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

Maryland 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

Maryland 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 reduce 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 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

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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).


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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.

**Statute or Rule**

The Board of Examiners of Psychologists regulates Maryland psychologists and has created its own Code of Conduct. Maryland psychologists are subject to the record keeping requirements created by statutes and regulations promulgated by the Board.

**Common Law**

Maryland courts have interpreted the state’s duty to warn statute once. In *Falk v. Southern Maryland Hospital, Inc.*, the Court of Special Appeals of Maryland held its statute barred suit when a violent inpatient struck a nurse, who then knocked down an elderly client, breaking the client’s hip. The Court ruled that because the client had not indicated any intent to harm a particular victim, the suit was barred.

**Contents of the record are mandated by law**

Under the regulations promulgated by the Board, psychologist must:

1. Keep records of a patient's condition and assessment results;

2. Maintain clinical records of informed consent, presenting problems, diagnosis, fee arrangements, dates and substance of each billed service, original test data with results and other evaluative material, and the results of any formal consultations with other professionals…

When conducting assessment, psychotherapy, counseling, or consulting with an individual or organization in person or by electronic transmission or other forms of

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7 *Id.* at p. 45.

8 CODE MD. REG. § 10.36.05.01.


10 *Id.* at p. 54.

11 CODE MD. REG. § 10.36.05.08.
communication, Maryland psychologists must:

(1) In general:
   (a) Obtain informed consent using appropriate language understandable to the client;
   (b) Vary appropriate informed consent forms and procedures to ensure that the client:
      (i) Has the capacity to consent;
      (ii) Has been provided with information concerning participation in the activity that reasonably might affect the willingness to participate, including limits of confidentiality and monetary costs or reimbursements;
      (iii) Is aware of the voluntary nature of participation and has freely and without undue influence expressed consent; and
      (iv) Is given the opportunity to ask questions and receive answers regarding the activity;

   ...(3) In therapeutic relationships, explain to the client:
      (a) The clarification of reasonable expectations;
      (b) The nature and purpose of testing, reports, and consultations;
      (c) The limits of confidentiality;
      (d) Specific information concerning fees, billing, and electronic services available in the payment of fees;
      (e) Psychotherapeutic schedules; and
      (f) The process and conditions of termination of therapy.

Financial Arrangements and Fees. A psychologist shall:

(1) Make advance financial arrangements that are clearly understood by the client;

(2) Inform the client about the possibility of initiating a collection procedure before using that procedure;

(3) Comply with the provisions regarding patient referrals contained in Health Occupations Article, §§1-301—1-306, Annotated Code of Maryland;

(4) Make full disclosure in advance to the client of any remuneration given or received for making or accepting referrals; and

(5) Refrain from signing statements for insurance purposes as though the

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12 CODE MD. REG. § 10.36.05.05.

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psychologist provided a service that was actually provided by someone else.

Confidentiality\textsuperscript{13}
A. A psychologist shall:

(1) Maintain confidentiality regarding information obtained from a client in the course of the psychologist's work;

(2) Discuss the requirements and limitations of confidentiality at the beginning of the professional relationship or at the intake interview;

…(5) Obtain written permission for the electronic recording of interviews;

(6) Avoid undue invasion of privacy by ensuring that written and oral reports contain only data relevant to the purpose of the evaluation;

(7) Treat any assessment result or interpretation regarding an individual as confidential information; and

B. Legal and Ethical Limits. A psychologist shall inform:

(1) Clients of the legal and ethical limits of confidentiality;

(2) Clients below the age of minority, or who have legal guardians, of the limits the law imposes on the right of confidentiality with respect to communications with the psychologist, to the extent that the client can understand, at the beginning of the professional relationship;

In addition, the Health Insurance Portability and Accountability Act (HIPAA)\textsuperscript{14} would apply to Maryland psychological records. A HIPAA notice of privacy practices\textsuperscript{15} that delineates the psychologist’s scope of and limitations of confidentiality

\textsuperscript{13} CODE MD. REG. § 10.36.05.08.
works in tandem with the disclosure document provided to the patient during the informed consent process specified by Maryland law. Several mandatory disclosures could occur and should be identified to the patient as part of the informed consent process:

- Mandatory duty to report child abuse or neglect;\(^{16}\)
- Mandatory duty to report suspected abuse, neglect, or financial exploitation of an vulnerable adult;\(^{17}\)
- Mandatory duty to warn or protect when a client known to be violent makes threats to inflict “imminent physical injury” on a specified victim or victims.\(^{18}\)

