Mental Health Law Manual

A handbook on laws governing mental health treatment

October 2021
14th Edition

California Hospital Association

CHA Publications

Several helpful publications are available through CHA including:

- *California Health Information Privacy Manual*
- *California Hospital Compliance Manual*
- *California Hospital Survey Manual — A Guide to the Licensing & Certification Survey Process*
- *Consent Manual*
- *Discharge Planning for Homeless Patients*
- *EMTALA — A Guide to Patient Anti-Dumping Laws*
- *Guide to Release of Patient Information*
- *Healthcare Workplace Violence Prevention*
- *Mental Health Law Manual*
- *Managing High Profile and Patient Care Conflict Situations*
- *Model Medical Staff Bylaws & Rules*
- *Record and Data Retention Schedule*
- *The Cal/OSHA Safe Patient Handling Regulation*

Plus numerous human resource and volunteer publications.

Ordering Information

For more information, visit CHA online at www.calhospital.org/publications

Published by the California Hospital Association.
Printed in the United States of America.

Liz Mekjavich, Vice President, Publishing and Education
Lois J. Richardson, Esq., Vice President and Legal Counsel
Bob Mion, Director, Publishing and Marketing
Emily Stone, Publishing Manager

Preface

Welcome to the fourteenth edition of the *Mental Health Law Manual* — a handbook on laws governing mental health treatment. The California Hospital Association has published this manual to help health care professionals understand the laws governing mental health treatment as well as the rights and protections of the patients they serve.

This manual is comprised of information taken from two other CHA publications: the *Consent Manual* and the *California Health Information Privacy Manual*. It also contains a chapter on the state and federal laws governing the use of seclusions and restraint. This edition reflects all state and federal legislation, regulations, and judicial decisions through June 2021.

We are pleased to publish this manual as a service to our members and others. We hope you will find it useful.

Lois J. Richardson, Esq.
Vice President and Legal Counsel
Editor, *Mental Health Law Manual*, Fourteenth Edition
California Hospital Association
(916) 552-7611
lrichardson@calhospital.org

Quick Reference

Introduction

Providing care to patients with mental health issues is complicated. Knowing what is in the best interest of the patient — and what is legal — isn't always easy.

Special protections are afforded to individuals with mental health issues who may be unable to make rational decisions regarding their care. These individuals have the right to be treated by a provider who protects their interests and preserves their basic rights.

Medical information about mental health treatment is particularly sensitive and therefore add another layer of complexity to the treatment process. This information must be handled with the utmost of care. At the same time, disclosure of information to patient advocacy groups, law enforcement officers, county behavioral health directors and others is sometimes required. And, there are unique reporting requirements for facilities and individuals that treat mental health patients.

Sorting through the maze of laws governing mental health treatment is particularly difficult because there are multiple bodies of law. In this manual, all laws governing mental health treatment and medical privacy are discussed — the Lanterman-Petris-Short (LPS) Act, the Confidentiality of Medical Information Act (CMIA), the Health Insurance Portability and Accountability Act (HIPAA), the Health Information Technology for Economic and Clinical Health (HITECH) Act, and other state and federal laws.

At the back of the manual you will find sample forms and appendices that can be adapted to fit your specific operations. (These forms can also be found online for CHA members at www.calhospital.org/forms-and-appendices, along with Spanish versions where available.)

Where to Find Laws Referenced in the Manual

All of the laws discussed in the *Mental Health Law Manual* can be found on the Internet.

I. FEDERAL LAW

A federal statute is written by a United States Senator or Representative. It is voted on by the United States Senate and the House of Representatives, and then signed by the President. A federal statute is referenced like this: 42 U.S.C. Section 1395. "U.S.C." stands for "United States Code." Federal statutes may be found at www.govinfo.gov/app/collection/uscode or at www.law.cornell.edu.

