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

Wisconsin 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**

Wisconsin 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 recommend that psychologists use this template, too.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.

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

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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**

Wisconsin does not specifically adopt the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (2003) (“APA Code of Ethics”). The Examining Board of Psychology is, however, charged with using the APA Code of Ethics as a model for developing standards for Wisconsin psychologists. Wisconsin psychologists are subject to the record keeping requirements promulgated by the Board of Psychologists, as well as a variety of Wisconsin statutes and regulations related to healthcare/medical records generally.


8 *Id.* at p. 45.


10 See WIS. STAT. ANN. § 455.08 (“The examining board shall adopt such rules as are necessary under this chapter and shall, by rule, establish a reasonable code of ethics governing the professional conduct of psychologists, using as its model the “Ethical Standards of Psychologists”, established by the American psychological association.” See, http://www.apa.org/ethics/code/principles.pdf (last accessed Aug. 1, 2012).

11 WIS. ADMIN. CODE PSY § 5.01(33).
Common Law

Relevant annotations to Wisconsin Statutes §§ 146.81 (re: Health care records; definitions) and 146.84 (Violations related to patient health care records):

- Fourteen-year-old victim of alleged sexual assault had an absolute statutory privilege to refuse to disclose health care records, and to prevent others from disclosing them, without her consent or the consent of her parent or legal guardian.\(^\text{12}\)
- Nursing home that refused to honor patient's son's request for patient's medical records, due to its belief that patient was possibly incompetent to consent to release of records, had duty to seek a temporary guardian for patient.\(^\text{13}\)

Relevant annotations to Wisconsin Statutes § 146.82 (re: Confidentiality of patient health care records):

- Actual damages are a prerequisite to recovery for violation of Wisconsin statute protecting confidentiality of patient records, in order to prevent possibility of frivolous or nuisance litigation. Wisconsin legislature, in providing cause of action for violations of confidentiality of medical records and in contemplating that statute would apply to disclosures made in judicial proceedings, manifested its intent that parties should not be able to assert absolute litigation privilege to liability under this medical records confidentiality law.\(^\text{14}\)
- Parents' third-party medical malpractice claims against daughter's psychologists and hospital where daughter received inpatient psychotherapy, based on theory of negligent infliction of emotional harm they allegedly suffered due to daughter's allegedly false memories, resulting from psychotherapy, of parents' physical and sexual abuse, were barred on public policy grounds; daughter neither joined in suit nor waived her right to the confidentiality of her medical records and therapist-patient communications, and parent's interest in financial compensation did not trump daughter's right to maintain confidentiality of her communications and records.\(^\text{15}\)
- Nurse's alleged violation of federal Health Insurance Portability and Accounting Act (HIPAA) and state statute governing confidentiality of health

\(^\text{12}\) *In re Jessica J.L.* (App. 1998) 589 N.W.2d 660, 223 Wis.2d 622.
\(^\text{13}\) *Szymczak v. Terrace at St. Francis* (App. 2005) 709 N.W.2d 103, 289 Wis.2d 110.
\(^\text{14}\) *In re Ortiz, Bkrtcy.* E.D.Wis.2010, 430 B.R. 523, appeal dismissed and remanded 665 F.3d 906, on remand 464 B.R. 807.
\(^\text{15}\) *Johnson v. Rogers Memorial Hosp., Inc.* (App. 2000) 616 N.W.2d 903, 238 Wis.2d 227, review granted 619 N.W.2d 91, 239 Wis.2d 307, reversed 627 N.W.2d 890, 244 Wis.2d 364.
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- Even though release of defendant's patient care billing records was not authorized by any exception in statute governing privilege pertaining to communications between patient and health care provider, release of such records was specifically authorized by exception in statute governing access to patient health care records to extent records are needed for billing, collection, or payment of claims, and thus, records were admissible in prosecution for public assistance fraud.  
- Health care provider's employee, a lab technician, was not acting within scope of employment when she accessed patients' medical records and then disclosed information to her husband, and thus provider could not be held vicariously liable for employee's conduct in patients' action for breach of confidentiality of patient health care records and breach of right of privacy; employee was not attempting to benefit or serve provider when she accessed records, provider's confidentiality policy delineated proper methods for access and release of medical records.  
- Parent's breach of contract claim against hospital that provided inpatient psychotherapy for their daughter, for damages they allegedly suffered as a result of hospital's alleged failure to provide appropriate treatment to their daughter was barred on public policy grounds; parent's claim was an action for medical malpractice labeled as a contract claim, and privileged nature of confidential communications between therapists and daughter and daughter's health care records precluded such a claim in order to further public policy of protecting confidentiality of therapist-patient relationship. Patient did not waive her therapist-patient privilege by signing limited authorization for disclosure of records of her medical tests, medications prescribed, and general progress, even though patient's parent inadvertently received records relating to her psychiatric care.

