164.526(e).

<sup>101</sup> *CalOHII PAHRA Analysis, supra* note 62, at 28-29.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 45 C.F.R. § 160.202. Definition of *More Stringent* (2).

<sup>109</sup> *Compare* Cal. Health & Safety Code § 123111(a), *with* 45 C.F.R. § 164.526(a)(2).

<sup>110</sup> 45 C.F.R. § 164.526(b)(1).

CalOHII's IPA analysis also finds that a state agency's duty to correct or delete inaccurate information is pre-empted in part by HIPAA.<sup>111</sup> CalOHII has determined that the state can only make corrections and deletions as provided under HIPAA.<sup>112</sup> However, HIPAA makes no provisions for a state agency to make corrections or deletions on its own, so to the contrary, it would seem that this is an area in which state law, but no federal law exists. In such instances, state law should remain in effect. In particular, the part of state law imposing a duty on state agencies to maintain accurate and complete records should remain in effect.<sup>113</sup>

On the other hand, as CalOHII concluded, HIPAA's more stringent amendment procedures completely supersede the Information Practices Act amendment procedures, except for IPA's 30-day period for accepting or rejecting a request to amend which is more stringent than HIPAA's 60 days.<sup>114</sup>

Because, as noted above, CMIA includes no amendment procedures, all of HIPAA's amendment procedures will apply to records governed by that Act.

**Question 4:** Can a personal representative request a patient's file?

#### **SHORT ANSWER**

A personal representative, including parent or guardian of a minor, the guardian or conservator of an adult, or a beneficiary or personal representative of a deceased person, may access an individual's health records upon presenting a valid authorization. For special provisions related to access to minors' records, see Question 8. A record keeper, including a state agency, generally cannot deny access purely in its own discretion or because it has determined that granting access would be contrary to an individual's best interests. The special provisions for access to medical information by a protection and advocacy organization apply when the organization is investigating abuse or neglect, but the organization would need a proper authorization to medical information in other instances.

#### **CALIFORNIA LAW**

The Legislature expressed the intent to permit access to medical information for people who are responsible for the health care of others.<sup>115</sup> California defines a "patient's representative" as the parent or guardian of a minor, the guardian or conservator of an adult, or the beneficiary or personal representative of a deceased patient.<sup>116</sup> Patient representatives have much the same access to a patient's medical information as does the patient.<sup>117</sup>

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<sup>111</sup> CalOHII IPA Analysis, *supra* note 70, at 39-40.

<sup>112</sup> *Id.*

<sup>113</sup> Cal. Civ. Code § 1798.18, CalOHII IPA Analysis, *supra* note 70, at 39-40.

<sup>114</sup> CalOHII IPA Analysis, *supra* note 70, at 113-114.

<sup>115</sup> Cal. Health & Safety Code § 123100.

<sup>116</sup> Cal. Health & Safety Code § 123105(e).

<sup>117</sup> Cal. Health & Safety Code § 123110.

Under IPA, personal information held by a state agency may be disclosed to the person representing the individual provided that it can be proven with reasonable certainty through agency forms, documents or correspondence that the person is the authorized representative of the individual whose personal information is at issue.<sup>118</sup> A person of the individual's choosing, who has written authorization from the individual, has the same right to inspect and copy records of personal information held by a state agency as does the individual.<sup>119</sup> California has a special rule to allow access to individuals' information in state agency files by protection and advocacy agencies to protect the rights of people with disabilities.<sup>120</sup> CMIA does not specifically address access by a personal representative, though it would appear to allow access by a personal representative who presents a duly prepared authorization.<sup>121</sup>

California also has a special provision for *legal* representatives of a patient. Prior to filing an action or appearing in an action, if the patient's attorney or a representative of the patient's attorney requests the patient's record, the health care provider must make available those records for inspection and copying by the attorney or attorney representative upon presentation of the patient's written authorization.<sup>122</sup> If the attorney employs a professional copying service, the health care provider must cooperate with the copying service when presented with authorization from the patient's representative.<sup>123</sup> The records must be made available within five days of presentation of the authorization.<sup>124</sup> Failure to provide records may subject the health care provider to liability for reasonable expenses, including attorney's fees, incurred in a proceeding to enforce the provision.<sup>125</sup> Costs for standard reproduction of the records may not exceed ten (\$.10) cents per page, or twenty (\$.20) cents per page of microfilm.<sup>126</sup> Clerical costs in locating and making available the records may be billed at a maximum rate of sixteen (\$16) dollars per hour per person and actual postage costs.<sup>127</sup>

### **FEDERAL LAW: HIPAA**

HIPAA requires record keepers to treat personal representatives as they would an individual with a few exceptions.<sup>128</sup> The exceptions include situations in which unemancipated minors may consent to their own health care services (and no other consent from another individual is required) and the minor has not requested that a person act as his or her representative, and situations in which the record keeper suspects abuse, neglect, or other circumstances suggesting that treating a person as the personal

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<sup>118</sup> Cal. Civ. Code § 1798.24(c).

<sup>119</sup> Cal. Civ. Code § 1798.34(b).

<sup>120</sup> Cal. Civ. Code § 1798.24b.

<sup>121</sup> Cal. Civ. Code § 56.11. *See* Question 5 regarding HIPAA pre-emption of authorization forms.

<sup>122</sup> Cal. Evid. Code § 1158.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 45 C.F.R. § 164.502(g).

representative would endanger the individual whose health information is at issue.<sup>129</sup> Notably, the record keeper, in its professional judgment, may determine that treating a person as an individual's personal representative is not in the best interest of the individual and thus not disclose information to that person.<sup>130</sup>

### PRE-EMPTION ISSUES

According to the CalOHII, PAHRA *requires* disclosure where HIPAA would only *permit* disclosure, and PAHRA's disclosure requirement can be followed without posing a legal conflict with HIPAA.<sup>131</sup> HIPAA reduces individual access by allowing record keepers the discretion to deny certain people as personal representatives under certain circumstances.<sup>132</sup> The California provisions do not allow for a record keeper to deny access purely in its own discretion or because the record keeper has determined that access to a particular person would be contrary to the individual's best interests, and thus the California provisions should take precedence.

