



COOPERATIVE OF
AMERICAN PHYSICIANS

Dear Doctor:

Thank you for the inquiry you made to the Cooperative of American Physicians, Inc. (CAP). The accompanying document that addresses your professional liability question is published by the California Medical Association's (CMA) legal team. You will also find this information and concise answers to many more of your medical practice questions in CMA's 2012 *California Physicians' Legal Handbook*, or through CMA's 24/7 information on demand service, "CMA ON-CALL," available at www.cmanet.org.

For all HIPAA issues, CMA also offers the CMA/PrivaPlan HIPAA toolkit, a comprehensive HIPAA Compliance CD-ROM. For information call (877) 218-7707 or contact at www.cmanet.org or <http://www.privaplan.com>.

We believe that membership in the CMA is one of the most important commitments a physician can make to protect his or her patients, practice, livelihood, and reputation.

The CMA:

- Makes sure your liability premiums will remain affordable for you and that injured patients get fair economic redress. CMA is the most powerful force keeping California's MICRA (Medical Injury Compensation Reform Act of 1975) strong against those attorneys who want to make more money from injured patients' lawsuits.
- Fights for physicians in the legislature and the courts to make sure that non-physician corporate interests do not make medical decisions about your patients for you.
- Represents your interests when physicians are victimized by financial problems afflicting those they contract with, whether it be a practice management company, a health plan, an IPA, or a medical group. CMA has been the lead advocate for its members in the midst of the numerous health plans and IPA insolvencies, and is immediately on the case when health plans withhold payments owed to CMA members.
- Keeps a physician up to date on all laws and regulations affecting medical practice.
- Keeps professional ethics at the heart of its policies and actions.

If you are not a CMA/county medical society member, we urge you to join now. These are tumultuous and precarious times for physicians. With your membership, CMA can remain strong for you.

Thank you.

While these articles cover questions physicians frequently ask about the laws governing the practice of medicine, it is not a substitute for a lawyer. Legal advice may be necessary in specific circumstances.

For membership information, please call your county medical society or 888-233-2937. To order the California Physicians' Legal Handbook, call 800-786-4262 or fax 916-551-2036. To learn more about what CMA does for its members every day, visit CMAnet at www.cmanet.org

Business Associate Agreement

This Business Associate Agreement ("Agreement") is entered into this ___ day of _____, ____ between [covered entity], a California [professional corporation] [partnership] [sole proprietorship] ("Physician Practice ") and [business associate], a [state corporation] ("Contractor").

RECITALS

Physician Practice is a [type of organization] that provides medical services with a principal place of business at [address].

Contractor is a [type of organization] that [description of primary functions or activities] with a principal place of business at [address].

Physician Practice, as a Covered Entity under the Health Information Portability and Accountability Act of 1996 ("HIPAA") is required to enter into this Agreement to obtain satisfactory assurances that Contractor, a Business Associate under HIPAA, will appropriately safeguard all Protected Health Information ("PHI") as defined herein, disclosed, created or received by Contractor on behalf of, Physician Practice.

Physician Practice desires to engage Contractor to perform certain functions for, or on behalf of, Physician Practice involving the disclosure of PHI by Physician Practice to Contractor, or the creation or use of PHI by Contractor on behalf of Physician Practice, and Contractor desires to perform such functions.

This contract shall be deemed an amendment to the parties' underlying contract dated _____ ("Underlying Agreement").

In consideration of the mutual promises below and the exchange of information pursuant to this agreement and in order to comply with all legal requirements for the protection of this information, the parties therefore agree as follows:

Article I. Definitions of Terms

- 1.01 Agreement means this Business Associate Agreement.
- 1.02 Business Associate shall have the meaning given to such term in 45 C.F.R. §160.103.
- 1.03 C.F.R. shall mean the Code of Federal Regulations.
- 1.04 Designated Record Set shall have the meaning given to such term in 45 C.F.R. §164.501.
- 1.05 Covered Entity shall have the meaning given to such term in 45 C.F.R. §160.103.
- 1.06 Privacy Laws shall mean HIPAA, the HIPAA regulations and any other applicable state or federal laws or regulations affecting or regulating the privacy or security of health information.
- 1.07 Protected Health Information ("PHI") shall have the meaning given to such term in 45 C.F.R. §164.501.
- 1.08 All references to the CFR are to their then current version.

