

## CHAPTER 6: Confidentiality

---

California mental health statutes place particular emphasis on the protection of confidentiality. As a general rule, all information about a mental health client is confidential and may be released only with the client authorization.

With a client's consent, information may be disclosed to whomever the client designates. But without the client's written consent, information and records obtained in the course of providing mental health services can only be released in certain legally specified circumstances. If there is no specific statutory or regulatory exception, it must be assumed the information cannot be released and must remain confidential. Even if a legal exception exists, no more information can legally be revealed than the statutes permit or require.

Some statutes require the release of information, while others leave disclosure to the discretion of mental health professionals. In this chapter, as in state law, mandatory disclosure is indicated by the word "must" and discretionary disclosure by the word "may".

### **HIPAA**

#### **WHAT IS HIPAA**

HIPAA stands for Health Insurance Portability and Accountability Act of 1996. This is a federal statute that is best known for placing restrictions on the ability of employer-provided health insurance plans to deny coverage for preexisting medical conditions. HIPAA also contains standards for electronic transmission of health information, and for protecting the privacy of health information.

HIPAA has been around since 1996; the privacy provisions were not implemented until 2003 because the issues are so controversial, complex, and caused tens of thousands of Public Comments that required addressing prior to implementation.

The privacy regulations place restrictions on the disclosure and use of individual health information, allow individuals access to their health information, and allow individuals to ask for amendment of inaccurate or incomplete health information about them.

#### **ADMINISTERING, LAWS, REGULATIONS**

The Federal Department of Health and Human Services administers the HIPAA privacy provisions, and insures compliance with the HIPAA privacy requirements.

---

Providing Patients' Rights Advocacy, through Education and Investigative Services under Contract #18-70006-000 with the California Department of State Hospitals.

The HIPAA privacy statute was enacted as part of Part C of Subtitle F of Public Law 104-191, Sections 261-264. Most of the privacy statute is codified as Sections 1171-1179 of the Social Security Act, 42 U.S.C. Section 1320d-1320d-8. The implementing regulations, effective April 14, 2003, are found at 45 CFR Section 160.101 et seq. The regulations have the force of law.

The purpose of the HIPAA "administrative simplification" provisions (which include the privacy protection requirements) is to improve the "efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information." Section 261 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191. (The "administrative simplification" provisions are designed to produce a single set of national billing codes.)

The purpose of the HIPAA privacy regulations is to protect individual health information from unauthorized disclosure, and to improve the accuracy of individual health information by allowing individuals to access their health information and to request amendment of that information if it is inaccurate or incomplete. Minimum national privacy standards are necessary as more and more health information is transmitted electronically. That is the reason for the federal standards.

The HIPAA privacy regulations require individual written authorization for release of protected health information unless disclosure without authorization is allowed under the regulations. There are many instances when disclosure without individual written authorization is allowed under the regulations. This includes disclosure required by law.

### **COVERED ENTITIES**

The HIPAA privacy regulations apply to health care providers, health plans, and health care clearinghouses (e.g. an entity that translates provider billing codes into standard HIPAA billing codes, and vice versa). (45 CFR Section 160.102(a), 160.103 (definition of "Covered entity"))

### **HIPAA APPLIES TO PROTECTED HEALTH INFORMATION**

The HIPAA privacy regulations apply to "protected health information" which is defined to mean: "...individually identifiable health information [transmitted or maintained in any form or medium, electronic, or otherwise,]

## **45 CFR SECTION 164.501 (DEFINITION OF "PROTECTED HEALTH INFORMATION").**

"Health information" is defined to mean: "...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."

Any federal law preempts state law if the laws cover the same subject matter, unless the federal law has exceptions to preemption. The HIPAA privacy statute has a specific section dealing with preemption. The statute provides that the HIPAA privacy statute shall "supersede" any "contrary" provision of state law. (Social Security Act section 1178(a)(1), 42 U.S.C. Section 1320d-7(a)(1)).

The statute then lists several exceptions to preemption. (Social Security Act Section 1178(a)(2), 42 U.S.C. Section 1320d-7(a)(2))

## **FEDERAL VERSUS STATE LAW**

Whenever there are overlapping State and Federal laws, the law that provides the greater protections or liberty to the consumer must be acted on.