17 State v. Allen (App. 1996) 546 N.W.2d 517, 200 Wis.2d 301, review denied 555 N.W.2d 124, 204 Wis.2d 319.
Contents of the record are mandated by law

Under the regulations promulgated by the Psychology Examining Board and set forth in the Wisconsin Administrative Code “failure to maintain adequate records relating to services provided to a client in the course of a professional relationship” constitutes unprofessional conduct:20

Each patient record entry shall be dated, shall identify the treating therapist, and shall be sufficiently legible to be understood and to allow interventions by other professionals… [and] …shall contain…

(a) Pertinent patient history.
(b) Pertinent objective findings related to examination and test results.
(c) Assessment or diagnosis.
(d) Plan of treatment for the patient.
(e) A discharge summary upon termination of treatment.

In addition, Chapter 146 (Miscellaneous Health Care Provisions) of the Wisconsin statutes subject “health care providers,” including psychologists, to the following mandates regarding the content of health records, subject to the definitions set forth below:

Health care records; definitions21

(1) “Health care provider” means any of the following: …(h) A psychologist licensed under ch. 455.

(2) “Informed consent” means written consent to the disclosure of information from patient health care records to an individual, agency or organization that includes all of the following:

(a) The name of the patient whose record is being disclosed.
(b) The type of information to be disclosed.
(c) The types of health care providers making the disclosure.
(d) The purpose of the disclosure such as whether the disclosure is for further medical care, for an application for insurance, to obtain payment of an

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19 Johnson v. Rogers Memorial Hosp., Inc. (App. 2000) 616 N.W.2d 903, 238 Wis.2d 227, review granted 619 N.W.2d 91, 239 Wis.2d 307, reversed 627 N.W.2d 890, 244 Wis.2d 364.
20 Wis. Admin. Code PSY § 5.01(33).
21 Wis. Stat. Ann. § 146.81-.84.
insurance claim, for a disability determination, for a vocational rehabilitation evaluation, for a legal investigation or for other specified purposes.

(c) The individual, agency or organization to which disclosure may be made.

(f) The signature of the patient or the person authorized by the patient and, if signed by a person authorized by the patient, the relationship of that person to the patient or the authority of the person.

(g) The date on which the consent is signed.

(h) The time period during which the consent is effective.

(3) “Patient” means a person who receives health care services from a health care provider.

(4) “Patient health care records” means all records related to the health of a patient prepared by or under the supervision of a health care provider… “Patient health care records” includes billing statements and invoices for treatment or services provided by a health care provider and includes health summary forms prepared under s. 302.388(2)…

(5) “Person authorized by the patient” means the parent, guardian, or legal custodian of a minor patient, as defined in s. 48.02(8) and (11), the person vested with supervision of the child under s. 938.183 or 938.34(4d), (4h), (4m), or (4n), the guardian of a patient adjudicated incompetent in this state, the personal representative, spouse, or domestic partner under ch. 770 of a deceased patient, any person authorized in writing by the patient or a health care agent designated by the patient as a principal under ch. 155 if the patient has been found to be incapacitated under s. 155.05(2), except as limited by the power of attorney for health care instrument. If no spouse or domestic partner survives a deceased patient, “person authorized by the patient” also means an adult member of the deceased patient's immediate family, as defined in s. 632.895(1)(d). A court may appoint a temporary guardian for a patient believed incompetent to consent to the release of records under this section as the person authorized by the patient to decide upon the release of records, if no guardian has been appointed for the patient.

The contents of patient health care records maintained for hospital inpatients have many requirements. Regulations promulgated by the Department of Health also mandate other contents of records that must be maintained by hospitals.
addition, Wisconsin psychologists who work in settings governed by Chapter 51 (State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act) of the Wisconsin Statutes are subject to several other record keeping standards.24

As mentioned earlier, the Examining Board of Psychology is charged with using the APA Code of Ethics to help inform standards of practice for Wisconsin psychologists.25 In addition, the Health Insurance Portability and Accountability Act (HIPPA)26 would apply to Wisconsin psychological records. A HIPPA notice of privacy practices27 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.

