

Date of Hearing: September 5, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

SB 35 (Umberg) – As Amended August 28, 2023

SENATE VOTE: 35-0

SUBJECT: Community Assistance, Recovery, and Empowerment (CARE) Court Program

SYNOPSIS

Last year's SB 1338 (Umberg, Chap. 319, Stats. 2022) established the Community Assistance, Recovery, and Empowerment (CARE) Act. The CARE Act is intended to provide essential mental health and substance use disorder services to severely mentally ill Californians—many of whom are homeless or incarcerated—while also preserving these individuals' self-determination to the greatest extent possible. The CARE process is largely overseen by the courts, which are trusted with ensuring that eligible individuals—termed “respondents”—are delivered mental health and substance use disorder services, as an alternative to involuntary conservatorship or imprisonment.

On August 28, this bill was amended in order to allow health care providers, and others with medical information relevant to the determination of CARE Act eligibility, to share such information with county behavioral health agencies and the courts. Disclosure of medical information under the CARE Act is necessary because of the short time frame (14 court days) that county behavioral health agencies have to provide a written report as to a respondent's eligibility for the process. These amendments triggered referral to this Committee.

The privacy of medical information is largely governed by the federal Health Insurance Portability and Accountability Act (HIPAA) and California's Confidentiality of Medical Information Act (CMIA). Disclosure of medical information generally requires a patient's informed consent. However, respondents who are eligible for the CARE process may not be able to grant informed consent for the release of information, due to the very circumstances that make them eligible for the CARE Act. Any disclosure must therefore be made on the basis of another valid exemption from medical privacy laws.

Proposed bill amendments set forth and discussed in this analysis are meant to strengthen privacy protections under the CARE Act, while still ensuring that the Act can function as intended. Amendment language was developed in consultation with the Assembly Health and Judiciary Committees, the California Health and Human Services Agency, the Judicial Council of California, and numerous county representatives. Due to timing considerations, these amendments will not be adopted in this Committee, but rather in the Assembly Appropriations Committee, which will hear the bill if it passes this Committee.

This bill was previously heard by the Assembly Judiciary Committee, where it passed on a 10-0-1 vote.

SUMMARY: Amends the soon-to-be implemented CARE Act in order to facilitate information exchange between health care providers, county behavioral health agencies, and the courts necessary for the Act to function. Specifically, **this bill:**

- 1) Specifies that a county shall be granted only one extension for implementing the CARE Act. The final date for counties to implement under any circumstances is December 1, 2025.
- 2) Provides that legal representation of a respondent in CARE Act proceedings, and in matters related to CARE agreements and CARE plans, does not alter an attorney's obligations under the State Bar Act and the California Rules of Professional Conduct, including obligations relating to the attorney's duty of confidentiality.
- 3) Requires that if a person other than the director of a county behavioral health agency files a CARE Act petition, that the written report provided to the court by the appropriate agency (which includes a determination as to whether the respondent meets, or is likely to meet, the criteria for the CARE process) must include information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report.
- 4) Provides, notwithstanding any other law, that a county behavioral health agency must include in any report evaluation, or other document filed with the court, the information, including protected health information necessary to support the determinations, conclusions, and recommendations in the filing.
- 5) Prohibits a county behavioral health agency from submitting to the court (except by court order) original or photocopied records underlying the information in a report evaluation or other document.
- 6) Requires the county behavioral health agency to serve an unredacted copy of any report evaluation, or other document filed with the court, on the respondent and the respondent's counsel and, if the respondent consents, on the supporter.
- 7) Provides that, notwithstanding any other law, a provider of health care (as defined under the state Confidentiality of Medical Information Act (CMIA)) or a covered entity (as defined under the federal Health Insurance Portability and Accountability Act (HIPAA)), may disclose to the county behavioral health agency any information, including protected health information, mental health records excluding psychotherapy notes, and substance use disorder patient records, to the extent permitted by applicable HIPAA regulations, that is (i) in its possession about the respondent and (ii) relevant to the county behavioral health agency's provision, coordination, or management of services and supports, including, but not limited to, the preparation of any required investigations, evaluations, or reports. Deems this a disclosure for treatment purposes under applicable HIPAA regulations.
- 8) Provides that, notwithstanding any other law, a provider of health care (as defined under the CMIA) or a covered entity (as defined under HIPAA)—if either filed a CARE Act petition or executed an affidavit included with a CARE Act petition—must provide to the county behavioral health agency any information about the respondent, including protected health information, mental health records excluding psychotherapy notes, and substance use disorder patient records, to the extent permitted by applicable HIPAA regulations, that is in its possession about the respondent and may be relevant in connection with an investigation, evaluation, or other report or hearing, or with the provision of services and supports.
- 9) Permits a county behavioral health agency to apply to the court ex parte for an order requiring a provider of health care (as defined under the CMIA) or a covered entity (as

defined under HIPAA) to provide to the agency, to the court, or to both, protected health information, mental health records excluding psychotherapy notes, and substance use disorder patient records, to the extent permitted by applicable HIPAA regulations, in its possession about the respondent that may be relevant in connection with an investigation, evaluation, or other report or hearing, or with the provision of services and supports.