At the state level, California Welfare and Institutions Code 5328 et seq. in the LPS Act are the primary sources of this protection for most of the mental health records that Patients' Rights Advocates will encounter. These records are also protected under federal law by regulations promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPAA). (45 CFR Part 160 and subparts A and E of Part 164).

The interplay of state and federal law can be complex, but in the case of mental health records, the law that provides the greater confidentiality or, in the case of the patient's access to his/her own records, the greater liberty, is the law that will apply.

HIPAA permits disclosures that are required under LPS or other state or federal law. (45 CFR 164.512(a)).

The primary impact of the HIPAA regulations, therefore, is to limit some of the permissive disclosures that would otherwise be allowed under LPS. In other words, where LPS permits, but does not require, disclosure, and HIPAA prohibits the disclosure, the disclosure may not be made.

## **MENTAL HEALTH INFORMATION**

With the exceptions of the limitations identified in Welfare and Institutions Code (WIC) Section 5328, information and records obtained in the course of providing mental health services to either voluntary or involuntary patients are confidential. (WIC Section 5328)

## **LPS-PROTECTED INFORMATION AND RECORDS, DISCLOSURES WITH CLIENT AUTHORIZATION:**

### **RELEASE TO THE PATIENT'S DESIGNEE**

LPS allows the patient, with his/her clinician's approval, to authorize release of protected information to a third party. (WIC 5328(a)(2))

HIPAA gives patients the right to access their own mental health information and to have this information sent to designated third parties. Therefore, the LPS provision that requires that the disclosure of mental health records to a designee be "approved" by the patient's physician, psychologist, or social worker (Section 5328(b)) is likely pre-empted by HIPAA. The patient's request to send information to a third party designee must be in writing and signed by the patient, and clearly identify the designee, and where the information is to be sent. (78 Fed. Reg. 5566, 5634-5635 (Jan. 25, 2013)).

### **RELEASE TO DESIGNEE OF MINOR PATIENT'S PARENT OR GUARDIAN**

If the patient is a minor and his/her parent, guardian, or guardian ad litem designates, in writing, any person to receive information or records, the information must be released. However, a physician, psychologist, social worker, nurse, attorney, or other professional will not be compelled to release information given to her in confidence by members of the patient's family. (WIC Section 5328[a][4])

## **LPS-PROTECTED INFORMATION AND RECORDS, DISCLOSURES WITHOUT CLIENT AUTHORIZATION:**

### **RELEASE TO OTHER HEALTH PROFESSIONALS**

Information and records may be released without the patient's consent in communications between qualified professional persons in the provisions of services or appropriate referrals, if (1) the persons releasing and receiving the information work in the same facility, or (2) the persons receiving the information do not work in the same facility but have medical or psychological responsibility for the patient's care. The release of information to other professional persons, who do not have responsibility or have not yet assumed responsibility, requires the consent of the patient, his/her guardian, or his/her conservator. (WIC Section 5328[a][1])

### **RELEASE TO MAKE CLAIM**

To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he or she may be entitled. (WIC Section 5328[a][3])

These disclosures for payment purposes are permitted under HIPAA. (45 CFR 164.501 and 164.506)

### **RELEASE FOR RESEARCH**

For research, provided that the Director of Health Care Services, the Director of State Hospitals, the Director of Social Services, or the Director of Developmental Services designates by regulation, rules for the conduct of research and requires the research to be first reviewed by the appropriate institutional review board or boards. The rules shall include, but need not be limited to, the requirement that all researchers shall sign an oath of confidentiality. (WIC Section 5328[a][5])

### **RELEASE TO THE COURTS**

Information and records may be released to the court without client consent as necessary for the administration of justice. (WIC Section 5328[a][6])

Release of confidential records under this provision may only be made in response to a court order and only directly to the court that issued the order. It should be further noted that some information in the records may also be subject to psychotherapist–patient privilege under California Evidence Code, Section 1014.