IPA also does not allow the state agency to exercise its discretion in determining whether to disclose information to a personal representative, thus IPA is more stringent in this regard and trumps HIPAA.<sup>133</sup>

California's special law to allow access to protected information for protection and advocacy agencies is partially pre-empted.<sup>134</sup> A protection and advocacy agency may have access to this information in order to investigate abuse or neglect, but would require a proper authorization for any other access.<sup>135</sup>

California Evidence Code section 1158 which gives special access to medical records to attorneys or their representatives should be fully enforceable despite HIPAA. To date, CalOHII has not posted a pre-emption analysis of this section of California law. Attorneys wishing to use this section should make sure that the authorization complies with all HIPAA requirements (see below). Section 1158 actually gives quicker access to records than does HIPAA.<sup>136</sup> The "reasonable cost" of section 1158 should not exceed the vaguely defined fees allowed under HIPAA.<sup>137</sup>

#### **Question 5:** What does a valid authorization to access medical records look like?

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<sup>129</sup> 45 C.F.R. §§ 164.502(g)(3), 164.502(g)(5). In those situations where a person, such as a parent, is not a representative of an unemancipated minor under HIPAA, a record keeper may still disclose or refuse to disclose the minor's records to the minor consistent with State law. 45 C.F.R. § 164.502(g)(3)(ii).

<sup>130</sup> 45 C.F.R. § 164.502(g)(5)(ii).

<sup>131</sup> *CalOHII PAHRA Analysis*, *supra* note 62 at 12-13.

<sup>132</sup> 45 C.F.R. § 164.502(g)(5)(ii).

<sup>133</sup> See discussion, *supra*, at nn. 118-120.

<sup>134</sup> *CalOHII IPA Analysis*, *supra* note 70, at 91-92.

<sup>135</sup> *Id.*

<sup>136</sup> Compare Cal. Evid. Code § 1158 (five days to make records available), with 45 C.F.R. § 164.524(b)(2) (up to 30 or 60 days to make records available).

<sup>137</sup> 45 C.F.R. § 164.524(c)(4).

## SHORT ANSWER

A valid authorization may be handwritten by the person signing it; however, it generally should be typewritten. If the authorization is signed by someone other than the individual whose health information is sought, the personal representative must include a description of his/her authority to act on behalf of the individual. The person's signature must serve no purpose other than to approve the authorization to provide access to the health information (e.g. not also approving payment of benefits or waiving rights, etc.). Authorizations must serve no purpose other than the disclosure of health information. The authorization must have a specific date for the authorization to end. The record keeper must provide a copy of the authorization to the individual.

The authorization should include a specific and meaningful description of the information to be used or disclosed. The name of the person or entity that is authorized to disclose the information and the name of the person, entity, or type of entity to whom the information will be disclosed must also be included. The purpose of the disclosure must be included. This statement of purpose is sufficient if it states: "at the request of the individual."

The authorization must include statements regarding the right to revoke the authorization, exceptions to that right, and ability or inability of the record keeper to condition benefits or services on the signing of an authorization. A statement informing the individual that the information disclosed may be re-disclosed and may lose its HIPAA protections must be included.

## CALIFORNIA LAW

Neither PAHRA nor IPA contain requirements for the contents of authorizations. IPA mentions written authorizations,<sup>138</sup> and both sets of laws allow a record keeper to ask for proper identification before inspecting records.<sup>139</sup>

CMIA requires an authorization, except in certain listed—and extensive—situations.<sup>140</sup> A person that is not already authorized to receive medical information must have a valid authorization. An authorization is valid if it:

- Is handwritten by the person who signs it or is in a typeface no smaller than 14-point type.<sup>141</sup>
- Is clearly separate from any other language present on the same page and is signed for no other purpose than to execute the authorization.<sup>142</sup>
- Is signed and dated by one of the following:

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<sup>138</sup> Cal. Civ. Code § 1798.34(b).

<sup>139</sup> Cal. Civ. Code § 1798.34(a), Cal. Health & Safety Code § 123110(g).

<sup>140</sup> Cal. Civ. Code §§ 56.10(a)-(c), 56.102(b).

<sup>141</sup> Cal. Civ. Code § 56.11(a).

<sup>142</sup> Cal. Civ. Code § 56.11(b).

- The patient<sup>143</sup>
- The legal representative of the patient, if the patient is a minor or legally incompetent.<sup>144</sup>
- The spouse of the patient or the person financially responsible for the patient, where the medical information is being sought for the sole purpose of processing an application for health insurance or for enrollment in certain types of health plans as an enrolled spouse or dependent under the policy or plan.<sup>145</sup>
- The beneficiary or personal representative of a deceased patient.<sup>146</sup>
- States the specific uses and limitations on the types of medical information to be disclosed<sup>147</sup>
- States the name or functions of the record keeper that may disclose the medical information.<sup>148</sup>
- States the name or functions of the persons or entities authorized to receive the medical information<sup>149</sup>
- States the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information.<sup>150</sup>
- States a specific date after which the record keeper is no longer authorized to disclose the medical information.<sup>151</sup>
- Advises the person signing the authorization of the right to receive a copy of the authorization.<sup>152</sup>

Upon demand from a patient or the person signing the authorization, the health care provider must furnish a copy of the authorization to that person.<sup>153</sup> An individual who could sign an authorization may cancel or modify that authorization at any time, but the cancellation or modification would only be effective after the health care provider has received it.<sup>154</sup>

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<sup>143</sup> Cal. Civ. Code § 56.11(c)(1).

<sup>144</sup> Cal. Civ. Code § 56.11(c)(2).

<sup>145</sup> Cal. Civ. Code § 56.11(c)(3).

<sup>146</sup> Cal. Civ. Code § 56.11(c)(4).

<sup>147</sup> Cal. Civ. Code § 56.11(d).

<sup>148</sup> Cal. Civ. Code § 56.11(e).

<sup>149</sup> Cal. Civ. Code § 56.11(f).

<sup>150</sup> Cal. Civ. Code § 56.11(g).

<sup>151</sup> Cal. Civ. Code § 56.11(h).

<sup>152</sup> Cal. Civ. Code § 56.11(i).

<sup>153</sup> Cal. Civ. Code § 56.12.

<sup>154</sup> Cal. Civ. Code § 56.15.

