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

2 Christina Luini, J.D., 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.
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.

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.

West Virginia 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**

West Virginia 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 recommend its use.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 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**

The West Virginia Board of Examiners of Psychologists has adopted the APA Ethical Principles of Psychology and Code of Conduct for psychologists in its administrative code.10

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8 Id. at p. 45.


10 W. Va. CODE R. § 17-3-6 (adopting The Ethical Principles of Psychologists and Code of Conduct (American Psychological Association 2002, amended 2010), copies 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) (“6.1. The Board hereby adopts the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association as part of this rule, and all provisions of this Code of Ethics have the same effect as if they were specifically promulgated rules of the Board. In addition to the APA Code of Ethics, School-Psychologists are also bound by the National Association of School Psychologists Principles for Professional Ethics.”).
Common Law

Relevant annotations to Chapter 27 of the West Virginia Code (re: “Mentally Ill Persons”)

- Psychiatrist’s former patient alleged sufficient facts to support submission of case to jury on theory that psychiatrist was negligent when he released patient's medical records to patient's husband's attorney without taking reasonable care to insure that only those parts of her medical records that court had found “relevant” to divorce proceeding instituted by husband would be made public.11

- Statute, providing for confidentiality of mental health records, was inapplicable in newspapers’ action seeking writ of prohibition to prevent enforcement of court order prohibiting publication of information relating to acts, diagnosis, and treatment of individual who was convicted as an adult of first-degree sexual assault and who was no longer a minor, but was at time of treatment where information released to press was not released by Department of Health, its agents or employees and document released was not a clinical record.12

- Mental health records are confidential information which may be disclosed pursuant to order of trial court if it finds that information sought is sufficiently relevant to proceeding to outweigh importance of maintaining confidentiality.13

- When confidential mental health records of prospective witness are sought for purpose of impeaching witnesses' credibility, circuit court should first examine records ex parte to determine if request is frivolous; if it finds probable cause to believe that mental health records contain material relevant to credibility issue, counsel should be allowed to examine records; and court should then conduct an in camera hearing in which requesting party's counsel designates parts of records he believes relevant and both sides present arguments on relevancy of those parts.14

- When mental health records containing confidential information are sought to be produced because records are allegedly relevant to issue of witnesses' credibility, trial court must first determine that person whose medical records are sought will actually be called as a witness since if individual will not be called as witness, records need not be produced.15

Citing Reference to West Virginia Code section 16-29-1 (re: copies of health care records to be furnished to patients):

14 Id.
15 Id.
• Plaintiff's claimed of alleged violations of W Va. Code, § 16-29-1, entitled “Copies of Healthcare Records To Be Furnished To Patient's” by Defendant Charleston Area Medical Center. Court concluded (1) W.Va. Code, §16-29-1 provides that medical records requested by patients in writing must be produced in whole or in part within a reasonable period of time. (2) W.Va. Code, §16-29-1, in part, allows patients the right to review their records upon written request at reasonable times and places. (3) W.Va. Code, §16-29-1 requires that medical records, whether in whole or in part, be delivered to patients upon request within a reasonable period of time of said request. (4) W.Va. Code, §16-29-1 does not permit medical records to be withheld, in part, by a healthcare provider because such records are not completed at the time of the patient's request based upon hospital policy that records not be furnished to a patient until such time as the records are fully completed. (5) Under the circumstances of this case, a delay of 36 days in furnishing the Plaintiff her medical records is unreasonable pursuant to W.Va. Code, §16-29-1.16

Contents of the record are mandated by law
West Virginia adopted the APA Code of Ethics into its Administrative Code and the following standards regulate the content of psychological records kept by West Virginia psychologists.17 In addition, the Health Insurance Portability and Accountability Act (HIPAA)18 would apply to West Virginia psychological records.

3.10 Informed Consent19
(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.)

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17 APA CODE OF ETHICS, supra note 10.
19 APA CODE OF ETHICS, supra note 10.
(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\(^{20}\) 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. West Virginia mandatory reporting duties must be disclosed to meet this standard:

- Duty to report abuse or neglect of a child under age 18;\(^{21}\)
- Duty to report that an incapacitated adult is being abuse, neglect or placed in an emergency situation.\(^{22}\)

The following standards set forth in the APA Code of Ethics create specific record keeping obligations for West Virginia psychologists:

4.04 Minimizing Intrusions on Privacy\(^{23}\)

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\(^{21}\) W. VA. CODE ANN. § 49-6A-2.

