A Television Producer's Guide to Medical Privacy Law in California

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In California, the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)—in particular, its implementing regulations known as the Privacy Rule—and the California Confidentiality of Medical Information Act (the CMIA) create the potential for serious civil and criminal liability for the unauthorized dissemination of certain health information.[1] This field guide is intended to help television producers recognize circumstances that trigger HIPAA and the CMIA, and to offer tips to minimize potential legal exposure.

Basic Statutory Prohibition

Both HIPAA and the CMIA prohibit the dissemination of individually identifiable health/medical information without authorization, except as specifically required or permitted by those laws. This prohibition applies to information about deceased persons[2] as well as living persons.

Do HIPAA and the CMIA Apply to Television Producers?

Neither HIPAA nor the CMIA expressly applies to television producers. These laws expressly prohibit the unauthorized disclosure of individually identifiable health information by health care providers like doctors, dentists, psychologists, psychiatrists, etc., and other health care entities such as health insurers and certain handlers of health care data. However, the CMIA also prohibits the ***further dissemination*** of personally identifiable health information. The exact scope of this additional prohibition is

unclear, and conceivably could include media.[3] And, even though HIPAA does not apply to the media, television producers must be equipped to deal with (and perhaps even challenge) the manner in which covered entities interpret HIPAA's prohibitions.

There have been no criminal prosecutions of media defendants under either HIPAA or the CMIA. However, in a civil case where the CMIA was not directly in issue, the California Supreme Court allowed an "intrusion" privacy tort claim against media defendants to be heard by a jury, stating in a footnote in its opinion that "[t]he question whether the [media] defendants acted in concert with Mercy Air to illegally [*i.e.,* in violation of the CMIA] reveal confidential medical information may be relevant to plaintiffs' intrusion claim."[4] Also, there has been one California civil case where the appellate court, in an unpublished opinion, assumed the CMIA applied to a network. The court held that the network had not disclosed information in violation of the statute, but—as in the case mentioned above—the court allowed intrusion claims to proceed. The videographer in this case had been dressed in hospital attire and had told the plaintiff that the film of his hospital emergency room evaluation and treatment—which subsequently was broadcast—would be used only for training of hospital personnel.[5]

"Individually Identifiable Health Information" Under HIPAA

"Individually identifiable health information" under HIPAA is a subset of the larger category of "health information" and is:

1. Created or received by a health care provider, health plan 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; and
    a. Identifies the individual; or
    b. Could be used to identify the individual.

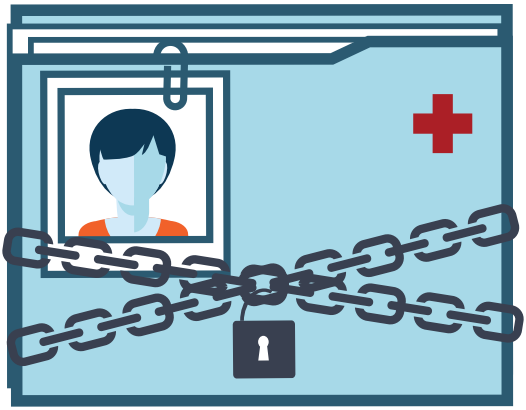
"Individually Identifiable Medical Information" Under the CMIA

"Medical information" that is "individually identifiable" under the CMIA is information in possession of or derived from a provider of health care, health plan, pharmaceutical company, or health care contractor such as a pharmacy benefits manager, regarding a patient's medical history, mental or physical condition, or treatment, which:

1. Includes or contains any element of personal identifying information sufficient to allow identification of the individual; or
2. Includes or contains any information that alone or in combination with other publicly available information, reveals the individual's identity.

HIV/AIDS Confidentiality Statutes

Many states, including California, have enacted HIV/AIDS confidentiality statutes that prohibit the disclosure of HIV test results and impose serious penalties, including criminal liability, for violations.[6] Courts in several states have narrowly construed these statutes to recognize that where information about a person's HIV status is already known and publicly available, it is thus not capable of being "disclosed."[7] While it appears that statutory claims for news media disclosure of HIV status have been largely unsuccessful, common-law causes of action for invasion of privacy, such as publication of private facts, may be successful,[8] where the information has not been disclosed previously.



