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Chapter 58: Disclosure of Medical Information in Pretrial Settlements with Marriage and Family Therapists

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Code Section Affected
Civil Code § 56.105 (amended).
SB 282 (Yee); 2013 STAT. Ch. 58.

I. INTRODUCTION

Licensed marriage and family therapists (LMFT) are healthcare providers who treat people to "achieve more adequate, satisfying and productive" interpersonal relationships.[1] Like other healthcare providers, LMFTs are subject to lawsuits for "illegal, irresponsible, unprofessional, or unethical treatment."[2] Thus, after a patient gives notice of intent to file a lawsuit against an LMFT,[3] and before the patient files his complaint, the LMFT's insurer needs access to the patient's medical information in order to evaluate potential pre-complaint settlements.[4]

While confidentiality is critical in a patient-therapist relationship,[5] an LMFT needs the ability to disclose information to his insurer in order to defend himself in a lawsuit and evaluate potential settlements.[6] Chapter 58 ensures that LMFTs can defend themselves by requiring a patient to authorize disclosure of medical information when making a settlement demand or offer to compromise with an LMFT before filing his complaint.[7]

1. *Who Are LMFTs?*, CAL. ASS'N OF MARRIAGE AND FAMILY THERAPISTS, http://www.camft.org/AM/Template.cfm?Section=Who_are_LMFTs&Template=/CM/HTMLDisplay.cfm&ContentID=11857 (last visited Aug. 30, 2013) (on file with the *McGeorge Law Review*).

2. Mary Riemersma, *What is the Potential for Recourse Against a Therapist*, THE THERAPIST (Jan. 2001), http://www.camft.org/ScriptContent/CAMFTarticles/Legal_Issues/RecourseAgainstTherapist.htm (on file with the *McGeorge Law Review*).

3. *See* CAL. CIV. PROC. CODE § 364(a) (West 2006) (requiring plaintiffs to give defendants notice of their intention to file suit at least ninety days before filing).

4. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 282, at 4 (May 7, 2013) (explaining the Senate Judiciary Committee's analysis of SB 1229 from the 1985-86 Reg. Sess.).

5. David D. Jensen, *Disclosing Outpatient Records: Pin the Key Legal Principle*, THE THERAPIST (Sept. 2011), http://www.camft.org/AM/Template.cfm?Section=Legal_Issues&template=/CM/Content Display.cfm&ContentID=10465 (on file with the *McGeorge Law Review*).

6. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 282, at 3 (May 9, 2013).

7. CIV. § 56.105 (enacted by Chapter 58).

II. LEGAL BACKGROUND

Individuals have a strong interest in protecting their personal privacy, particularly in the context of medical treatment.[8] In 1981, the California Legislature created the Confidentiality of Medical Information Act (CMIA)[9] to protect medical record privacy.[10] Section A of this Part summarizes the CMIA, including its mandatory and permissive disclosures.[11] Section B introduces a shortcoming of the original CMIA, and Section C explains how the legislature responded to the problem by protecting physicians engaged in pretrial settlement or compromise negotiations.[12]

A. The Confidentiality of Medical Information Act

Even though individuals have a strong interest in protecting their personal privacy,[13] medical information is necessary for insurers to determine the merits of professional negligence claims against healthcare providers.[14] To balance both interests, the California Legislature enacted the CMIA to make "individually identifiable medical information" confidential, but also to allow "reasonable and limited uses" of the information.[15]

The CMIA governs the disclosure of medical information for a wide range of healthcare providers,[16] including physicians and LMFTs.[17] The CMIA defines medical information as information "regarding a patient's medical history, mental or physical condition, or treatment."[18]

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8. *See* Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 38, 876 P.2d 999, 1002 (1994) (determining whether disclosure of medical information violated the Confidentiality of Medical Information Act or the state constitutional right to privacy).

9. CIV. § 56.

10. *Medical Privacy Enforcement*, STATE OF CAL. OFFICE OF HEALTH INFO. INTEGRITY, http://www.ohii.ca.gov/calohi/MedicalPrivacyEnforcement.aspx (last visited Jan. 27, 2014) (on file with the *McGeorge Law Review*).

11. *See infra* Part II.A (summarizing the CMIA).

12. *See infra* Part II.B–C (identifying a shortcoming of the CMIA and describing the legislative remedy).

13. *See Heller*, 8 Cal. 4th at 66, 876 P.2d at 1022 (concluding that the right to privacy is particularly important in physician-patient relationships).

14. *See* GEORGE MCDONALD, CALIFORNIA MEDICAL MALPRACTICE: LAW AND PRACTICE 626 (2003) (explaining that there is little hope for settling unless all documents relating to fault are collected).

15. *Heller*., 8 Cal. 4th at 46–47, 876 P.2d at 1108 (suggesting that "reasonable and limited uses" means medical information can only be disclosed for a specific purpose, to a specific party, and only for a limited time).

