



CASE OF THE MONTH



ALWAYS Document Your Informed Refusal Conversations

Dona Constantine, RN, BS

This *Case of the Month* emphasizes the importance of documenting conversations with patients regarding informed refusal.

Beware: A good physician-patient relationship may not always save the day when adult children get involved.

Mr. S, a 65-year-old male patient had his initial visit with Dr. G, his new primary care physician (PCP). At this visit, Dr. G ordered routine lab work, including a prostate-specific antigen (PSA) blood test, which resulted in 2.7 (Year 1). The following year, Mr. S saw Dr. G for his annual visit. A PSA was ordered which resulted in 8.6 (Year 2) and Dr. G contacted Mr. S to inform him of the elevated result. Mr. S was referred to a urologist who performed a prostate biopsy. The biopsy was negative for cancer. Over the following decade, Mr. S saw Dr. G annually, and sometimes semi-annually, and routine PSA levels were ordered. From Year 3 to Year 8, Mr. S's PSA levels fluctuated between 3.8 to 5.4. In Year 9, his PSA levels increased to 6.7 and a repeat level was drawn six months later, and resulted in 5.66. Six months later (Year 10), the PSA level was 6.69.

Although not documented, Dr. G recommended Mr. S

see a urologist when the PSA levels remained elevated. Mr. S declined the referral, rationalizing it was not needed because when his PSA was over 8, his biopsy was negative. Dr. G reiterated the elevated PSA could be indicative of cancer that eventually metastasizes and leads to death. However, Mr. S still insisted he did not want to see a urologist and have another biopsy, even if it meant death, because the biopsy "hurt like hell." The patient's wife witnessed this conversation.

Mr. S returned to Dr. G the following year, and another PSA was ordered (Year 11) and resulted in 25.15. Dr. G contacted Mr. S regarding the result and need for a urology referral. Given the significant increase in the PSA level, Mr. S agreed to see a urologist. He followed up with a urologist and underwent a prostate biopsy which revealed cancer. A post-procedure bone scan showed widely disseminated osseous metastases.

Although Mr. S and his wife had a good relationship with Dr. G, they hired an attorney who filed a notice of intent (NOI) to sue at the insistence of their adult children. The significant increase in the PSA level to 25.25 in year 11 prompted the children to question the accuracy

of Dr. G's interpretation and follow up of the prior PSA levels. Unfortunately, Dr. G did not document his many conversations with Mr. S regarding: the risk of not seeing a urologist for the elevated PSA levels; not having a prostate biopsy; or the consequences of refusing treatment, including cancer, metastases, and death. Had these conversations and Mr. S's refusal to follow medical advice been documented in the medical record, an attorney may not have pursued legal action.

After the NOI was issued, Mr. S's wife visited Dr. G and apologized to him for pursuing a lawsuit. She informed him that it was not her husband's nor her desire to sue him. Unknown to Dr. G, Mr. S's wife also made a gift to the hospital in Dr. G's honor. The plaintiff attorney subsequently withdrew his representation of the patient, and the case was not pursued by the patient or his family.

Although justice prevailed, Dr. G could have avoided months of needless anxiety following the issuance of the NOI had he documented Mr. S's informed refusals to follow up on the elevated PSA levels. Patients have the right to refuse a proposed procedure or treatment, including a physician's recommendation that a patient

see a specialist.¹ In cases that proceed to trial, the California jury instructions given on informed refusal are: "A (physician) must explain the risks of refusing a procedure in language that a patient can understand and give the patient as much information as (they) need to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have a medical procedure (treatment). The patient must be told about any risk of death, serious injury, or significant potential complications that may occur if the procedure is refused. A physician is not required to explain minor risks that are not likely to occur."² Although documentation of this discussion is not included in the jury instructions, documentation in the medical record provides evidence of the patient's informed refusal should the patient dispute the discussion or is no longer alive to testify. ↩

Dona Constantine is a Senior Risk & Patient Safety Specialist. Questions or comments related to this article should be directed to DConstantine@CAPphysicians.com.

