The Duty to Record: Ethical, Legal, and Professional Considerations for Hawai‘i 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’s\(^2\) 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 policies 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

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Columbia with reference to several relevant state-by-state surveys retrieved from Lexis 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.

Hawai‘i 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**

Hawai‘i 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

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4 50 State Surveys, Legislation & Regulations, Psychologists & Mental Health Facilities (Lexis March 2012); Lexis Nexis 50 State Comparative Legislation / Regulations, Medical Records (Lexis June 2011); 50 State Statutory Surveys: Healthcare Records and Recordkeeping (Thomson Reuters/ West October 2011).

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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 Hawai‘i Board of Psychology likely applies the standards of the APA Ethical Principles of Psychology and Code of Conduct to psychologists:

The psychologist shall not misrepresent the professional… purposes …

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6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
8 *Id.* at p. 45.
11 HAW. CODE R. § 16-98-34 (b).
of the …organizations with which the psychologist is associated:

…(3) A psychologist shall not use affiliation with the American Psychological Association …for purposes that are not consonant with the stated purposes of the Association…

**Common Law**


- Child care workers on military base met standard of care for mandated reporters of child abuse, under Hawai‘i statute, when they notified military police of marks they saw on child under their care; Hawai‘i statute required child care workers to “immediately report the matter orally to the department or to the police department,” and military police were the report point of contact under military's memorandum of agreement with Hawai‘i Department of Human Services. Claim under the Federal Tort Claims Act (FTCA) against military staff who negligently failed to report suspicion of child abuse stemmed from state law, and Hawai‘i statute only allowed for private right of action against deliberate violations of child abuse reporting statute. 12


- There is no relevant information properly in the record of a child's child protective services case that cannot be considered by family court in involuntary termination of parental rights case involving same child. HRS § 571-61(b)(1)(E). 13

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

The APA Code of Conduct also would be applied with the Health Insurance Portability and Accountability Act (HIPAA) 14 to psychological records:

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3.10 Informed Consent\textsuperscript{15}

(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.)

A HIPAA notice of privacy practices\textsuperscript{16} 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. In addition, the Hawai‘i law would require disclosure about the following exceptions to protecting patient confidentiality:\textsuperscript{17}

\begin{itemize}
  \item Mandatory duty to report child abuse or neglect;\textsuperscript{18}
\end{itemize}

\begin{footnotesize}
\textsuperscript{15} APA CODE OF CONDUCT, supra note 10.
\textsuperscript{17} HAW. CODE R. § 16-98-34 (d)(4).
\textsuperscript{18} HAW. REV. STAT. § 350-1.1.
\end{footnotesize}
• Mandatory duty to report vulnerable adult abuse or neglect;\textsuperscript{19}
• Disclosure would occur for communication “reflecting the client’s intent to commit a criminal or tortuous act that the [clinician] reasonably believes is likely to result in death or substantial bodily harm.”\textsuperscript{20}

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\textsuperscript{21}
(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

Hawai’i law does note that the following disclosures may be made “by the psychologist in the course of … practice …Such information shall not be communicated to others unless certain important conditions are met:”\textsuperscript{22}

(1) Information received in confidence may be revealed only after careful deliberation and where there is clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities;

(2) Information obtained in clinical or consulting relationships, or evaluative data concerning children, students, employees, and others may be discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports should present only data germane to the purposes of the evaluation; every effort shall be made to avoid undue invasion of privacy;

(3) Clinical and other materials may be used in classroom teaching and writing only when the identity of the persons involved is adequately disguised…

HIPAA also permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.\textsuperscript{23}

\textsuperscript{19} HAW. REV. STAT. § 346-224.
\textsuperscript{20} HAW. REV. STAT. § 626-1, r. 504.1(d)(6).
\textsuperscript{21} APA CODE OF CONDUCT, supra note 10.
\textsuperscript{22} HAW. CODE R. § 16-98-34 (d).

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

6.06 Accuracy in Reports to Payors and Funding Sources\textsuperscript{24}
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\textsuperscript{25}
(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 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.

\textsuperscript{24} APA CODE OF ETHICS, supra note 10.
\textsuperscript{25} Id.
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 Hawai‘i would use an intake and evaluation note, progress notes, termination note templates.