- 10) Requires that all information shared under 4) – 9) be disclosed to the respondent and the respondent’s counsel, and if the respondent consents, to the supporter.
- 11) Provides that any provider of health care or covered entity shall not be held civilly or criminally liable for any disclosure authorized or required under 4) – 9).
- 12) Clarifies that, except as expressly provided, 4) – 9) do not authorize any further disclosure or redisclosure of information.
- 13) Clarifies that in order for the director of a California Indian health services program or California tribal behavioral health department to be able to file a petition regarding a respondent, the program or department must have, within the previous 30 days, provided, or currently be providing, the respondent with behavioral health services.
- 14) Clarifies that in order for a judge of a tribal court to be able to file a petition regarding a respondent, the court must be located in California and the respondent must have appeared in the court within the previous 30 days.
- 15) Authorizes CARE Act proceedings to be conducted by a superior court judge or by a court-appointed commissioner or other subordinate judicial officer.
- 16) Specifies that there is no court fee for filing a CARE petition nor may any fees be charged by any public officer for services in filing or serving papers or for the performance of any duty enjoined by the CARE Act.
- 17) Specifies that a supporter of the respondent who is present with the respondent is allowed to perform the functions described in Welfare and Institutions Code sections 5980 and 5981 (which are part of the CARE Act), subject to the limits provided in those sections.
- 18) Provides that the respondent has the right to an interpreter in all proceedings if necessary for the respondent’s full participation.
- 19) Allows for the appointment of counsel “working in [the] capacity” of a public defender, rather than a public defender to be appointed to represent the respondent.
- 20) Clarifies the following regarding the rights of the original petitioner:
 - a) The original petitioner has a right to be present and make a statement at the initial hearing on the merits of the petition.
 - b) The court may permit the original petitioner to continue to participate in CARE proceedings only to the extent the respondent consents to the petitioner’s participation.
- 21) Requires additional evidence presented at the hearing on the merits of a petition to be “admissible” evidence.

- 22) Clarifies the following regarding the hearing on the merits of the CARE petition: if, at the hearing, the court finds there is not clear and convincing evidence that the respondent meets the CARE criteria in Welfare and Institutions Code section 5972, the court must dismiss the case without prejudice, unless the court makes a finding, on the record, that the original petitioner's filing was not in good faith, in which case the dismissal shall be with prejudice.
- 23) Requires the court, upon finding at a case management hearing that the parties have entered, or are likely to enter, a CARE agreement, to do one of the following:
 - a) Approve or modify the terms of the CARE agreement, and set a progress hearing for 60 days.
 - b) Continue the hearing by 14 days, upon stipulation of the parties, in order to allow additional time to enter into a CARE agreement.
- 24) Adds the following due dates for reports to be submitted by the Department of Health Care Services to the Legislature: the preliminary report is due by December 31, 2026 and the final report by December 31, 2028.
- 25) Makes technical and non-substantive conforming changes.
- 26) Contains an urgency clause. States that it is necessary that this measure take immediate effect because the CARE Act takes effect in October 2023, and therefore important changes to the Act must take effect immediately to ensure its success.

EXISTING STATE LAW:

- 1) Establishes the Community Assistance, Recovery, and Empowerment (CARE) Act. (Welf. & Inst. Code §§ 5970-5987.)
- 2) Directs Glenn, Orange, Riverside, San Diego, San Francisco, Stanislaus, and Tuolumne Counties to begin implementing the CARE Act no later than October 1, 2023. (Welf. & Inst. Code § 5970.5(a).)
- 3) Provides that the state's remaining counties must begin implementing the CARE Act no later than December 1, 2024. (Welf. & Inst. Code § 5970.5(b).)
- 4) Authorizes a one-time delay in CARE Act implementation by a county, upon application to the Department of Health Care Services. Under no circumstances may the final date of implementation be later than December 1, 2025. (Welf. & Inst. Code § 5970.5(c).)
- 5) Defines the following terms under the CARE Act:
 - a) "CARE plan" means an individualized, appropriate range of services and supports, which include behavioral health care, stabilization medications, housing, and other supportive services, as appropriate. (Welf. & Inst. Code § 5971(b).)
 - b) "County behavioral health agency" means the local director of mental health services, the local behavioral health director, or both (as applicable), or their designee. (Welf. & Inst. Code § 5971(3).)

- c) “Petitioner” means the person or entity who first files a CARE Act petition with the court. If the petitioner is not the county behavioral health agency, the court is required, at the initial hearing, to substitute the director of a county behavioral health agency or the director’s designee as the petitioner. (Welf. & Inst. Code § 5971(m).)
 - d) “Respondent” means the person who is subject to the petition for the CARE process. (Welf. & Inst. Code § 5971(o).)
 - e) “Parties” means the petitioner, the respondent, the county behavioral health agency, and any other local entity that the court may add to the proceeding which is providing services or supports to the respondent. (Welf. & Inst. Code § 5971(l).)
 - f) “CARE agreement” means a voluntary settlement agreement entered into by the parties, and that includes the same elements as a CARE plan to support the respondent in accessing community-based services. (Welf. & Inst. Code § 5971(a).)
 - g) “Graduation plan” means a voluntary agreement entered into by the parties at the end of the CARE program. It includes a strategy to support a successful transition out of court jurisdiction and may include a psychiatric advance directive. A graduation plan includes the same elements as a CARE plan, to support the respondent in accessing services and supports. A graduation plan may not place additional requirements on local government entities and is not enforceable by the court. (Welf. & Inst. Code § 5971(h).)
 - h) “Supporter” means an adult who assists the respondent. Assistance may include supporting the person to understand, make, communicate, implement, or act on their own life decisions during the CARE process, including a CARE agreement, a CARE plan, and developing a graduation plan. (Welf. & Inst. Code § 5971(q).)
- 6) Provides that a respondent may qualify for the CARE process only if all of the following criteria are met:
- a) The person is 18 years of age or older.
 - b) The person is currently experiencing a severe mental illness, as defined, and has a diagnosis identified in the disorder class: schizophrenia spectrum and other psychotic disorders, as defined in the most current version of the Diagnostic and Statistical Manual of Mental Disorders. Specifically exempts specified other conditions or disorders.
 - c) The person is not clinically stabilized in on-going voluntary treatment.
 - d) At least one of the following is true:
 - i) The person is unlikely to survive safely in the community without supervision and the person’s condition is substantially deteriorating.
 - ii) The person is in need of services and supports in order to prevent a relapse or deterioration that would likely to result in grave disability or serious harm to the person or to others.
 - e) Participation in a CARE plan or agreement would be the least restrictive alternative necessary to ensure the person's recovery and stability.

