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

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.
Columbia with reference to several relevant state-by-state surveys retrieved from Lexis and Westlaw.\textsuperscript{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.

Kentucky 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.

\textbf{State Specific Template for contents of a record}

Kentucky 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 believe that a termination note will likely reduce exposure to arguments about continued duty of care and reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Kentucky, and recommend that psychologists use this template, too.\textsuperscript{5}

Because the documents permit hovering over the underline fields with a cursor

\textsuperscript{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 (Thomson Reuters/ West October 2011).

to select an option or permit filling in the shaded text boxes, they cannot be inserted into this document. Please access each of the documents on this website, separately.

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

The Kentucky Board of Examiners of Psychology has adopted its own “Code of Conduct” for Kentucky psychologists, which set forth several obligations related to record keeping.

Common Law

Relevant citing references to 201 KY. ADMIN. REGS. 26:145 (re: Psychologist Code of Conduct)

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
Psychologist sought judicial review of one-year suspension of his license by the State Board of Examiners of Psychology in administrative disciplinary proceeding. The Board found that Maggard violated KRS 319.082(1)(f) and 201 KAR 26:145, Section 3(5) when he rendered a formal, professional opinion about a minor child “without direct and substantial professional contact with, or a formal assessment of,” that child, and that his actions constituted violations of KRS 319.082(1)(c) and (d)—“unfair, false, and misleading act[s] or practice[s]” and “practic[ing] psychology in a negligent manner.” The Circuit Court, Franklin County, upheld suspension. Psychologist appealed. The Court of Appeals affirmed. Holdings: Upon acceptance of discretionary review, the Supreme Court, Scott, J., held that: 1) Board had subject matter jurisdiction over psychologist; 2) psychologist was not entitled to absolute immunity in administrative disciplinary proceeding; and 3) psychologist was entitled to discovery on fraud and misconduct claims.11

Relevant Annotations to KY. REV. STAT. ANN. § 620.030 (re: duty to report child abuse or neglect):

- Pursuant to mandatory reporting statute, any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused has a legal obligation to report the suspected conduct, and criminal liability attaches for an intentional failure to perform that duty.12

- Background: Defendant was convicted on conditional guilty plea in the Livingston Circuit Court, of fifteen counts of sexual offenses against minors. Defendant appealed. Holdings: The Supreme Court, Graves, J., held that: …nothing in the statute abrogated psychologist-client privilege in cases involving dependent, neglected, or abused children or prohibited mandatory report of abuse when children subsequently reached adulthood.13

Relevant Annotations to KY. REV. STAT. ANN. § 209.030 (re: duty to report elder abuse):

• KRS 209.030 requires a report, either oral or written, to the cabinet for human resources by any person, including physicians, counselors, and law enforcement officers, having reasonable cause to suspect adult abuse. This duty is not alleviated if the victim receives treatment, is in therapy or refuses to press charges or leave the abusive home environment. The physician-patient confidentiality of KRS 213.200 is modified in cases of suspected adult abuse. OAG 83-187.

Relevant Annotations to KY. REV. STAT. ANN. § 202A.400 (Duty to warn victim of potential threat of violence)

• A Federal Court of Appeals applied Kentucky law and held Ky. Rev. Stat. § 202A.400 did not create a duty to warn when there was not a specific threat, and that the statute superseded any common law liability.14
• For purposes of statute providing that mental health professional cannot be held liable for failure to warn patient's intended victim unless patient has communicated to the mental health professional an actual threat of physical violence against clearly identified or reasonably identifiable victim, “communicated to the mental health professional” includes threats communicated by a patient directly to a mental health professional and threats communicated by a patient to the mental health professional indirectly through agents or ostensible agents of that professional who have a duty to relay the patient's information. A threat is “actual” when it exists in fact, is real and genuine, as opposed to a vague or uncertain indication of a potential harm, or a statement made in jest or obvious exaggeration. The patient's statement that he loved his girlfriend and did not want to harm her, but was afraid that he could not control himself was not clear and certain enough to constitute communication of “actual threat.”15

Relevant annotations to: KY. REV. STAT. ANN. § 319.082 (Disciplinary actions against license and certificate holders):

• Evidence was sufficient to support findings of State Board of Examiners of Psychology in disciplinary proceeding that psychologist, hired to perform

---

14 Riley v. United Health Care of Hardin, Inc., 165 F.3d 28 (6th Cir. 1998).
15 Devasier v. James (Ky. 2009) 278 S.W.3d 625.
evaluation of child whose parents had filed action against dentist, provided opinions about child without having substantial professional contact with her, and without conducting formal assessment, as would support suspension of his license to practice for one year; psychologist only had contact with child for brief period during one visit, and psychologist prepared written summary of clinical assessment in which he opined that child had suffered permanent psychological injury as a result of treatment she received from dentist.  