## **RELEASE TO LAW ENFORCEMENT**

There are several provisions in LPS that permit or require the disclosure of information to law enforcement for various purposes, some of these disclosures are mandatory (“must”), while others are discretionary (“may”). As with all disclosures of information, only the minimum necessary to accomplish the intended purpose may be released. (Please refer to the cited Code sections for details)

The LPS Act contains other provisions permitting or mandating release of LPS–protected information to law enforcement related to patients not generally encountered by county patients’ rights advocates, e.g. state hospital patients, individuals found not guilty by reason of insanity, etc. These provisions may not be included as they are beyond the scope of this chapter. (*contact COPR for additional information*)

### **Mandatory release to law enforcement**

Information and records must be released to law enforcement under the following circumstances. (Please refer to the cited Code Sections for details):

When the peace officer who brought the patient in for an involuntary 72-hour hold under Welfare and Institutions Code Section 5150 requests notification of release. (WIC Sections 5152.1, 5250.1, 5328[a][16])

When a patient is believed to be the victim or the perpetrator of a crime while hospitalized. This shall be limited solely to information directly relating to the factual circumstances of the commission of the enumerated offenses and shall not include any information relating to the mental state of the patient or the circumstances of his or her voluntary or involuntary admission, commitment, or treatment. (WIC Section 5328.4)

In facilities licensed as general hospitals or acute psychiatric hospitals, an assault or battery committed against on-duty hospital staff that results in injury or involves the use of a firearm or dangerous weapon. (California Health and Safety Code Section 1257.7(d))

When a patient who is a Mentally Disordered Sex Offender, a civilly committed Sexually Violent Predator, or is committed to the department, to a state hospital, or any other public or private mental health facility approved by the county mental health director under Section 1026 or 1370 of the Penal Code is moved or is under criminal investigation, identification information and records shall be forwarded immediately without prior request to the Department of Justice. Information automatically reported

shall be restricted to name, address, fingerprints, date of admission, date of discharge, date of escape or return from escape, date of any home leave, parole or leave of absence and, if known, the county in which the person will reside upon release. (WIC Sections 5328.2, 5328.01)

When a patient committed under the Penal Code escapes from the hospital. (WIC Section 7325.5, Penal Code Sections 1370.5[b], 4536[b])

When release of information would protect federal or state elective constitutional officers and their families. (WIC Section 5328[a][7])

When the Youth Authority or an adult correctional agency, as necessary to the administration of justice, require the records. (WIC Section 5328.02)

When a health practitioner who has knowledge of or observes a child, in his or her professional capacity or within the scope of his or her employment, whom he or she knows or reasonably suspects has been the victim of child abuse. (Penal Code Section 11166)

When a psychotherapist is aware that his/her patient presents a serious danger to a foreseeable victim. (WIC Section 8105 [c])

When a law enforcement officer personally lodges with a facility a warrant of arrest or an abstract of such a warrant.

### **Discretionary release to law enforcement**

Specific information may be released to law enforcement under the following circumstances. (Please refer to the cited Code Sections for details):

When a mentally disordered person is believed to be the victim of a crime. (WIC Section 5004.5)

When a civilly committed patient escapes from the hospital. (WIC Sections 5328.3, 7325)

HIPAA permits limited disclosure to law enforcement of information related to criminal conduct that has occurred on the premises of the facility. (45 CFR 164.512(a)(2) and(f)(5)).

Note: The California Hospital Association advises its members to consult their legal counsel for help in determining whether a disclosure is necessary to the administration of justice. (Mental Health Law: A

### **RELEASE TO THE LEGISLATURE**

Information and records may be released without patient consent to the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by these committees. Members of the state legislature also have access to information in treatment records pertaining to denial of rights, provided that patients' identities are concealed. (WIC Sections 5326.1, 5328[a][8])

### **RELEASE TO INSURER**

If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed. (WIC Section 5328[a][9])

### **RELEASE TO PATIENT'S ATTORNEY**

Information and records must be released to the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient (or, if applicable, by the patient's parent, guardian, guardian ad litem, or conservator). If the patient is unable to sign a release, the facility may release the information and records once it is satisfied of the identity of the attorney and the fact that the attorney represents the patient's interests. However, a physician, psychologist, social worker, nurse, attorney, or other professional will not be compelled to release information given to him/her in confidence by members of the patient's family. (WIC Sections 5328[a][10], 5328[a][2]).