References

¹Kichler, Deborah "You Didn't Tell Me That. Informed Refusal as a Defense". Risk Management and Patient Safety News, p. 1. October 2020 <https://www.capphysicians.com/articles/you-didnt-tell-me-informed-refusal-defense>

²Judicial Council of California Civil Jury Instructions (2023 edition), CACI No. 534. https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf

Updated Mutual Protection Trust (MPT) Agreement Now Available

The updated MPT Agreement is now available to CAP members in the Member's Area of www.CAPphysicians.com.

To access the MPT Agreement:

1. **Log in** to your member account at <https://member.capphysicians.com>. If you do not have an account, you will need to register for one at <https://member.capphysicians.com/register>.
2. **Click on** the "Member Documents" box and select "MPT Agreement" to view the updated document.

A physical copy of the MPT Agreement is also available to members by contacting CAP at communications@CAPphysicians.com.

For questions, please contact Membership Services at **800-610-6642** or via email at MS@CAPphysicians.com. ↩

RISK MANAGEMENT AND PATIENT SAFETY NEWS



Psychotherapy Notes and Progress Notes: What's the Difference?

Monica Ludwick, Pharm.D.

Behavioral health professionals understand that proper documentation of medical information is an essential and required component of quality patient care. Accurate and detailed notes of patient visits and interactions help mental health professionals diagnose and treat patients quickly, safely, and accurately, and help them devise effective treatment plans.

An individual's mental health information is highly sensitive. The federal government under the Health Information Portability and Accountability Act (HIPAA) adds another level of protection to some, though not all, mental health information, provided that certain steps are taken by the mental health professional when creating and storing this information. It is important to know the difference between psychotherapy notes and progress notes to further safeguard this information from disclosure when responding to legal and other requests for a patient's mental health information.

Psychotherapy notes are granted special protection under HIPAA because they are likely to include particularly sensitive patient information and the personal notes of the treating clinician. These personal notes (think "chicken scratch") are intended to help the clinician recall any discussion or remarks. Generally, they are of little or no value to others, and are not seen by persons other than the clinician. The provider's personal notes must be kept separate from the mental health record, including progress notes.

Psychotherapy notes are defined by HIPAA Regulations 45 CFR 164.501 (65 Federal Register at 82805)¹ as:

1) Recorded by a healthcare provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session, and, 2) Maintained separate from the medical record (actually separate in a different location—colored paper in the same chart is NOT considered separate). Most importantly, a psychotherapy note does NOT contain:

1. Medication prescription and monitoring
2. Duration of encounter
3. The modalities and frequencies of treatment furnished
4. Results of clinical tests
5. Any summary of diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date

Progress notes on the other hand are part of a patient or medical record. According to the California Health and Safety Code,² a patient record is a document "in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient." A patient record includes the mental health record which is comprised of information specifically relating to the evaluation or treatment of a mental disorder.² In general, a patient record (progress note) includes the following:

1. Documents which indicate the nature of the services rendered
2. The clinical documentation created by the provider during the course of therapeutic treatment
3. Any summary of diagnosis, functional status, the treatment plan including medication prescribing and administering, symptoms, prognosis, and progress to date

Requests for Information

A covered entity generally must obtain a specific authorization for disclosure of psychotherapy notes to a person other than the person who created the notes. This authorization is in addition to any consent an individual may have given for the use or disclosure of other protected health information to carry out treatment, payment, and healthcare operations. This additional level of individual control provides greater protection than a general application of the “minimum necessary” rule.

Healthcare professionals should not consider the extra privacy protections afforded to psychotherapy notes as applicable to general mental health records, or the overall care and treatment of a patient could be impacted. Mental health records are considered to fall within general protected health information (PHI) and are part of the general health record, which are covered by general authorizations for disclosure of patient health records.