- f) It is likely that the person will benefit from participation in a CARE plan or agreement. (Welf. & Inst. Code § 5972.)
- 7) Permits any of the following adults to file a petition to initiate a CARE Act proceeding:
- a) A person with whom the respondent resides.
 - b) A spouse, parent, sibling, child, or grandparent of the respondent, or another individual who stands in loco parentis to the respondent.
 - c) The director of a hospital, or their designee, in which the respondent is hospitalized, including pursuant to the LPS Act.
 - d) The director of a public or charitable organization, agency, or home that is currently providing, or within the previous 30 days has provided, behavioral health services to the respondent, or in whose institution the respondent resides, or the director's designee.
 - e) A licensed behavioral health professional, or their designee, who is treating, or has been treating within the last 30 days, the respondent for a mental illness.
 - f) A first responder, including a peace officer, firefighter, paramedic, emergency medical technician, mobile crisis response worker, or homeless outreach worker who has had repeated interactions with the respondent in the form of multiple arrests, multiple detentions, as provided, multiple attempts to engage the respondent in voluntary treatment, or other repeated efforts to aid the respondent in obtaining professional assistance.
 - g) The public guardian or public conservator, or their designee. A respondent may be referred from conservatorship proceedings.
 - h) The director of a county behavioral health agency of the county in which the respondent reside or is present. A respondent may be referred from assisted outpatient treatment proceedings.
 - i) The director of the county Adult Protective Services or their designee.
 - j) The director of a California Indian health services program, California tribal behavioral health department, or their designee.
 - k) The judge of a tribal court that is located in California, or their designee.
 - l) The respondent. (Welf. & Inst. Code § 5974.)
- 8) Allows a court, if a criminal defendant is found to be mentally incompetent and ineligible for a diversion, to refer the defendant to the CARE program, as provided. (Penal Code § 1370.1 (b)(1)(D)(iv).)
- 9) Requires the Judicial Council to create a mandatory court form to file a CARE process petition, together with any other forms necessary during the CARE process. The petition form must be signed under penalty of perjury and include:

- a) The name of the respondent and their address, if known.
 - b) The petitioner's relationship with the respondent.
 - c) Facts that support petitioner's allegation that the respondent meets the CARE criteria in 6).
 - d) Either of the following:
 - i) An affidavit of a licensed behavioral health professional stating, first, that the health professional or their designee has examined the respondent within 60 days of the submission of the petition, or has made multiple attempts to examine, but has not been successful in eliciting the cooperation of the respondent to submit to an examination, within 60 days of submission of the petition; and second, that the licensed behavioral health professional has determined that the respondent meets, or has reason to believe, explained with specificity in the affidavit, that the respondent meets, the diagnostic criteria for CARE proceedings.
 - ii) Evidence that the respondent was detained for a minimum of two intensive treatments pursuant to the LPS Act, the most recent of which must have been no more than 60 days before the date of the petition. (Welf. & Inst. Code § 5975.)
- 10) Provides that if a person other than the respondent files a petition for CARE Act proceedings that is unmeritorious or intended to harass or annoy the respondent, and that person had previously filed a petition for CARE Act proceedings that was unmeritorious or intended to harass or annoy the respondent, the second petition is grounds to declare the person a vexatious litigant. (Welf. & Inst. Code § 5975.1.)
- 11) Establishes that the respondent has the following rights:
- a) To receive notice of the hearings.
 - b) To receive a copy of the court-ordered evaluation.
 - c) To be represented by counsel at all stages of a proceeding commenced under this chapter, regardless of the ability to pay.
 - d) To be allowed to have a supporter.
 - e) To be present at the hearing unless they waive the right to be present.
 - f) To present evidence.
 - g) To call witnesses.
 - h) To cross-examine witnesses.
 - i) To appeal decisions, and to be informed of the right to appeal. (Welf. & Inst. Code § 5976.)
- 12) Provides for the following regarding CARE Act hearings:

- a) Establishes that hearings are presumptively closed to the public, but permits the respondent to demand that the hearings be public.
 - b) Permits the respondent to request the presence of a family member or friend without waiving the right to keep the hearing closed to the rest of the public.
 - c) Permits the court to grant a request by another party to make a hearing public if the judge conducting the hearing finds that the public interest clearly outweighs the respondent's interest in privacy.
 - d) Declares that all reports, evaluations, diagnoses, or other information related to the respondent's health shall be confidential.
 - e) Requires the judge, before commencing a hearing, to inform the respondent of their rights under this section. (Welf. & Inst. Code § 5976.5.)
- 13) Requires the court, upon receipt of a CARE Act petition, to promptly review it to determine whether a prima facie showing has been made that the respondent is or may be a person described in 6), and then do one of the following:
- a) If the court finds the petitioner has not made the required prima facie showing, then dismiss the case without prejudice. (Welf. & Inst. Code § 5977(a)(2).)
 - b) If the court finds the petitioner has made the required prima facie showing, and the petitioner is the director of a county behavioral health agency, then the court must do all of the following:
 - i) Set the matter for initial hearing within 14 court days.
 - ii) Appoint counsel.
 - iii) Determine if the petition includes a determination as to whether the respondent meets the criteria for the CARE process and is willing to engage voluntarily with services, and, if not, order the county to submit a report containing this information within 14 court days.
 - iv) Require notice be provided to the respondent, respondent's counsel, and the county behavioral health agency where the respondent resides. (Welf. & Inst. Code § 5977(a)(3)(A).)
 - c) If the court finds the petitioner has made the required prima facie showing, but the petitioner is not a county behavioral health agency, then the court must do all of the following:
 - i) Order a county agency to investigate whether the respondent meets the criteria for the CARE process and is willing to engage voluntarily with services.
 - ii) File a written report with the court within 14 court days.
 - iii) Provide notice to the respondent and the petitioner that a report has been ordered.