16. *See* CAL. CIV. CODE § 56.05(j) (West 2007) (referring to the California Business and Professions Code and Health and Safety Code for a full list of providers).

17. *See* CAL BUS. & PROF. CODE § 2050–2051 (West 2012) (requiring physicians to obtain a certificate); *see also* CAL. BUS. & PROF. CODE § 4980 (West 2008) (requiring marriage and family therapists to obtain a valid license).

18. *Id.* § 56.05(g).

Under the CMIA, healthcare providers cannot disclose medical information without obtaining authorization from the patient.[19] However, there are mandatory and permissive exceptions that allow disclosure.[20] One mandatory exception requires healthcare providers to disclose medical information pursuant to discovery proceedings.[21] Permissive exceptions allow disclosure for such needs as diagnosing a patient, determining the amount of payment for care, and conducting quality control reviews.[22]

B. The CMIA Disclosure Gap: Pretrial Settlements

Prior to 1985, despite numerous disclosure exceptions, the CMIA did not permit healthcare providers to disclose medical information before the patient filed his complaint.[23] In professional negligence actions against healthcare providers, a plaintiff must provide notice of intent to commence an action at least ninety days before filing a complaint.[24] Therefore, a physician could not disclose medical information to his insurer for a period of at least ninety days unless the patient authorized disclosure.[25]

During this interim period, parties engaged in pre-complaint dispute resolution, either through settlement or statutory offers to compromise.[26] A settlement is a contractual agreement to terminate a lawsuit,[27] while an offer to compromise is an offer to enter judgment against a party without going to trial.[28] The statutory offer to compromise encourages early dispute resolution by punishing parties that reject a reasonable compromise offer but fail to achieve a better result through trial.[29] When a party does not accept an offer to compromise and ends up worse-off after trial than it would have been had it accepted the offer, the party cannot recover post-offer costs, may have to pay the opposing

19. *Id.* § 56.10.

20. *Id.* § 56.10(b)–(c).

21. *Id.* § 56.10(b)(3).

22. *Id.* § 56.10(c)(1)–(17) (listing other exceptions which allow for disclosure of the following: billing and claims management, licensing and accrediting, investigation by the coroner's office, bona fide research purposes, litigating employment related lawsuits, administering care under a health service plan, investigating the need for a conservatorship, coordinating organ or tissue transplantation, reporting adverse affects of products to the Food and Drug Administration, responding to disaster welfare inquiries, encrypting data, and monitoring care of enrollees in a disease management service).

23. *See id.* § 56.105 (indicating that the legislature added this section in 1985).

24. CAL. CIV. PROC. CODE § 364(a) (West 2007).

25. *See* GEORGE MCDONALD, CALIFORNIA MEDICAL MALPRACTICE: LAW AND PRACTICE 626 (2003) (describing the notice of claim process).

26. CIV. PROC. § 998.

27. *See* Gorman v. Holte, 164 Cal. App. 3d 984, 988, 211 Cal. Rptr. 34 (2d Dist. 1985) (defining settlement).

28. CIV. PROC. § 998(b) (West 2007).

29. *See* Bank of San Pedro v. Superior Court, 3 Cal. 4th 797, 804, 838 P.2d 218, 222 (1992) (explaining the policy behind statutory offers to compromise).

party's costs, and may have a damage award reduced.[30] These important pre-complaint resolution options require speculation about liability and damage awards in order for the parties to resolve the issue; thus, the defending party and his insurer must have access to medical information to evaluate the offer.[31]

Without access to medical information, the insurance companies defending healthcare providers were unable to properly evaluate the merits of the settlement offer or offer to compromise.[32] In a disadvantaged position, healthcare providers risked violating the CMIA by disclosing relevant information to their insurance companies without authorization.[33]

C. Closing the Disclosure Gap to Promote Settlement

In 1985, because of pre-complaint disclosure problems, the California Legislature added Civil Code Section 56.105 to the CMIA to require disclosure of medical information before a plaintiff files his complaint.[34] Specifically, in a professional negligence action against physicians and surgeons (physicians), patients must authorize the physician to disclose medical information to insurers when the patient makes a demand for settlement or an offer to compromise before serving a complaint.[35]

The authorization must permit disclosure of information that is useful for determining liability, potential damages, and the merits of the demand or offer.[36] If a defending party subsequently requests medical information pursuant to the authorization, they must notify the patient, explain the contents of the requested materials, and allow patients to obtain copies at the patient's expense.[37]

Section 56.105 does not limit the doctor-patient privilege or other privileges "in the Evidence Code except for the disclosure of medical information subject to the patient's authorization."[38] Also, the disclosure requirement is separate from the patient's procedural obligation to provide notice of his intent to commence an action for professional negligence against a healthcare provider within ninety days.[39]

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30. CIV. PROC. § 998(c)–(e) (explaining the consequences for plaintiffs and defendants who do not accept an offer to compromise and end up worse off after trial).

31. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 282, at 4 (May 7, 2013) (referencing the Senate Judiciary Committee's analysis of SB 1229 from the 1985–86 Reg. Sess.).

32. MCDONALD, *supra* note 14.

33. CAL. CIV. CODE § 56.10 (West 2007).

34. *See* Heller v. Norcal Mut. Ins. Co., 8 Cal.4th 30, 40–41, 876 P.2d 999, 1004 (1994) (explaining that prior to enacting Section 56.105, CMIA did not permit disclosure of medical information before a complaint was filed).

35. CIV. § 56.105.

36. *Id.*

37. *Id.*

38. *Id.*

39. CAL. CIV. PROC. CODE § 364(a) (West 2007).

III. CHAPTER 58

Chapter 58 extends the authorization requirements of Section 56.105 of the California Civil Code to professional negligence cases against LMFTs.[40] Chapter 58 should not be construed to limit the psychotherapist-patient privilege "except for the disclosure of medical information subject to the patient's authorization."[41]

IV. ANALYSIS

Section A explains why LMFTs should receive the same protections as physicians under the CMIA and why Chapter 58 is a natural addition to Section 56.105.[42] Section B examines whether adding LMFTs to Section 56.105 will encourage early settlement, which Section 56.105 is designed to do.[43] Section C assesses whether LMFTs will experience fewer claims alleging violation of the CMIA as a result of the new protection.[44]

A. LMFTs Are Entitled to the Same Protections as Doctors Under the CMIA

LMFTs are subject to the same disclosure requirements as physicians[45] and should therefore benefit equally from Section 56.105's protections.[46] Senator Leland Yee, the author of Chapter 58, notes that the law "provide[s] an important legal protection to marriage and family therapists similar to that currently enjoyed by physicians and surgeons."[47] In the same way that doctors retain information regarding a patient's medical history and treatment, LMFTs retain information about patients' mental conditions, typically in the form of notes.[48] These notes become relevant in a settlement demand or offer to compromise.[49]

Legislative analysts did not comment on why Chapter 58 only adds LMFTs and not other healthcare providers who are also subject to CMIA disclosure requirements.[50] For instance, the CMIA regulates chiropractors, dentists, speech-

40. CIV. § 56.105 (amended by Chapter 58).

41. *Id.*

42. *See infra* Part IV.A (explaining why LMFTs should be covered by Section 56.105).

43. *See infra* Part IV.B (examining whether Chapter 58 will encourage more settlements).

44. *See infra* Part IV.C (determining whether LMFTs will experience fewer claims for violation of the CMIA).

45. *See* CIV. § 56.05(j) (referring to the Business and Professions Code for a full list of healthcare providers subject to CMIA's requirements); *see also* BUS. & PROF. § 2050–79 (describing licensing requirements for physicians); BUS. & PROF. § 4980–81 (describing licensing requirements for marriage and family therapists).

46. *Id.* § 56.105.

47. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 282, at 2 (June 18, 2013).

48. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 282, at 4 (May 7, 2013).

49. *Id.*

50. *Id.* at 3 (acknowledging that the definition of health care provider includes a spectrum of practitioners).

language pathologists, nurses, acupuncturists, veterinarians, and occupational therapists.[51] Because the California Association of Marriage and Family Therapists (CAMFT) sponsored Chapter 58,[52] other trade associations may sponsor future expansions to Section 56.105.[53]

B. Encouraging More Pretrial Settlements

When the legislature enacted Section 56.105 in 1985, the California Senate Judiciary Committee "argued that comprehensive medical information is often necessary to effectively evaluate settlement offers, and thus requiring disclosure of specified medical information to accompany settlement demands would allow more reasonable settlement negotiations."[54] Yet, although LMFTs are healthcare providers, if a patient sued an LMFT for malpractice prior to Chapter 58, there was "no requirement that the LMFT's insurer be granted access to the medical records of the patient before a settlement is made."[55]

When suing a healthcare provider for professional negligence, the plaintiff must provide notice of intent to commence an action ninety days before filing a complaint, creating a naturally long period before trial and providing opportunities to settle.[56] But there is little hope to settle a case unless a defending party can assess all of the documents that speak to the defendant's fault and the potential damages.[57] It follows that when one party offers to compromise, the opposing party must be able to evaluate the offer and reasonably decide whether to accept or reject it.[58] Therefore, according to CAMFT, "patient authorizations to release medical information are in the best interests of both parties because the releases make it possible for evaluations of settlement demands or offers of compromise to be conducted."[59]

