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

Introduction

The American Psychological Association Practice Directorate has provided an excellent online presentation about electronic healthcare records (EHRs) and the basic terminology related to EHRs; the presentation dispels common myths about EHR systems and provides detail about their meaningful use in integrated health care settings.1

The Division 31 and 42 EHR working group’s2 primary goal was to create a series of State specific templates that would work well for psychologists as they transition into the use of EHRs, particularly in integrated health care settings where shared information is clinically essential and specific laws or regulations may dictate at least some of what is included in those records. To achieve this goal, we conducted a review of the laws related to record keeping, and the relevant and recent literature (particularly the last decade) regarding EHRs, including variations across states. Further, we consulted with key psychologists that have been using EHRs on a day to day basis, who have developed experience establishing polices and processes within their own institutions and practices. They have effectively used this developing technology to improve clinical care while protecting patient rights. They have found that the EHR enables collaborating professionals within the integrated health care settings to understand the behavioral risk factors that exist in each case and to be kept informed about the health behavior changes that occur with psychological service interventions (HRSA, 2012).3

In order to digest the laws accurately, we examined the annotated codes and regulations available on Westlaw and Lexis for the 50 states and the District of Columbia with reference to several relevant state-by-state surveys retrieved from Lexis

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2 Christina Luini, JD, M.L.I.S.; Dinelia Rosa, PhD; Mary Karapetian Alvord, PhD; Vanessa K. Jensen, PsyD; Jeffrey N. Younggren, PhD; G. Andrew H. Benjamin, JD, PhD, ABPP. The working group, came together to discharge the obligations of the CODAPAR grant that we wrote and received: http://www.apadivisions.org/division-31/news-events/grant-funding.aspx.
and Westlaw. Our research answered the following questions for each jurisdiction: (a) Do record keeping duties created by statutes or administrative rules exist? (b) Have court rulings created a common-law duty or interpreted the statutes or administrative rules? (c) What are the contents of the record that are mandated by law? (d) Are there laws related to the maintenance and security of records? (e) What are the laws related to retention of records? (f) What are the consequences of violating specific duties?

Readers should view the narrative summary of their jurisdiction’s law as a starting point for interpreting how to meet the law within their own jurisdiction as they construct their electronic records. As laws can change, please check the law with your state associations to see if more current interpretations for meeting the record keeping duties. Many state professional associations have ethics committees that can be consulted as part of their benefits. In addition, your association can refer psychologists for individual consultation to lawyers specializing in legal practices focused on mental health practice. The professional liability carriers also provide free legal and professional consultation.

Arkansas 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

Arkansas law suggests the need 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.

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.
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**


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8 Id. at p. 45.


10 ARK. CODE R § 16.1 (“The Arkansas Psychology Board adopts the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association as part of these Rules and Regulations. The principles shall constitute one standard by which appropriate professional practices are determined.”); *see also* ARK. CODE ANN. § 17-97-203(5) (“The Arkansas Psychology Board shall: . . . (5) Adopt the code of ethics of the American Psychological Association to govern appropriate practices or behavior as referred to in this chapter . . . .”). Copies of the APA Code of Ethics are 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) [hereinafter “APA CODE OF ETHICS”].
Common Law
There is no case law interpreting the specific recordkeeping obligations for Arkansas psychologists.

Contents of the record are mandated by law
Arkansas has adopted the APA Code of Ethics into Code of Arkansas Rules by reference. In addition, the Health Insurance Portability and Accountability Act (HIPPA) would apply to Arkansas psychological records.

3.10 Informed Consent
(a) When psychologists ... provide assessment, therapy, counseling or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons... (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

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11 074-00-1 ARK. CODE R § 16.1.
13 APA CODE OF ETHICS, supra note 10, § 3.10.
A HIPPA notice of privacy practices that delineates the psychologist’s scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient during the informed consent process specified by Standards 3.10, 9.03, and 10.01.

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

Standard 4.04(a) suggests that psychologists focus the documentation in a manner that is very protective of their client’s privacy rights. HIPPA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.

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

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.)

15 APA CODE OF ETHICS, supra note 10, § 4.04.
17 APA CODE OF ETHICS, supra note 10, § 6.06.
18 APA CODE OF ETHICS, supra note 10, § 9.01.

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.
(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

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 Arkansas would use an intake and evaluation note, and progress notes templates.

Maintenance and Security of Records
Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,

19 APA CODE OF ETHICS, supra note 10, § 9.02.
20 APA CODE OF ETHICS, supra note 10, § 9.10.
21 APA CODE OF ETHICS, supra note 10, § 4.01.

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.
“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.) This standard supports the record keeping standards:

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 enables the patient to inspect and obtain Protected Health Information (PHI) records, to include your 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.

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

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22 APA CODE OF ETHICS, supra note 10, § 6.
23 45 CFR 164.524.
24 45 CFR 164.526 (a).
25 45 CFR 164.528.
26 APA CODE OF ETHICS, supra note 10, § 6.02.
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.