There are a few exceptions for which psychotherapy notes may be disclosed without authorization (other than treatment, payment or operation of one’s practice).³ Authorization is not required for use or disclosure of psychotherapy notes for law enforcement purposes or legal mandates, certain oversight activities authorized by federal law, use by a coroner or medical examiner, or avoidance of a serious and imminent threat to health or safety.³

Recall that the “minimum necessary” requirement mandates physicians to restrict the disclosure of confidential information to the minimum amount of information needed. Psychotherapy notes are granted more protection with regard to disclosures and

subpoenas but a) there are currently no state statutes about whether psychotherapy notes should be included in disclosed records, and b) no record is ever completely immune from disclosure.⁴

Summary

At some point in time, you may be asked to disclose a patient’s psychotherapy notes. It is critical to understand your obligation when it comes to sharing psychotherapy notes to avoid any costly patient privacy or HIPAA violation. To ensure that a patient’s records are disclosed in compliance with all applicable laws, consider the following:

1. Ensure that all staff know the difference between the patient’s medical record and psychotherapy notes. Progress notes are part of the medical record!
2. Keep your psychotherapy notes separate from the patient’s clinical record.
3. Reach out to your electronic medical record (EMR) provider to determine how to differentiate your psychotherapy notes from the clinical medical record.
4. Create a policy and procedure for staff members to use when confronted with a patient or 3rd party request for medical records.
5. Ensure you are using an appropriate authorization for release of medical records. For CAP’s template see the following link: [Authorization for Use and Disclosure of Medical Information Release \(English\) | The Cooperative of American Physicians \(capphysicians.com\)](#)
6. Seek legal guidance for complex questions regarding release of information .

HIPAA affords specific protection to psychotherapy notes, but no special protections generally for mental health records. However, certain states may have in place stricter safeguards for mental health records, and HIPAA requires that providers comply with these additional restrictions.⁵ ↩

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References

¹CMA Legal Counsel. 2022. *Confidentiality of Sensitive Medical Information*. California Medical Association. <https://www.cplh.org/document-library/detail/viewhtml/productcd/4250>. Accessed 6/24/23.

²Cal. Health & Safety Code § 123105(d). Section 123105. https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=123105.&lawCode=HSC. Accessed 6/22/23.

³45 CFR 164.508. <https://www.ecfr.gov/current/title-45/section-164.508>. Accessed 9/8/23.

⁴"Minimum Necessary Requirement" Health and Human Services. July 26, 2013. <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/minimum-necessaryrequirement/index.html#:~>.

⁵45 CFR 160.203. <https://www.ecfr.gov/current/title-45/part-160/section-160.203>.

New and Updated HR Manual for Medical Practices Now Available!

Now, Easier to Customize for Practices of Any Size and Setting!

For many practices, HR-related issues such as high turnover and frequently changing rules and regulations can impact both the patient experience and operational efficiency.

That's why CAP is committed to helping members address their critical HR challenges with a newly published and streamlined *Human Resources Manual for Medical Practices*. Offered at no charge, this popular resource provides invaluable tools to help you manage the full spectrum of employment-related policies and procedures.

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Regardless of your practice's size or specialty, the new HR Manual can help:

- **Reduce the chances of employment-related lawsuits** by detailing current labor laws, including leaves of absence, rest breaks and meal periods, discriminatory practices, and more.
- **Improve morale and engagement** by establishing clear-cut job expectations, so your employees have a solid understanding of what's expected of them.
- **Increase administrative productivity** by providing practical HR forms and templates for managers and supervisors.

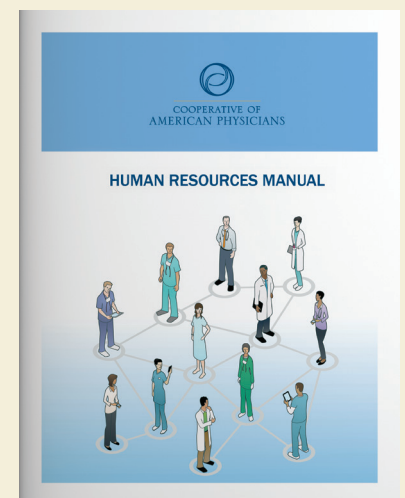
The *Human Resources Manual for Medical Practices* is offered as separate employee and manager's handbooks.