However, HIPAA does not permit such disclosures without patient authorization. This permissive disclosure is therefore preempted by HIPAA. Another basis for disclosure would have to be used, e.g. written authorization by the patient's representative or release pursuant to a court order.

Information in the patient's treatment record pertaining to the denial of rights must be released to his/her attorney upon request. (WIC Section 5326.1).

### **RELEASE TO PROBATION OFFICER**

Upon written agreement by a person previously confined in or otherwise treated by a facility, the professional person in charge of the facility or his or her designee may release any information, except information which has been given in confidence by members of the person's family, requested by a probation officer

charged with the evaluation of the person after his or her conviction of a crime if the professional person in charge of the facility determines that the information is relevant to the evaluation. The agreement shall only be operative until sentence is passed on the crime of which the person was convicted. The confidential information released pursuant to this subdivision shall be transmitted to the court separately from the probation report and shall not be placed in the probation report. The confidential information shall remain confidential except for purposes of sentencing. After sentencing, the confidential information shall be sealed. (WIC Section 5328[a][11])

### **RELEASE TO "MULTIDISCIPLINARY PERSONNEL" TEAMS**

Information and records must be released to members of multidisciplinary personnel teams who are trained in the prevention, identification, and treatment of child abuse and neglect and who are qualified to provide a broad range of services related to child abuse. (WIC Section 5328[12][A])

### **RELEASE TO COUNTY PATIENTS' RIGHTS ADVOCATES**

To county patients' rights advocates who have been given voluntary authorization by a client or a guardian ad litem. The client or guardian ad litem, whoever entered into the agreement, may revoke the authorization at any time, either in writing or by oral declaration to an approved advocate.

## **OTHER ENTITIES/INDIVIDUALS TO WHICH CONFIDENTIAL INFORMATION MAY BE RELEASED**

### **RELEASE TO THE PATIENT OR HIS/HER REPRESENTATIVE**

With limited exceptions, a patient, or their authorized representative, is entitled to access to their mental health records held by a health care provider. (HSC Sections 123110[a], 123115)

### **RELEASE TO THE PATIENT'S FAMILY**

Upon admission to a facility, or change of status, or in health, unless the patient directs otherwise, a 24 hour public or private mental health facility licensed pursuant to section 1250 of the Health and Safety Code must make reasonable attempts to notify the patient's next of kin or any other person designated by the patient upon the patient's admission to the facility. Similarly, but only upon the request of the family member, the facility must make reasonable attempts to notify the patient's next of kin or any other person designated by the patient of the patient's release, transfer, serious illness, injury, or death, unless the patient

requests that this information not be provided. The facility must inform the patient of his/her right to request the withholding of this information. (WIC Section 5328.1 [b], Health and Safety Code (HSC) Section 1250)

### **UPON FAMILY'S REQUEST FOR SPECIFIED INFORMATION**

If a family member or other person designated by the patient requests notification of the patient's diagnosis, prognosis, progress, or medication and its side effects, a treatment facility must release the information if authorized to do so by the patient. If the patient is unable to authorize the release of this information, the facility must note the attempt to secure consent in the patient's treatment record and must make daily efforts to secure the patient's consent or refusal. Information must not be released without the patient's consent. When the patient is unable to give consent and the person requesting the information is the patient's spouse, parent, child, or sibling, the facility must notify the requestor of the patient's presence in the facility. (WIC Section 5328.1[a])

### **UPON THE DISAPPEARANCE OF A VOLUNTARY PATIENT**

When a voluntary patient who otherwise meets the criteria for involuntary detention disappears without prior notice from a designated facility and his/her whereabouts remain unknown, the facility may notify the patient's relatives of the disappearance if such notification is necessary for their own or the patient's protection. (WIC Section 5328.3)

### **RELEASE TO CONSERVATORS, FROM CONSERVATORS, AND IN CONSERVATORSHIP PROCEEDINGS**

Information in the patients' treatment record pertaining to the denial of rights including the use of seclusion and restraint must be released to his/her conservator upon request. (WIC Section 5326.1)