3.10 Informed Consent28

(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, 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.

24 WIS. STAT. ANN. § 51.30.
25 See WIS. STAT. ANN. § 455.08 (“The examining board shall adopt such rules as are necessary under this chapter and shall, by rule, establish a reasonable code of ethics governing the professional conduct of psychologists, using as its model the “Ethical Standards of Psychologists”, established by the American psychological association.” See, http://www.apa.org/ethics/code/principles.pdf (last accessed Aug. 1, 2012).
28 APA CODE OF ETHICS, supra note 10.

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(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.)

Wisconsin law also establishes the content of the informed consent disclosures by stating what cannot be revealed without the patient’s consent:29

…(12) Revealing facts, data, information, records or communication received from a client in a professional capacity except in the following circumstances:

(a) With the informed consent of the client or the client's authorized representative.
(b) With prior notification to the client at the time the information was elicited of the use and distribution of the information.
(c) If necessary to prevent injury to the client or another person.
(d) Pursuant to the lawful order of a court of law.
(e) Use of case history material for teaching or research purpose, or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the client.
(f) Where otherwise permitted or required under ss. 51.30 and 146.82, Stats.
(g) When required by federal or state law.

(13) Failure to obtain written, informed consent from the client or client’s legal representative prior to the use of observation or electronic taping, recording or filming procedures.

(15) Failure to provide clients a description of what may be expected in the way of tests, consultation, reports, fees, billing, therapeutic regimen or schedule.

(16) Failure to provide clients a description of possible effects of proposed treatment.

29 Wis. Admin. Code, Psy § 5.01.
...(18) Failure to conduct an assessment, evaluation, or diagnosis as a basis for treatment consultation.

...(20) Engaging in experimental treatment or services without assuring objectivity through keeping adequate records and consulting with colleagues.

In addition, a slew of mandatory disclosures could occur and should be identified to the patient as part of the informed consent process:

**Confidentiality of patient health care records**

(1) Confidentiality. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient ...or releases made for purposes of health care operations, as defined in 45 CFR 164.501, and as authorized under 45 CFR 164, subpart E.

(2) Access without informed consent. (a) Notwithstanding sub. (1), patient health care records shall be released upon request without informed consent in the following circumstances:

1. To health care facility staff committees, or accreditation or health care services review organizations for the purposes of conducting management audits, financial audits, program monitoring and evaluation, health care services reviews or accreditation.

2. To the extent that performance of their duties requires access to the records, to a health care provider or any person acting under the supervision of a health care provider or to a person licensed under s. 256.15, including medical staff members, employees or persons serving in training programs or participating in volunteer programs and affiliated with the health care provider, if any of the following is applicable:
   a. The person is rendering assistance to the patient.
   b. The person is being consulted regarding the health of the patient.
   c. The life or health of the patient appears to be in danger and the information contained in the patient health care records may aid the person in rendering assistance.
   d. The person prepares or stores records, for the purposes of the preparation or storage of those records.

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30 Wis. Stat. Ann. § 46.82.
3. To the extent that the records are needed for billing, collection or payment of claims.

4. Under a lawful order of a court of record.

5. In response to a written request by any federal or state governmental agency to perform a legally authorized function, including but not limited to management audits, financial audits, program monitoring and evaluation, facility licensure or certification or individual licensure or certification. The private pay patient, except if a resident of a nursing home, may deny access granted under this subdivision by annually submitting to a health care provider, other than a nursing home, a signed, written request on a form provided by the department. The provider, if a hospital, shall submit a copy of the signed form to the patient’s physician.

6. For purposes of research if the researcher is affiliated with the health care provider and provides written assurances to the custodian of the patient health care records that the information will be used only for the purposes for which it is provided to the researcher, the information will not be released to a person not connected with the study, and the final product of the research will not reveal information that may serve to identify the patient whose records are being released under this paragraph without the informed consent of the patient. The private pay patient may deny access granted under this subdivision by annually submitting to the health care provider a signed, written request on a form provided by the department.

7. To an elder-adult-at-risk agency designated under s. 46.90(2) or other investigating agency under s. 46.90 for purposes of s. 46.90(4) and (5) or to an adult-at-risk agency designated under s. 55.043(1d) for purposes of s. 55.043. The health care provider may release information by initiating contact with the elder-adult-at-risk agency or adult-at-risk agency without receiving a request for release of the information from the elder-adult-at-risk agency or adult-at-risk agency.