Impact on Television Production

As previously mentioned, the prohibitions on dissemination of medical information might appear initially to govern only disclosure of personally identifiable medical information by health care professionals, but that impression is deceiving. The CMIA, for example, also explicitly regulates redisclosure by "recipients" of individually identifiable medical information. Importantly, the term "recipient" is not defined in the statute, so creative plaintiffs' lawyers may claim it covers *anyone* who received individually identifiable medical information, including media entities. With the exception of the cases cited above, however (*see* endnotes 3-5), it appears this has not been occurring.

Constitutional Considerations

The First Amendment provides journalists with broad protection against laws purporting to prohibit publication of lawfully obtained, truthful information about matters of public concern. Indeed, the United States Supreme Court has struck down a statute under which damages were imposed on a newspaper for publication of a rape victim's name that had been improperly disclosed by law enforcement, and the high court has protected the media's dissemination of excerpts of illegally intercepted telephone conversations (where the media did not participate in the unlawful interception and the information disclosed involved a matter of public concern). Thus, by analogy, a journalist who lawfully obtains and discloses individually identifiable health/medical information should not be found liable for violating HIPAA or the CMIA. As the California Supreme Court noted in the *Shulman* case (*see* endnote 4), however, television producers must abide by generally applicable laws when they are gathering information, and they may be liable in tort if they do not.

TIPS: TELEVISION PRODUCTION

DOES THE STORYLINE REQUIRE YOU TO OBTAIN INFORMATION FROM A HOSPITAL, CLINIC, OR SIMILAR ENTITY?

Ask for "Directory Information": HIPAA and the CMIA generally do not prohibit hospitals (in particular) from disclosing the following general "directory information" in connection with an inquiry about a *specific patient*, unless the patient has exercised the right to restrict or prohibit his or her inclusion in the directory:

a. Name;
b. General description of the individual's condition/reason for treatment that does not communicate specific medical information about the individual;
c. Religious affiliation; and/or
d. Any other information that is not medical/health information.

Ask for "De-Identified" Information: Health care providers and other health care entities may be willing to provide information with all of the patient's identifying information removed.

Ask to Review Nonconfidential Records: The following records typically need not be kept confidential under HIPAA or the CMIA and may contain the needed medical information:

a. Police incident reports;
b. Fire incident reports;
c. Court records;
d. Birth records;
e. Death/autopsy/coroner records;
f. Records maintained by family members, clubs and associations; and/or
g. Records required to be disclosed by court order (unless under seal or subject to limitations imposed by a protective order).

Obtain Facility Guidelines Governing Release of Patient Information: Obtaining a hospital or other health care facility's guidelines on the release of patient information may help you and/or legal counsel determine whether the facility's policies are HIPAA/CMIA-compliant, and to obtain whatever information is available.

Never Misrepresent Your Role: Always properly identify yourself as a television producer, and never misrepresent yourself as a member of the hospital staff, family or otherwise. If asked about the nature of your programming, always provide a truthful and complete response.

Never pay for confidential health information: Sale of protected health/medical information is generally prohibited–and subject to substantial penalties under the CMIA–and the narrowly limited exceptions would not apply to television production activities, including pre- and post-production activities.

Obtain Consent for Access to Private Property: Access to private property, including electronic records, generally requires consent of the property owner or person in lawful possession (*i.e.,* a tenant). Access to offices where the public is invited, *e.g.,* stores or other public buildings, does not require consent. Access to hospitals or doctors' offices for purposes of production (including pre- and post-production) should be either with consent or after consultation with counsel. There have been instances where it was deemed permissible for reporters to pose as patients and seek treatment in order to uncover information about the conduct of medical practitioners, but those reporters did **not** reveal other patients' information.[9]

TIPS: PROGRAM DISSEMINATION

Evaluate Whether HIPAA/CMIA Is Triggered: Does or will the program disclose personally identifiable health/medical information? Remember, personally identifiable health/medical information includes information about a living or deceased person's medical history, physical or mental condition, and/or physical or mental treatment.

Determine Whether the Information Already Is Public: If the information is already public, *e.g.,* in a public record, or the patient has made it public (*e.g.,* Angelina Jolie, Michael Douglas), a legal claim should not be successful.