Download the Manager's Handbook at:

CAPphysicians.com/ManagersHandbook

Download the Employee Handbook at:

CAPphysicians.com/EmployeeHandbook ➔



Important Notice: Credit Card Fees Coming in 2024



Any members making payments to CAP by credit card on or after January 1, 2024, will be charged a 3% fee of the amount billed. This fee will apply to any credit card payments made online, by autopay, by mail, by phone, or other method.

The 3% fee will be implemented in 2024 so that the significant costs associated with credit card processing fees will no longer be absorbed by CAP and thus no longer shared by the entire membership.

IMPORTANT NOTICE: In addition to the 3% credit card fee, effective January 1, 2024, CAP will no longer accept payments made by debit card. Enroll in autopay via the automated clearinghouse (ACH) now to avoid any disruptions in your CAP billing cycle.

CAP and MPT are committed to serving the best interests of each member. Reducing costs is one way to ensure that your rates for medical malpractice coverage remain as stable and affordable as possible.

If you pay your bill by credit card and would like to avoid the 3% fee starting in 2024, you can set up automatic ACH payments using your checking account securely and easily.

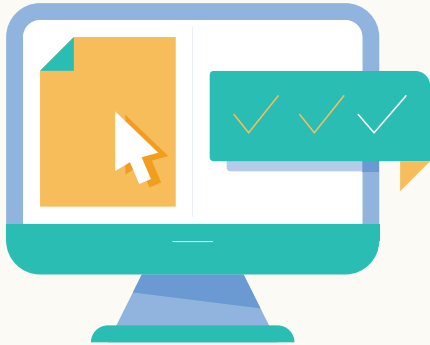
Don't wait until January! Set up electronic and automatic payments now for hassle-free transactions at no cost!

Here's How:

1. Visit <https://member.capphysicians.com/> to log in to your CAP account. If you do not have an account, you will need to register to create one at <https://member.capphysicians.com/register>.
2. Once logged in, select the green "Set Up Paperless Billing" button.
3. Select the "Via Email Only" button.
4. Verify your email address and click the "Save Changes" button.
5. Then, simply click on the "Pay CAP Bill" button (agree to the terms and conditions when prompted) and follow the instructions to set up autopay payments by clicking on the "Set Up Autopay Payments" and provide the required information for recurring payments made by ACH.

For assistance with your account, or if you have questions about your membership or the new credit card fee, please call **800-610-6642** or email MS@CAPphysicians.com. ➦

2023 Open Enrollment



Take Advantage of Exclusive Personal Insurance Coverage at Excellent Group Rates

CAP Physicians Insurance Agency, Inc. (CAP Agency) is pleased to announce the upcoming 2023 open enrollment period when CAP members will have the exclusive opportunity to access a wide range of personal insurance products and flexible plan options at competitive large group rates.

Open enrollment will occur this year from **October 1st through November 15th** for coverage beginning **January 1, 2024**.

Open enrollment is only scheduled once a year for a limited time, so this will be your best chance to take advantage of the excellent benefits CAP Agency has to offer at low group rates.

The following products will be available for you to upgrade your existing benefits or purchase new coverage.

Short-Term Disability¹	\$1,000 weekly benefit plan in addition to state disability benefits. Supplements the long-term disability policy's 90-day waiting period.
Long-Term Disability^{1,2}	Up to a \$10,000 maximum monthly benefit ² available or 60% of your income after a 90-day waiting period.
Life Insurance (Medical Underwriting Required for New Policyholders³)	Up to a \$500,000 death benefit paid directly to the beneficiary tax-free.
Accident Insurance¹	Affordable coverage for unforeseen bills after an accident or injury, especially if you have a high deductible health plan or limited network.
Critical Illness Insurance¹	Protection from the financial impact of a critical illness such as cancer diagnosis, heart attack, or stroke.
Hospital Indemnity Insurance¹	Coverage to help pay for expenses, such as hospitalization admission and confinement, that may not be covered under your medical plan.
Dental and Vision¹	Flexible plan options available for physicians and their family members.
Newest Offerings	
Legal Plans	Access to experienced attorneys to help with estate planning, home sales, tax audits, and more.

SEPTEMBER 2023

Identity & Fraud Protection

Fraud protection, digital security, and identity theft protection, all under the same plan.