(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.27

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

6.03 Withholding Records for Nonpayment29

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).30

Licensed psychologists in Arkansas may be subject to the following provision governing access to medical records that applies to “medical health care providers” generally:

27 Id.
28 45 CFR 164.508.
29 ALA. ADMIN. CODE § 750-X-6, Appendix II, § 6.01.
30 45 CFR 164.508 (b)(4).
Access to medical records.32

(a)(1) In contemplation of, preparation for, or use in any legal proceeding, any person who is or has been a patient of a doctor, hospital, ambulance provider, medical health care provider, or other medical institution shall be entitled to obtain access, personally or by and through his or her attorney, to the information in his or her medical records, upon request and with written patient authorization, and shall be furnished copies of all medical records pertaining to his or her case upon the tender of the expense of such copy or copies.

(2) Cost of each photocopy, excluding X rays, shall not exceed fifty cents (.50cent(s)) per page for the first twenty-five (25) pages and twenty-five cents (.25cent(s)) for each additional page. A labor charge not exceeding fifteen dollars ($15.00) may be added for each request for medical records under subdivision (a)(1) of this section, and the actual cost of any required postage may also be charged.

(3) Provided, however, in the alternative to the labor charge described in subdivision (a)(2) of this section, a reasonable retrieval fee for stored records of a hospital, a physician's office, or an ambulance provider may be added to the photocopy charges, only if the requested records are stored at a location other than the location of the hospital, physician's office, or ambulance provider.

(4) Provided, further, this section shall not prohibit reasonable fees for narrative medical reports or medical review when performed by the physician or medical institution subject to the request, but only if a narrative medical report or medical review is requested by the person or entity requesting the records.

(b)(1) If a doctor believes a patient should be denied access to his or her medical records for any reason, the doctor must provide the patient or the patient's guardian or attorney a written determination that disclosure of such information would be detrimental to the individual's health or well-being.

(2) (A) At such time, the patient or the patient's guardian or attorney may select another doctor in the same type practice as the doctor subject to the request to review such information and determine if disclosure of such information would be detrimental to the patient's health or well-being.

(B) If the second doctor determines, based upon professional judgment, that disclosure of such information would not be detrimental to the health or well-being of the individual, the medical records shall be released to the patient or the patient's guardian or attorney.

31 A search for the term “medical health care provider” within Title 16 of the Arkansas Code does not return a definition. Arguably, a licensed psychologist providing mental health care treatment may be subject to these provisions absent any other law.

32 ARK. CODE ANN. § 16-46-106.
(3) If the determination is that disclosure of such information would be detrimental, then it either will not be released or the objectionable material will be obscured before release.

(4) The cost of this review of the patient's record will be borne by the patient or the patient's guardian or attorney.

(c) Nothing in this section shall preclude the existing subpoena process; however, if a patient is compelled to use the subpoena process in order to obtain access to, or copies of, their own medical records after reasonable requests have been made and a reasonable time has expired, then the court issuing the subpoena and having jurisdiction over the proceedings shall grant the patient a reasonable attorney's fee plus costs of court against the doctor, hospital, or medical institution.

(d) This section does not apply to the Department of Correction.

Retention of Records

Although no Arkansas requirement exists, HIPPA 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

Arkansas adopted the APA Code of Ethics into its Administrative Code and the standards discussed, including HIPPA infractions, can all lead to disciplinary actions being prosecuted by the Arkansas Psychology Board: The Board may refuse to grant a license or may suspend or revoke any license for a period to be determined by the board, may impose a fine of up to five thousand dollars ($5,000), may issue a letter of reprimand, and may require additional hours of education of a licensee on the ground that a psychologist has violated any rule or regulation of the board or the rules of ethics as adopted by the board.

The Arkansas Code provides immunity to persons serving as a custodian of records who furnish medical records or information pursuant to a subpoena or other legal obligation or authority:

No liability for furnishing medical records or accessing information

33 45 CFR 164.530 (j)(2).
34 ARK. CODE ANN. § 17-97-310(a)(8); see also 074-00-1 ARK. CODE R § 11.6.H (“Pursuant to A.C.A. § 17-97-101, et seq., the Board may suspend, refuse, or revoke a license for a period to be determined by the Board, may impose a fine of up to five thousand dollars ($5,000); may issue a letter of reprimand; and/or may require additional hours of education of a licensee on the following grounds: . . . 11.6. H. Violations of the current ethical code.”).
pursuant to subpoena or other legal obligation or authority.\textsuperscript{35}

Notwithstanding any other law to the contrary, no person or medical facility serving as a custodian of health or medical records shall be subject to any civil or criminal liability for:

(1) Providing access to or producing copies of the records pursuant to a subpoena issued by any board, agency, commission, prosecuting attorney, or grand jury;

(2) Providing access to or producing a copy of the health or medical records requested by a clerk of a court, the Department of Correction, the Department of Community Correction, the Arkansas State Hospital, the Department Human Services, or a local law enforcement agency under the Sex Offender Registration Act of 1997, \textsection 12-12-901 et seq.; or

(3) Requesting or accessing information under \textsection 17-80-116.

\textsuperscript{35} \textit{ARK. CODE ANN.} \textsection 20-9-310.