Maintenance and Security of Records
Hawai‘i law mandates that the “psychologist shall make provisions for the maintenance of confidentiality and the preservation and ultimate disposition of confidential 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.) This standard supports the record

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26 Id.
27 Id.
28 Record keeping laws are delineated further for State funded or reimbursed programs (Confidentiality of Records- HAW. REV. STAT. § 334-5; Broad Service Hospitals (HAW. CODE R. § 11-93-21; Patient’s rights- HAW. CODE R. § 11-93-26; Psychiatric services- HAW. CODE R. § 11-93-29); Child and Adolescent Mental Health Division Services (Right to a Clinical Record, Access to the Record- HAW. REV. STAT. § 11-175-30; Right to confidentiality of the clinical record- HAW. REV. STAT. § 11-175-31); Department of Human Services (Record requirements for healthcare providers who treat Medicaid patients- HAW. REV. STAT. § 346-40).
29 HAW. CODE R. § 16-98-34 (d)(6).
30 APA CODE OF CONDUCT, supra note 10.
keeping standards:

6. Record Keeping and Fees\textsuperscript{31}

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.)

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, including Psychotherapy Notes created by the psychologist, as long as those records are maintained.\textsuperscript{32} In addition, patients have a right to amend any part of the record;\textsuperscript{33} 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.\textsuperscript{34}

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional…\textsuperscript{35}

(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

\textsuperscript{31} Id.
\textsuperscript{32} 45 CFR 164.524.
\textsuperscript{33} 45 CFR 164.526 (a).
\textsuperscript{34} 45 CFR 164.528.
\textsuperscript{35} APA CODE OF ETHICS, supra note 10.

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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.)

HIPAA establishes privacy protections for all transmissions of PHI records, and requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties. Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment
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).

Retention of Records
Although no law specific to psychologists exists for retention of records, and the definition of "health care provider" does not include psychologists, those health care facilities “…defined in section 323D-2, and the employees of any of them.”

The health care provider shall retain medical records in the original or reproduced form for a minimum of seven years after the last data entry except in the case of minors whose records shall be retained during the period of minority plus seven years after the minor reaches the age of majority.

36 45 CFR 164.508.
37 APA CODE OF ETHICS, supra note 10.
38 45 CFR 164.508 (b)(4).
39 HAW. REV. STAT. § 671-1.
40 HAW. REV. STAT. § 622-58.
Violations of the specific duty
Under the statute governing licensed professionals generally, “unethical practice of psychology” for which Hawai‘i psychologists may be sanctioned includes:41

Denial, suspension, revocation of license, or probation of a license holder.
(a) In addition to any other actions authorized by law, the board shall refuse to grant a license to any applicant and may revoke or suspend any license, or may place a license, or may put a license holder on conditional probation, for any cause authorized by law, including but not limited to the following:

(1) Professional misconduct, gross carelessness, manifest incapacity, or incompetency in the practice of psychology;

(2) Violation of this chapter by the applicant within one year of the application, or violation of this chapter by a license holder any time the license is valid;

(3) Any unethical practice of psychology as defined by the board in accordance with its own rules;

(4) Fraud or deception in applying for or procuring a license to practice psychology as defined in section 465-1;

(5) Conviction of a crime substantially related to the qualifications, functions, or duties of psychologists;

(6) Willful unauthorized communication of information received in professional confidence;

(7) The suspension, revocation, or imposition of probationary conditions by another state of a license or certificate to practice psychology issued by that state if the act for which the disciplinary action was taken constitutes a violation of this chapter;

…(11) Conviction of fraud in filing medicaid claims or conviction of fraud in filing claims to any third party payor, for which a copy of the record of conviction, certified by the clerk of the court entering the conviction, shall be conclusive evidence;

...(13) Repeated acts of excessive treatment or use of diagnostic procedures as determined by the standard of the local community of licensees;

...(15) Conviction of any crime or offense that reflects the inability of the practitioner to practice psychology with due regard for the health and safety of clients or patients;

(16) Use of untruthful or deceptive or improbable statements concerning the licensee's qualifications or the effects or results of proposed treatment;

(17) Functioning outside of the licensee's professional competence established by education, training, and experience;

(18) Refusal to comply with any written order of the board;

(19) Making any fraudulent or untrue statement to the board; or

(20) Violation of a board rule.

(b) The board at its discretion may order any licensee who is placed on probation or whose license is suspended to obtain additional training and to take an examination as prescribed by the board.