- iv) Upon receipt of the report, within 5 days, do one of the following:
 - 1) If the county's report does not support a prima facie showing under 6), or if the county determines that the respondent has enrolled or is likely to enroll in voluntary behavioral health treatment, dismiss the matter.
 - 2) If the county's report does support a prima facie showing under 6), set the matter for initial hearing within 14 court days, appoint counsel, and order the county to provide notice of the hearing as specified. (Welf. & Inst. Code § 5977 (a)(3)(B).)
- 14) Establishes procedures and requirements for the following:
 - a) Initial hearing on a CARE Act petition. (Welf. & Inst. Code § 5977(b).)
 - b) Hearing on the merits of the petition. (Welf. & Inst. Code § 5977(c).)
 - c) Case management hearing. (Welf. & Inst. Code § 5977.1(a).)
 - d) Clinical evaluation review hearing. (Welf. & Inst. Code § 5977.1(c).)
 - e) Hearing to review proposed CARE plans. (Welf. & Inst. Code § 5977.1(d).)
 - f) Status review hearing that occurs at least every 60 days during the one-year (potentially two-year) CARE plan implementation. (Welf. & Inst. Code §§ 5977.2, 5977.3.)
- 15) Allows the court, at any point during CARE proceedings, if it determines, by clear and convincing evidence, that the respondent, after receiving notice, is not participating in the CARE process, to terminate respondent's participation. The court is then permitted to make a referral under the LPS Act, as provided. (Welf. & Inst. Code § 5979(a).)
- 16) Provides that, if a respondent was timely provided with all services and supports required by their CARE plan, the fact that the respondent failed to successfully complete the plan, including the reasons for that failure, (i) is a fact to be considered by a court in a subsequent hearing under the LPS Act, provided that the hearing occurs within six months of termination of the CARE plan; and (ii) creates a presumption at that hearing that the respondent needs additional interventions beyond the supports and services provided by the CARE plan. (Welf. & Inst. Code § 5979(a)(3).)
- 17) Creates a process for penalizing counties or other local government entities that do not comply with CARE court orders. (Welf. & Inst. Code § 5979 (b).)
- 18) Establishes the LPS Act to end inappropriate, indefinite, and involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to provide prompt evaluation and treatment of those with mental health disorders or impaired by chronic alcoholism. (Welf. & Inst. Code §§ 5000-5566.)
- 19) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)
- 20) Establishes the Confidentiality of Medical Information Act (CMIA) (Civ. Code §§ 56-56.37.)

21) Defines the term “provider of health care” under CMIA. (Civ. Code § 56.05(o).)

EXISTING FEDERAL LAW:

- 1) Establishes under federal law, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which, among other things, sets standards for the privacy of individually identifiable health information and security standards for the protection of electronic protected health information. (Pub. L. 104-191, 110 Stat. 1936.)
- 2) Provides that if a HIPAA provision conflicts with state law, the provision that is most protective of patient privacy prevails. (45 C.F.R. § 160.203.)
- 3) Defines the term “covered entity” under HIPAA. (45 C.F.R. § 160.103.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Background.** Last year’s SB 1338 (Umberg, Chap. 319, Stats. 2022) established the Community Assistance, Recovery, and Empowerment (CARE) Act. The CARE Act is intended to provide essential mental health and substance use disorder services to severely mentally ill Californians—many of whom are homeless or incarcerated—while also preserving these individuals’ self-determination to the greatest extent possible.

The CARE process is largely overseen by the courts, which are trusted with ensuring that eligible individuals—termed “respondents”—are delivered mental health and substance use disorder services, as an alternative to involuntary conservatorship or imprisonment. The California Health and Human Services Agency (CalHHS) describes the CARE process as “an upstream diversion to prevent more restrictive conservatorship or incarceration.” (See CalHHS, *Community Assistance, Recovery & Empowerment Act*, available at <https://www.chhs.ca.gov/care-act/>.)

The CARE process is initiated when an eligible person files a petition under the Act with the superior court. Eligible petitioners include the county behavioral health agency; a spouse, parent, sibling, child, or grandparent; a treating behavioral health professional; the county public guardian or public conservator; and other enumerated persons and entities. (For a complete list of eligible petitioners, see Welf. & Inst. Code § 5974.) There are strict criteria for CARE Act eligibility, including that the respondent suffer from severe mental illness, as defined; not be currently clinically stabilized in on-going voluntary treatment; and either be unlikely to survive safely in the community, or need services and supports to avoid grave disability or the risk of serious harm to themselves or others. (For a complete list of criteria, see Welf. & Inst. Code § 5972.)

Upon receiving a petition, the court must review it and determine whether it shows that the respondent may be eligible for the CARE process. If so, the court must then order the county behavioral health agency to submit a report within 14 court days that includes all of the following information:

- (i) A determination as to whether the respondent meets, or is likely to meet, the criteria for the CARE process.

(ii) The outcome of efforts made to voluntarily engage the respondent during the 14-day report period.

(iii) Conclusions and recommendations about the respondent's ability to voluntarily engage in services. (Welf. & Inst. Code § 5977(a)(3).)

Based on this report, the court then determines whether to set an initial hearing on the petition and appoint counsel for the respondent. (Welf. & Inst. Code § 5977(a)(5).)

It is largely the requirement for this report to be filed with the court that has necessitated the latest amendments to this bill, and consequently, referral to this Committee.

2) **Need for hearing by this Committee.** As passed by the Senate to the Assembly, SB 35 was a simple bill that would allow a county, if granted an extension by the Department of Health Care Services, additional time to implement the CARE Act. On June 12, 2023, the bill was amended to incorporate many new provisions, including ones allowing CARE Act proceedings to be conducted by court-appointed commissioners, and requiring respondents to be provided an interpreter if needed. In July 2023, this version of the bill was heard by the Assembly Judiciary Committee. (The Judiciary Committee's analysis describes the June 12 amendments.) On August 28, 2023, SB 35 was amended again in order to allow health care providers, and others with medical information relevant to the determination of CARE Act eligibility, to share such information with county behavioral health agencies. Under the August 28 amendments, this information, in turn, can then be shared with the courts.

The privacy of medical information is largely governed by the federal Health Insurance Portability and Accountability Act (HIPAA) and California's Confidentiality of Medical Information Act (CMIA). Disclosure of medical information generally requires a patient's informed consent.