Article II. Obligations of Contractor

2.01 Permitted Uses and Disclosures. Contractor may not use or disclose PHI received or created pursuant to this agreement except as follows:

[Note: Insert an ordered list (use lower case letters) of permitted uses and disclosures by the Contractor; *be specific in the description of what Contractor will do on behalf of the Physician Practice that relates to the creation, use, receipt or disclosure of PHI*. Include as the last numbered permitted uses/disclosures paragraphs 2.02-2.11 below.]

[Note: In order to avoid having to amend the Agreement if anything in the list changes, consider putting the list of permitted uses/disclosures of PHI in an exhibit by adding "except as set forth in Exhibit "A" to the Agreement."]

2.02 Contractor's Operations–Permitted Uses of PHI. Contractor may use the PHI it obtains or creates in its capacity as a Business Associate for the proper management and administration of Contractor or to carry out Contractor's legal responsibilities.

2.03 Contractor's Operations – Permitted Disclosures of PHI. Contractor may disclose the PHI it obtains or creates in its capacity as a Business Associate if such disclosure is necessary for the Contractor's proper management and administration or to carry out the Contractor's legal responsibilities, and:

The disclosure is required by law; or

Contractor obtains reasonable assurances from the recipient of the PHI that the PHI will be held confidentially and used or further disclosed only as required by law or with such further authorizations required by law, and any such disclosure shall be only for the purpose for which it was initially disclosed to the recipient;

The recipient notifies the Contractor (and Contractor in turn notifies Physician Practice) of any instances of which it is aware in which the confidentiality of the PHI has been breached; and

Except for treatment disclosures, the Contractor and its agents agree to use, disclose, or request only the limited data set (as defined in 45 C.F.R. §164.514(e)(2)), or if that is inadequate, the minimum PHI necessary to accomplish the intended purpose of that use, disclosure or request, and further agree that the party disclosing the PHI determines what constitutes the minimum necessary to accomplish the intended purpose of the disclosure. Contractor understands that the HHS Secretary is mandated to issue guidance on what constitutes "minimum necessary," and agrees that Contractor and its agents will be bound by that guidance when it is issued and becomes effective.

2.04 Additional Obligations imposed by the HITECH Act. Contractor agrees to abide by all the following:

- a) Contractor will not disclose PHI to a health plan if the individual to whom the PHI pertains has so requested and (1) the disclosure would be for the purposes of payment or health care operations, and not for the purposes of treatment, (2) the protected health information at issue pertains to a health care item or service for which the individual pays out-of-pocket and in full and 3) the disclosure is not required by law.
- b) Contractor agrees to comply with all rules governing marketing communications, that is, written communications about a product or service that encourages the recipient to purchase or use the product or service.
- c) Contractor agrees to clearly and conspicuously provide any recipient of health care fundraising communications the opportunity to opt out of receiving any further such solicitations.
- d) Contractor understands and agrees that effective February 18, 2010, it will be held to the same standards as Physician Practice to rectify a pattern of activity or practice that constitutes a material breach or violation of Contractor's obligation under the contract, it will be subject to the same penalties as a covered entity for any

violation of the HIPAA Privacy or Security requirements, and it will also be subject to periodic audits by the HHS secretary.

- e) Contractor understands and agrees that the HHS Secretary will adopt a rule regarding the sale of PHI, and further agrees that Contractor will comply with that rule as soon as it becomes effective.

2.05 Access to PHI by Individuals. Contractor shall cooperate with Physician Practice to fulfill all requests by individuals for access to the individual's PHI that are approved by Physician Practice. Contractor shall cooperate with Physician Practice in all respects necessary for Physician Practice to comply with 45 C.F.R. §164.524 and California law. Contractor further agrees that to the extent Contractor maintains PHI of Physician Practice in an electronic health record (EHR), the Physician Practice must comply with patients' requests for access to their PHI by giving them, or any entity that they designate clearly, conspicuously and specifically, the information in an electronic format, and must not charge the requestor more than the labor costs in responding to the request for the copy (or summary or explanation).