A federal regulation is written by a federal agency such as the U.S. Department of Health and Human Services or the U.S. Food and Drug Administration. The proposed regulation is published in the Federal Register, along with an explanation (called the "preamble") of the regulation, so that the general public and lobbyists may comment on it. The federal agency must summarize and respond to each comment it receives on the proposed regulation. The agency may or may not make changes to the proposed regulation based on the comments. The final regulation is also published in the *Federal Register*. A federal regulation is referenced like this: 42 C.F.R. Section 482.1 or 42 C.F.R. Part 2. "C.F.R." stands for "Code of Federal Regulations." Federal regulations may be found at www.ecfr.gov. The preamble, however, is only published in the Federal Register and not in the Code of Federal Regulations. The Federal Register may be found at www.gpo.gov/fdsys or at www.federalregister.gov.

The Centers for Medicare & Medicaid Services (CMS) publishes its *Interpretive Guidelines* on the internet. The *Interpretive Guidelines* include information for surveyors on how CMS interprets the Conditions of Participation, and instructions for surveyors on how to assess hospitals' compliance with the Conditions of Participation. They may be found at www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html (click on Publication 100-07, "State Operations Manual, then "Appendices Table of Contents"). There are several appendices that hospitals will find useful, for example, A (hospitals), V (EMTALA), W (critical access hospitals), and Z (emergency preparedness for all providers and certified supplier types).

A federal law must be obeyed throughout the United States, including in California, unless the federal law expressly states otherwise. As a general rule, if a federal law conflicts with a state law, the federal law prevails, unless the federal law expressly states otherwise.

If there is no conflict, such as when one law is stricter but they don't actually conflict with each other, both laws generally must be followed. For example, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal law states that providers must conform to whichever provision of federal or state law provides patients with greater privacy protection or gives them greater access to their medical information.

II. STATE LAW

A state statute is written by a California Senator or Assembly Member. It is voted on by the California Senate and Assembly, and then signed by the Governor. A state statute is referenced like this: Civil Code Section 56 or Health and Safety Code Section 819. State statutes may be found at www.leginfo.legislature.ca.gov. Proposed laws (Assembly Bills and Senate Bills) may also be found at this website.

A state regulation is written by a state agency such as the California Department of Public Health or the California Department of Managed Health Care. A short description of the proposed regulation is published in the California Regulatory Notice Register, more commonly called the Z Register, so that the general public and lobbyists may request a copy of the exact text of the proposed regulation and comment on it. The state agency must summarize and respond to each comment it receives on the proposed

regulation. The agency may or may not make changes to the proposed regulation based on the comments. A notice that the final regulation has been officially adopted is also published in the Z Register. The Z Register may be found at oal.ca.gov/california_regulatory_notice_online.

A state regulation is referenced like this: Title 22, C.C.R., Section 70707. “C.C.R.” stands for “California Code of Regulations.” State regulations may be found at https://govt.westlaw.com/calregs/search/index.

A state law must be obeyed in California only. As a general rule, if a California law conflicts with a federal law, the federal law prevails, unless the federal law expressly states otherwise. (If there is no conflict, such as when one law is stricter but they don’t actually conflict with each other, both laws generally must be followed.)

List of Forms and Appendices by Chapter

These documents are provided in English in the back of the manual. All forms can be found online for CHA members at www.calhospital.org/forms-and-appendices, including Spanish versions, when available. "S" denotes that the form is provided in English and Spanish.

* Indicates forms that are new or revised in this edition.

9. PAYMENT FOR MEDI-CAL EMERGENCY AND POST-STABILIZATION MENTAL HEALTH SERVICES

MH 9-A Medical Necessity for MHP Coverage
MH 9-B Types of MCPs and MHPs
MH 9-C Pertinent DHCS Plan Letters
MH 9-D DHCS Chart: Medi-Cal Mental Health Services
MH 9-E Pertinent Legal Definitions of Emergency Psychiatric Conditions

* Indicates forms that are new or revised in this edition.