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Helps cover the costs of vet visits, accident, illness, and more.

Save the Date and Prepare Now!

Here's what you can do now to make sure you take full advantage of all the products available during the open enrollment period:

- Review your current policies and benefits.
- Assess your current personal and business needs and any major changes within the past year.
- Collect required information: Social Security numbers, beneficiary information, birthdates, etc.
- Review available coverage programs at <https://www.capphysicians.com/business-personal-insurance#life-disability-highlights>.

Our goal is to ensure that all CAP members have a comprehensive overview of their available benefits so you can make informed decisions on what kinds of insurance are best for you and your family for the coming year.

More information about the open enrollment period will be available in October. Do not miss important emails from CAP that will include details on rates and enrollment. Contact us today at 800-819-0061, or at CAPAgency@CAPphysicians.com for questions about your current coverage or anticipated coverage needs. ➔

¹To be eligible, you must be working in healthcare at least 17.5 hours/week and cannot be currently disabled or at the time coverage becomes effective. Other limited time preexisting condition exclusions may apply.

²Income from the tax year immediately prior will be used to determine benefit at time of claim.

³Members covered by CAP longer than 90 days and not previously enrolled in supplemental life coverage.

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By Andie Tena

New Online Practice Management Evaluation

Answering a Few Questions Can Pay Dividends to Boost Your Practice's Operational Effectiveness

Is your practice running as smoothly as it could be? Even if things are mostly working, it's a good idea to regularly review your office systems and procedures to assess the areas where your practice shines, and the areas where you could use a little help.


To take advantage of the opportunity to receive personalized guidance from a practice management expert, [complete CAP's Workflow Optimization Tool](#). This brief form will prompt you (or your practice manager) to reflect on simple questions that identify potential gaps in your business operations, such as:

- When does a new patient complete their paperwork?
- How does your office handle no-shows?
- What is your process for collecting overdue balances?
- How are voicemails received and handled?

The form takes just a few minutes to complete and gives our practice management experts an accurate assessment of your practice systems and workflows.

An assigned practice management expert will thoroughly review the information you provide and use it to tailor recommendations to help you boost your business's operations and your practice's bottom line during a one-on-one virtual practice assessment. They can advise on best practices for appointment scheduling, new patient intake protocols, billing, collections, and accounts receivable workflows, and so much more. This sort of consultative, one-on-one assistance can cost hundreds, but is available to you for free as part of your CAP membership.

This new evaluation form is offered as part of the *My Practice* program, CAP's free practice management and business services solutions program. As an exclusive benefit of your membership, you have free access to *My Practice*.

If you are looking to optimize your practice's business operation or need additional resources and support, contact *My Practice* at **213-473-8630** or via email at MyPractice@CAPphysicians.com, for immediate assistance. 

Andie Tena is CAP's Assistant Vice President of Practice Management Services. Questions or comments related to this column should be directed to ATena@CAPphysicians.com.

Making Changes to Your Practice? Update Your Membership Information to Help With Your Year-End Planning



If you are considering a change in your practice this year or in 2024, please notify CAP as soon as possible so our Membership Services Department can work with you to ensure that any necessary coverage transitions are implemented smoothly. Changes include, but are not limited to:

- Retirement from practice at age 55+
- Part-time practice (e.g., 20 or fewer hours per week or 16 hours for anesthesiologists)
- Reduction or any change in the scope of your practice
- Employment with a government agency or non-private practice setting
- Employment with an HMO or other self-insured organization
- Joining a practice insured by another carrier
- Moving out of state
- Termination of membership

The Mutual Protection Trust Board (MPT) of Trustees will levy an assessment in November 2023. To allow ample processing time, we strongly recommend that you complete your Coverage Update Form (CUF) no later than October 31, 2023, to be evaluated for reductions or proration of the 2024 assessment.

The online Membership Information Update form is now available in the Member's Only Area of the CAP website at <https://member.CAPphysicians.com>.

If you have not yet registered for the Member's Only Area, please register for an account at <https://member.CAPphysicians.com/register>. You will need your member number and the last four digits of your Social Security number.