Information may be released to qualified persons in the course of conservatorship proceedings. (WIC Section 5328[a])

Additionally, treatment facilities must release patient information and records to county officers engaging in conservatorship investigations. (WIC Section 5354) However, a treatment facility must obtain the consent of the patient or his/her conservator before releasing information to a professional person not employed by the facility who does not have the medical or psychological responsibility for the patient's care. (WIC Sections 5328[a], 5354)

## **RELEASE TO THE DEPARTMENT OF HEALTH CARE SERVICES**

Information and records shall be released to the Director of Department of Health Care Services, or his/her designee, when necessary for the Director to discharge his/her duties and powers as the state authority responsible for executing the laws related to the state's mental health system. Individual treatment records shall be available to the Director of DHCS to enable him to investigate, monitor and control abuses and denials of patients' Rights. As the state authority responsible for executing the laws related to the state's mental health system, DHCS has the overall statutory authority regarding mental health services, delivery of services and patients' rights of persons receiving the services. (62 Attorney General's Opinion 57, 59-60; 53 Attorney General's Opinion 151, 158; WIC Sections 4005.1, 4011, 5326.1, 5326.9)

## **RELEASE TO THE LOCAL MENTAL HEALTH DIRECTOR**

Information in the patient's treatment record pertaining to the denial of rights, including the use of seclusion and restraint must be released to the local mental health director upon request. (WIC Section 5326.1)

## **RELEASE TO DISABILITY RIGHTS CALIFORNIA**

Disability Rights California (DRC), is the agency established by federal law for the protection and advocacy of the rights of individuals identified as mentally ill, is granted access to records and information. (WIC Sections 4903 [a], 5328.06)

Below are 2 of several circumstances under which DRC has access:

- When the patient is a client of DRC's and the patient or her legal representative has authorized such access;
- When the patient is unable to authorize access and has no legal representative or has a public entity as legal representative, and DRC has received a complaint the patient has suffered abuse or neglect, or has determined probable cause exists to believe the patient has suffered abuse or neglect.

## **RELEASE TO THE CALIFORNIA OFFICE OF PATIENTS' RIGHTS**

Information in the patient's treatment record pertaining to the denial of rights, including the use of seclusion and restraint, must be released to the California Office of Patients' Rights upon request. (WIC Section 5326.1)

## **RELEASE TO THE LOCAL PATIENTS' RIGHTS ADVOCATE**

County Patients' Rights Advocates, appointed by local mental health directors, must be given access to patient information and records in order to investigate patients' complaints of rights denials and to monitor mental health facilities' compliance with patients' rights provisions. (WIC Sections 5520, 5545)

When a county Patients' Rights Advocate provides services to a specific client, the client or his/her guardian ad litem must give authorization if the Advocate is to have access to the client's records. The statute requires that the authorization be in writing or reduced to writing. (WIC Section 5541)

## **RELEASE TO THE PATIENT OR HIS/HER REPRESENTATIVE**

With limited exceptions, a patient, or his/her authorized representative, is entitled to access to his/her mental health records held by a health care provider. (HSC Sections 123110[a], 123115)

## **RELEASE LICENSING PERSONNEL**

Information and records may be released to licensing personnel who are authorized licensed or registered health professionals attached to the State Department of Public Health, as well as to authorized legal staff or special investigators attached to the State Department of Social Services, as necessary for them to inspect, license, and investigate health facilities and community care facilities. The information may be with either Department in a criminal, civil, or administrative proceeding, but may only be released to the judge or hearing officer and to the parties to the case. (WIC Section 5328.15[a])

Information and records may also be released to any board which licenses and certifies mental health professionals when the Director of State Hospitals has reasonable cause to believe that a violation of a law subject to the board's jurisdiction has occurred and the records are relevant to the violation. The records, which must not contain the patient's name, must be sealed after the board reaches its decision. (WIC Section 5328.15[b])

## **RELEASE RELATING TO ABUSE**

Information and records may be disclosed in communications relating to the prevention, investigation, or treatment of elder abuse or dependent adult abuse. (WIC Sections 5328.5, 15633.5)