1 Overview of Mental Health Laws

1 Overview of Mental Health Laws

I. INTRODUCTION

State and federal law recognize that every adult with the capacity to make health care decisions has the fundamental right of self-determination over his or her body and property. A patient's right to determine the course of his or her own medical or mental health treatment may be limited by the government in only the narrowest of circumstances; for example, to protect the public health (in the instance of communicable diseases), and to protect vulnerable persons who may not be able to protect or care for themselves. In many cases, the latter category includes persons who may be seriously mentally ill.

Persons who are mentally ill may not recognize their need for medical or mental health treatment. Indeed, the very nature of their illness may cause them to resist the treatment they desperately need.

State and federal laws seek to balance the conflicting interests of seriously mentally ill persons. In limited circumstances, the liberty of a person who may be a danger to self or others or gravely disabled may be curtailed while that person undergoes mental health evaluation and/or treatment. Because our system of government recognizes the seriousness of curtailing a person's liberty for even a short time, laws permitting involuntary hospitalization include strong procedural and substantive protections to ensure that these citizens do not become the victims of abuse.

State and federal laws have also been enacted to provide protections for mental health patients who have not been involuntarily hospitalized, in recognition of the fact that even less seriously mentally ill patients may not be completely able to protect and advocate for themselves.

This manual describes the laws regulating mental health evaluation and treatment, whether voluntarily or involuntarily accessed by the patient. This manual also describes the rights and responsibilities of health care providers who evaluate and treat mental health patients.

II. THE LANTERMAN-PETRIS-SHORT ACT: INVOLUNTARY EVALUATION AND PATIENT RIGHTS

In California, the main law governing mental health evaluation and treatment is the Lanterman-Petris-Short (LPS) Act [Welfare and Institutions Code Section 5000 *et seq.*]. This law, enacted in 1967 (and amended many times since then), sets forth the procedures that law enforcement and health care providers must follow prior to involuntarily detaining a person for mental health evaluation and treatment. LPS also sets forth the rights of mental health patients, whether voluntarily or involuntarily admitted, and contains procedural requirements that must be followed prior to providing specified types of treatment to mental health patients. *(See chapters 3 and 4 for detailed information.)*

III. LAWS REGARDING RESTRAINT AND SECLUSION

Both state and federal law protect patients from the inappropriate use of seclusion and restraint, and establish requirements to be followed when the use of either intervention is necessary. A complete discussion of these requirements is found in chapter 5.

IV. PATIENT ADVOCACY PROGRAMS

Both state and federal law have appointed independent parties to safeguard the rights of mental health patients. The laws regarding patient advocates are found in chapter 4.

V. PRIVACY RIGHTS OF MENTAL HEALTH PATIENTS

Both the state and federal constitutions recognize the privacy rights of all individuals. Due to the sensitive nature of mental health information, many statutes and regulations have been enacted to provide confidentiality protections. A brief overview of these laws follows, with more detailed information in chapter 6.

The privacy of a patient's medical information, including the use of such information and its disclosure to third parties, is governed by both California and federal law. Specific state protections for medical information are provided in the Confidentiality of Medical Information Act (CMIA) [Civil Code Section 56 *et seq.*] and, for specified mental health patients, in LPS [Welfare and Institutions Code Section 5328 *et seq.*].

Both the CMIA and LPS govern the disclosure to third parties of patient-identifiable information by hospitals and other health care providers. These laws generally prohibit health care providers from disclosing information relating to patients, their care and treatment, unless the disclosure is specifically authorized by law or by the patient. In addition, the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 protects medical information, including mental health information, held by hospitals, physicians, health plans and others.

A. State Law

California law provides heightened protection to information relating to mental health treatment delivered in institutional and other specified outpatient settings under LPS. In addition, the California legislature has seen fit to protect mental health treatment information through the creation of a psychotherapist-patient privilege instead of relying on the physician-patient privilege that applies to routine medical information but which has numerous exceptions.