Because California law requires that copies of requested records be forwarded to patients within fifteen (15) days of their request, Contractor agrees to forward any copies requested by Physician Practice for this purpose within five (5) business days. If Contractor receives a request from an individual for access to PHI, Contractor immediately shall forward such request to Physician Practice. Physician Practice shall be solely responsible for determining the scope of PHI and Designated Record Set with respect to each request by an individual for access to PHI. [If Contractor maintains PHI in a Designated Record Set on behalf of Physician Practice, Contractor shall permit any individual, upon notice by Physician Practice, to access and obtain copies of the individual's PHI in accordance with 45 C.F.R. §164.524 and California law. Contractor shall make the PHI available in the format requested by the individual and approved by Physician Practice, unless the PHI is not readily producible requested in such format, in which case the PHI shall be produced in hard copy format. Contractor may not charge the individual any fees for such access to PHI.] Physician Practice shall reimburse Contractor a portion of the fee charged by Physician Practice to the individual that is proportional to the amount of PHI produced by Contractor in relation to the amount of PHI produced by Physician Practice, less Physician Practice administrative expenses.

2.06 Access to Contractor's Books and Records. Contractor shall make its internal practices, books and records relating to the use and disclosure of PHI received from, or created or received by Contractor on behalf of Physician Practice available to the Secretary of the Department of Health and Human Services for purposes of determining Physician Practice's compliance with the HIPAA laws and regulations. [Upon reasonable notice to Contractor and during Contractor's normal business hours, Contractor shall make such internal practices, books and records available to Physician Practice to inspect for purposes of determining compliance with this Agreement.]

2.07 Amendment of PHI. As directed and in accordance with the time frames specified by Physician Practice, Contractor shall incorporate all amendments or addenda to PHI received from Physician Practice. Within five (5) business days following Contractor's amendment of PHI as directed by Physician Practice, Contractor shall provide written notice to Physician Practice confirming that Contractor has made the amendments or addenda to PHI as directed by Physician Practice and containing any other information as may be necessary for Physician Practice to provide adequate notice to the individual in accordance with 45 C.F.R. §164.526 and California law.

2.08 Disclosure Accounting. [Note: Because disclosures of PHI made for purposes of payment, treatment and health care operations are exempt from the disclosure accounting requirements and most business associates' disclosures of PHI are made for such purposes, it should be rare that an accounting of disclosures would be required, unless the disclosure is prohibited.] In the event that Contractor makes any disclosures of PHI that are subject to the accounting requirements of 45 C.F.R. §164.528, Contractor promptly shall report such disclosures to Physician Practice. The notice by Contractor to Physician Practice of the disclosure shall include the name of the individual, the recipient, and the reason for disclosure, and the date of the disclosure. Contractor shall maintain a record of each such disclosure, including the date of the disclosure, the name and, if available, the address of the recipient of the PHI, a brief description of the PHI disclosed and a brief description of the purpose of the disclosure. Contractor shall maintain this record for a period of six (6) years and make available to Physician Practice upon request in an electronic format so that Physician Practice may meet its disclosure accounting obligations under 45 C.F.R. §164.528. Contractor understands that the HHS Secretary is mandated

to adopt rules expanding the disclosure accounting obligations applicable to physician practices that maintain EHRs, and agrees that Contractor will be bound by those rules when they are issued and become effective.

2.09 Security Safeguards. Contractor shall implement a documented information security program that includes administrative, technical and physical safeguards designed to prevent the accidental or otherwise unauthorized use or disclosure of PHI, and the integrity and availability of electronic PHI (ePHI) it creates, receives, maintains or transmits on behalf of Physician Practice. The security program shall include all the reasonable and appropriate policies and procedures to comply with the standards, implementation specifications, and other requirements of the HIPAA Security Rule. In addition, Contractor agrees to: (1) maintain written documentation of its policies and procedures, and of any action, activity or assessment which the HIPAA Security Rule requires to be documented; (2) retain this documentation for 6 years from the date of its creation or the date when it last was in effect, whichever is later; (3) make this documentation available to those persons responsible for implementing the procedures to which the documentation pertains; and (4) review this documentation periodically, and update it as needed in response to environmental or operational changes affecting the security of the electronic protected health information.