California has special laws pertaining to the authorization to disclose medical information about a person's outpatient treatment with a psychotherapist and authorizations to disclose medical information pertaining to medical malpractice cases.<sup>155</sup>

### FEDERAL LAW: HIPAA

A record keeper may use or disclose protected health information pursuant to a HIPAA-compliant authorization.<sup>156</sup> Any use or disclosure of protected health information must be consistent with the authorization.<sup>157</sup> An authorization can still be valid if it contains elements or information in addition to those listed below, as long as the additions are not inconsistent with the requirements.<sup>158</sup> Valid authorizations must be written in plain language and contain the following core elements and required statements:<sup>159</sup>

- A specific and meaningful description of the information to be used or disclosed;<sup>160</sup>
- The name or other specific identification of the person(s), or class of persons, authorized to make the use or disclosure;<sup>161</sup>
- The name or other specific identification of the person(s), or class of persons, to whom the record keeper may make the use or disclosure;<sup>162</sup>
- A description of each purpose of the use or disclosure. If the individual initiates the authorization, it is sufficient to include the statement, "at the request of the individual."<sup>163</sup>
- An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of information for research, including the creation and maintenance of a research database or research repository.<sup>164</sup>
- Signature of the individual and date is also required.<sup>165</sup> If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must be provided.<sup>166</sup>

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<sup>155</sup> Cal. Civ. Code §§ 56.104, 56.105.

<sup>156</sup> 45 C.F.R. § 164.502(a)(iv).

<sup>157</sup> 45 C.F.R. § 164.508(a)(1).

<sup>158</sup> 45 C.F.R. § 164.508(b)(ii).

<sup>159</sup> 45 C.F.R. § 164.508 (c)(1), (2).

<sup>160</sup> 45 C.F.R. § 164.508(c)(1)(i).

<sup>161</sup> 45 C.F.R. § 164.508(c)(1)(ii).

<sup>162</sup> 45 C.F.R. § 164.508(c)(1)(iii).

<sup>163</sup> 45 C.F.R. § 164.508(c)(1)(iv).

<sup>164</sup> 45 C.F.R. § 164.508(c)(1)(v).

<sup>165</sup> 45 C.F.R. § 164.508(c)(1)(vi).

<sup>166</sup> 45 C.F.R. § 164.508(c)(1)(vi).

- A statement of the individual’s right to revoke the authorization in writing, and either exceptions to that right and how the individual may go about making the revocation or a reference to the record keeper’s privacy notice;<sup>167</sup>
- A statement regarding the ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the individual agreeing to the authorization;<sup>168</sup> and
- A statement informing the individual that information released pursuant to the authorization may be re-disclosed and lose HIPAA protection;<sup>169</sup>

If the record keeper is asking for authorization to disclose or use the information for marketing purposes, it must disclose that it will receive monetary benefit directly or indirectly from the use or disclosure.<sup>170</sup> An individual is entitled to a copy of the signed authorization which the record keeper has requested.<sup>171</sup>

An authorization is invalid, if the document submitted has any of the following defects:

- the expiration date has passed or the expiration event is known by the record keeper to have occurred;<sup>172</sup>
- one of the core elements described above is not completely filled out;<sup>173</sup>
- the record keeper knows that the authorization has been revoked,<sup>174</sup>
- the authorization is combined with another document to create a compound authorization, except for certain compound authorizations,<sup>175</sup>
- the authorization conditions the provision of treatment, payment, or enrollment in a health plan or eligibility for benefits on providing the authorization, except where legally allowed;<sup>176</sup> or
- any material information in the authorization is known by the record keeper to be false.<sup>177</sup>

<sup>167</sup> 45 C.F.R. § 164.508(c)(2)(i).

<sup>168</sup> 45 C.F.R. § 164.508(c)(2)(ii).

<sup>169</sup> 45 C.F.R. § 164.508(c)(2)(iii).

<sup>170</sup> 45 C.F.R. § 164.508(a)(3)(ii).

<sup>171</sup> 45 C.F.R. § 164.508(c)(4).

<sup>172</sup> 45 C.F.R. § 164.508(b)(2)(i).

<sup>173</sup> 45 C.F.R. § 164.508(b)(2)(ii).

<sup>174</sup> 45 C.F.R. § 164.508(b)(2)(iii).

<sup>175</sup> 45 C.F.R. § 164.508(b)(2)(iv). Section 164.508(b)(3) lists three types of compound authorizations that are permitted.

<sup>176</sup> 45 C.F.R. § 164.508(b)(2)(iv). Section 164.508(b)(4) contains descriptions of the limited circumstances under which a conditional authorization is permitted.

<sup>177</sup> 45 C.F.R. § 164.508(b)(2)(v).

## PRE-EMPTION ISSUES

Neither PAHRA nor IPA conflicts with HIPAA in this area. Allowing a record keeper to verify the identity of an unknown person requesting access is actually a requirement under HIPAA, so this requirement is effective.<sup>178</sup>

According to CalOHII, CMIA is only partially preempted by HIPAA.<sup>179</sup> California allows an authorization to be handwritten by the person signing it, and this does not conflict with HIPAA.<sup>180</sup> Two California authorization elements are more stringent than HIPAA standards and therefore must be implemented. First, a signature must serve no other purpose than to execute an authorization, effectively making a compound authorization with one signature invalid.<sup>181</sup> Second, California requires a specific date for ending the authorization to disclose information, while HIPAA allows either a date or an event.<sup>182</sup> By requiring a specific date California gives greater protection to individuals and thus takes precedence over HIPAA.<sup>183</sup>

The California requirement that an authorization be signed and dated by the patient, the patient's spouse or a legal representative is preempted by HIPAA because, unlike HIPAA, the former does not require that if the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.<sup>184</sup> In addition, HIPAA makes no provision for the execution of authorizations by the spouse of the patient or the person financially responsible for the patient, so this separate provision is preempted by HIPAA.<sup>185</sup>

HIPAA requires a record keeper to provide a copy of an authorization regardless of whether the patient or personal representative demands a copy; thus, in this instance, HIPAA preempts California law.<sup>186</sup>

HIPAA requires that an authorization include the required statements noted above, including the right to revoke the authorizations, exceptions to the right to revoke, and the ability or inability of the record keeper to condition benefits or services on a signed authorization.<sup>187</sup> Since California law has no similar provision, these statements must be part of a valid authorization in order to meet the more stringent requirements of HIPAA.