Evaluate the Source: Evaluate whether the source of the information is a person subject to nondisclosure obligations under HIPAA/CMIA, *e.g.,* a health care provider or insurer, or rather is a friend or family member who would not be subject to any legal obligation of nondisclosure under HIPAA/CMIA. An employee of a HIPAA- and/or CMIA-covered entity is subject to nondisclosure obligations. If the source has a legal obligation of nondisclosure, the producer may still be able to disseminate what the source volunteers to disclose, but counsel should be consulted. (Note that an employee may be subject to termination as well as civil and criminal penalties for disclosing protected health/medical information.)

Evaluate Defenses: If the program does or will disclose non-public, personally identifiable health/medical information, ask the following questions to determine whether the First Amendment may provide a defense:

a. Is the patient a public figure? If the patient is a public figure (*e.g.,* a celebrity or public official), the First Amendment may provide a defense.
b. Is the program's subject matter newsworthy? Newsworthiness in this context relates to whether the subject matter of the program is a matter of public concern (*e.g.,* public safety, expenditure of public monies, performance of public duties, governmental operations). If it is a matter of public concern and the specific medical information at issue is relevant to that subject matter, the First Amendment may provide a defense.
c. What records or information did your source already have, and how did the source obtain the records or information?
d. Do you need to ask the source to obtain records or information that the source does not already have?

Obtain a HIPAA/CMIA-Compliant Authorization:
If the program does or will disclose personally identifiable health/medical information about a private figure, and the program's subject matter does not concern a matter of public interest, to minimize risk exposure (and if it is feasible under the circumstances), you should attempt to obtain a HIPAA/CMIA-compliant authorization from the patient. (Counsel should be consulted to determine whether an authorization satisfies federal and state law.)

De-Identify the Story: If you have determined that the program does or will reveal personally identifiable health/medical information under circumstances where constitutional protection is doubtful and the patient has not signed a HIPAA/CMIA-compliant authorization, you should consider whether it is possible to disseminate the program without revealing the patient's identity. In some instances, however, the patient's identity will be crucial to the entertainment value of the program and this will not be an option.

Notes

[1] Other medical privacy laws exist in California (*e.g.,* specific laws on confidentiality of AIDS, mental health, and substance abuse information), and California has an express state constitutional right to privacy. *See* Cal. Const. art 1, § 1; *Pettus v. Cole*, 49 Cal. App. 4th 402 (1996). However, HIPAA and the CMIA are the principal laws on the subject that affect people and businesses in California. Note that under HIPAA's preemption provision, whenever California law is stricter than HIPAA—*i.e.,* more protective of patients—California law controls.

[2] HIPAA's protection of a deceased person's records ends after 50 years from the date of the patient's death—but the CMIA protection is forever.

[3] A federal district court recently evaluated Florida's similar medical privacy statute in *Pierre-Paul v. ESPN Inc.*, 2016 WL 4530884 (S.D. Fla. Aug. 29, 2016). Like the CMIA, Florida's statute prohibits "third parties" to whom medical information is disclosed from further disclosing that information without the express written consent of the patient or the patient's legal representative. *See* Fla. Stat. § 456.057(11). Former NFL player Jason Pierre-Paul had one of his fingers amputated after a fireworks accident on the Fourth of July, and ESPN sports journalist Adam Schefter broke the story, tweeting a copy of Pierre-Paul's medical records. Pierre-Paul then sued ESPN and Schefter for violating Section 456.057(11) and for common-law invasion of privacy, among other claims. In dismissing Pierre-Paul's statutory claim, the district court concluded that "the constraints on third-party dissemination of medical information mainly curb the actions of health providers" and other parties outlined in the statute. The court concluded that the restriction on third-party dissemination did not encompass a journalist like Schefter. However, the district court permitted the common-law claim for invasion of privacy to proceed. At the date of this publication, there is no California case interpreting the "recipient" or "further dissemination" language in the CMIA.

