

The Duty to Record: Ethical, Legal, and Professional Considerations for Alaska Psychologists

Introduction

The American Psychological Association Practice Directorate has provided an excellent online presentation about electronic healthcare records (EHRs) and the basic terminology related to EHRs; the presentation dispels common myths about EHR systems and provides detail about their meaningful use in integrated health care settings.¹

The Division 31 and 42 EHR working group's² primary goal was to create a series of State specific templates that would work well for psychologists as they transition into the use of EHRs, particularly in integrated health care settings where shared information is clinically essential and specific laws or regulations may dictate at least some of what is included in those records. To achieve this goal, we conducted a review of the laws related to record keeping, and the relevant and recent literature (particularly the last decade) regarding EHRs, including variations across states. Further, we consulted with key psychologists that have been using EHRs on a day to day basis, who have developed experience establishing policies and processes within their own institutions and practices. They have effectively used this developing technology to improve clinical care while protecting patient rights. They have found that the EHR enables collaborating professionals within the integrated health care settings to understand the behavioral risk factors that exist in each case and to be kept informed about the health behavior changes that occur with psychological service interventions (HRSA, 2012).³

In order to digest the laws accurately, we examined the annotated codes and regulations available on Westlaw and Lexis for the 50 states and the District of Columbia with reference to several relevant state-by-state surveys retrieved from Lexis

¹ Electronic Health Records: A Primer (retrieved Nov. 29, 2012 at <http://www.apapracticecentral.org/update/2012/11-29/electronic-records.aspx>.

² Christina Luini, JD, M.L.I.S.; Dinelia Rosa, PhD; Mary Karapetian Alvord, PhD, Vanessa K. Jensen, PsyD; Jeffrey N. Younggren, PhD; G. Andrew H. Benjamin, JD, PhD, ABPP. The working group, came together to discharge the obligations of the CODAPAR grant that we wrote and received: <http://www.apadivisions.org/division-31/news-events/grant-funding.aspx>.

³ Preparing the Interprofessional Workforce to Address Health Behavior Change. (retrieved Nov. 11, 2012 at http://www.hrsa.gov/advisorycommittees/bhpradvisory/acicbl/Reports/acicbl_tenth_report_final.pdf).

and Westlaw.⁴ Our research answered the following questions for each jurisdiction: (a) Do record keeping duties created by statutes or administrative rules exist? (b) Have court rulings created a common-law duty or interpreted the statutes or administrative rules? (c) What are the contents of the record that are mandated by law? (d) Are there laws related to the maintenance and security of records? (e) What are the laws related to retention of records? (f) What are the consequences of violating specific duties?

Readers should view the narrative summary of their jurisdiction's law as a starting point for interpreting how to meet the law within their own jurisdiction as they construct their electronic records. As laws can change, please check the law with your state associations to see if more current interpretations for meeting the record keeping duties. Many state professional associations have ethics committees that can be consulted as part of their benefits. In addition, your association can refer psychologists for individual consultation to lawyers specializing in legal practices focused on *mental health practice*. The professional liability carriers also provide free legal and professional consultation.

Alaska specific templates for the types and contents of the record are provided based upon a review of your jurisdiction's law. The digest of your jurisdiction's law should be read if you intend to use the templates.

State Specific Template for contents of a record

Alaska law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We also believe that a termination note will likely reduce exposure to arguments about continued duty of care, and reduces the risk of responsibility in a duty to protect/warn jurisdiction.⁵

Because the documents permit hovering over the underline fields with a cursor to select an option (click then select) or permit filling in the shaded text boxes, they

⁴ 50 State Surveys, Legislation & Regulations, Psychologists & Mental Health Facilities (Lexis March 2012); Lexis Nexis 50 State Comparative Legislation / Regulations, Medical Records (Lexis June 2011); 50 State Statutory Surveys: Healthcare Records and Recordkeeping, Records Retention (Thomson Reuters/ West October 2011); 50 State Statutory Surveys: Healthcare, Healthcare Facilities: Maintaining Privacy of Health Information (Thomson Reuters / West October 2011).

⁵ Benjamin, G. A. H., Kent, L., & Sirikantraporn, S. (2009). Duty to protect statutes. In J. L. Werth, E.R. Welfel, & G. A. H. Benjamin (Eds.), *The duty to protect: Ethical, legal, and professional responsibilities of mental health professionals* (pp. 9 – 28). Washington, DC: APA Press. doi:10.1037/11866-002.

cannot be inserted into this document.⁶ Please access each of the documents.