California has a special law regarding disclosure of medical information by a pharmaceutical company.<sup>188</sup> This provision prohibits conditioning receipt of pharmaceuticals on a patient's signing of

<sup>178</sup> See 45 C.F.R. § 164.514(h)(1)(i).

<sup>179</sup> *CalOHII CMIA Analysis*, *supra* note 68.

<sup>180</sup> Cal. Civ. Code § 56.11(a), *CalOHII CMIA Analysis*, *supra* note 68, at 94.

<sup>181</sup> Cal. Civ. Code § 56.11(b), *CalOHII CMIA Analysis*, *supra* note 68, at 94.

<sup>182</sup> Compare Cal. Civ. Code § 56.11(h), with 45 C.F.R. § 164.508(c)(1)(v).

<sup>183</sup> *CalOHII CMIA Analysis*, *supra* note 68, at 94-97.

<sup>184</sup> Compare Cal. Civ. Code § 56.11(c), with 45 C.F.R. § 164.508(c)(1)(vi), *CalOHII CMIA Analysis*, *supra* note 68, at 94-97.

<sup>185</sup> See Cal. Civ. Code § 56.11(c)(3). *CalOHII CMIA Analysis*, *supra* note 68, at 94.

<sup>186</sup> Compare Cal. Civ. Code § 56.12, with 45 C.F.R. § 164.508(c)(4). *CalOHII CMIA Analysis*, *supra* note 68, at 98.

<sup>187</sup> 45 C.F.R. § 164.508(c)(2).

<sup>188</sup> Cal. Civ. Code § 56.102.

an authorization in certain circumstances.<sup>189</sup> However, this provision is pre-empted by HIPAA, except in relation to individuals who are enrolled in clinical research-related treatment.<sup>190</sup>

California's special laws pertaining to the authorization to disclose medical information about a person's outpatient treatment with a psychotherapist and authorizations to disclose medical information pertaining to medical malpractice cases do not conflict with HIPAA, so both laws remain in effect.<sup>191</sup>

With respect to the other issues of authorizations not mentioned above, HIPAA does not preempt the state laws because they are not contrary to standards specified by HIPAA, or they are more stringent than HIPAA.<sup>192</sup>

**Question 6:** When may a provider deny access to health information sought under an otherwise valid authorization?

### SHORT ANSWER

A health care provider may not deny access to medical records based on unpaid bills for health care services. Providers who deny access on this basis could be subject to fines, imprisonment, or disciplinary action by a state licensing agency.

Denial of access to medical records is more likely to be an issue and to be allowed when concerning psychotherapy notes and medical records related to a medical research study. These determinations must be made by a health care professional, and under HIPAA, they are generally not appealable.

State agencies may still deny access to records revealing status as adoptive parents, health information used for administrative actions or proceedings, health information used to determine fitness for licensure or public employment, and information held by the State Compensation Insurance Funds related to settlement of workers' compensation claims. In other instances, a state agency may only deny access if a health care professional has determined that the access is reasonably likely to endanger the life or physical safety of the individual or another person. Such denials would be appealable.

### CALIFORNIA LAW

In California, under PAHRA, a health care provider may deny a minor's representative access to the minor patient's records if it determines that such access would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being.<sup>193</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *CalOHII CMIA Analysis, supra* note 68, at 87-88.

<sup>191</sup> *CalOHII CMIA Analysis, supra* note 68, at 89-90; Cal. Civ. Code § 56.104.

<sup>192</sup> *CalOHII CMIA Analysis, supra* note 68, at 93-97; Cal. Civ. Code § 56.11.

<sup>193</sup> Cal. Health & Safety Code § 123115(a)(2).

With respect to *mental health records*, a provider may deny access if s/he determines that there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of the records.<sup>194</sup> If the provider denies access to mental health records, the patient must be informed of the denial.<sup>195</sup> In addition, a written record of the request and the reasons for the denial must be placed in the patient's file.<sup>196</sup>

A provider cannot withhold patient records or summaries of patient records because of an unpaid bill for health care services.<sup>197</sup> A provider who withholds patient records or summaries of patient records because of unpaid bills for health care services will be subject to sanctions.<sup>198</sup>

Under IPA, California places some restrictions on access to information held by state agencies. Certain information regarding status as adoptive parents that was promised to be or legally held confidential may be kept confidential.<sup>199</sup> An agency may withhold information about a person's fitness for licensure or public employment.<sup>200</sup> If an agency determines that the disclosure of physical or psychological health information that it possesses would be detrimental to the individual, the agency may decline to disclose the information.<sup>201</sup> The State Compensation Insurance Fund need not disclose personal information related to settlement of claims for work-related illnesses or injuries.<sup>202</sup> An agency may simply delete the exempt information when disclosing personal information to an individual.<sup>203</sup> Upon request from an individual directly affected by the determination, IPA requires the agency to review its determinations that particular information is exempt from access.<sup>204</sup>

### **FEDERAL LAW: HIPAA**

Record keepers may not deny access or deny an individual's right to obtain copies of health information, unless the information is subject to an exception set forth below.<sup>205</sup> Failure to pay a bill is not a lawful reason to deny access.<sup>206</sup> Individuals do not have a right to access, nor do they have a right to a review of denied access, to the following:<sup>207</sup>

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<sup>194</sup> Cal. Health & Safety Code § 123115(b). PAHRA defines "mental health records" as "patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder" which "includes, but is not limited to, all alcohol and drug abuse records." Cal. Health & Safety Code § 123105(b).

<sup>195</sup> Cal. Health & Safety Code § 123115(b)(3).

<sup>196</sup> Cal. Health & Safety Code § 123115(b)(1).

<sup>197</sup> Cal. Health & Safety Code § 123110(j).

<sup>198</sup> Cal. Health & Safety Code § 123110(j).

<sup>199</sup> Cal. Civ. Code § 1798.38.

<sup>200</sup> Cal. Civ. Code § 1798.40(d).

<sup>201</sup> Cal. Civ. Code § 1798.40(f).

<sup>202</sup> Cal. Civ. Code § 1798.40(g).

<sup>203</sup> Cal. Civ. Code § 1798.43.

<sup>204</sup> Cal. Civ. Code § 1798.41(b).

<sup>205</sup> 45 C.F.R. § 164.524(a)(1).

<sup>206</sup> 65 Fed. Reg. 82,735 (Dec. 28, 2000).