**Termination of Services\(^\text{19}\)**

A psychologist shall:

(1) Make or recommend referral to other professional, technical, or administrative resources if the referral is clearly in the best interest of the client; and

(2) Unless precluded by the actions of the client, terminate the professional relationship in an appropriate manner, notify the client in writing of this termination, and assist the client in obtaining services from another professional, if:

- (a) It is reasonably clear the client is not benefiting from the relationship;
- (b) A multiple relationship develops or is discovered after the professional relationship has been initiated;
- (c) Impaired competency or objectivity develops or is discovered after a professional relationship has been initiated; or
- (d) The psychologist has been threatened or otherwise endangered by the client or another person with whom the client has a relationship.

**Maintenance and Security of Records**

Maryland has established laws that affect the maintenance and security of psychological records, and psychologists must:\(^{20}\)


\(^{16}\) MD. CODE ANN., FAM. LAW § 5-704.

\(^{17}\) MD. CODE ANN., FAM. LAW § 14-302(a) and (d).

\(^{18}\) MD. CODE ANN., CRIM. & PROC. § 5-609(b).

\(^{19}\) CODE MD. REG. § 10.36.05.07.
…(3) Safeguard information obtained in clinical or consulting relationships or evaluative data concerning children, students, employees, and others obtained in the course of practice, …or other professional services;

(4) Release mental health records or other confidential information only as permitted or required by law;

…(8) Obtain informed written consent before presenting in writing, lecture, or other public forums identifying information obtained during the course of professional work, and disguise this information when case reports or other confidential information are used as a basis for teaching or research.8

…C. Record Keeping…
…(3) Make provisions for maintaining confidentiality in the storage and disposal of written and electronic records;

(4) Ensure that professional records are maintained for a period consistent with State and federal laws;

(5) Limit access to client records and ensure that a person's working under the psychologist's authority including, but not limited to, psychology associates and office personnel, comply with the requirements for confidentiality of client material; and

(6) Provide evaluations or treatment reports within a reasonable time consistent with State and federal laws on proper and lawful requests by a client, insurance carrier, court, institution, or other authorized health provider.

Maryland also has established other laws that affect the maintenance and security of health care records that psychologists must follow:21

...D. A health care provider shall retain medical records in:
(1) An office with access restricted to authorized staff;

(2) A computer or other device with appropriate security such as passwords or data encryption;

20 CODE MD. REG. § 10.36.05.08.
21 CODE MD. REG. § 10.01.16.04; See, CODE MD. REG. § 10.01.16.05-.07; disposal of records, and destruction of records; Also, see, CODE MD. REG. § 10.07.02.01, et seq. about the laws related to records for hospitals and facilities.
(3) A commercial records storage site with appropriate environmental and security controls; or

(4) Other storage options that ensure protection, security, and access control.

E. Maintenance of medical records may be contracted to a records management service that agrees to comply with and be subject to this chapter.

F. Medical records that have been placed in storage remain the responsibility of the health care provider, including:

(1) Providing the patient or person in interest access to their medical records and authorized copies upon request in accordance with Health-General Article, §4-304, Annotated Code of Maryland, and 45 CFR §164.524, as amended;

(2) Ensuring the confidentiality of the medical records;

(3) Providing security and restricted access to the medical records; and

(4) Protecting the medical records from:
   (a) Damage;
   (b) Loss; and
   (c) Deterioration.

G. If a medical record is kept in electronic form, a health care provider shall:

(1) Maintain or have access to compatible electronic hardware and software that will enable the health care provider to generate a legible copy of the record in order to comply with patient and governmental access needs; and

(2) Prepare and maintain a current back-up copy of electronic medical record files.

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. 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

22 45 CFR 164.524.
23 45 CFR 164.526 (a).
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). Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.

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. Concrete security standards are established for all electronic healthcare information (45 CFR 160).

**Retention of Records**

Maryland law requires retention for a period of 5 years from the date of the record, or for a minor 5 years or 3 years after reaching the age of majority (18), whichever is later. It also provides for an earlier destruction, if certain requirements are met, including notice to the patients, either directly or by publication.

**Violations of the specific duty**

If the Board finds that violations of the record keeping laws occur, it may suspend or revoke a license, reprimand a licensee and/or impose a monetary penalty.

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24 45 CFR 164.508 (b)(4).
25 45 CFR 164.528.
26 45 CFR 164.508.
27 MD. CODE ANN., HEALTH GEN. § 4-403.
28 Id.
29 CODE MD. REG. § 10.36.08.00, et seq.