For assistance, please call Membership Services at **800-610-6642** or email MS@CAPphysicians.com. ↩

SEPTEMBER 2023

5TH ANNUAL PUBLIC AFFAIRS SYMPOSIUM

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Wednesday

September 20, 2023

12:00 Noon - 1:30 p.m.

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This year's Symposium will address the following legislation and issues:

- Medicare Inflation Act
- Physician Fee Schedule
- Prior Authorization Reform
- No Surprises Act
- Managed Care Organization (MCO) Tax

Panelists include CAP's Federal Lobbyist Robert Bradner, Holland & Knight, CAP's State Lobbyist Lindsay Gullahorn, Capitol Advocacy, CAP's Principal Political Consultant Peter Mitchell, P.M. Consulting, Inc., and CAP Public Affairs Analyst, Gabriela Villanueva as moderator. ↩

Managed Care Organization Tax Revived

by Gabriela Villanueva



During the 2019-2020 budget cycle, Governor Newsom did not include a proposal to extend the Managed Care Organization (MCO) tax, which expired on July 1, 2019. An active MCO tax package for the state's General Fund leverages federal dollars to help fund the state's Medicaid program, better known as Medi-Cal. At the time, the Governor expressed concern that pursuing a reauthorization of the MCO tax could conflict with the state's efforts to renegotiate two Medi-Cal waivers set to expire in 2020 with the federal government. During both of Governor Newsom's terms, he has expanded access to Medi-Cal for multiple segments of the population. According to a report by the California Health Care Foundation:

*Medi-Cal, California's Medicaid program, is the state's health insurance program for Californians with low income, including nearly 4 in 10 children, one in five nonelderly adults, and two million seniors and people with disabilities. It also pays for more than 50% of all births in the state and 55% of all patient days in long-term care facilities. In total, over 13 million Californians—one in three—rely on the program for health coverage. Medi-Cal pays for essential primary, specialty, acute, behavioral health, and long-term care services.*¹

It is well known that reimbursement for services provided through Medi-Cal coverage is prohibitively low, and has been for a long time, not leaving many options for providers to increase their base of Medi-Cal recipients.

During May's budget revision, the Governor included an increase in Medi-Cal reimbursement rates in the proposed MCO tax package to at least 87.5% of Medicare for Primary Care (inclusive of Nurse Practitioners and Physician Assistants), Maternity Care (inclusive of OB/GYN and doulas,) and non-specialty mental health services, effective January 1, 2024. The proposal became final when the legislature passed the 2023-2024 budget on June 15th, 2023, giving many in the medical community renewed confidence in a better funded program.

The California Medical Association led a coalition during this year's budget process to ensure that these dollars will be allocated annually for refunding and reinvesting in the Medi-Cal program, and not be made accessible for General Fund purposes.² ↩

Gabriela Villanueva is CAP's Government and External Affairs Analyst. Questions or comments related to this article should be directed to GVillanueva@CAPphysicians.com.

¹Finocchio, Len; Paci, James; Newman, Matthew. 2021. Medi-Cal Facts and Figures – 2021 Edition Essential Source of Coverage for Millions. August 18, 2021. Blue Sky Consulting Group. <https://www.chcf.org/publication/2021-edition-medi-cal-facts-figures/#:~:text=In%20total%2C%20over%2013%20million,the%20program%20for%20health%20coverage.>

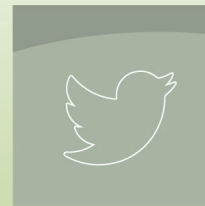
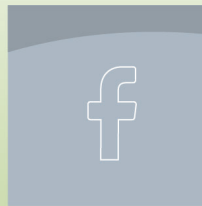
²California Medical Association. "Historic legislation renews MCO Tax and expands Medi-Cal patient access to care." June 27, 2023. <https://www.cmadocs.org/newsroom/news/view/ArticleId/50203/Historic-legislation-renews-MCO-Tax-and-expands-Medi-Cal-patient-access-to-care.>



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The information in this publication should not be considered legal or medical advice applicable to a specific situation. Legal guidance for individual matters should be obtained from a retained attorney.

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