<sup>207</sup> 45 C.F.R. § 164.524(a)(1), 65 Fed. Reg. 82,554 (Dec. 28, 2000).

- Psychotherapy notes;<sup>208</sup> (Even though individuals are denied access to psychotherapist notes, record keepers are encouraged to provide access when they believe it is appropriate to do so.<sup>209</sup>)
- Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding;<sup>210</sup>
- Protected health information maintained by a record keeper that is:
  - Subject to the Clinical Laboratory Improvements Amendments of 1988 (CLIA) if the law prohibits such access;<sup>211</sup> or
  - A research laboratory which is one of a few exempt from CLIA.<sup>212</sup> These laboratories are those that perform forensic testing, those that test human specimens but do not report patient-specific results for the diagnosis, prevention or treatment of any disease or impairment of, or the assessment of the health of individual patients, and those laboratories certified by the Substance Abuse and Mental Health Services Administration (SAMHSA).<sup>213</sup>

Providers are allowed to deny an individual access -- without an opportunity for review -- in the following circumstances:

- A record keeper that is a correctional institution or a covered health care provider acting under the direction of the correctional institution may deny an inmate's request to obtain a copy of health information, if obtaining such copy would jeopardize the health, safety, security, custody, or rehabilitation of the individual, other inmates, officers, employees, or other persons at the correctional institution or responsible for the transporting of the inmate.<sup>214</sup>
- Information that is created or obtained by a health care provider during research that includes treatment may be temporarily suspended while research is in progress, if the individual agreed to the denial of access when consenting to participate in the research, and was informed that access will be reinstated upon completion of the research.<sup>215</sup>

<sup>208</sup> 45 C.F.R. § 164.524(a)(1)(i).

<sup>209</sup> 65 Fed. Reg. 82,733 (Dec. 28, 2000).

<sup>210</sup> 45 C.F.R. § 164.524(a)(1)(ii).

<sup>211</sup> 45 C.F.R. § 164.524(a)(1)(iii)(A); CLIA provisions may be found at 42 U.S.C. 263a.

<sup>212</sup> 45 C.F.R. § 164.524(a)(1)(iii)(B).

<sup>213</sup> 42 C.F.R. § 493.3(a)(2).

<sup>214</sup> 45 C.F.R. § 164.524 (a)(2)(ii).

<sup>215</sup> 45 C.F.R. § 164.524(a)(2)(iii).

- An individual's information is contained in records subject to the Privacy Act,<sup>216</sup> if the denial of access under the Privacy Act would meet the requirements of that law.<sup>217</sup>
- If the information was obtained from someone other than a health care provider under a promise of confidentiality and access would be reasonably likely to reveal the source of the information.<sup>218</sup>

HIPAA also permits record keepers to deny access -- so long as the individual is provided the right to have a denial reviewed -- in the following three circumstances listed below. If access is denied on one of these bases, the record keeper must allow the individual a review by a health care professional other than the one who originally denied the request.<sup>219</sup> The record keeper must provide or deny access according to what the reviewing official decides.<sup>220</sup>

- A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person;<sup>221</sup>
- The information refers to another person (unless the other person is a health care provider) and a licensed health care professional has determined that the access requested is reasonably likely to cause substantial harm to the other person;<sup>222</sup> or
- The request for access is made by the individual's personal representative and a licensed health care professional has determined access by the personal representative is reasonably likely to cause substantial harm to the individual or another person.<sup>223</sup>

When access to health information is denied in whole or in part, these guidelines must be followed:

- The record keeper, to the extent possible, must give the individual access to any other protected health information requested.<sup>224</sup>
- Provide a timely written denial to the individual written in plain language<sup>225</sup> and containing:

<sup>216</sup> 5 U.S.C. § 552a. The Privacy Act is a federal law which establishes a code of fair information practice that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies.

<sup>217</sup> 45 C.F.R. § 164.524(a)(2)(iv).

<sup>218</sup> 45 C.F.R. § 164.524(a)(2)(v).

<sup>219</sup> 45 C.F.R. § 164.524(a)(4).

<sup>220</sup> 45 C.F.R. § 164.524(a)(4).

<sup>221</sup> 45 C.F.R. § 164.524(a)(3)(i).

<sup>222</sup> 45 C.F.R. § 164.524(a)(3)(ii).

<sup>223</sup> 45 C.F.R. § 164.524(a)(3)(iii).

<sup>224</sup> 45 C.F.R. § 164.524(d)(1).

<sup>225</sup> 45 C.F.R. § 164.524(d)(2).

- The basis for the denial;<sup>226</sup>
  - If applicable, a statement of the individual’s review rights, including a description of how the individual obtain a review;<sup>227</sup>
  - A description of how the individual may complain to the record keeper or to the DHHS Office of Civil Rights. The description must include the name, or title, and telephone number of the contract person or office designated for receiving HIPAA complaints.<sup>228</sup>
- If the record keeper does not have the information requested, but knows where the information is maintained, the record keeper must inform the individual where to direct the request for access.<sup>229</sup>
  - If the individual has requested a review of the denial, the individual has a right to have the denial reviewed by a licensed health care professional who is designated by the record keeper to act as a reviewing official and who did not participate in the original decision to deny access.<sup>230</sup> The record keeper must provide or deny access in accordance with the determination of the reviewing official.<sup>231</sup>

### PRE-EMPTION ISSUES

As to mental health records, California law denies access to such records, i.e., generally records related to “evaluation or treatment of a mental disorder” including alcohol and drug abuse records, which include what HIPAA would call “psychotherapy notes.”<sup>232</sup> However, some mental health records may not be included in the HIPAA definition. In addition, California law only looks at the potential danger that disclosure would have on the individual.<sup>233</sup> HIPAA denies access to the records when the danger is to the individual or to another person.<sup>234</sup> California law does not provide for a review of a denial of access to mental health records; HIPAA does.<sup>235</sup>

Because it would not be possible to follow both state and federal law regarding access in these instances, California law pertaining to mental health records that are not psychotherapist notes is pre-empted by HIPAA.<sup>236</sup> The State law makes access more difficult and does not provide for a review of

<sup>226</sup> 45 C.F.R. § 164.524(d)(2)(i).

<sup>227</sup> 45 C.F.R. § 164.524(d)(2)(ii).