However, respondents who are eligible for the CARE process may not be able to grant informed consent for the release of information, due to the very circumstances that make them eligible for the CARE Act. Any disclosure must therefore be made on the basis of another valid exemption from medical privacy laws. Disclosure of medical information under the CARE Act is necessary because of the short time frame (14 court days) that county behavioral health agencies have to provide a written report as to a respondent's eligibility for the process. The Act explicitly excludes individuals with "a psychotic disorder that is due to a medical condition or is not primarily psychiatric in nature, including, but not limited to, physical health conditions such as traumatic brain injury, autism, dementia, or neurologic conditions." (Welf. & Inst. Code § 5972(b).) As explained to Committee staff, acute psychosis may be precipitated even by something as simple as an untreated urinary tract infection, which, of course, would not be eligible for the CARE process. Yet there may be no way for a county behavioral health agency to rule out medical causes that do not give rise to CARE eligibility without first examining the respondent's medical records. (In addition, significant financial penalties can be levied against a county that fails to comply with court orders under the CARE Act.)

The August 28 amendments, together with several existing provisions of the CARE Act, present a number of privacy-related issues that lie within this Committee's jurisdiction.

3) **Author's statement.** According to the author:

SB 1338 (Umberg 2022) created the CARE Act (also known as CARE Court) as a response to the urgent need for innovative solutions for individuals who are suffering with untreated schizophrenia spectrum and psychotic disorders, often unhoused in our communities, and who face high risks for repeated hospitalization, incarceration, institutionalization, mental health conservatorship, and premature death. Since the passage of SB 1338, California Health and Human Services (CalHHS) & Judicial Council of California (JCC) have worked diligently with counties and stakeholders to ensure that CARE Court is implemented successfully. However, during this process, CalHHS and JCC have identified a few urgent changes needed to make CARE Court work better for the people that need it most. Therefore, SB 35 would modify various parts of CARE Court ahead of its implementation in October of 2023. For example, this bill eliminates the filing fee to support equitable access to petitioners with limited resources, allows proceedings to be conducted by subordinate judicial officers to ensure timely access for court proceedings to protect due process, and clarifies the due dates of the program's preliminary and final evaluations. Changes like these are urgently needed to help CARE Court succeed.

4) **What the August 28 amendments would do.** As discussed above, on August 28, 2023, SB 35 was amended to facilitate information sharing between health care providers, other HIPAA-covered entities, county behavioral health agencies and the courts, thereby triggering referral to this Committee. The August 28 amendments to the bill are described in paragraphs 2) – 12) and 22) of the **SUMMARY** above.

5) **Further proposed amendments to the bill.** Proposed amendments set forth and discussed below are meant to strengthen privacy protections under the CARE Act in various ways, while still ensuring that the Act can function as intended.

Amendment language was developed in consultation with the Assembly Health and Judiciary Committees, the California Health and Human Services Agency, the Judicial Council of California, and numerous county representatives. Due to timing considerations, these amendments will not be adopted in this Committee, but rather in the Assembly Appropriations Committee, which will hear the bill if it passes this Committee.

6) **Proposed amendment—rectifying an inconsistency.** The bill in print contains an inconsistency. If the person filing the initial CARE Act petition is a county behavioral health agency director, then the court must order the agency to submit a report that includes a determination as to whether the respondent meets, or is likely to meet the criteria for the CARE process. But if the petitioner is anyone else, then the court must order the agency to submit a *written* report that contains the same information. (Welfare and Institutions Code § 5977(a).) The report is critical to the CARE process; it is what the court relies on to decide whether to hold an initial hearing on the petition. In order to ensure accountability and verifiability for the court's decision, it is important that the report be in writing, regardless of whether a county behavioral health agency director filed the initial petition. The amendment below rectifies this inconsistency.

Welfare and Institutions Code 5977. (a) [...]

(3) If the court finds that the petitioner has made a prima facie showing that the respondent is, or may be, a person described in Section 5972, the court shall do one of the following:

(A) If the petitioner is the director of a county behavioral health agency, or their designee, the court shall do the following: [...]

(iii) Determine whether the petition includes all of the following information and, if it does not, order the county behavioral health agency to submit a *written* report *with the court* within 14 court days that includes all of the following:

[...]

(B) If the petitioner is a person other than the director of a county behavioral health agency, or their designee, the court shall order a county agency, or their designee, as determined by the court, to investigate, as necessary, and file a written report with the court within 14 court days and provide notice to the respondent and petitioner that a report has been ordered. The written report shall include all of the following: [...]

7) **Proposed amendment—defining “legal proceeding.”** The following definition is relied upon in other amendments. It is intended to capture all legal proceedings, whether in court, before an administrative body, or through alternative dispute resolution—except those proceedings with which CARE Act proceedings are inextricably linked.

Welfare and Institutions Code 5971. Unless the context otherwise requires, the following definitions shall govern the construction of this part. [...]

(k) “Legal proceeding” means any administrative, civil, or criminal proceeding, including, but not limited to, juvenile court proceedings and family court proceedings and services, and any form of alternative dispute resolution, including arbitration and mediation, except for the following:

(1) A proceeding under this part.

(2) A proceeding under the Lanterman-Petris-Short Act described in paragraph (2) or (3) of subdivision (a) of Section 5979.

(3) A proceeding from which the respondent was referred to CARE Act proceedings as described in Section 5978.

(4) A disciplinary proceeding under Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(5) An appeal from any of the proceedings identified in paragraphs (1) through (4), inclusive.

7) **Proposed amendment—ensuring the confidentiality of written reports submitted to the courts.** Under the August 28 amendments, the written report that a county behavioral health agency is required to file with the court in response to a CARE Act petition may now include “[t]he information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report.” (Proposed Welf. & Inst. Code § 5977(a)(3)(B)(iv).) In other words, a document containing medical information (and, potentially, other highly sensitive information) about the respondent will be in the possession of

two entities—a county and a court—that are subject to various laws providing for information in their possession to be publicly available, available in subsequent litigation, and so forth.