8. To the department under s. 255.04 and to the persons specified under s. 255.04(3). The release of a patient health care record under this subdivision shall be limited to the information prescribed by the department under s. 255.04(2).

9.a. In this subdivision, “abuse” has the meaning given in s. 51.62(1)(ag);
“neglect” has the meaning given in s. 51.62(1)(br); and “parent” has the meaning given in s. 48.02(13), except that “parent” does not include the parent of a minor whose custody is transferred to a legal custodian, as defined in s. 48.02(11), or for whom a guardian is appointed under s. 54.10 or s. 880.33, 2003 stats.

b. Except as provided in subd. 9.c. and d., to staff members of the protection and advocacy agency designated under s. 51.62(2) or to staff members of the private, nonprofit corporation with which the agency has contracted under s. 51.62(3)(a)3., if any, for the purpose of protecting and advocating the rights of a person with developmental disabilities, as defined under s. 51.62(1)(am), who resides in or who is receiving services from an inpatient health care facility, as defined under s. 51.62(1)(b), or a person with mental illness, as defined under s. 51.62(1)(bm).

c. If the patient, regardless of age, has a guardian appointed under s. 54.10 or s. 880.33, 2003 stats., or if the patient is a minor with developmental disability, as defined in s. 51.01(5)(a), who has a parent or has a guardian appointed under s. 48.831 and does not have a guardian appointed under s. 54.10 or s. 880.33, 2003 stats., information concerning the patient that is obtainable by staff members of the agency or nonprofit corporation with which the agency has contracted is limited, except as provided in subd. 9.e., to the nature of an alleged rights violation, if any; the name, birth date and county of residence of the patient; information regarding whether the patient was voluntarily admitted, involuntarily committed or protectively placed and the date and place of admission, placement or commitment; and the name, address and telephone number of the guardian of the patient and the date and place of the guardian's appointment or, if the patient is a minor with developmental disability who has a parent or has a guardian appointed under s. 48.831 and does not have a guardian appointed under s. 54.10 or s. 880.33, 2003 stats., the name, address and telephone number of the parent or guardian appointed under s. 48.831 of the patient.

d. Except as provided in subd. 9.e., any staff member who wishes to obtain additional information about a patient described in subd. 9.c. shall notify the patient's guardian or, if applicable, parent in writing of the request and of the guardian's or parent's right to object. The staff member shall send the notice by mail to the guardian's or, if applicable, parent's address. If the guardian or parent does not object in writing within 15 days after the notice is mailed, the staff member may obtain the additional information. If the guardian or parent objects in writing within 15 days after the notice is mailed, the staff member may not obtain the additional information.
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e. The restrictions on information that is obtainable by staff members of the protection and advocacy agency or private, nonprofit corporation that are specified in subd. 9.e. and d. do not apply if the custodian of the record fails to promptly provide the name and address of the parent or guardian; if a complaint is received by the agency or nonprofit corporation about a patient, or if the agency or nonprofit corporation determines that there is probable cause to believe that the health or safety of the patient is in serious and immediate jeopardy, the agency or nonprofit corporation has made a good-faith effort to contact the parent or guardian upon receiving the name and address of the parent or guardian, the agency or nonprofit corporation has either been unable to contact the parent or guardian or has offered assistance to the parent or guardian to resolve the situation and the parent or guardian has failed or refused to act on behalf of the patient; if a complaint is received by the agency or nonprofit corporation about a patient or there is otherwise probable cause to believe that the patient has been subject to abuse or neglect by a parent or guardian; or if the patient is a minor whose custody has been transferred to a legal custodian, as defined in s. 48.02(11) or for whom a guardian that is an agency of the state or a county has been appointed.

10. To persons as provided under s. 655.17(7)(b), as created by 1985 Wisconsin Act 29, if the patient files a submission of controversy under s. 655.04(1), 1983 stats., on or after July 20, 1985 and before June 14, 1986, for the purposes of s. 655.17(7)(b), as created by 1985 Wisconsin Act 29.

11. To a county department, as defined under s. 48.02 (2g), a sheriff or police department or a district attorney for purposes of investigation of threatened or suspected child abuse or neglect or suspected unborn child abuse or for purposes of prosecution of alleged child abuse or neglect, if the person conducting the investigation or prosecution identifies the subject of the record by name. The health care provider may release information by initiating contact with a county department, sheriff or police department or district attorney without receiving a request for release of the information. A person to whom a report or record is disclosed under this subdivision may not further disclose it, except to the persons, for the purposes and under the conditions specified in s. 48.981 (7).