Our group also suggests that users of the templates consider how “behavior may be shaped by culture, the groups to which one belongs, and cultural stereotypes.”⁷ Whenever “Eurocentric therapeutic and interventions models”⁸ may impair the consideration of multicultural factors among the integrated health care team members, we urge that psychologists note the factors within the appropriate template fields. In light of the World Health Organization’s demonstrated commitment to the formulation of a diagnostic system that moves beyond biological causation and integrates the contributions of psychological, cultural, and social factors, and APA’s participation in the development of the *International Classification of Functioning, Disability and Health* (World Health Organization, 2010), our group recommends using ICD-10 whenever diagnoses are being made.⁹ The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

Statute or Rule

The Alaska Administrative Code incorporates by reference the American Psychological Association’s *Ethical Principles of Psychologists and Code of Conduct* (June 2003) (“APA Code of Ethics”),¹⁰ as well as the American Psychological Association’s

⁶ Please use the most recent version of WORD to access the full capabilities of the EHR templates.

⁷ American Psychological Association. (2002). *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists* (pp.17-24; p. 11). Washington, DC: Authors (<http://www.apa.org/pi/oema/resources/policy/multicultural-guideline.pdf> (last accessed August 1, 2012).

⁸ *Id.* at p. 45.

⁹ See ICD-10 at <http://apps.who.int/classifications/icd10/browse/2010/en> (last accessed August 1, 2012); The APA Policy and Planning Board recognized how psychology could move forward by turning to a diagnostic system that was based on the concept of functional impairments (APA Policy and Planning Board, (2005). APA 2020: A perfect vision for psychology: 2004 five-year report of the policy and planning board. *American Psychologist*, 60, 512-522, 518. (See, <http://www.apa.org/about/governance/bdcmte/five-year-report.pdf> ; and APA has helped fund the creation of the 10th edition in 2008. See, <http://www.apa.org/about/governance/council/08aug-crminutes.aspx> (last accessed August 1, 2012)).

¹⁰ ALASKA ADMIN. CODE tit. 12, § 60.185(a) (“The ethics to be adhered to by licensed psychologists and licensed psychological associates are the Ethical Principles of Psychologists and Code of Conduct (June 2003), of the American Psychological Association, Inc. Ethical Principles of Psychologists and Code of Conduct is incorporated by reference in this section.”). Copies of the APA Code of Ethics are available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C. 20002-4242 and on the APA’s website at <http://www.apa.org/ethics/code/principles.pdf> (last accessed Aug. 1, 2012) [hereinafter “APA CODE OF ETHICS”].

General Guidelines for Providers of Psychological Services (1987 edition) (“APA General Guidelines”).¹¹

Common Law

There is no case law interpreting the record keeping obligations for Alaska psychologists.

Contents of the record are mandated by law

Alaska adopted the APA Code of Ethics into its Administrative Code and the following standards regulate the content of psychological records kept by Alaska psychologists.¹² In addition, the Health Insurance Portability and Accountability Act (HIPAA)¹³ would apply to Alaska psychological records.

3.10 Informed Consent¹⁴

(a) When psychologists ...provide assessment, therapy, counseling or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons... (See also Standards [9.03, Informed Consent in Assessments](#); and [10.01, Informed Consent to Therapy](#).)

(b) For persons who are legally incapable of giving informed consent,

¹¹ ALASKA ADMIN. CODE tit. 12, § 60.185(b) (“The standards to be adhered to by licensed psychologists and licensed psychological associates rendering psychological services in the state are General Guidelines for Providers of Psychological Services, (1987 edition), of the American Psychological Association. General Guidelines for Providers of Psychological Services is incorporated by reference in this section.”). Copies of the General Guidelines for Providers of Psychological Services (1987) are available from the Order Department, American Psychological Association, P.O. Box 2710, Hyattsville, MD 20784 and on the APA’s website at <http://www.apa.org/about/policy/guidelines-providers.pdf> (last accessed Aug. 1, 2012) [hereinafter APA GENERAL GUIDELINES].

¹² ALASKA ADMIN. CODE tit. 12, § 60.185(a). The standards set forth herein reflect the text of the APA Code of Ethics effective as of August 1, 2012. This version of the APA Code of Ethics contains amendments to the June 2003 version of the APA Code of Ethics adopted on February 20, 2010. Note, however, that the Alaska Administrative Code does not reference the amended version of the APA Code of Ethics.