Information and records may be released to multidisciplinary team members when an older adult client, in the opinion of the human services agency serving

older adults through a multidisciplinary team, presents signs of elder abuse or neglect. (WIC Section 5328.05[a])

### **RELEASE TO POTENTIAL EMPLOYERS**

If an employer to whom a patient has applied for a job requires the patient's records, the records must be forwarded to a qualified physician representing the employer upon the patient's request, unless the physician or administrative officer responsible for the patient deems the release contrary to the patient's best interest. In such a case, the physician or administrator must notify the patient of his/her decision not to release the records within five days. If the physician or administrator also deems release of the records to the patient to be contrary to his/her best interest, the physician or administrator must give formal notice of this decision to the superior court in the county in which the patient resides. (WIC Section 5328.9)

### **RELEASE TO THE CORONER**

If a patient dies in a state hospital, the Department of State Hospitals, the physician in charge of the patient, or the person in charge of the facility (or his/her designee) shall release to the coroner information and records obtained in the course of providing treatment. Information about the patient's personal life, which is not related to the diagnosis and treatment of the patient's physical condition, should not be included. Information released to the coroner should be sealed and not made part of the public record. (WIC Section 5328.8)

## **REQUIRED DOCUMENTATION**

### **DOCUMENTATION OF DISCLOSURE**

The physician in charge of the patient or the professional person in charge of the facility, or his or her designee, must make sure documentation is entered in the patient's medical record if any disclosure of records or information is made to:

- Anyone the patient, patient's parent (in the case of a minor patient), conservator or guardian designates (WIC Section 5328[a]);
- The adult patient's family (WIC Section 5328.1);
- The police if a voluntary patient who otherwise meets LPS criteria escapes from an inpatient facility (WIC Section 5328.3); or
- The police if the patient, while hospitalized, is suspected of being a victim or perpetrator of a major crime (WIC Section 5328.4)

The documentation must include:

- The date and circumstances under which the disclosure was made.
- The names and relationships to the patient, if any, of person or agencies to whom such disclosure was made.
- The specific information disclosed.

(WIC Section 5828.6)

### **SIGNED CONSENT FORMS**

LPS requires a consent form signed by the patient, or someone legally authorized to consent on his/her behalf, for release of any mental health information to which such patient is required to consent under WIC 5328 (a) or (d) or for release of alcohol and drug treatment information under the provisions of Health & Safety Code 11845.5 (formerly Sections 11878 and 11879).

Additionally, HIPAA requires a separate consent form for “psychotherapy notes.”

Both California’s LPS Act and Confidentiality of Medical Information Act (CMIA), and federal HIPAA regulations require specific elements that must be included in a valid consent for release of information. These requirements are similar, but not identical.

Signed consent forms should include the following:

- The name of the individual who has authorization to release the information.
- The use of the information the information to be released.
- Any use of the consent form must be noted in the patient’s file. Patients who sign the forms must be given a copy. (WIC Sections 5328, 5328.7)

### **BREACH OF CONFIDENTIALITY PENALTIES**

Any person may bring an action against any individual who has willfully and knowingly released confidential information or records concerning him/her in violation of the law for whichever is greater: \$500.00 or three times the amount of actual damages. This is in addition to any disciplinary action employers or licensing boards may take against the individual. (WIC Section 5330)

## **CLIENT ACCESS TO MENTAL HEALTH RECORDS**

Under both federal HIPAA regulations and state law, a patient, or his/her authorized representative, is entitled to review, receive copies of, or ask for amendments of, their health records his/her mental and/or physical health records held by a health care provider. (HSC Section 123110)

### **PATIENT ACCESS TO RECORDS**

A patient or patient's representative must make a written request to inspect and/or to receive copies of the patient's records. (HSC Section 123110[a][b])

A request for copies must specify the records to be copied. (HSC Section 123110 [b])

### **TIMEFRAME FOR RECEIPT OR REVIEW OF RECORDS**

If a patient or representative makes a written request for inspection of records, the health care provider must allow access to the records during regular business hours within five working days after receiving the request. (HSC Section 123110 [a])

If a patient or representative makes a request for copies of all or part of a file, the health care provider must transmit the copies within fifteen days after receiving the request. (HSC Section 123110 [b])

### **LIMITATION TO A PATIENT'S ACCESS**

There is a limitation to the absolute right of access. The health care provider may decline to permit inspection or provide copies of mental health records to a patient if there is a "substantial risk of significant adverse or detrimental consequences to the patient in seeing or receiving" such records. (HSC Section 123115[b])

However, such a refusal is subject to the following conditions:

The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reason for refusing to permit inspection or provide copies of the records, including a description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted.