12. To a school district employee or agent, with regard to patient health care records maintained by the school district by which he or she is employed or is an agent, if any of the following apply:
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a. The employee or agent has responsibility for preparation or storage of patient health care records.

b. Access to the patient health care records is necessary to comply with a requirement in federal or state law.

13. To persons and entities under s. 940.22.

14. To a representative of the board on aging and long-term care, in accordance with s. 49.498(5)(e).

15. To the department under s. 48.60(5)(c), 50.02(5) or 51.03(2) or to a sheriff, police department or district attorney for purposes of investigation of a death reported under s. 48.60(5)(a), 50.035(5)(b), 50.04(2t)(b) or 51.64(2).

16. To a designated representative of the long-term care ombudsman under s. 16.009(4), for the purpose of protecting and advocating the rights of an individual 60 years of age or older who resides in a long-term care facility, as specified in s. 16.009(4)(b).

17. To the department under s. 50.53(2).

18. Following the death of a patient, to a coroner, deputy coroner, medical examiner or medical examiner's assistant, for the purpose of completing a medical certificate under s. 69.18 (2) or investigating a death under s. 979.01 or 979.10. The health care provider may release information by initiating contact with the office of the coroner or medical examiner without receiving a request for release of the information and shall release information upon receipt of an oral or written request for the information from the coroner, deputy coroner, medical examiner or medical examiner's assistant. The recipient of any information under this subdivision shall keep the information confidential except as necessary to comply with s. 69.18, 979.01 or 979.10.

18m. If the subject of the patient health care records is a child or juvenile who has been placed in a foster home, group home, residential care center for children and youth, or juvenile correctional facility, including a placement under s. 48.205, 48.21, 938.205, or 938.21, or for whom placement in a foster home, group home, residential care center for children and youth, or juvenile correctional facility is recommended under s. 48.33(4), 48.425(1)(g), 48.837(4)(c), or 938.33(3) or (4), to an agency directed by a court to prepare a court report under s. 48.33(1), 48.424(4)(b), 48.425(3), 48.831(2), 48.837(4)(c),
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or 938.33(1), to an agency responsible for preparing a court report under s. 48.365(2g), 48.425(1), 48.831(2), 48.837(4)(c), or 938.365(2g), to an agency responsible for preparing a permanency plan under s. 48.355(2e), 48.38, 48.43(1)(c) or (5)(c), 48.63(4) or (5)(c), 48.831(4)(e), 938.355(2e), or 938.38 regarding the child or juvenile, or to an agency that placed the child or juvenile or arranged for the placement of the child or juvenile in any of those placements and, by any of those agencies, to any other of those agencies and, by the agency that placed the child or juvenile or arranged for the placement of the child or juvenile in any of those placements, to the foster parent of the child or juvenile or the operator of the group home, residential care center for children and youth, or juvenile correctional facility in which the child or juvenile is placed, as provided in s. 48.371 or 938.371.

19. To a procurement organization, as defined in s. 157.06(2)(p), for the purpose of conducting an examination to ensure the medical suitability of a body part that is or could be the subject of an anatomical gift under s. 157.06.

20. If the patient’s health care records do not contain information and the circumstances of the release do not provide information that would permit the identification of the patient.

21. To a prisoner's health care provider, the medical staff of a prison or jail in which a prisoner is confined, the receiving institution intake staff at a prison or jail to which a prisoner is being transferred or a person designated by a jailer to maintain prisoner medical records, if the disclosure is made with respect to a prisoner's patient health care records under s. 302.388 or to the department of corrections if the disclosure is made with respect to a prisoner's patient health care records under s. 302.388(4).

22. By a person specified in subd. 21. to a correctional officer of the department of corrections who has custody of or is responsible for the supervision of a prisoner, to a person designated by a jailer to have custodial authority over a prisoner, or to a law enforcement officer or other person who is responsible for transferring a prisoner to or from a prison or jail, if the patient health care record indicates that the prisoner has a communicable disease and disclosure of that information is necessary for the health and safety of the prisoner or of other prisoners, of the person whom the information is disclosed, or of any employee of the prison or jail.

Notwithstanding sub. (1), patient health care records shall be released, upon request, to appropriate persons in accordance with s. 980.031(4) and to authorized representatives of
APA Standard 4.04(a) suggests that psychologists focus the documentation in a manner that is very protective of their client’s privacy rights.  