\(^{22}\) W. VA. CODE ANN. § 9-6-9(a).

\(^{23}\) APA CODE OF ETHICS, supra note 10.
(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.

Although HIPAA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.  

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

26 Id.
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 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 West Virginia would use an intake and evaluation note, progress notes, and termination templates.

Maintenance and Security of Records

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.)

The following APA Standards and the West Virginia law delineate the record keeping responsibilities:

6. Record Keeping and Fees

27 Id.
28 Id.
29 Id.
30 Id.

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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.)

West Virginia law permits patients to obtain copies of their records:

Copies of health care records to be furnished to patients
Any licensed …health care provider …under the laws of this state shall, upon the written request of a patient, his authorized agent or authorized representative, within a reasonable time, furnish a copy, as requested, of all or a portion of the patient's record to the patient, his authorized agent or authorized representative subject to the following exceptions:

(a) In the case of a patient receiving treatment for psychiatric or psychological problems, a summary of the record shall be made available to the patient, his authorized agent or authorized representative following termination of the treatment program.

…(d) This article shall not apply to records subpoenaed or otherwise requested through court process.

(e) The provisions of this article may be enforced by a patient, authorized agent or authorized representative, and any health care provider found to be in violation of this article shall pay any attorney fees and costs, including court costs incurred in the course of such enforcement…

Reasonable expenses to be reimbursed
(a) The provider shall be reimbursed by the person requesting in writing a copy of the records at the time of delivery for all reasonable expenses incurred in complying with this article: Provided, that the cost may not exceed seventy-five

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31 W. VA. CODE § 16-29-1; see, DeBORD v. CHARLESTON AREA MEDICAL CENTER, INC., supra note 16.
32 W. VA. CODE § 16-29-2.
cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars.

(b) Notwithstanding the provisions of subsection (a) of this section, a provider shall not impose a charge on an indigent person or his or her authorized representative if the medical records are necessary for the purpose of supporting a claim or appeal under any provisions of the Social Security Act, 42 U.S.C.§ 301 et seq.

(c) For purposes of this section, a person is considered indigent if he or she:
   (1) Is represented by an organization or affiliated pro bono program that provides legal assistance to indigents; or
   (2) Verifies on a medical records request and release form that the records are requested for purposes of supporting a social security claim or appeal and submits with the release form reasonable proof that the person is financially unable to pay full copying charges by reason of unemployment, disability, income below the federal poverty level, or receipt of state or federal income assistance.

(d) Any person requesting free copies of written medical records pursuant to the provisions of subsection (b) of this section is limited to one set of copies per provider. Any additional requests for the same records from the same provider shall be subject to the fee provisions of subsection (a).

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 psychologists). Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.

33 45 CFR 164.524.
34 45 CFR 164.526 (a).
35 45 CFR 164.528.
6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...36

(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.37

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

6.03 Withholding Records for Nonpayment39

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.

Release and transfer of PHI records cannot be conditioned on payment or other

36 APA CODE OF ETHICS, supra note 10.
37 Id.
38 45 CFR 164.508.
39 APA CODE OF ETHICS, supra note 10.
Retention of Records

Although no West Virginia requirement exists, HIPAA\(^{41}\) 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

APA Code of Ethics and HIPAA infractions can all lead to disciplinary actions being prosecuted by the West Virginia Board of Examiners of Psychologists:\(^{42}\)

(a) The board may at any time upon its own motion and shall upon the verified written complaint of any person conduct an investigation to determine whether there are any grounds for the suspension or revocation of a license or temporary permit issued under the provisions of this article.

(b) The board shall suspend or revoke any license or temporary permit when it finds the holder thereof has:

1. Been convicted of a felony or other crime involving moral turpitude;
2. Obtained a license or temporary permit by means of fraud or deceit;
3. Been incompetent, grossly negligent, or guilty of other malpractice as defined by the board by reasonable rules and regulations; or
4. Failed or refused to comply with the provisions of this article or any reasonable rule and regulation promulgated by the board hereunder or any order or final decision of the board.

(c) The board shall also suspend or revoke any license or temporary permit if it finds the existence of any grounds which would justify the denial of an application for such license or temporary permit if application were then being made for it.

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\(^{40}\) 45 CFR 164.508 (b)(4).

\(^{41}\) 45 CFR 164.530 (j)(2).

\(^{42}\) W. VA. CODE R. § 17-3-7; W. VA. CODE §30-21-10.