[To the extent feasible, Contractor agrees to encrypt all ePHI and destroy all paper PHI such that it is unusable, unreadable or indecipherable to unauthorized users.]

Upon request, Contractor shall make available Contractor's documented security program, including the most recent ePHI risk analysis, policies, procedures, security incidents and responses and evidence of training.

2.10 Reporting and Mitigating Unauthorized Uses and Disclosures of PHI. Immediately upon discovery by Contractor, Contractor shall report to Physician Practice any uses or disclosures of PHI not authorized by this Agreement and, with respect to ePHI, any security incident, including any attempted or successful unauthorized access, use, disclosure, modification, or destruction of ePHI or interference with information system operations.

Contractor further agrees that, following the discovery of a breach of unsecured PHI, Contractor will notify the Physician Practice of such a breach without unreasonable delay and in no case later than [insert a number not to exceed 60, taking into account the Physician Practice's independent obligations to comply with the breach notification rules (if the Physician Practice is bound by the California law governing "institutional providers," this number should be less than 5)] calendar days after discovery of a breach. Where the breach involves an institutional provider, notification of the breach will be made no later than five (5) days after the unlawful activity has been detected. (Health & Safety Code §1280.15.) The notice will include, to the extent possible, the identity of the affected individual, and any other available information that the Physician Practice is required by 45 C.F.R. §164.404(c) to include in its notification to individuals. To the extent this information is not available when Contractor notifies Physician Practice of the breach, Contractor will provide it promptly thereafter as information becomes available.

Contractor understands and agrees that a breach of unsecured PHI will be treated as "discovered" as of the first day on which Contractor knew of the breach, or by exercising reasonable diligence, would have known of the breach. The knowledge and reasonable diligence of each of Contractor's employees, officers or other agents shall be imputed to Contractor, other than the knowledge of the employee, officer or agent who committed the breach. [Contractor further understands and agrees that as it is an agent of Physician Practice, the date Contractor discovers (or should have discovered) the breach will be imputed to the Physician Practice.]

To the extent a law enforcement official tells Contractor that a notification, notice, or posting of a breach of unsecured PHI would impede a criminal investigation or cause damage to national security, Contractor shall: (1) if the statement is in writing and specifies the time for which a delay is required, delay such notification, notice, or posting for the time period specified by the official; or (2) if the statement is made orally, document the statement, including the identity of the official making the statement, and delay the notification, notice, or posting temporarily and no longer than thirty (30) days from the date of the oral statement, unless a written statement as described in paragraph (1) of this section is submitted during that time. Contractor further agrees that at the request of Physician Practice, Contractor shall provide notice of the breach of unsecured PHI to individuals as required by the Breach Notification Rule, but that Contractor will not otherwise provide such notice.

Contractor shall use its best efforts to mitigate the deleterious effects of any use or disclosure of PHI not authorized by this Agreement. Further, in the notice provided to Physician Practice by Contractor regarding unauthorized uses and/or disclosures of PHI, or security incidents involving ePHI, Contractor shall describe the remedial or other actions undertaken or proposed to be undertaken regarding the unauthorized use or disclosure of PHI, or security incident involving ePHI. Finally, Contractor agrees that it will maintain adequate documentation of all its security breach investigation and notification efforts, including documentation of the reasons for any delay in notification.

2.11 Affiliates, Agents, Subsidiaries and Subcontractors. Contractor shall require that any agents, affiliates, subsidiaries or subcontractors, to whom it provides PHI received from, or created or received by Contractor on behalf of Physician Practice agree in writing to the same use, disclosure, and security obligations and restrictions imposed on Contractor by this Agreement.

2.12 Ownership of Information. All PHI shall be deemed owned by the Physician Practice unless otherwise agreed in writing. During the term of this Agreement, Contractor and any authorized subcontractors shall have the right to use the PHI solely for the purposes of this Agreement. Contractor and its agents shall not have the right to de-identify the PHI unless agreed in writing.