**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.

**Maintenance and Security of Records**

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality, psychologists 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 Wisconsin law delineate the record keeping responsibilities:

**6. Record Keeping and Fees**

**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.)

HIPPA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient. Wisconsin law permits certain disclosures under the following circumstances:

…(4) Release of a portion of a record to certain persons.
   (a) In this subsection:
      1. “Immediate family” has the meaning given in s. 350.01(8m).
      2. “Incapacitated” has the meaning given in s. 50.94(1)(b).
   (b) Notwithstanding sub. (1), a health care provider may release a portion, but not a copy, of a patient health care record, to the following, under the following circumstances:
      1. Any person, if the patient or a person authorized by the patient is not incapacitated, is physically available, and agrees to the release of that portion.
      2. Any of the following, as applicable, if the patient and person authorized by the patient are incapacitated or are not physically available, or if an emergency makes it impracticable to obtain an agreement from the patient or from the person authorized by the patient, and if the health care provider determines, in the exercise of his or her professional judgment, that release of a portion of the patient health care record is in the best interest of the patient:
         a. A member of the patient's immediate family, another relative of the patient, a close personal friend of the patient, or an individual identified by the patient, that portion that is directly relevant to the involvement by the member, relative, friend, or individual in the patient's care.
         b. Any person, that portion that is necessary to identify, locate, or notify a member of the patient's immediate family or another person that

35 WIS. STAT. ANN. § 46.82.
is responsible for the care of the patient concerning the patient's location, general condition, or death.

(5) Redisclosure. (a) In this subsection, “covered entity” has the meaning given in 45 CFR 160.103.

(b) Notwithstanding sub. (1) and except as provided in s. 610.70(5), a covered entity may redisclose a patient health care record it receives under this section without consent by the patient or person authorized by the patient if the redisclosure of the patient health care record is a release permitted under this section.

(c) Notwithstanding sub. (1), an entity that is not a covered entity may redisclose a patient health care record it receives under this section only under one of the following circumstances:
   1. The patient or a person authorized by the patient provides informed consent for the redisclosure.
   2. A court of record orders the redisclosure.
   3. The redisclosure is limited to the purpose for which the patient health care record was initially received.

Access to patient health care records

(1c) Except as provided in s. 51.30 or 146.82(2), any patient or person authorized by the patient may, upon submitting a statement of informed consent, inspect the health care records of a health care provider pertaining to that patient at any time during regular business hours, upon reasonable notice.

(1f)(am) If a patient or person authorized by the patient requests copies of the patient's health care records under this section for use in appealing a denial of social security disability insurance, under 42 USC 401 to 433, or supplemental security income, under 42 USC 1381 to 1385, the health care provider may charge the patient or person authorized by the patient no more than the amount that the federal social security administration reimburses the department for copies of patient health care records.

(bm) If the department requests copies of a patient's health care records for use in determining eligibility for social security disability insurance, under 42 USC 401 to 433, or supplemental security income, under 42 USC 1381 to 1385, the health care provider may charge no more than the amount that the federal social security administration reimburses the department for copies of patient health care records.

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.

(cm) Except as provided in sub. (1g), a health care provider may not charge a patient or a person authorized by the patient more than 25 percent of the applicable fee under sub. (3f) for providing one set of copies of a patient's health care records under this section if the patient is eligible for medical assistance, as defined in s. 49.43(8). A health care provider may require that a patient or person authorized by the patient provide proof that the patient is eligible for medical assistance before providing copies under this paragraph at a reduced charge. A health care provider may charge 100 percent of the applicable fee under sub. (3f) for providing a 2nd or additional set of copies of patient health care records for a patient who is eligible for medical assistance.

(1g) The requirement under sub. (1f)(cm) to provide one set of copies of records at a reduced charge if the patient is eligible for medical assistance does not apply if the health care provider is the department or the department of corrections.

(1m)(a) A patient's health care records shall be provided to the patient's health care provider upon request and, except as provided in s. 146.82 (2), with a statement of informed consent.

(b) The health care provider under par. (a) may be charged reasonable costs for the provision of the patient's health care records.

(2) The health care provider shall provide each patient with a statement paraphrasing the provisions of this section either upon admission to an inpatient health care facility, as defined in s. 50.135(1), or upon the first provision of services by the health care provider.

(3) The health care provider shall note the time and date of each request by a patient or person authorized by the patient to inspect the patient's health care records, the name of the inspecting person, the time and date of inspection and identify the records released for inspection.