The amendments below are intended to safeguard the confidentiality of the report and the information it contains. The protection would presumably also extend to drafts of the report, and other documents containing the information within the report, that are in a county’s possession, as, without such an interpretation, this protection might become meaningless.

Welfare and Institutions Code 5977. [...]

(d) The following shall apply to any written report submitted by a county behavioral health agency to the court pursuant to this section:

(1) The report is confidential and not subject to disclosure or inspection under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(2) The report is inadmissible in any subsequent legal proceeding, except upon motion of the respondent in that subsequent legal proceeding.

(3) The report shall be confidential pursuant to subdivision (e) of Section 5976.5.

(4) This subdivision shall not affect the applicability of paragraph (2) of subdivision (c) of Section 5977.1, make admissible any evidence that is not otherwise admissible, or permit a witness to base an opinion on any matter that is not a proper basis for such an opinion. The admission or exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code, including but not limited to Section 352 of Evidence Code, and by judicial decision.

8) **Proposed amendment—clarifying applicable exceptions from medical privacy laws.** As currently in print, this bill uses the phrase “notwithstanding any other law” in order to establish the necessary exemptions from medical privacy laws for disclosure of information to county behavioral health agencies and the courts. The lack of precision in the phrase “notwithstanding any other law” is undesirable, for several reasons. In general, state law cannot authorize an act that is prohibited by federal law. Moreover, the right to privacy is guaranteed under the state Constitution and cannot be waived merely by statutory decree; it is therefore imperative that statutes which depend on an exemption from the constitutional right to privacy rely on a recognized exemption from this guarantee. Further, despite the liability exemption in this bill, providers of health care and covered entities will likely wish to know the specific legal authority on which they should rely for disclosing records protected under medical privacy laws.

Welfare and Institutions Code 5977.4. [...]

(d) (1) ~~Notwithstanding any other law,~~ Consistent with paragraph (9) of subdivision (b) of Section 56.10 of the Civil Code, the county behavioral health agency shall include in any report evaluation, or other document filed with the court, the information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the filing. The county behavioral health agency shall not, unless ordered to do so by the court, submit to the court original or photocopied records underlying the information in a report evaluation or other document required or ordered under this

subdivision. The county behavioral health agency shall serve an unredacted copy of any report evaluation, or other document filed with the court on the respondent and the respondent's counsel and, with the consent of the respondent, on the supporter in a manner authorized by law. Neither a county nor an employee or agent thereof shall be held civilly or criminally liable for any disclosure authorized or required by this paragraph.

The provision above governs a county behavioral health agency's disclosure of medical information to the court. Civil Code § 56.10(b)(9), a CMIA provision, requires "a provider of health care, a health service plan, or a contractor [to] disclose medical information if the disclosure is compelled by any of the following: ... (9) When otherwise specifically required by law."

According to information provided by county representatives to Committee staff:

[County behavioral health agencies] are ... "providers of health care" covered under CMIA, because the county staff engaged in treatment activities are "licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code" (e.g., psychologists, [licensed clinical social workers], and [licensed marriage and family therapists]). (See Civ. Code, §§ 56.10, subd. (a) and 56.05, subd. (o) [definition of "provider of health care"].)

This CMIA definition is also the basis for allowing disclosures to county behavioral health agencies under the next three sets of amendments.

(2) (A) ~~Notwithstanding any other law, Consistent with paragraph (1) of subdivision (c) of Section 56.10 of the Civil Code~~, a provider of health care, as defined in Section 56.05 of the Civil Code, or a covered entity, as defined in Section 160.103 of Title 45 of the Code of Federal Regulations, may disclose to the county behavioral health agency any information, including protected health information, *and* mental health records excluding psychotherapy notes, ~~and substance use disorder patient records, to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations,~~ in its possession about the respondent that is relevant to the county behavioral health agency's provision, coordination, or management of services and supports under this ~~section part~~, including, but not limited to, the preparation of any required investigations, evaluations, or reports. Such a disclosure is a disclosure for treatment purposes, *which may be made only to the extent permitted* under Section 164.506 of Title 45 of the Code of Federal Regulations. *The information disclosed may include substance use disorder patient records only to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations.*

The provision above governs voluntary disclosures by a provider of health care (as defined under CMIA) or a covered entity (as defined under HIPAA) to a county behavioral health agency. Disclosure is permitted for treatment purposes under 45 C.F.R. § 164.506, which governs uses and disclosures to carry out treatment, payment, or health care operations.

According to information provided by county representatives to Committee staff:

County behavioral health agencies are "covered entities" under HIPAA (or, more accurately, covered components of the "hybrid" county entity) because (1) they are providers of medical or health services, and (2) they transmit health information in

electronic form in connection with covered transactions (e.g., for Medi-Cal billing). (45 CFR § 160.103 [definitions of “covered entity,” “health care provider,” and “transaction”]. See also 45 CFR § 164.105 [implementation of HIPAA by "hybrid" legal entities, such as counties, that have both covered and non-covered functions].)

This HIPAA definition is also the basis for allowing disclosures to county behavioral health agencies under the next two sets of amendments.

Title 42, Part 2 of the Code of Federal Regulation, cited in the amendments above and below, governs the confidentiality and disclosure of patients’ substance abuse disorder records.