<sup>228</sup> 45 C.F.R. § 164.524(d)(2)(iii).

<sup>229</sup> 45 C.F.R. § 164.524(d)(3).

<sup>230</sup> 45 C.F.R. § 164.524(d)(4).

<sup>231</sup> 45 C.F.R. § 164.524(d)(4).

<sup>232</sup> *CalOHII PAHRA Analysis, supra* note 62, at 32-35. Compare Cal. Health & Safety Code § 123115(b), with 45 C.F.R. § 164.501 (Definition of *Psychotherapy notes*).

<sup>233</sup> Cal. Health & Safety Code § 123115(b).

<sup>234</sup> 45 C.F.R. § 164.524(a)(3).

<sup>235</sup> Compare Cal. Health & Safety Code § 123115, with 45 C.F.R. § 164.524(a)(4).

<sup>236</sup> *CalOHII PAHRA Analysis, supra* note 62, at 33.

a denial of access; thus, access to mental health records that are not psychotherapist notes would be governed by HIPAA.<sup>237</sup>

According to CalOHII, State requirements for mental health records which also meet the HIPAA definition of psychotherapy notes are more stringent and must be followed over HIPAA rules.<sup>238</sup> HIPAA diminishes individual access to psychotherapy notes by giving record keepers an absolute denial of access with no opportunity for the individual to seek a review.<sup>239</sup> While California law also does not provide for a review when access to psychotherapy notes is denied, California law does not explicitly deny an individual's right to access and provides slightly greater access by allowing providers the professional discretion to allow or deny access.<sup>240</sup>

Unlike California law, nowhere in HIPAA is it explicit that a provider may not deny access because of unpaid health care bills.<sup>241</sup> However, when the HIPAA regulations were published, DHHS confirmed that neither the failure to pay a bill, nor the "burden" of providing the information is a lawful reason for denying access.<sup>242</sup> Record keepers may only deny access for the reasons provided in the rules.<sup>243</sup> Therefore, the prohibition in California law remains in effect. HIPAA only provides for fines and imprisonment for violations, and California law includes disciplinary action by a licensing agency.<sup>244</sup>

Several California laws regarding access to records held by government agencies continue in effect, while some others are at least partially pre-empted. California may still keep status as adoptive parents and other promises or understandings concerning confidentiality from an individual requesting the information.<sup>245</sup> HIPAA disallows a right to access health information used for administrative actions or proceedings.<sup>246</sup> As such, California can still deny access to information used to determine fitness for licensure or public employment.<sup>247</sup> HIPAA allows workers' compensation law, essentially state law, to decide whether there is access to health information in workers' compensation records; thus, California's denial of access to information related to settlement of claims in records of the State Compensation Insurance Fund remains in effect.<sup>248</sup>

However, California's law allowing an agency to deny access to information because the agency has determined that revealing the information would have a detrimental effect on the individual cannot

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<sup>237</sup> *Id.*

<sup>238</sup> *CalOHII PAHRA Analysis, supra* note 62, at 32-35.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* Compare Cal. Health & Safety Code § 123115(b) with 45 C.F.R. § 164.524(a)(1)(i).

<sup>241</sup> Cal. Health & Safety Code § 123110(j).

<sup>242</sup> 65 Fed. Reg. 82,735 (Dec. 28, 2000).

<sup>243</sup> *Id.*

<sup>244</sup> Compare Cal. Health & Safety Code § 123110(i) with 42 U.S.C. §§ 1320d-5, 1320d-6 and 45 C.F.R. § 160.400 *et seq.*

<sup>245</sup> *CalOHII IPA Analysis, supra* note 70, at 119-120. Compare Cal. Civ. Code § 1798.38 with 45 C.F.R. § 164.524(a)(2)(v).

<sup>246</sup> 45 C.F.R. § 164.524(a)(1)(ii).

<sup>247</sup> *CalOHII IPA Analysis, supra* note 70, at 126-127, Cal. Civ. Code § 1798.40(d).

<sup>248</sup> *CalOHII IPA Analysis, supra* note 70, at 132. Compare Cal. Civ. Code § 1798.40(g) with 45 C.F.R. § 164.512(l).

stand under HIPAA.<sup>249</sup> HIPAA requires that the determination be whether the access is “reasonably likely to endanger the life or physical safety of the individual or another person,” be made by a health care professional, and be reviewable—all of which weigh in favor of greater access for the individual.<sup>250</sup> If an agency denies access, it must still provide the individual with notice that the agency has determined that it does not legally need to disclose the information.<sup>251</sup> However, the process for reviewing that denial must follow HIPAA’s requirements.<sup>252</sup>

When health information which must be provided is combined with information that may be or must be withheld, both California law and HIPAA express a preference for a state agency to grant access to as much of the information as to which an individual has a right.<sup>253</sup> California law continues in effect as long as the deleted or withheld information does not exceed what HIPAA permits.<sup>254</sup>

**Question 7:** What can a patient who is denied access do?

### SHORT ANSWER

Denials of access to psychotherapy notes are generally not appealable. For other types of denials for which HIPAA allows an appeal, the record keeper must inform the individual of the appeal process. The initial denial must be reviewed by a health care professional. The record keeper must follow the decision of the person making the review. California law also provides for judicial procedures to obtain access to health information which was denied.

### CALIFORNIA LAW

Any patient or representative aggrieved by a violation may, in addition to any other remedy provided by law, file a lawsuit against the health care provider to enforce their obligations.<sup>255</sup> Any judgment rendered in the action may, in the discretion of the court, include an award of costs and reasonable attorney fees to the prevailing party.<sup>256</sup>

If the provider willfully refuses to provide records, the provider is subject to a fine and disciplinary action by the state agency, board, or commission that issued the health care provider’s professional or institutional license.<sup>257</sup>

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<sup>249</sup> *CalOHII IPA Analysis*, *supra* note 70, at 130-131. Compare Cal. Civ. Code § 1798.40(f) with 45 C.F.R. § 164.524(a)(3).

<sup>250</sup> *Id.*, 45 C.F.R. § 164.524(a)(3)(i).

<sup>251</sup> Cal. Civ. Code § 1798.41(a), *CalOHII IPA Analysis*, *supra* note 70, at 135.

<sup>252</sup> *CalOHII IPA Analysis*, *supra* note 70, at 136-137. Compare Cal. Civ. Code § 1798.41(b) with 45 C.F.R. §§ 164.524(a)(4), (d)(4).