¹³ HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart C--SECURITY STANDARDS FOR THE PROTECTION OF ELECTRONIC PROTECTED HEALTH INFORMATION](#) ; [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

¹⁴ APA CODE OF ETHICS, *supra* note 10.

psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards [9.03, Informed Consent in Assessments](#); and [10.01, Informed Consent to Therapy](#).)

A HIPAA notice of privacy practices¹⁵ that delineates the psychologist's scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient during the informed consent process specified by Standards 3.10, 9.03, and 10.01.

4.04 Minimizing Intrusions on Privacy¹⁶

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

Standard 4.04(a) suggests that psychologists focus the documentation in a manner that is very protective of their client's privacy rights.

6.06 Accuracy in Reports to Payors and Funding Sources¹⁷

In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and

¹⁵ 45 CFR 164.502 (a)(1)(ii) & 45 CFR 164.506 (c); HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

¹⁶ APA CODE OF ETHICS, *supra* note 10.

¹⁷ *Id.*

the diagnosis. (See also Standards [4.01, Maintaining Confidentiality](#); [4.04, Minimizing Intrusions on Privacy](#); and [4.05, Disclosures](#).)

9.01 Bases for Assessments¹⁸

(a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements,...on information and techniques sufficient to substantiate their findings. (See also Standard [2.04, Bases for Scientific and Professional Judgments](#).)

(b) Except as noted in [9.01c](#), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards [2.01, Boundaries of Competence](#), and [9.06, Interpreting Assessment Results](#).)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

9.02 Use of Assessments¹⁹

(a) Psychologists administer, adapt, score, interpret or use assessment techniques, interviews, tests or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques...

9.10 Explaining Assessment Results²⁰

Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative...

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Standard 6.06 implies that information about the *nature of the service provided...*, *the fees charged, the identity of the provider, findings, and diagnosis* should be maintained in the record when necessary for billing purposes. In addition, the requirements of Arizona laws and the standards 9.01, 9.02, and 9.10 suggest that psychologists would use an intake and evaluation note, and progress notes templates.

Alaska also adopted the APA General Guidelines into its Administrative Code by reference²¹ and the following guidelines create specific record keeping obligations for Alaska psychologists:

2.3.2 Psychologists develop plans for psychological services appropriate to the problems presented by the users.

ILLUSTRATIVE STATEMENT: Ideally, a plan for intervention or consultation is in written form and serves as a basis for accountability. Regardless of the type of setting or users involved, a plan that describes the psychological services indicated and the manner in which they will be provided is developed and agreed upon by the providers and users.²²

2.3.3 There is a mutually acceptable understanding between a provider and a user or that user's responsible agent regarding the delivery of service.

ILLUSTRATIVE STATEMENT: A psychologist discusses the plan for provision of psychological services with the user, noting procedures that will be used and respective responsibilities of provider and user. This interaction is repeated whenever major changes occur in the plan for service. This understanding may be oral or written, but in any event, the psychologist documents the nature of the understanding.²³

2.3.5 Accurate, current, and pertinent records of essential psychological services are maintained.

ILLUSTRATIVE STATEMENT: At a minimum, records kept of psychological services should include identifying data, dates of services, and

²¹ ALASKA ADMIN. CODE tit. 12, § 60.185(b).

²² APA General Guidelines, *supra* note 11, at 6.

²³ *Id.*

types of services, and where appropriate, may include a record of significant actions taken. Providers make all reasonable efforts to record essential information concerning psychological services within a reasonable time of their completion.²⁴

Maintenance and Security of Records

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,²⁵ “[p]sychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship.” (See also Standard [2.05, Delegation of Work to Others.](#))

Alaska also has delineated specific confidentiality standards:

Confidentiality of communication.²⁶

(a) A psychologist or psychological associate may not reveal to another person a communication made to the psychologist or psychological associate by a client about a matter concerning which the client has employed the psychologist or psychological associate in a professional capacity. This section does not apply to

- (1) a case conference with other mental health professionals or with physicians and surgeons;
- (2) a case in which the client in writing authorized the psychologist or psychological associate to reveal a communication;
- (3) a case where an immediate threat of serious physical harm to an identifiable victim is communicated to a psychologist or psychological associate by a client;
- (4) disclosures of confidential communications required under Rule 504, Alaska Rules of Evidence; or
- (5) proceedings conducted by the board or the department where the disclosure of confidential communications is necessary to defend against charges that the psychologist or psychological associate has violated provisions of this chapter; information obtained by the board or department under this paragraph is

²⁴ *Id.*

²⁵ APA CODE OF ETHICS, *supra* note 10.