Contents of the record that are mandated by law

Under the laws regulating psychological practice, a duty to disclose certain information to all patients is required and would include the following written content that would be part of the informed consent process before engaging in psychological services. The Health Insurance Portability and Accountability Act (HIPAA) calls for a notice of privacy practices that delineates the psychologist’s scope of and limitations of confidentiality. It works in tandem with the disclosure document provided to the patient during the informed consent process specified by Kentucky law:

Informed client

---

19 201 KY. ADMIN. REGS. 26:145, section 5(1); See telehealth standards: KY. REV. STAT. ANN. § 319.140; See also 201 KY. ADMIN. REGS.26:310, section 3 (telehealth and telepsychology): Section 3. Competence, Limits on Practice, Maintenance, and Retention of Records. A credential holder using telehealth to deliver psychological services or who practices telepsychology shall:
(1) Limit the practice of telepsychology to the area of competence in which proficiency has been gained through education, training, and experience;
(2) Maintain current competency in the practice of telepsychology through continuing education, consultation, or other procedures, in conformance with current standards of scientific and professional knowledge;
(3) Document the client's presenting problem, purpose, or diagnosis;

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
The credential holder shall give a truthful, understandable, and appropriate account of the client's condition to the client or to those responsible for the care of the client. The credential holder shall keep the client fully informed as to the purpose and nature of an evaluation, treatment, or other procedure, and of the client's right to freedom of choice regarding services provided.

Kentucky psychologists must describe the limits of confidentiality during the informed consent process before providing psychological services:

**Legal limits of confidentiality**

1) General. The credential holder shall safeguard the confidential information obtained in the course of practice, teaching, research, or other professional services. Except as provided in this section, the credential holder shall obtain the informed written consent of the client prior to disclosing confidential information.

2) Disclosure without informed written consent. The credential holder shall disclose confidential information without the informed consent of the client if the credential holder has a duty to warn an intended victim of the client's threat of violence pursuant to KRS 202A.400 or 645.270.

…(4) Services involving more than one (1) interested party. If more than one party has an appropriate interest in the professional services rendered by the credential holder to a client or clients, the credential holder shall clarify to all parties prior to rendering the services the dimensions of confidentiality and professional responsibility that shall pertain in the rendering of services.

(5) Multiple clients. If service is rendered to more than one (1) client during a joint session, the credential holder shall at the beginning of the professional relationship clarify to all parties the manner in which confidentiality shall be handled.

(4) Follow the record-keeping requirements of 201 KAR 26:145, section 6; and
(5) Ensure that confidential communications obtained and stored electronically cannot be recovered and accessed by unauthorized persons when the credential holder disposes of electronic equipment and data.

20 201 KY. ADMIN. REGS. 26:145, section 7.

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
(6) Legally dependent clients. At the beginning of a professional relationship the credential holder shall inform a client who is below the age of majority or who has a legal guardian, of the limit the law imposes on the right of confidentiality with respect to his or her communications with the credential holder.

…(9) Reporting of abuse of children and vulnerable adults. The credential holder shall be familiar with the relevant law concerning the reporting of abuse of children and vulnerable adults, and shall comply with those laws, including KRS 620.030.

(10) Discussion of client information among professionals. If rendering professional services as part of a team or if interacting with other appropriate professionals concerning the welfare of the client, the credential holder may share confidential information about the client if the credential holder takes reasonable steps to ensure that all persons receiving the information are informed about the confidential nature of the information and abide by the rules of confidentiality.

Details to meet this standard include describing the specific information about the mandatory reporting duties that apply to psychologists:

- Duty to report a child is dependent, neglected, or abused;21
- Duty to report abuse, neglect or exploitation of vulnerable adults;22
- Duty to warn or take reasonable precautions to protect a clearly identified or reasonably identifiable victim from an actual threat of physical violence, or the patient has communicated to the mental health professional an actual threat of some specific violent act.23

The credential holder rendering professional services to an individual client, or services billed to a third-party payor, shall maintain professional records that include:24

1. The presenting problem, purpose or diagnosis;

---

21 KY. REV. STAT. ANN. § 620.030.
22 KY. REV. STAT. ANN. § 209.030(2)-(6)(a).
23 KY. REV. STAT. ANN. § 202A.400 or KY. REV. STAT. ANN. § 645.270.
24 201 KY. ADMIN. REGS. 26:145, section 3(6)(a).

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
2. The fee arrangement;
3. The date and substance of each professional contact or service;
4. Test results or other evaluative results obtained and the basic test data from which the results were derived;
5. Notation and results of a formal consult with another provider; and
6. A copy of all test or other evaluative reports prepared as part of the professional relationship.