Expanding Section 56.105 encourages settlement of cases against LMFTs

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51. *See* CIV. § 56.05(i) (referring to the California Business and Professions Code and Health and Safety Code for a list of health care providers subject to CMIA's requirements); CAL BUS. & PROF. CODE §§ 1000.5 (West 2012) (chiropractors); CAL BUS. & PROF. CODE §§ 1625–1638.7 (West 2012) (dentists); CAL BUS. & PROF. CODE § 2532 (West 2003) (speech-language pathologists); CAL BUS. & PROF. CODE §§ 2732 (West 2003) (nurses); CAL BUS. & PROF. CODE § 4935 (West 2011) (acupuncturists); CAL BUS. & PROF. CODE § 4825 (West 2011) (veterinarians); CAL BUS. & PROF. CODE § 2570.3 (West 2003) (occupational therapists).

52. *Legislative Update*, CAL. ASS'N OF MARRIAGE & FAMILY THERAPISTS (May 10, 2013), http://www.camft.org/AM/Template.cfm?Section=Legislative_Updates2&Template=/CM/HTMLDisplay.cfm&ContentID=14469 (on file with the *McGeorge Law Review*).

53. Telephone Interview with Cathy Atkins, Staff Attn'y, Cal. Ass'n of Marriage & Family Therapists (July 25, 2013) (notes on file with the *McGeorge Law Review*).

54. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 282, at 4 (May 7, 2013).

55. *Id.* at 3; *see also* CIV. § 56.10(b)–(c) (West 2007) (showing there are no mandatory or permissive exceptions allowing pre-complaint disclosure in cases against LMFTs).

56. CAL. CIV. PROC. CODE § 364(a) (West 2007).

57. GEORGE MCDONALD, CALIFORNIA MEDICAL MALPRACTICE: LAW AND PRACTICE 626 (2003).

58. *See* Thomas v. Duggins Const. Co., 139 Cal. App. 4th 1105, 1114, 44 Cal. Rptr. 66, 71 (4th Dist. 2006) (including the ability to evaluate an offer as an element for a valid offer to compromise).

59. *Legislative Update*, *supra* note 52.

and does not deter from the CMIA's goal of making medical information confidential because it only allows for "reasonable and limited uses" of the information.[60] Just like the original version of Section 56.105, Chapter 58 "only applies to demands or offers made prior to service of a complaint because, once the complaint is served, a party may seek this information through discovery."[61] As a further limit, patients shall only disclose information that is necessary to evaluate the demand for settlement or offer to compromise.[62] Because the legislature enacted Section 56.105 to encourage settlement of cases and California strongly supports settlement,[63] adding LMFTs as a protected group will likely increase settlements and compromises.

C. Protecting Defendants from Claims for CMIA Violations

Often, a patient's notice of a future claim pursuant to Section 364 of the Code of Civil Procedure goes directly to a healthcare provider's insurer.[64] In order to investigate the potential claim, the insurer proceeds "to procure and access what otherwise might remain confidential" under the CMIA.[65] Because Chapter 58 requires the plaintiff to authorize disclosure of medical records, it protects LMFT defendants "from claims that they violated the [CMIA] by disclosing client medical information . . . when preparing malpractice claim defenses."[66]

V. CONCLUSION

Public policy strongly supports pretrial settlement.[67] As such, the California Legislature enacted Section 56.105 of the CMIA to facilitate pretrial settlements and protect defendants from claims that they violated the CMIA.[68] By expanding Section 56.105 to include LMFTs, Chapter 58 increases the number of healthcare providers who are adequately equipped to evaluate pre-complaint settlement demands and offers to compromise.[69] Chapter 58 also protects LMFTs from claims that they violated the CMIA by disclosing patient information while

60. *See* Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 38, 876 P.2d 999, 1102 (1994) (explaining the purpose of section 56.105).

61. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 282, at 2 (June 18, 2013).

62. CAL. CIV. CODE § 56.105 (West 2007).

63. *See* Kaufman v. Goldman, 195 Cal.App.4th 734, 745, 124 Cal. Rptr. 3d 555, 564 (1st Dist. 2011) (noting the importance of recognizing the strong public policy favoring settlement of disputes).

64. MCDONALD, *supra* note 25.

65. *Id.*

66. *Legislative Update*, *supra* note 52.

67. *See Kaufman*, 195 Cal.App.4th at 745 (noting the importance of recognizing the strong public policy favoring settlement of disputes).

68. *See* Heller v. Norcal Mutual Ins. Co., 8 Cal. 4th 30, 40, 876 P.2d 999, 1004 (1994).

69. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 282, at 4 (May 7, 2013) (referencing the Senate Judiciary Committee's analysis of SB 1229 from the 1985-86 Reg. Sess.)

preparing to defend a professional negligence claim.[70]

70. *Legislative Update*, *supra* note 52.