[4] *Shulman v. Group W Prods., Inc.,* 18 Cal. 4th 200 (1998) (affirming dismissal of "public disclosure" invasion-of-privacy claims brought by automobile accident victims against television producers, arising from broadcast of a documentary showing plaintiffs' rescue and transportation to a hospital by a medevac helicopter, on the ground that the facts revealed in the broadcast were newsworthy—but remanding the plaintiffs' intrusion claims for trial. Without the patients' consent, a cameraman had been allowed to ride in the medevac helicopter along with the patients and film them, and the attending nurse had been wearing a microphone that allowed her conversations with the patients and other caregivers about the patients' conditions and treatment to be recorded for the broadcast, when those conversations otherwise would not have been audible to others).

[5] *Carter v. Superior Court,* 2002 Cal. App. Unpub. LEXIS 5017 (Cal. App. Ct. Jan. 10, 2002). Citing *Shulman*, the *Carter* court also relied on the distinction between public disclosure claims, which relate to news reporting, and intrusion claims, which relate to newsgathering. According to the courts in these two cases, intrusion claims do not implicate the First Amendment or California's anti-SLAPP statute—because unlike reporting, fact-gathering by entering otherwise private places does not involve the exercise of free speech. *See also Chanko v. American Broadcasting Cos., Inc.,* 27 N.Y.3d 46, 57-58 (N.Y. Ct. App. 2016) (dismissing claim for intentional infliction of emotional distress because television network's conduct in filming patient's medical treatment and death in hospital emergency room without consent, and then broadcasting a portion of the footage as a part of the defendant's documentary series about medical trauma, were not sufficiently outrageous where the network did not use decedent's name, blurred his image, and devoted less than three minutes to decedent and his circumstances—but permitting intrusion claim against hospital and physician to proceed).

[6] *See, e.g.,* Cal. Health & Safety Code § 120980 (imposing civil and criminal penalties for disclosure of HIV test results).

[7] *See, e.g., Doe v. Alton Telegraph,* 805 F. Supp. 30, 31 (C.D. Ill. 1992) (court order requiring convicted prostitute to undergo AIDS testing, which was a matter of public record, was not protected from disclosure under the state AIDS Confidentiality Act).

[8] *See, e.g., WMAZ v. Kubach,* 212 Ga. App. 707 (1994) ($500,000 jury verdict in a common-law privacy action was upheld where an HIV patient's identity was revealed in a broadcast, in breach of an agreement to provide a disguise).

[9] *Lieberman v. KCOP Television*, 110 Cal. App. 4th 156, 162 (2003).

About the Authors

Karen A. Henry | LOS ANGELES
Counsel
karenhenry@dwt.com | 213.633.6832

Karen is an accomplished litigator, who passionately defends the First Amendment freedoms of creators and distributors of a wide variety of entertainment content, from television programs to video games. Litigating in state and federal court, Karen strategically leverages California's anti-SLAPP statute and other speech-protective defenses and procedural devices to defeat a host of claims brought against content creators and publishers, including claims for copyright infringement, right-of-publicity, idea submission, defamation, and Lanham Act violations.

Terri D. Keville | LOS ANGELES
Partner
terrikeville@dwt.com | 213.633.8660

Terri advises health care clients on credentialing, peer review, and other medical staff issues, medical privacy, consent, clinical research, emergency care requirements, and other operational matters. She has made favorable new law for California health care organizations in cases involving physician peer review, Medicare and ERISA pre-emption, and California's Unfair Competition Law.

Our Offices

Anchorage
Suite 1100
188 West Northern Lights Blvd.
Anchorage, AK 99503-3985
907.257.5300

Bellevue
Suite 2300
777 108th Avenue NE
Bellevue, WA 98004-5149
425.646.6100

Los Angeles
Suite 2400
865 South Figueroa Street
Los Angeles, CA 90017-2566
213.633.6800

New York
21st Floor
1251 Avenue of the Americas
New York, NY 10020-1104
212.489.8230

Portland
Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5630
503.241.2300

San Francisco
Suite 800
505 Montgomery Street
San Francisco, CA 94111-6533
415.276.6500

Seattle
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
206.622.3150

Shanghai, China
Suite 701-704
Two International Finance Centre
8 Century Avenue, Pudong District
Shanghai, China 200120
011.8621.6170.9500

Washington, D.C.
Suite 800
1919 Pennsylvania Avenue NW
Washington, D.C. 20006-3402
202.973.4200

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