<sup>253</sup> Cal. Civ. Code § 1798.43, 45 C.F.R. § 164.524(d)(1).

<sup>254</sup> *CalOHII IPA Analysis*, *supra* note 70, at 141-142.

<sup>255</sup> Cal. Health & Safety Code § 123120.

<sup>256</sup> *Id.*

<sup>257</sup> Cal. Health & Safety Code § 123110(i).

If the health information is sought from a state agency, the individual may bring a civil action against the agency.<sup>258</sup> A court may issue an injunction or order the agency to produce the documents.<sup>259</sup> The Attorney General or a district attorney may also bring suit against the agency.<sup>260</sup> An agency's intentional violation of the law or wrongful disclosure of private health information is penalized under California law.<sup>261</sup>

### **FEDERAL LAW: HIPAA**

If the individual has the right to have the denial reviewed (see Question 6), the individual has a right to have the denial reviewed by a licensed health care professional who is designated by the record keeper to act as a reviewing official and who did not participate in the original decision to deny.<sup>262</sup> The record keeper must provide or deny access in accordance with the determination of the reviewing official.<sup>263</sup> An individual may also file a complaint with the DHHS Office of Civil Rights, and a denial must include information on how to make such a complaint.<sup>264</sup> If there is a violation of the individual's right of access, HIPAA provides for fines and imprisonment as penalties.<sup>265</sup>

### **PRE-EMPTION ISSUES**

As noted in the responses to the previous question, the right to review of a denial of access to health information often depends on whether the health information fits HIPAA's definition of "psychotherapy notes." California law also permits an individual to file suit to obtain access to health information, and this provision is not pre-empted by HIPAA.<sup>266</sup>

HIPAA only provides for fines and imprisonment for violations, and California law includes disciplinary action by a licensing agency.<sup>267</sup> Both types of penalties could be imposed without a conflict of law.<sup>268</sup>

California's laws permitting an individual, the Attorney General, or a district attorney to sue a state agency under IPA in order to obtain an order or injunction to release health information have no parallel or conflicting provision in HIPAA, and therefore, the California laws continue in effect.<sup>269</sup>

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<sup>258</sup> Cal. Civ. Code § 1798.45.

<sup>259</sup> Cal. Civ. Code §§ 1798.46, 1798.47.

<sup>260</sup> Cal. Civ. Code § 1798.47.

<sup>261</sup> Cal. Civ. Code §§ 1798.55, 1798.57.

<sup>262</sup> 45 C.F.R. § 164.524(a)(4), (d)(4).

<sup>263</sup> 45 C.F.R. § 164.524(a)(4), (d)(4).

<sup>264</sup> 45 C.F.R. §§ 164.524(d)(2)(iii), 160.306 *et seq.*

<sup>265</sup> 42 U.S.C. §§ 1320d-5, 1320d-6, 45 C.F.R. § 164.500 *et seq.*

<sup>266</sup> *CalOHII PAHRA Analysis, supra* note 62 at 36, citing 65 Fed. Reg. 82,582 (Dec. 28, 2000), applied to Cal. Health & Safety Code § 123120.

<sup>267</sup> Compare Cal. Health & Safety Code § 123110(i), 42 U.S.C. §§ 1320d-5, 1320d-6, with 45 C.F.R. § 160.400 *et seq.*

<sup>268</sup> 65 Fed. Reg. 82,582 (Dec. 28, 2000); *CalOHII PAHRA Analysis, supra* note 62, at 24-25.

<sup>269</sup> *CalOHII IPA Analysis, supra* note 70, at 144-149. Cal. Civ. Code §§ 1798.45-1798.47.

The penalties against state agencies for intentionally violating the law or wrongful disclosure of private health information also remain in effect.<sup>270</sup>

**Question 8:** Are there special rules for minors?

### SHORT ANSWER

A minor may obtain access to health records of health services to which he or she could have given consent. It is not necessary that the minor alone actually gave consent to those particular services.

Generally, if a personal representative has the authority to make health care decisions for a minor, the personal representative may also seek access to the minor's files. If the minor alone could have authorized particular health services, the record keeper may deny a personal representative access to those particular records. A record keeper may also deny access to the personal representative if the minor has been or may be subjected to domestic violence, abuse, or neglect by the person or if treating the person as a personal representative could endanger the minor. The record keeper may also determine that it is not in the minor's best interests to treat the person as the minor's personal representative.

If the person seeking access to medical records is a minor or if a parent or guardian is seeking access to a child's medical records, advocates first should review provisions specific to the rights of minors in these instances.

### CALIFORNIA LAW

A minor may sign an authorization for release of health information obtained in the course of health services to which the minor could have lawfully consented.<sup>271</sup> A legal representative of the minor, including a parent or guardian, can give authorization to release a minor's health information, but not health information obtained from health care to which the minor could have legally consented.<sup>272</sup>

For the purposes of obtaining access to medical records, a personal representative is defined to include the parent or guardian of the minor patient.<sup>273</sup> However, a minor patient may request access to records of health care to which the minor was legally able to consent.<sup>274</sup> A minor's personal representative has no right to inspect or obtain copies of those records to which the minor may seek access.<sup>275</sup> Of note, the law does not require that the minor have been the one who *actually* consented to the health services; the law only requires that the health services are of the type to which the minor *legally could*

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<sup>270</sup> CalOHII IPA Analysis, *supra* note 70, at 158, 161-162. Cal. Civ. Code §§ 1798.55, 1798.57.

<sup>271</sup> Cal. Civ. Code § 56.11(c)(1).

<sup>272</sup> Cal. Civ. Code § 56.11(c)(2).

<sup>273</sup> Cal. Health & Safety Code § 123105(e).

<sup>274</sup> Cal. Health & Safety Code § 123110(a).

