The Duty to Record: Ethical, Legal, and Professional Considerations for Delaware 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 polices 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

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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.
and Westlaw. 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.

Delaware 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

Delaware 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 duty to protect/warn, and recommend its use.

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

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6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
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.” Whenever “Eurocentric therapeutic and interventions models” 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. The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

**Statute or Rule**

Delaware explicitly adopts the American Psychological Association’s Recordkeeping Guidelines, which cite throughout the text the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (hereinafter referred to as the “Ethics Code”).

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8 *Id.* at p. 45.
11 DEL. CODE ANN. § 3514(a)(5) (“A practitioner licensed or registered under this chapter shall be subject to disciplinary actions set forth in § 3516 of this title, if, after a hearing, the Board finds that the psychologist or psychological assistant: …Has not conducted the practitioner's professional
Common Law

There are no published Delaware cases interpreting the duty to protect statute. In common law cases before the statute was enacted, and when applying federal law, Delaware courts have found a Tarasoff duty. No duty to protect was found when the victim clearly knew of the danger and had heard about the patient's dangerous proclivities at a court hearing.

Contents of the record are mandated by law

The Delaware Administrative Code adopts the APA’s Record Keeping Guidelines, and Guideline 2 establishes “A psychologist strives to maintain accurate, current, and pertinent records of professional services as appropriate to the circumstances and as may be required by the psychologist’s jurisdiction. Records include information such as the nature, delivery, progress, and results of psychological services, and related fees.” The Delaware Code requires licensed psychologists to comply with the APA Code of Ethics and, accordingly, the following ethical standards regulate the content of records kept by Delaware psychologists. In addition, the Health Insurance Portability and Accountability Act (HIPAA) would apply to Delaware psychological records.

3.10 Informed Consent

(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


12 DEL. CODE ANN. § 5402.
15 24 DEL. ADMIN. CODE § 3500-11.
16 DEL. CODE ANN. tit. 11, § 3514(a)(5).
18 APA CODE OF ETHICS, supra note 11.
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, 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 practices 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. Delaware mandatory reporting duties must be disclosed to meet this standard:

- Duty to report abuse or neglect of a child under age 18,
- Duty to report abuse, neglect or exploitation of adult in need of services;
- Duty to protect if the client makes an “explicit and imminent threat to kill or seriously injury a clearly identified victim or victims, or to commit a specific violent act or to destroy property under circumstances which could easily lead to serious personal injury or death, and the client has the apparent intent and ability to carry out the threat. The clinician must warn the potential victim, law enforcement, and attempt to hospitalize the client.”

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20 DEL. CODE ANN. tit. 16, § 901.
21 DEL. CODE ANN. tit. 31, § 3910(a).
22 DEL. CODE ANN. tit. 16, § 5402.
The following standards set forth in the APA Code of Ethics create specific record keeping obligations for Delaware psychologists

**4.04 Minimizing Intrusions on Privacy**

(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 Sources**

In their reports to payors for services …psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided …the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

**9.01 Bases for Assessments**

(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.

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23 APA CODE OF ETHICS, *supra* note 11.
24 *Id.*
25 *Id.*
9.02 Use of Assessments

(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 Results

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…

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 standards 9.01, 9.02, and 9.10 suggest that psychologists in Delaware should use an intake and evaluation note, progress note, and termination note templates.

Maintenance and Security of Records

The APA’s Record Keeping Guidelines 1, 3, 5, 6, and 9 discuss obligations with respect to maintenance and security of records. The Delaware Code requires licensed psychologists to comply with the APA Code of Ethics and, accordingly, the following ethical standards create specific record keeping obligations for Delaware psychologists:

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality, “[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.)”

Additionally, APA Code of Ethics Standard 6.02(b) requires that Delaware psychologists 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.\textsuperscript{31}

HIPAA also enables the patient to inspect and obtain Protected Health Information (PHI) records, including Psychotherapy Notes created by the psychologist, as long as those records are maintained.\textsuperscript{32} In addition, patients have a right to amend any part of the record;\textsuperscript{33} 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).

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).\textsuperscript{34} Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.\textsuperscript{35}

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.\textsuperscript{36} Concrete security standards are established for all electronic healthcare information (45 CFR 160).

\textbf{Retention of Records}

APA’s Record Keeping Guidelines 1 and 7 discuss obligations with respect to maintenance and security of records.\textsuperscript{37} The Delaware Administrative Code sets forth the following standard for record keeping by psychologists:

\textbf{Record Retention}\textsuperscript{38}

Licensees must adhere to the most recent version of the American Psychological Association's Record Keeping Guidelines. The most recent version can usually be found in the APA's website www.apa.org.

\begin{itemize}
\item \textsuperscript{31} APA CODE OF ETHICS, \textit{supra} note 11.
\item \textsuperscript{32} 45 CFR 164.524.
\item \textsuperscript{33} 45 CFR 164.526 (a).
\item \textsuperscript{34} 45 CFR 164.508 (b)(4).
\item \textsuperscript{35} 45 CFR 164.528.
\item \textsuperscript{36} 45 CFR 164.508.
\item \textsuperscript{37} APA RECORD KEEPING GUIDELINES, \textit{supra} note 10.
\item \textsuperscript{38} 24 DEL. ADMIN. CODE § 3500-11.
\end{itemize}
The record retention schedules in the Record Keeping Guidelines may be superseded by the requirements under state law or of other authorities or entities, such as the licensee's insurance carrier. The longest required retention period for any class of records should be followed. It is the licensee's responsibility to determine the proper schedule to follow.

**Violations of the specific duty**

Delaware psychologists may be subject to discipline as follows:

**Grounds for refusal, revocation or suspension of licenses and registrations**

(a) A practitioner licensed or registered under this chapter shall be subject to disciplinary actions set forth in § 3516 of this title, if, after a hearing, the Board finds that the psychologist or psychological assistant: . . . (5) Has not conducted the practitioner's professional activities in conformity with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (hereinafter referred to as the Ethics Code); and in conformity with the rules and regulations adopted by the Board to implement the Ethics Code.

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