

The Duty to Record: Ethical, Legal, and Professional Considerations for Iowa 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 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 Columbia with reference to several relevant state-by-state surveys retrieved from Lexis

¹ Electronic Health Records: A Primer (retrieved Nov. 29, 2012 at <http://www.apapracticecentral.org/update/2012/11-29/electronic-records.aspx>.

² Christina Luini, J.D., M.L.I.S.; Dinelia Rosa, PhD.; Mary Karapetian Alvord, PhD.; Vanessa K. Jensen, PsyD.; Jeffrey N. Younggren, PhD.; G. Andrew H. Benjamin, JD, PhD, ABPP. The working group, came together to discharge the obligations of the CODAPAR grant that we wrote and received: <http://www.apadivisions.org/division-31/news-events/grant-funding.aspx>.

³ Preparing the Interprofessional Workforce to Address Health Behavior Change. (retrieved Nov. 11, 2012 at http://www.hrsa.gov/advisorycommittees/bhpradvisory/acicbl/Reports/acicbl_tenth_report_final.pdf).

and Westlaw.⁴ Our research answered the following questions for each jurisdiction: (a) Do record keeping duties created by statutes or administrative rules exist? (b) Have court rulings created a common-law duty or interpreted the statutes or administrative rules? (c) What are the contents of the record that are mandated by law? (d) Are there laws related to the maintenance and security of records? (e) What are the laws related to retention of records? (f) What are the consequences of violating specific duties?

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

Iowa 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

Iowa 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.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.⁶ Please access each of the documents on this website, separately.

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).

⁵ Benjamin, G. A. H., Kent, L., & Sirikantraporn, S. (2009). Duty to protect statutes. In J. L. Werth, E.R. Welfel, & G. A. H. Benjamin (Eds.), *The duty to protect: Ethical, legal, and professional responsibilities of mental health professionals* (pp. 9 – 28). Washington, DC: APA Press. doi:10.1037/11866-002.

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.”⁷ Whenever “Eurocentric therapeutic and interventions models”⁸ 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.⁹ The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

Statute or Rule

Iowa has adopted and incorporated by reference the standards of the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (“APA Code of Ethics”) in Administrative Rules.¹⁰

Common Law

The Iowa Supreme Court has repeatedly declined to adopt the standards that

⁷ American Psychological Association. (2002). *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists* (pp.17-24; p. 11). Washington, DC: Authors (<http://www.apa.org/pi/oema/resources/policy/multicultural-guideline.pdf> (last accessed August 1, 2012)).

⁸ *Id.* at p. 45.

⁹ See ICD-10 at <http://apps.who.int/classifications/icd10/browse/2010/en> (last accessed August 1, 2012); The APA Policy and Planning Board recognized how psychology could move forward by turning to a diagnostic system that was based on the concept of functional impairments (APA Policy and Planning Board, (2005). APA 2020: A perfect vision for psychology: 2004 five-year report of the policy and planning board. *American Psychologist*, 60, 512-522, 518. (See, <http://www.apa.org/about/governance/bdcmte/five-year-report.pdf> ; and APA has helped fund the creation of the 10th edition in 2008. See, <http://www.apa.org/about/governance/council/08aug-crminutes.aspx> (last accessed August 1, 2012)).

¹⁰ IOWA ADMIN. CODE r. 645-242.2(1) (“Failure to comply with the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association, as published in the December 2002 edition of *American Psychologist*, hereby adopted by reference.”); 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”].

the *Tarasoff* case and its progeny have spawned.¹¹ The Court has preferred to distinguish *Tarasoff*,¹² concluding, for example, that there can be no duty to warn where the victim already knows of the client's threats.¹³ The Court also has found a duty to protect in very limited circumstances, as when the clinician had explicitly promised to warn the third party on the client's release.¹⁴

Other common law cases have interpreting the specific recordkeeping obligations for Iowa psychologists:

- State Board of Psychology, while investigating alleged misconduct between psychologist and patient, had authority to subpoena records of another psychologist who was currently treating patient but was not under investigation.¹⁵
- Testimony of psychologist in respect to his professional relationship with mother was admissible in proceeding to terminate mother's parental relationship with her three minor children where mother, though entitled to claim statutory privilege, waived her rights by signing a waiver form a week before trial that authorized psychologist to "discuss information concerning me with any judges, attorneys, social workers, etc., and to release any and all information contained in records."¹⁶
- Defendant had sufficiently compelling interest in psychotherapists' records pertaining to victim to be entitled to access to records in prosecution for first-degree murder for purpose of assisting trial court's determination of whether defendant's need for records outweighed any interest in psychotherapist-patient privilege; prosecution exposed defendant to most

¹¹ *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71 (Iowa 2002); *Matter of Votteler's Estate*, 327 N.W.2d 759 (Iowa 1982); *Cole v. Taylor*, 301 N.W.2d 766 (Iowa 1981).