<sup>275</sup> Cal. Health & Safety Code § 123115(a)(1).

have consented.<sup>276</sup> Even in those instances in which the personal representative may obtain access to the minor's health information, the health care provider may deny access to the personal representative if the provider determines that allowing that access would be detrimental to the provider's professional relationship with the minor or might endanger the minor's physical safety or psychological well-being.<sup>277</sup>

### FEDERAL LAW: HIPAA

Generally, if a person has the authority to act on behalf of a minor in making decisions related to the minor's health care, that person is treated as the minor's personal representative for HIPAA purposes.<sup>278</sup> However, if the minor has consented legally to health care services (and no other person's consent for such services is required), the record keeper should not treat another person as the personal representative of that minor unless the minor has requested that the person be treated as the personal representative.<sup>279</sup> Nor may the health care provider treat the person as a minor's personal representative if the minor legally could have authorized the health services, though the actual consent may have come from the minor, a court, or another person.<sup>280</sup> A parent or guardian (or other person holding such capacity) may also agree to confidentiality between the health care provider and a minor, in which case the record keeper should not disclose records to such person.<sup>281</sup>

Nevertheless, a record keeper may refuse to recognize a person as the personal representative of a minor if the minor has been or may be subjected to domestic violence, abuse, or neglect by the person or if treating the person as a personal representative could endanger the minor.<sup>282</sup> The record keeper, in its professional judgment, could simply decide that it is not in the minor's best interests to treat the person as the minor's personal representative.<sup>283</sup>

### PRE-EMPTION ISSUES

CalOHII concludes that California's provisions for authorizing the release of a minor's health information are pre-empted by HIPAA, largely due to elements required in an authorization under HIPAA, but not included in this part of California's law.<sup>284</sup> Though the pre-emption analysis fails to consider the minor's access to his/her own health records or the minor's right to deny access to a

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<sup>276</sup> Generally under California law, a minor may make his or her own medical decisions if he or she is 15 years of age or older, living separately from his or her parents, and the minor is managing his or her own financial affairs. See Cal. Family Code §§ 6920-6922. However, a minor who is *not* emancipated nevertheless may consent to his or her own mental health care, family planning, rape or sexual assault treatment, or substance abuse diagnosis and treatment under certain conditions. See Cal. Fam. Code §§ 6924-6929. A California minor also needs neither parental nor judicial consent for an abortion.

*American Academy of Pediatrics v. Lungren*, 16 Cal.4<sup>th</sup> 307, 66 Cal. Rptr.2d 210 (1997).

<sup>277</sup> Cal. Health & Safety Code § 123115(a)(2).

<sup>278</sup> 45 C.F.R. § 164.502(g)(2).

<sup>279</sup> 45 C.F.R. § 164.502(g)(3)(i)(A).

<sup>280</sup> 45 C.F.R. § 164.502(g)(3)(i)(B).

<sup>281</sup> 45 C.F.R. § 164.502(g)(3)(i)(C).

<sup>282</sup> 45 C.F.R. § 164.502(g)(5)(i).

<sup>283</sup> 45 C.F.R. § 164.502(g)(5)(ii).

<sup>284</sup> *CalOHI CMIA Analysis*, *supra* note 68, at 94-97.

person acting as a personal representative, those protections may be sufficiently covered under the HIPAA provisions noted above.

As previously noted, for most conflicts between California law and HIPAA, the latter pre-empts the former. However, in the case of HIPAA provisions which give a personal representative (e.g., a parent) the right to access the health records of an unemancipated minor, if state law, including case law, conflicts with HIPAA, state law prevails.<sup>285</sup> For this reason, the California provisions relating to a personal representative's ability to access health information about an unemancipated minor take precedence over the HIPAA provisions specific to minors.<sup>286</sup>

**Question 9:** Are there other California laws regarding privacy of medical information?

California has several other statutes pertaining to release of private medical information. These statutes have not been analyzed in the foregoing analysis. However, advocates may have situations in which the following laws are relevant and their interface with HIPAA should be analyzed. Some sections of CMIA which were not part of this analysis, but which advocates may find relevant in other circumstances are included below. The laws for which CalOHII has issued a pre-emption analysis are marked with an asterisk.

Insurance Information and Privacy Protection Act, Ins. Code §§ 791-791.27.

Elder Abuse and Dependent Adult Civil Protection Act, Welf. & Inst. Code §§ 15600 *et seq.*\*

Child Abuse and Neglect Reporting Act, Pen. Code §§ 11164 *et seq.*\*

Lanternman, Petris, Short Act, Welf & Inst. Code §§ 5328 *et seq.*

Disclosure of Genetic Test Results by a Health Care Service Plan, Cal. Civ. Code § 56.17

Use and Disclosure of Medical Information by Employers, Cal. Civ. Code §§ 56.20-56.25

California Public Records Act, Cal. Gov. Code § 6250 *et seq.*

### Advocacy Tips

- √ Make sure that your authorization to release medical information complies with the elements discussed in Question 5.
- √ Use the provider's authorization form, rather than your own, if the provider's form complies with the law. Most providers are not well-versed in these laws. They will tend to use the authorization form that they have been assured is HIPAA –compliant. Using the form which is more familiar to the provider can save a great deal of time and hassle and can potentially yield better results.
- √ Always keep a copy of the signed authorization in case the record keeper loses the original.

<sup>285</sup> 45 C.F.R. § 164.502(g)(3)(ii), (g)(5).

<sup>286</sup> CalOHI PAHRA Analysis, *supra* note 62, at 10, 12-13, 30-31.

- √ If you are seeking the records to support a client's eligibility appeal for public benefits, you may be able to get copies of the records for free.
- √ If the records are extensive and duplication costs are important factors, consider reviewing the files at the record keeper's office to see what parts are relevant.

### **Additional Resources**

For a detailed analysis of HIPAA and how it relates to California law and state agencies, visit the Office of Health Information Integrity Web site at <http://www.ohi.ca.gov/calohi/>.

#### **Dept. of Health and Human Services, Office of Civil Rights (“OCR”)**

<http://www.hhs.gov/ocr/privacy/>

OCR monitors compliance with the HIPAA privacy provisions. This site has regulations and interpretations of HIPAA. OCR investigates HIPAA violations. Consumers can find out more information about HIPAA or filing a complaint by visiting the Web site, calling (866) 627-7748 or emailing OCR at [OCRAMail@hhs.gov](mailto:OCRAMail@hhs.gov).

#### **Health Privacy Project**

<http://www.cdt.org/issue/health-privacy>

The Center for Democracy and Technology is a non-profit public interest organization that works on a variety of issues including privacy of health information. In that regard, they monitor news on health privacy, comment on events and regulations regarding privacy. The Health Privacy section of their web site has good basic information about health privacy as well as state law on health privacy.