MENTAL HEALTH TREATMENT INFORMATION PROTECTED BY LPS

Since 1969, LPS [Welfare and Institutions Code sections 5328-5328.9] has provided strict confidentiality protection to information and records obtained in the course of providing services to:

1. Patients who are treated or evaluated under Welfare and Institutions Code Sections 5150-5344. These code sections include involuntary evaluation and treatment in a designated facility for patients who are a danger to self or others or gravely disabled. These patients do not include patients who may be detained involuntarily for up to 24 hours in a non-designated hospital on an emergency basis (usually, but not always, in the emergency department) under Health and Safety Code Section 1799.111 (chapter 3 contains a thorough description of all of these patients); and
2. Patients who are receiving voluntary or involuntary mental health treatment in a:
    a. State mental hospital;
    b. County psychiatric ward, facility or hospital;
    c. University of California psychiatric facility: Langley Porter Psychiatric Institute and the Neuropsychiatric Institute at UCLA. Other University of California mental health services providers should consult University of California counsel regarding their status under LPS;
    d. Federal hospital, psychiatric hospital or unit;
    e. Private institution, hospital, clinic or sanitarium which is conducted for, or that includes a department or ward conducted for, the care and treatment of persons who are mentally disordered;
    f. Psychiatric health facility as described in Health and Safety Code Section 1250.2;
    g. Mental health rehabilitation center as defined in Welfare and Institutions Code Section 5675;
    h. Skilled nursing facility with a special treatment program service unit for patients with chronic psychiatric impairments *(see Title 22, California Code of Regulations, Sections 51335 and 72443-72475 regarding such special treatment programs)*;
    i. Community program funded by the Bronzan-McCorquodale Act. Because it is often difficult to determine which patients received services funded under the Bronzan-McCorquodale Act, each program and its legal counsel should review any funds received under the Bronzan-McCorquodale Act to determine the applicability, if any, of those confidentiality provisions as a result of such funding [Welfare and Institutions Code Sections 5600-5778]; and
    j. Community program specified in the Welfare and Institutions Code Sections 4000-4390 and Welfare and Institutions Code Sections 6000-6008.

LPS also protects information and records obtained in the course of providing services to persons with developmental disabilities. In some instances, overlapping protection is provided to records of such individuals under the Lanterman Developmental Disabilities Services Act [Welfare and Institutions Code Sections 4514-4518], whose provisions are substantially the same as the provisions of LPS and apply only to persons with developmental disabilities, primarily in settings other than private hospitals.

Although LPS became law in 1969, its confidentiality provisions apply to records and information obtained in the course of providing similar services to patients prior to 1969.

More information about the LPS confidentiality protections is found in chapter 6.

MENTAL HEALTH TREATMENT INFORMATION NOT PROTECTED BY LPS

Absent some tie-in to one of the above described programs, LPS does not apply to other mental health patients or their records, even though those records may describe mental health treatment similar to what is protected under LPS. These records are instead subject to the Confidentiality of Medical Information Act (CMIA) *(see chapter 6)*. For example, mental health services provided to a voluntary patient in a private general acute care hospital that has no psychiatric unit are subject to the CMIA rather than LPS. Mental health services provided to an involuntary patient in a private, non-designated hospital emergency department are subject to the CMIA rather than LPS. Mental health services provided by a consulting psychotherapist to a medical patient (who is not on a psychiatric hold) are subject to the CMIA rather than LPS. Also, mental health services provided by a private psychotherapist in the community are subject to the CMIA. The information generated by these psychotherapists does not fall under LPS.

More information about CMIA confidentiality protections is found in chapter 6.

PSYCHOTHERAPIST-PATIENT PRIVILEGE

The psychotherapist-patient privilege applies to patients covered by both LPS and CMIA. This privilege is relevant to health care providers only when patient information is requested for court proceedings, such as in response to a subpoena or court order, or for a deposition or testimony in court. Providers don't need to consider this privilege when using or disclosing information for treatment or payment purposes.