Article III. Obligations of Physician Practice

3.01 Physician Practice shall inform Contractor of any of the following changes which affect Contractor: changes to its Notice of Privacy Practices that affect Contractor, new or changed authorizations, restrictions on use of PHI agreed to by the Practice; or patient opt-outs concerning fundraising or marketing solicitations.

Article IV. Term and Termination

4.01 Term. This Agreement shall be for a term of ____ year[s], commencing on _____ and ending on _____ ("Initial Term"). [Add if appropriate] This Agreement shall automatically renew for successive ____ year periods ("Renewal Term") unless one party notifies the other party of its intent not to renew within sixty (60) days prior to end of the Initial Term or any Renewal Term. [NOTE: The renewal term should be no longer than the underlying agreement.]

4.02 Termination for Breach of Privacy. Physician Practice, at its sole option and without an opportunity to cure, immediately may terminate this Agreement without further liability if Physician Practice determines that Contractor has violated a material term of this Agreement related to the privacy or security of the PHI.

4.03 Termination Without Cause. Either party to this Agreement may terminate the Agreement upon provision of [sixty (60)] days prior written notice.

[NOTE: Ensure the notice period is long enough to allow for replacement of the services; time should be longer than the "for cause" termination in paragraph below.]

4.04 Termination For Cause. Either party may terminate this agreement for a material breach after thirty (30) days written notice of the breach and an opportunity to cure during the 30-day period.

Either party may terminate this Agreement immediately upon written notice if the other has a receiver or trustee appointed for any or all of its property, becomes insolvent or otherwise is unable to pay its debts as they mature, makes an assignment for benefit of creditors, becomes subject to bankruptcy proceedings or is dissolved or liquidated.

4.05 Effects of Termination: Disposal of PHI. Upon termination of this Agreement, Contractor shall recover all PHI that is in the possession of Contractor's agents, affiliates, subsidiaries or subcontractors. Contractor shall return to Physician Practice or destroy all PHI that Contractor obtained or maintained pursuant to this Agreement on behalf of Physician Practice. If the parties agree at that time that the return or destruction of PHI is not feasible, Contractor shall extend the protections provided under this Agreement to such PHI, and limit further use or disclosure of the PHI to those purposes that make the return or destruction of the PHI infeasible. If the parties agree at the time of termination of this Agreement

that it is infeasible for the Contractor to recover all PHI in the possession of Contractor's agents, affiliates, subsidiaries or subcontractors, Contractor shall provide written notice to Physician Practice regarding the nature of the unfeasibility and Contractor shall require that its agents, affiliates, subsidiaries and subcontractors agree to the extension of all protections, limitations and restrictions required of Contractor hereunder.

4.06 Mitigating Effects of Termination. In the event of termination of this Agreement, the parties agree to work together to effectuate a smooth transition for both parties and continuous protection of the PHI disclosed to or maintained by Contractor.

Article V. Insurance and Indemnification

5.01 Insurance. [Note: Add if there is a significant risk to the Physician Practice;] Contractor shall maintain at least [one million dollars (\$1,000,000)] of general liability insurance to cover the risks related to this Agreement and shall, upon request, provide a copy of such policy to the Physician Practice.]

5.02 Indemnification. Each party will indemnify and hold harmless the other party to this Agreement from and against all claims, losses, liabilities, costs and other expenses incurred as a result of, or arising directly or indirectly out of or in conjunction with:

Any misrepresentation, breach of warranty or non-fulfillment of any undertaking on the part of the party under this Agreement; and

Any claims, demands, awards, judgments, actions and proceedings made by any person or organization arising out of or in any way connected with the party's performance under this Agreement.

5.03 Breach Investigation and Notification. Contractor further agrees to indemnify and hold harmless Physician Practice from and against any and all claims, losses, liabilities, costs and other expenses arising out of a breach of unsecured PHI maintained, stored, accessed, transmitted or used by Contractor. At the request of the Physician Practice, Contractor further agrees to carry out the notification to affected individuals and to the media as required by state and federal law, and to bear the burden of demonstrating that all notifications were made as required by law.