²⁶ ALASKA STAT. § 08.86.200.

confidential and is not a public record for purposes of AS 40.25.110 – 40.25.140.

(b) Notwithstanding (a) of this section, a psychologist or psychological associate shall report to the appropriate authority incidents of child abuse or neglect as required by AS 47.17.020, incidents of abuse of a vulnerable adult as required by AS 47.24.010, and incidents of abuse of disabled persons disclosed to the psychologist or psychological associate by a client. In this subsection “disabled person” means a person who has a physical or mental disability or a physical or mental impairment, as defined in AS 18.80.300.

Standard 4.01 and the Alaska law support the record keeping standards:

6. Record Keeping and Fees²⁷

6.01 Documentation of Professional ...Maintenance of Records

Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard [4.01, Maintaining Confidentiality](#).)

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, including the Psychotherapy Notes created by the psychologist, as long as those records are maintained.²⁸ In addition, patients have a right to amend any part of the record;²⁹ Under this section, a denial of the proposed amendment can occur if the record was not created by the psychologist (unless the patient provides a reasonable basis to believe that the originator of PHI is no longer available to act on the requested amendment) or if the record is accurate and complete (other subsections are not discussed as they are unlikely to arise for psychologists). Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.³⁰

²⁷ APA CODE OF ETHICS, *supra* note 10.

²⁸ 45 CFR 164.524.

²⁹ 45 CFR 164.526 (a).

³⁰ 45 CFR 164.528.

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...³¹

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards [4.01, Maintaining Confidentiality](#), and [6.01, Documentation of Professional and Scientific Work and Maintenance of Records](#).)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards [3.12, Interruption of Psychological Services](#), and [10.09, Interruption of Therapy](#).)

Additionally, APA Code of Ethics Standard 6.02(b) requires the use coding or other techniques to avoid the inclusion of personal identifiers when confidential patient information is entered into databases or systems of records that are available to persons whose access has not been consented to by the patient.³²

HIPAA establishes privacy protections for all transmissions of PHI records, and requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties.³³ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment³⁴

Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received.

³¹ APA CODE OF ETHICS, *supra* note 10.

³² *Id.*

³³ 45 CFR 164.508.

³⁴ APA CODE OF ETHICS, *supra* note 10.

Release and transfer of PHI records cannot be conditioned on payment or other conditions (such as enrollment in the health plan that employs the psychologist).³⁵

Retention of Records

Although no Alaska requirement exists, HIPAA³⁶ mandates that a covered entity must retain the documentation ...for six years from the date of its creation or the date when it last was in effect, whichever is later.

Violations of the specific duty

Alaska adopted the APA Code of Ethics and General Guidelines into its Administrative Code and the standards guidelines discussed, including HIPAA infractions, can all lead to disciplinary actions being prosecuted by the Alaska Board of Psychologist and Psychological Associate Examiners.³⁷

Grounds for imposition of disciplinary sanctions.

- (a) After a hearing, the board may impose a disciplinary sanction on a person licensed under this chapter when the board finds that the licensee
- ... (2) engaged in deceit, fraud, or intentional misrepresentation in the course of providing professional services or engaging in professional activities;
 - ... (5) intentionally or negligently engaged in or permitted the performance of patient care by persons under the licensee's supervision that does not conform to minimum professional standards regardless of whether actual injury to the patient occurred;
 - (6) failed to comply with this chapter, with a regulation adopted under this chapter, or with an order of the board;
- (b) The board may summarily suspend the license of a licensee who refuses to submit to a physical or mental examination under AS 08.86.075. A person whose license is suspended under this subsection is entitled to a hearing by the board within seven days after the effective date of the order. If, after a hearing, the board upholds the suspension, the licensee may appeal the suspension to a court of competent jurisdiction.

Penalty.³⁸ A person who violates this chapter is guilty of a class B misdemeanor.

³⁵ 45 CFR 164.508 (b)(4).

³⁶ 45 CFR 164.530 (j)(2).

³⁷ ALASKA STAT. § 08.86.204.

³⁸ ALASKA STAT. § 08.86.210.

Limits or conditions on license; discipline.³⁹

(a) Upon a finding that by reason of demonstrated problems of competence, experience, education, or health the authority to practice psychology or as a psychological associate under this chapter should be limited or conditioned or the practitioner disciplined, the board may reprimand, censure, place on probation, restrict practice by time, specialty, procedure or facility, require additional education or training, or revoke or suspend a license.

³⁹ ALASKA STAT. § 08.86.220.