Under the psychotherapist-patient privilege [Evidence Code Section 1010 *et seq.*], a patient may refuse to disclose, and prevent other persons (such as the psychotherapist) from disclosing, the patient's confidential communication with a psychotherapist in the context of legal proceedings. **"Confidential communication"** refers to information, including information obtained by an examination of the patient, transmitted between a patient and his or her psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted. Confidential communication also includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship. [Evidence Code Section 1012]

The term psychotherapist includes psychiatrists, psychologists, licensed clinical social workers, school psychologists, marriage and family therapists, professional clinical counselors, psychological assistants, and various interns and trainees for such categories. Interestingly, the definition of psychotherapist also includes persons authorized, or reasonably believed by the patient to be authorized, to practice the professions listed above. Thus, California law seeks to protect the confidentiality of mental health information disclosed by patients so long as the patient reasonably believes that the professional receiving it is a psychotherapist, regardless of whether the person actually is a psychotherapist or not.

HIV TEST RESULTS

AIDS became recognized as a specific disease in the United States in 1981. Because of the stigma associated with the disease then, the California legislature gave HIV test results extra confidentiality protection in 1985. These strict laws are still on the books. The confidentiality protections afforded to HIV test results are discussed in chapter 6.

B. Federal Law

HIPAA

The state laws described above are augmented by federal privacy protections pursuant to HIPAA. HIPAA provides federal protection to all medical information, including mental health information, held by hospitals, physicians, health plans and other "covered entities." With the exception of a narrow category relating to psychotherapy notes, HIPAA does not distinguish between mental health and other forms of medical information. State provisions that are more stringent than HIPAA continue in effect; as a result, many of the California protections specific to mental health information continue to provide additional protection.

HIPAA calls for providers to conform to whichever federal or state law provides patients with greater privacy protection or with greater access to their own health information. Specifically, providers must comply with whichever *provision* of each law is more strict. Thus if HIPAA is more stringent than California law, with the exception of one provision, providers must comply with HIPAA and

the provision in state law that gives the individual greater protection.

HIPAA contains patient privacy rights including the right to a Notice of Privacy Practices, the right to access medical information, the right to request amendments, and the right to an accounting of disclosures, among others. These rights are discussed in chapter 6.

HIPAA also restricts the use and disclosure of medical information. These restrictions are described in chapter 6.

Psychotherapy Notes

HIPAA introduced the concept of "psychotherapy notes." There is no such concept in California law. **"Psychotherapy notes"** means:

> notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session *and that are separated from the rest of the individual's medical record*. (emphasis added)

Most hospitals, skilled nursing facilities, and other institutional providers will not have psychotherapy notes, as defined in HIPAA, because the definition requires the notes to be separate from the rest of the medical record.

The special provisions in HIPAA regarding the use and disclosure of psychotherapy notes must be complied with for all patient types in California — patients whose records are covered by the CMIA, patients whose records are covered by LPS, and patients receiving services in a federally-assisted drug or alcohol abuse program.

More information about psychotherapy notes is found in chapter 6.

FEDERALLY-ASSISTED SUBSTANCE USE DISORDER PROGRAMS

The federal government has promulgated confidentiality rules that apply to drug and alcohol abuse treatment programs. These rules do not apply to all substance abuse patients; they apply only to patients served by "federally-assisted programs." These rules are described in detail in CHA's *California Health Information Privacy Manual*, available online at www.calhospital.org/privacy.

List of Forms and Appendices

These documents are provided in English in the back of the manual. All forms, including Spanish versions, when available, can be found online for CHA members at www.calhospital.org/free-resources. "S" denotes that the form is provided in English and Spanish.

* Indicates forms that are new or revised in this edition.

Index

D

E

F

G

H

I

J

L

M

S

T

U

V

W

X