In light of the duty for Kentucky psychologists to terminate a professional relationship if the client is not benefitting from the service, the psychologist must prepare the client appropriately for the termination and assist the client in obtaining alternative services from another professional, further content in the record must show compliance with this duty. Furthermore, under the Kentucky law and HIPAA, psychologists should use an intake and evaluation note, and progress note, and termination note templates.

**Maintenance and security of records**

Kentucky law has established a series of confidentiality protections that affect the maintenance and security of the record:

The credential holder shall store and dispose of written, electronic and other records in a manner which shall ensure their confidentiality.

**Additional Confidentiality Protections**

…(7) Limited access to client records. The credential holder shall limit access to client records to preserve their confidentiality and shall ensure that all persons working under the credential holder's authority comply with the requirements for confidentiality of client material.

(8) Release of confidential information. The credential holder shall release

---

25 201 KY. ADMIN. REGS. 26:145, section 5(2); See also 201 KY. ADMIN. REGS. 26:145, section 4 (Duty to terminate if psychologist is impaired due to lack of objectivity or personal health issues).
26 Some record keeping laws relate to hospital or inpatient practices: See, KY. REV. STAT. ANN. § 210.235 Confidential nature of records (Title XVIII. Public Health, Chapter 210. State and Regional Mental Health Programs).
27 201 KY. ADMIN. REGS. 26:145, section 3(6)(c).
28 201 KY. ADMIN. REGS. 26:145, section 7.
confidential information upon court order or to conform with state law, including KRS 422.317, or federal law or regulation.

...(11) Disguising confidential information. If case reports or other confidential information is used as the basis of teaching, research, or other published reports, the credential holder shall exercise reasonable care to ensure that the reported material is appropriately disguised to prevent client identification.

(12) Observation and electronic recording. The credential holder shall ensure that diagnostic interviews or therapeutic sessions with a client are observed or electronically recorded only with the informed written consent of the client.

(13) Confidentiality after termination of professional relationship. The credential holder shall continue to treat as confidential information regarding a client after the professional relationship between the credential holder and the client has ceased.

HIPAA 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. In addition, patients have a right to amend any part of the record; 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.

HIPAA also 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. Release and transfer of PHI records cannot be conditioned on payment or other conditions (such as enrollment in the health plan

29 45 CFR 164.524.
30 45 CFR 164.526 (a).
31 45 CFR 164.528.
32 45 CFR 164.508.
that employs the psychologist). Concrete security standards are established for all electronic healthcare information (45 CFR 160).

**Retention of Records**

Psychologists must “ensure that all records are maintained for a period of not less than six (6) years after the last date that services were rendered.”

**Violations of the specific duties**

The board may suspend, revoke, or refuse to issue or renew a license; may accept an assurance of voluntary compliance; restrict, or place a credential holder on probation; or issue an administrative reprimand or private admonishment upon proof that the credential holder has:

(a) Committed any act involving moral turpitude, dishonesty, or corruption, relating to the practice of psychology, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon conviction of such a crime, the judgment and sentence is presumptive evidence at the ensuing disciplinary hearing of the guilt of the licensee or applicant of the crime described in the indictment or information and of the person’s violation of the statute on which it is based. For the purpose of this subsection, conviction includes all instances in which a plea of guilty or "nolo contendere" is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended;

…(c) Committed any unfair, false, misleading, or deceptive act or practice;

(d) Been incompetent or negligent in the practice of psychology;

…(f) Violated any state statute or administrative regulation governing the practice of psychology;

(g) Unlawfully failed to cooperate with the board by:

1. Not furnishing any papers or documents requested by the board;

---

33 45 CFR 164.508 (b)(4).
34 201 KY. ADMIN. REGS. 26:145, section 3(6)(b).
35 KY. REV. STAT. ANN. § 319.082.
2. Not furnishing in writing a complete explanation covering the matter contained in the complaint filed with the board;
3. Not appearing before the board at the time and place designated; or
4. Not properly responding to subpoenas issued by the board;

(h) Failed to comply with an order issued by the board or an assurance of voluntary compliance;

...(k) Practiced beyond the scope demonstrated by an appropriate combination of knowledge, skill, experience, training, and education;

...(m) Been convicted of any misdemeanor or felony relating to the practice of psychology. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended;

...(o) Been convicted of a misdemeanor offense under KRS Chapter 510 involving a client, patient, or student, or a felony offense under KRS Chapter 510, 530.064(1)(a), or 531.310, or been found by the board to have had sexual contact as defined in KRS 510.010 with a client, patient, student, or supervisee;

(p) Improperly divulged confidential information;

...(q) Exercised undue influence in such a manner as to exploit the client, patient, student, or supervisee for financial or other personal advantage to the practitioner or a third party…