The health care provider shall inform the patient of the provider's refusal to permit him or her to inspect or obtain copies of the requested records, and inform the patient of the right to require the provider to permit inspection by,

or provide copies to, a licensed physician and surgeon, licensed psychologist, licensed marriage, family, and child counselor, or licensed clinical social worker designated by written authorization of the patient. The licensed physician and surgeon, licensed psychologist, licensed marriage, family, and child counselor, or licensed clinical social worker to whom the records are provided for inspection or copying shall not permit inspection or copying by the patient; and

The health care provider must record in the chart the date of the request, the reason for the denial, and a description of the specific anticipated adverse or detrimental consequences and whether the patient requested that another health professional inspect or obtain the requested records. (HSC Section 123115 [b][1]-[4])

If 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, they may deny access. However, the individual has the right to a review (an appeal) by a licensed health care professional who is designated by the Department and who has not participated in the original decision to deny access. (HIPAA)

### **Summary of a patient's medical records in lieu of complete access**

A health care provider may prepare a summary of the record, for inspection and copying by a patient. However, HIPAA gives the individual, not the provider, this choice.

If the health care provider chooses to prepare a summary of the record rather than allowing access to the entire record, he or she shall make the summary of the record available to the patient within 10 working days from the date of the patient's request. However, if more time is needed because the record is of extraordinary length or because the patient was discharged from a licensed health facility within the last 10 days, the health care provider shall notify the patient of this fact and the date that the summary will be completed, but in no case shall more than 30 days elapse between the request by the patient and the delivery of the summary. In preparing the summary of the record the health care provider shall not be obligated to include information that is not contained in the original record. (HSC Section 123130[a])

A health care provider may confer with the patient in an attempt to clarify the patient's purpose and goal in obtaining his or her record. If as a consequence the patient requests information about only certain injuries, illnesses, or episodes,

this subdivision shall not require the provider to prepare the summary required by this subdivision for other than the injuries, illnesses, or episodes so requested by the patient. The summary shall contain for each injury, illness, or episode any information included in the record relative to the following:

- Chief complaint or complaints including pertinent history.
- Findings from consultations and referrals to other health care providers.
- Diagnosis, where determined.
- Treatment plan and regimen including medications prescribed.
- Progress of the treatment.
- Prognosis including significant continuing problems or conditions.
- Additionally, the health care provider may charge a reasonable fee based on actual time and cost for the preparation of the summary. The cost shall be based on a computation of the actual time spent preparing the summary for availability to the patient or the patient's representative. The health care provider may charge a "reasonable fee" based on actual time and cost for preparation of a summary pursuant to a patient's request for access to her records. (HSC Section 123130[f])

### **RECOURSE IF REQUEST IS DENIED**

A health care provider who willfully violates Health and Safety Code Section 123110 is guilty of an infraction punishable by a fine of not more than one hundred dollars (\$100). The state agency, board, or commission that issued the health care provider's professional or institutional license shall consider a violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate. (HSC Section 123110[i])

If the covered entity denies access, in whole or in part, to protected health information, the covered entity must comply with the following requirements:

Making other information accessible. The covered entity must, to the extent possible, give the individual access to any other protected health information requested, after excluding the protected health information as to which the covered entity has a ground to deny access.

The covered entity must provide a timely, written denial to the individual, and the denial must be in plain language and contain the following:

- The basis for the denial;

- If applicable, a statement of the individual's review rights, including a description of how the individual may exercise such review rights; and
- A description of how the individual may complain to the covered entity pursuant to the complaint procedures outlined in HIPAA or to the Secretary pursuant to the procedures in HIPAA. The description must include the name, or title, and telephone number of the contact person or office designated.