[NOTE: The scope of the services performed under a business associate agreement should dictate the scope of the indemnification. Because neither of these variables can be known in drafting a form agreement, consider replacing this indemnification provision with one recommended by your own legal counsel.]

Article VI. Miscellaneous

6.01 Contractor's Compliance with HIPAA. Physician Practice makes no warranty or representation that compliance by Contractor with this Agreement, or the Privacy Laws will be adequate or satisfactory for Contractor's own purposes or that any information in Contractor's possession or control, or transmitted or received by Contractor, is or will be secure from unauthorized use or disclosure. Contractor is solely responsible for all decisions made by Contractor regarding the safeguarding of PHI.

6.02 Notices. Any notice required to be given pursuant to the terms and provisions of this Agreement shall be in writing and may be either personally delivered or sent by registered or certified mail in the United States Postal Service, Return Receipt Requested, postage prepaid, addressed to each party at the addresses which follow or to such other addresses as the parties may hereinafter designate in writing:

Physician Practice: _____

Contractor: _____

Any such notice shall be deemed to have been given, if mailed as provided herein, as of the date mailed.

6.03 Change in Law. In the event that there are subsequent changes or clarifications of statutes, regulations or rules relating to Agreement, Physician Practice shall notify Contractor of any actions it reasonably deems are necessary to comply with such changes, and Contractor promptly shall take such actions. In the event that there shall be a change in the federal or state laws, rules or regulations, or any interpretation or any such law, rule, regulation or general instructions which may render any of the material terms of this Agreement unlawful or unenforceable, or materially affects the financial arrangement contained in this Agreement, either party may, by providing advanced written notice, propose an amendment to this Agreement addressing such issues. If, within fifteen (15) days following the notice, the parties are unable to agree upon such amendments, either party may terminate this Agreement by giving the other party at least [thirty (30)] days written notice.

[NOTE: Ensure the notice period is long enough to allow for replacement of the services.]

6.04 Amendments. By mutual consent of the parties, this Agreement may from time to time be modified or amended in writing and such written modifications signed by the parties shall be attached to and become part of this Agreement.

6.05 Severability and Survival. In the event any provision of this Agreement is held to be unenforceable for any reason, the unenforceability thereof shall not affect the remainder of this Agreement, which shall remain in full force and effect and enforceable in accordance with its terms. The obligations of the parties to the PHI shall survive the termination of this Agreement.

6.06 Counterparts. This Agreement may be executed in counterparts, any of which is considered to be an original agreement.

6.07 Governing Law. This Agreement shall be construed broadly to implement and comply with the requirements relating to the Privacy Laws. All other aspects of this Agreement shall be governed under the laws of the State of California and venue for any actions relating to this Agreement shall be proper in _____ County, California.

6.08 Assignment/Subcontracting. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors and assigns. Contractor may not assign or subcontract the rights or obligations under this Agreement without the express written consent of Physician Practice. Physician Practice may assign its rights and obligations under this Agreement to any successor or affiliated entity.

6.09 Entire Agreement. This Agreement contains the entire agreement between parties and supersedes all prior discussions, negotiations and services for like services. This Agreement shall be interpreted in a manner consistent with the Underlying Agreement. In the event of conflict, this Agreement shall prevail.

6.10 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than Covered Entity, Business Associate and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

6.11 Assistance in Litigation or Administrative Proceedings. Contractor shall make itself and any agents, affiliates, subsidiaries, subcontractors or employees assisting Contractor in the fulfillment of its obligations under this Agreement, available to Physician Practice, at no cost to Physician Practice, to testify as witnesses, or otherwise, in the event of litigation or administrative proceedings being commenced against Physician Practice, its directors, officers or employees based upon claimed violation of the Privacy Laws, except where Contractor or its agents, affiliates, subsidiaries, subcontractors or employees are a named adverse party.

If a disclosure of PHI is required by law, Contractor shall notify Physician Practice in advance to provide the Practice an opportunity to intervene and object (unless such notice is itself prohibited by law).

6.12 Intent to Comply with Laws. This Agreement shall be construed consistently with all Privacy Laws and in favor of the protection of PHI.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement to be effective as of [effective date of the agreement].

PHYSICIAN PRACTICE

CONTRACTOR

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____