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The CMIA – The Statute Psychologists Must Comply with but Have Never Heard Of

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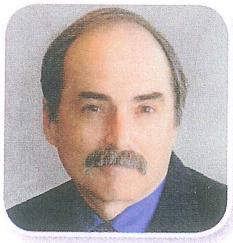
The Confidentiality Medical Information Act or CMIA (Civil Code § 56.1 et seq.) is a comprehensive state statute governing the maintenance and release of psychotherapy records and medical records in California. Failure to comply with it can lead to monetary penalties and professional discipline. However, it was not intended that the CMIA would be a secret from psychologists.

Some portions of CMIA psychologists need to be familiar with are:

1. Civil Code §56.10 et seq. which governs disclosures of patient information and outlines exceptions, including disclosures necessary to warn victims of a patient's threat. This should be the starting point when a psychologist wants to know whether a particular disclosure is allowed, such as releasing information to third party payors.
2. Section 56.103 governs disclosure of a minor's mental health information to social workers, probation officers, and others.
3. Section 56.106 governs the release of records by a minor's psychotherapist where the therapist knows the minor has been removed from the custody of a parent or guardian.
4. Civil Code §56.11 sets forth the criteria for a release of information to be valid. Releases which do not comply with this section are invalid. This section, among other things, says the release must be in type no smaller than 14 points, if the release is not handwritten. This section requires the release language to be separate from other language on the page and the signatures must be only for the authorization. It specifies who may sign the releases, requires the specific areas of limitation of the information to be set forth and requires the authorization state a particular date after when it is no longer effective. Section 56.11 was originally entered in 1981 and amended several times, including in 1999. Given how long it has been in effect, it would be interesting to know how many of the psychologists reading this article have releases which meet these criteria.
5. Civil Code §56.104 adds some additional requirements for requests concerning out-patient psychotherapy, including that information will not be utilized for other than the intended use and the person reviewing the information will destroy it when the time frame specified in the request has expired.



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Although this section of the act appears to often be disregarded, it is still in effect and offers a higher level of protection for psychotherapy records.

One of the earliest cases interpreting the CMIA is *Pettus v. Cole*.[1] That arose in the context of an adverse fitness for duty evaluation conducted of an employee by a psychologist and psychiatrist who were retained by management. They prepared a report of their findings and sent it to the employer with various recommendations, including that the employee go through a drug and alcohol treatment program. When the employee sued claiming violation of the CMIA, the defendants' response was what any defense attorney at the time would have said, namely there was no basis for any such claim because it was an adverse evaluation, therefore, the defendants owed no duty to the plaintiff. However, the Court of Appeal took a different view and said that because the evaluations created psychological information which fell under the protec-

tion of the CMIA, that the evaluators owed a duty of the evaluee that was equivalent to the duty owed a patient as to confidentiality.[2] That meant that the report could not be released without a release signed by the evaluee. There was no such release. To complicate matters, courts announcing legal decisions can make their decisions prospective, meaning they only apply to future cases, or retrospective, meaning they apply to the case before them. The Court of Appeal in this case took the position that the law had been clear and that the defendants simply had not complied with the law; therefore, if they did not have a release, they had no defense on the issue of providing the report to the employer, violating the CMIA. However, the court said the "traditional doctor/patient relationship" did not exist:

> "We do agree, however, that the traditional doctor/patient relationship, with the host of concomitant duties created by such a relationship, was not established between appellant and the respondent psychiatrists."

Since that decision was handed down our firm has had several cases where evaluees try to claim that the CMIA was violated. If releases were obtained, then the evaluees will typically claim the releases were coerced. Also, the evaluees assert that if they have confidentiality rights equivalent to a patient, they are entitled to get a copy of the evaluation which the employer typically views as their work product.

The CMIA has also become prominent in other types of litigation. For example, there were several cases filed as class actions under the CMIA over the theft of laptop computers. Presumably the attorneys bringing those cases were anticipating that if they could get a certain amount of money per plaintiff, it would be a lucrative case. The Second District Court of Appeal in *Regents of the University of California v. Superior Court* (2013) 220 Cal.App.4th 549 put a damper on such litigation by requiring that the person suing actually show that their data that was in a stolen laptop was actually viewed by some third party.[3] In this decision, the Court of Appeals draws a distinction between release of information and disclosing information that most nonlawyers will find odd. The Court noted that the CMIA did not define "disclose" and "release" and stated in part:

> ..."Disclose," as the Regents explains, is an active verb, denoting in the context of CMIA and the protections afforded confidential medical information an affirmative act of communication. But "to release" is broader, including not only "to give permission for publication, performance, exhibition, or sale of" or "to make available to the public," the definitions identified by the superior court, and "to set free from restraint, confinement, or servitude ... to let go," among the definitions proffered by the Regents, but also "[t]o cause or allow to move away or spread from a source or place of confinement" and to "allow or enable to escape from confinement."... Supra at 220 Cal.App.4th 564-565

A second laptop therapist case involved medical records stolen from an office computer. In that case, the computer was password protected but not encrypted. It was estimated four million patient records might have been exposed. Several lawsuits were filed under CMIA, one of which sought the CMIA payment of $1,000 for each patient whose records were in the computer – a total amount in the billions of dollars. However, the Court of Appeal there held that without evidence that someone actually looked at the confidential records, no violation of CMIA could be shown.[4]

Laptop theft cases aside, the CMIA has also been a factor in a lawsuit in Los Angeles where it was alleged that as part of a romantic tussle, an employee improperly accessed information and provided it to a disgruntled boyfriend.[5] In short, plaintiffs seem to be trying to find new and creative ways to involve the CMIA in litigation against psychologists. It is relatively simple on a plaintiff's part to point to the fact that Civil Code §56.11 sets forth in explicit details the requirements for a release and to then point that a psychologist release does not comply with that section and claimed that there was an improper disclosure.

Obviously the first step to avoid being a casualty of the CMIA is to read the Act which is readily available online. It is obviously a stronger defense to explain why a psychologist thought a particular portion of the Act did not apply then to have to admit the psychologist never heard of the law. A fundamental first step is to be sure releases used by the psychologist is consistent with the requirements of Civil Code §56.11.

Hopefully this article will spur psychologists to review this statute and be cognizant of its requirements which apply to them every day. ■

Endnotes

1 *Pettus v. Cole* (1996) 49 Cal.App.4th 402

2 *Pettus v. Cole, Supra* (1996) 49 Cal.App.4th 428-429

3 *Regents of the University of California v. Superior Court (Platter)* (2013) 220 Cal.App.4th 549

4 *Sutter Health v. Superior Court* (2014) 227 Cal.App.4th 1546

5 *Lozano v. Regents of the University of California* Los Angeles Superior Court Case No. BC505419