(3f)(a) Except as provided in sub. (1f) or s. 51.30 or 146.82(2), if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records.

(b) Except as provided in sub. (1f), a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a):
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1. For paper copies: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above.
2. For microfiche or microfilm copies, $1.50 per page.
   …4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge.
5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested.
6. Actual shipping costs and any applicable taxes.

(c)1. In this paragraph, “consumer price index” means the average of the consumer price index for all urban consumers, U.S. city average, as determined by the bureau of labor statistics of the U.S. department of labor.
2. On each July 1, beginning on July 1, 2012, the department shall adjust the dollar amounts specified under par. (b) by the percentage difference between the consumer price index for the 12-month period ending on December 31 of the preceding year and the consumer price index for the 12-month period ending on December 31 of the year before the preceding year. The department shall notify the legislative reference bureau of the adjusted amounts and the legislative reference bureau shall publish the adjusted amounts in the Wisconsin Administrative Register.

(4) No person may do any of the following:

   (a) Intentionally falsify a patient health care record.
   (b) Conceal or withhold a patient health care record with intent to prevent or obstruct an investigation or prosecution or with intent to prevent its release to the patient, to his or her guardian, to his or her health care provider with a statement of informed consent, or under the conditions specified in s. 146.82(2), or to a person with a statement of informed consent.
   (c) Intentionally destroy or damage records in order to prevent or obstruct an investigation or prosecution.

HIPPA 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

37 45 CFR 164.524.
38 45 CFR 164.526 (a).
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.39

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional…40
(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.41

HIPPA 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.42 Concrete security standards are established for all electronic healthcare information (45 CFR 160).

39 45 CFR 164.528.
40 APA CODE OF ETHICS, supra note 10.
41 Id.
42 45 CFR 164.508.
6.03 Withholding Records for Nonpayment\textsuperscript{43}

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 conditions (such as enrollment in the health plan that employs the psychologist).\textsuperscript{44}

Retention of Records

Under the regulations promulgated by the Psychology Examining Board and set forth in the Wisconsin Administrative Code “failure to maintain adequate records relating to services provided to a client in the course of a professional relationship” constitutes unprofessional conduct.\textsuperscript{45} The regulation mandates the following with respect to the retention of psychological records:

Unless records are subject to a different records retention policy by an entity with an obligation to maintain treatment records, a licensee shall retain treatment records for at least 7 years.

Chapter 146 (Miscellaneous Health Care Provisions) of the Wisconsin statutes subject “health care providers,” including psychologists to the following, requirements related to maintenance and security of records, subject to the definitions set forth above:

Preservation or destruction of patient health care records\textsuperscript{46}

(1) …any health care provider who ceases practice or business as a health care provider or the personal representative of a deceased health care provider who was an independent practitioner shall do one of the following for all patient health care records in the possession of the health care provider when the health care provider ceased business or practice or died:

(a) Provide for the maintenance of the patient health care records by a person who states, in writing, that the records will be maintained in compliance with ss. 146.81 to 146.835.

(b) Provide for the deletion or destruction of the patient health care records.

(c) Provide for the maintenance of some of the patient health care

\textsuperscript{43} APA CODE OF ETHICS, supra note 10.
\textsuperscript{44} 45 CFR 164.508 (b)(4).
\textsuperscript{45} WIS. ADMIN. CODE PSY § 5.01(33).
\textsuperscript{46} WIS. STAT. ANN. § 146.819.
records, as specified in par. (a), and for the deletion or destruction of some of the records, as specified in par. (b).

(2) If the health care provider or personal representative provides for the maintenance of any of the patient health care records under sub. (1), the health care provider or personal representative shall also do at least one of the following:

   (a) Provide written notice, by 1st class mail, to each patient or person authorized by the patient whose records will be maintained, at the last-known address of the patient or person, describing where and by whom the records shall be maintained.

   (b) Publish, under ch. 985, a class 3 notice in a newspaper that is published in the county in which the health care provider's or decedent's health care practice was located, specifying where and by whom the patient health care records shall be maintained.

(3) If the health care provider or personal representative provides for the deletion or destruction of any of the patient health care records under sub. (1), the health care provider or personal representative shall also do at least one of the following:

   (a) Provide notice to each patient or person authorized by the patient whose records will be deleted or destroyed, that the records pertaining to the patient will be deleted or destroyed. The notice shall be provided at least 35 days prior to deleting or destroying the records, shall be in writing and shall be sent, by 1st class mail, to the last-known address of the patient to whom the records pertain or the last-known address of the person authorized by the patient. The notice shall inform the patient or person authorized by the patient of the date on which the records will be deleted or destroyed, unless the patient or person retrieves them before that date, and the location where, and the dates and times when, the records may be retrieved by the patient or person.