(B) ~~Notwithstanding any other law, Consistent with paragraph (9) of subdivision (b) of Section 56.10 of the Civil Code, a provider of health care, as defined in Section 56.05 of the Civil Code, or a covered entity, as defined in Section 160.103 of Title 45 of the Code of Federal Regulations, that filed a CARE Act petition or executed an affidavit included with a CARE Act petition pursuant to paragraph (1) of subdivision (d) of Section 5975 shall provide to the county behavioral health agency any information, including protected health information, and mental health records excluding psychotherapy notes, and substance use disorder patient records, to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations,~~ in its possession about the respondent that may be relevant in connection with an investigation, evaluation, or other report or hearing under this ~~section part~~, or with the provision of services and supports under this ~~section part~~. *The provision of information under this paragraph is a disclosure required by law, which may be made only to the extent permitted under subdivision (a) of Section 164.512 of Title 45 of the Code of Federal Regulations. The information disclosed shall include substance use disorder patient records only to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations.*

The provision above governs mandatory disclosures by a provider of health care (as defined under CMIA) or a covered entity (as defined under HIPAA) to a county behavioral health agency, in situations where the provider or covered entity either filed a CARE Act petition or executed an affidavit included with a CARE Act petition. Disclosure is permitted under 45 C.F.R. § 164.512(a), which governs uses and disclosures required by law, and Civil Code § 56.10(b)(9), which addresses disclosures “otherwise specifically required by law.”

(C) The county behavioral health agency may apply to the court ex parte for an order requiring any provider of health care, as defined in Section 56.05 of the Civil Code, or any covered entity, as defined in Section 160.103 of Title 45 of the Code of Federal Regulations, to provide to the county behavioral health agency, to the court, or both, any information, including, but not limited to, protected health information, and mental health records excluding psychotherapy notes, and substance use disorder patient records, to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations, in its possession about the respondent that may be relevant in connection with an investigation, evaluation, or other report or hearing under this ~~section part~~, or with the provision of services and supports under this ~~section part~~. *The provision of information under this paragraph is a disclosure required by law, which may be made only to the extent permitted under Section 164.512 of Title 45 of the Code of Federal Regulations. The information ordered to be disclosed may include substance use disorder patient records*

only to the extent permitted by Part 2 (commencing with Section 2.1) of Title 42 of the Code of Federal Regulations.

The provision above permits a county behavioral health agency to obtain a court order ex parte (that is, without the appearance of the respondent or another party to the CARE proceeding) in order to compel disclosure of medical information to the agency and/or to the court. As before, disclosure is permitted under 45 C.F.R. § 164.512(a), which governs uses and disclosures required by law.

While not explicitly cited in the provision above, Civil Code § 56.10(b)(1) permits a provider of health care to disclose medical information under the CMIA if “compelled by...[a] court order.”

9) Proposed amendment—providing notice of disclosure to the respondent.

Welfare and Institutions Code 5977.4. [...]

(d) (3) [...] *(E) The county behavioral health agency shall notify the respondent of a disclosure under this paragraph as follows:*

(i) By mail at the respondent’s last known address, if any.

(ii) To the respondent’s counsel.

(iii) By including a copy of the notification under clause (i) or (ii) with the next notice of hearing served upon the respondent, if any.

~~(E)~~ *(F) All information, including the facts and records, or summary thereof, shared under this subdivision shall further be disclosed to the respondent and the respondent’s counsel, and with the consent of the respondent, to the supporter.*

The amendments above are intended to ensure that the county behavioral health agency notifies the respondent of any disclosure under the CARE Act of the respondent’s medical information.

10) Proposed amendment—preserving confidentiality of records.

Welfare and Institutions Code 5977.4. [...]

(d) (3) [...] *(B) Information disclosed to a county behavioral health agency by a provider of health care, as defined in Section 56.05 of the Civil Code, or a covered entity, as defined in Section 160.103 of Title 45 of the Code of Federal Regulations is confidential and not subject to disclosure or inspection under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).*

(C) Disclosure of information under this part shall not be deemed to in any way alter the duties or responsibilities of a county behavioral health agency, of a provider of health care, as defined in Section 56.05 of the Civil Code, or of a covered entity, as defined in Section 160.103 of Title 45 of the Code of Federal Regulations, with respect to the disclosed information under the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code), or the federal Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191).

Subparagraph (B) above is meant to ensure that the medical information of a respondent that is disclosed under the CARE Act to a county behavioral health agency remains confidential and that it does not inadvertently become subject to the California Public Records Act.

Subparagraph (C) above is meant to ensure that HIPAA and CMIA continue to govern medical information that is disclosed under the CARE Act.

11) Proposed amendment—ensuring the confidentiality of CARE court proceedings.

Welfare and Institutions Code 5976.5. (a) Notwithstanding any other law, and except as otherwise provided in this section, a hearing held under this part is presumptively closed to the public.

(b) The respondent may demand that the hearing be public and be held in a place suitable for attendance by the public.

(c) The respondent may request the presence of any family member or friend without waiving the right to keep the hearing closed to the rest of the public.

(d) A request by any other party to the proceeding to make the hearing public may be granted if the judicial officer conducting the hearing finds that the public interest in an open hearing clearly outweighs the respondent's interest in privacy.

(e) All reports, evaluations, diagnoses, or other information *filed with the court* related to the respondent's health shall be confidential. *The respondent may at any time petition the court for an order sealing these records or any other court records in a proceeding held under this part. Notwithstanding any Rule of Court prohibiting records kept confidential by law from consideration for sealing, if such a petition is filed, there shall exist a presumption in favor of sealing.*

This provision is meant to allow a respondent to seek sealing of records in their CARE Act proceeding. While confidentiality of court records can be provided for by statute (as here), sealing of records requires an individual petition to the court. (*See Cal. Rules of Court, rule 2.550; see also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178.)

(f) The fact that evidence is admitted at a proceeding held under this part shall not be the basis for admission of that evidence in any subsequent legal proceeding.

This provision is meant to ensure that the admissibility of evidence in a CARE Act proceeding cannot, in and of itself, be the basis for admitting that evidence in a subsequent legal proceeding. That said, this provision is not meant to impair the admission of evidence in a subsequent legal proceeding on some other basis that is lawful in that proceeding.

Note that the definition of "legal proceeding," as forth in section 7) above, excludes subsequent LPS proceedings to which the court may refer the respondent using its authority under the CARE Act; in such proceedings, evidence would be admissible on the basis that it was admitted in a CARE proceeding.

(g) Photographs, recordings, transcripts, other records of proceedings held under this part, and testimony regarding proceedings held under this part shall not be admissible in any

subsequent legal proceeding except upon motion by one of the following in that subsequent legal proceeding:

(1) The respondent.