   (b) Publish, under ch. 985, a class 3 notice in a newspaper that is published in the county in which the health care provider's or decedent's health care practice was located, specifying the date on which the records will be deleted or destroyed, unless the patient or person authorized by the patient retrieves them before that date, and the location where, and the dates and times when, the records may be retrieved by the patient or person…

Violations of the specific duty
Chapter 455 (Psychology Examining Board) of the Wisconsin Statutes set forth the following standards that relate record keeping by psychologists:

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Rules and code of ethics\textsuperscript{47}

The examining board shall adopt such rules as are necessary under this chapter and shall, by rule, establish a reasonable code of ethics governing the professional conduct of psychologists, using as its model the “Ethical Standards of Psychologists”, established by the American Psychological Association… Every person who holds a license to practice psychology in this state shall be governed and controlled by such code of ethics. A written statement of the code shall be made available to all applicants for licensing, as well as all licensed psychologists, when amendments are made to those standards...

Denial, limitation, suspension, revocation and reprimand\textsuperscript{48}

(1) Subject to the rules promulgated under s. 440.03(1), the examining board may deny an application for a license, or may by order suspend for a period not exceeding one year, limit, revoke or impose probationary conditions upon a license or reprimand a licensee if the applicant or licensee:

…(f) Engages in the willful, unauthorized communication of information received in professional confidence.

(g) Violates this chapter or any rule of professional conduct promulgated under this chapter.\textsuperscript{49}

(h) Is grossly negligent in the practice of his or her profession…

Actions subsequent to disciplinary proceedings\textsuperscript{50}

(1) In disciplinary proceedings that result in stipulation, settlement, reprimand, suspension, revocation, or limitation of a license issued by this board, the standard departmental policies will be followed.

(2) The following steps will be taken by the licensee of the board to protect the welfare of any clients affected by the board's action. These steps may include either or both of the following depending on the needs of the client and the nature of the disciplinary proceedings:

\textsuperscript{47} \textsc{Wis. Stat. Ann.} § 455.08.
\textsuperscript{48} \textsc{Wis. Stat. Ann.} 455.09.
\textsuperscript{49} This would include all of the record keeping duties discussed throughout the digest.
\textsuperscript{50} \textsc{Wis. Admin. Code Psy} § 5.02.
(a) Notification of clients regarding the termination of services by the subject of the board's action.

(b) Facilitation of the transfer of clients to other professionals who will be responsible for the clients' continuing care.

**Applicability**

Sections 146.815, 146.82, 146.83(4) and 146.835 apply to all patient health care records, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics.

**Violations related to patient health care records**

(1) Actions for violations; damages; injunction. (a) A custodian of records incurs no liability under par. (bm) for the release of records in accordance with s. 146.82 or 146.83 while acting in good faith.

(b) Any person, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 in a manner that is knowing and willful shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $25,000 and costs and reasonable actual attorney fees.

(bm) Any person, including the state or any political subdivision of the state, who negligently violates s. 146.82 or 146.83 shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $1,000 and costs and reasonable actual attorney fees.

(c) An individual may bring an action to enjoin any violation of s. 146.82 or 146.83 or to compel compliance with s. 146.82 or 146.83 and may, in the same action, seek damages as provided in this subsection.

(2) Penalties. (a) Whoever does any of the following may be fined not more than $25,000 or imprisoned for not more than 9 months or both:

1. Requests or obtains confidential information under s. 146.82 or 146.83(1c) or (3f) under false pretenses.
2. Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.
3. Violates s. 146.83(4).

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51 **Wis. Stat. Ann. § 146.836.**
52 **Wis. Stat. Ann. § 146.84.**

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(b) Whoever negligently discloses confidential information in violation of s. 146.82 is subject to a forfeiture of not more than $1,000 for each violation.

(c) Whoever intentionally discloses confidential information in violation of s. 146.82, knowing that the information is confidential, and discloses the information for pecuniary gain may be fined not more than $100,000 or imprisoned not more than 3 years and 6 months, or both.

(3) Discipline of employees. Any person employed by the state or any political subdivision of the state who violates s. 146.82 or 146.83, except a health care provider that negligently violates s. 153.50(6)(c), may be discharged or suspended without pay…