(2) The county behavioral health agency, the public guardian, or the public conservator.

This provision ensures that any record of a CARE Act proceeding, including testimony regarding such proceedings, is inadmissible in a subsequent legal proceeding. An exception is made for a limited set of persons—the respondent, the county behavioral health agency, the public guardian, or the public conservator—to nevertheless introduce such a record as evidence on motion.

(h) In a proceeding held under this part, this section shall not affect the applicability of paragraph (2) of subdivision (c) of Section 5977.1, make admissible any evidence that is not otherwise admissible, or permit a witness to base an opinion on any matter that is not a proper basis for that opinion. The admission or exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code, including, but not limited to, Section 352 of the Evidence Code, and by judicial decision.

This provision ensures that all applicable evidence laws continue to apply in CARE Act proceedings.

12) Proposed amendment—preventing abuse of the CARE process to gain an advantage in a subsequent legal proceeding. One of the distinctive features of the CARE Act is the extensive list of individuals, including a respondent’s spouse, children, or siblings, who may file a petition with the court in order to initiate a CARE proceeding. This is an important feature of the law, since it potentially makes supports and services available to individuals who are desperately in need, but may not be able to access other or more traditional channels for help. The CARE Act protects against abuse of the petition process by permitting courts to declare a person a vexatious litigant if they file two CARE petitions that are “without merit or...intended to harass or annoy the respondent[.]” (Welf. & Inst. Code § 5975.1.)

That said, it is easy to envision a situation in which a person might seek to gain an advantage in another legal proceeding by filing a CARE petition concerning a respondent. Suppose there is a dispute between siblings over family property or a family business; an attorney for one sibling might suggest filing a CARE petition regarding another sibling who suffers from mental illness. Or a family law attorney, assisting a client with a divorce, might aid them in filing a CARE petition regarding their spouse in order to gain an advantage in gaining child custody. In order to safeguard against such unethical conduct, the following amendment makes clear that it is cause for State Bar discipline for an attorney to file, or assist in filing, a CARE Act petition with knowledge that the filing is being made to gain an advantage in another legal proceeding.

Welfare and Institutions Code 5975.1. (a) [...]

(b) (1) If a person other than the respondent files a petition for CARE Act proceedings in order to gain an advantage over the respondent in another legal proceeding, then, notwithstanding any other provision of this part, it is cause for suspension, disbarment, or other discipline if a member of the State Bar is found to have filed the petition or assisted in the filing of the petition with knowledge that the filing was being made in order to gain that advantage.

(2) For purposes of this subdivision, “legal proceeding” shall not include:

(A) A proceeding under Part 1 (commencing with Section 5000) of Division 5.

(B) A proceeding under Section 300.

Paragraph (2) excludes proceedings involving LPS, Assisted Outpatient Treatment (aka “Laura’s Law”), and juvenile dependency, so that public attorneys involved in such proceedings are not inadvertently subjected to State Bar discipline.

13) Proposed amendment—ensuring CARE petitions are not the basis for unnecessarily prolonging jail time. While not within this Committee’s jurisdiction, the amendment set forth below was worked out by CARE Act stakeholders to prevent unnecessarily prolonged incarceration for defendants found incompetent to stand trial in misdemeanor criminal proceedings.

Penal Code 1370.01. [...] (b) If the defendant is found mentally incompetent, the trial, judgment, or hearing on the alleged violation shall be suspended and the court may do either of the following:

(1) [...]

(D) If the court finds the defendant ineligible for diversion based on the circumstances set forth in subdivision (b), (c), (d), or (g) of Section 1001.36, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

(iv) Refer the defendant to the CARE program pursuant to Section 5978 of the Welfare and Institutions Code. A hearing to determine eligibility for CARE shall be held within **30 14 court** days after the date ~~of~~ **on which the petition for the-referral referral is filed**. If the hearing is delayed beyond **30 14 court** days, the court shall order the defendant, if confined in county jail, to be released on their own recognizance pending that hearing. If the defendant is accepted into CARE, the charges shall be dismissed pursuant to Section 1385.

The current language in the bill would have required such defendants to remain in jail for up to 30 days, solely because they were referred for CARE proceedings. As amended, the maximum time would be reduced to 14 court days.

ARGUMENTS IN SUPPORT: California State Association of Counties, Urban Counties of California, and Rural County Representatives of California applaud the August 28 amendments to this bill, writing:

Fulfillment of county behavioral health agencies’ responsibilities under the CARE Act will require communication of detailed information regarding a respondent’s behavioral health condition and treatment to the court. Such information is generally confidential under state and federal law and cannot be disclosed by any health care provider – including county behavioral health – without the respondent's consent. A respondent may decline to consent to release of their confidential medical and mental health information to the court – particularly during early phases of the case, when county behavioral health is preparing the initial report.

to the court required under the provisions of the CARE Act. As a result, express legal authority will be required for county behavioral health agencies to provide the court with the information contemplated by the CARE Act.

ARGUMENTS IN OPPOSITION: ACLU California Action and Disability Rights California caution against disclosure of medical information to substantiate CARE Act petitions:

Allowing county agencies carte blanche to specifically search for and report to the court any information in medical records that substantiates a CARE petition's allegations raises civil rights, medical privacy, and due process concerns and is likely in conflict with state and federal medical privacy laws. Additionally, it may allow aspects of respondents' medical records that are outdated and/or written by individuals with minimal behavioral health expertise, to follow the respondent into a process that can restrict their civil rights. Subdivision (d) of Section 5977.4 of the Welfare and Institutions Code may also leave medical providers open to the risk of violating federal medical privacy law in order to follow state law.

REGISTERED SUPPORT / OPPOSITION:

Support

California State Association of Counties
Rural County Representatives of California
Urban Counties of California

Support if Amended

Families Advocating for the Seriously Mentally Ill

Opposition

ACLU California Action
DBSA California
Disability Rights California
Electronic Frontier Foundation

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