¹² *Anthony v. State*, 374 N.W.2d 662, 668 (Iowa 1985) addresses the scope of the duty to warn when the actor in question "has a duty to control the conduct of a third person to prevent that third person from causing physical harm to another" (p. 668). In this context, the *Anthony* court adopted a standard from *Thompson v. County of Alameda*, 27 Cal. 3d 741 (1980), a California case that held "the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim" (*Anthony*, 374 N.W.2d 662, 669 (quoting *Thompson*, 27 Cal. 3d 741, 759)); *Long*, 656 N.W.2d 71; *Votteler*, 327 N.W.2d 759; *Cole*, N.W.2d 766.

¹³ *Votteler*, 327 N.W.2d 759.

¹⁴ *Long*, 656 N.W.2d 71.

¹⁵ [*McMaster v. Iowa Bd. of Psychology Examiners*, 1993, 509 N.W.2d 754](#), certiorari denied [114 S.Ct. 2165, 511 U.S. 1143, 128 L.Ed.2d 888](#).

¹⁶ [*In Interest of Hochmuth*, 1977, 251 N.W.2d 484](#).

severe penalty provided by law, subject of privilege was deceased, at least some information in records was in public domain in wrongful-death action by victim's estate against defendant, and information sought by defendant might have reasonably affected his possibility of success in supporting his self-defense claim. A psychotherapist-patient privilege should not be deemed to be waived by implication except under the clearest of circumstances.¹⁷

- Statute prohibiting disclosure of mental health information implies a private cause of action, statute creates the duty or standard of care a person must follow, and a breach of that duty is negligence and gives rise to a tort action. Substantial evidence did not support finding that employee suffered emotional distress caused by employer's unauthorized release of mental health records; it was not within the knowledge and experience of ordinary lay jurors to determine which aspects of employee's emotional distress were related to the unauthorized disclosure of his mental health records and which were related to preexisting factors that led to his suicide attempt, and thus, due to his preexisting condition and the conclusory nature of his testimony, without expert testimony relating his condition to the unauthorized disclosures, the jury was left to speculate as to what part of employee's emotional distress, if any, was actually related to the disclosures.¹⁸

Contents of the record are mandated by law

Iowa has adopted the APA Code of Ethics into Code of Iowa Rules by reference.¹⁹ In addition, the Health Insurance Portability and Accountability Act (HIPAA)²⁰ would apply to Iowa psychological records.

3.10 Informed Consent²¹

(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

¹⁷ [State v. Heemstra, 2006, 721 N.W.2d 549](#), rehearing denied, appeal after new trial [759 N.W.2d 151](#).

¹⁸ [Doe v. Central Iowa Health System, 2009, 766 N.W.2d 787](#), rehearing denied.

¹⁹ APA CODE OF ETHICS, *supra* note 10.

²⁰ HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart C--SECURITY STANDARDS FOR THE PROTECTION OF ELECTRONIC PROTECTED HEALTH INFORMATION](#) ; [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

²¹ APA CODE OF ETHICS, *supra* note 10.

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 practices²² 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 Iowa law would require disclosure about the following exceptions to protecting patient confidentiality:

- Mandatory duty to report child abuse or neglect;²³
- Mandatory duty to report adult dependent abuse;²⁴
- Mandatory duty to warn of threatened or actual violent behavior of physical violence against a reasonably identifiable victim or victims appears to apply only to those psychologists who have a duty to control the conduct of the third person.²⁵

²² 45 CFR 164.502 (a)(1)(ii) & 45 CFR 164.506 (c); HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

²³ IOWA CODE § 232.69.

²⁴ IOWA CODE § 235B.3(2)-(3)(a) and (9).

4.04 Minimizing Intrusions on Privacy²⁶

(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. HIPAA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.²⁷

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

6.06 Accuracy in Reports to Payors and Funding Sources²⁸

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 Assessments²⁹

(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

²⁵ *Anthony*, 374 N.W.2d 662, 668.

²⁶ APA CODE OF ETHICS, *supra* note 10.

²⁷ 45 CFR 164.520; HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

²⁸ APA CODE OF ETHICS, *supra* note 10.

²⁹ *Id.*

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 Assessments³⁰

(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 Results³¹

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

Maintenance and Security of Records³²

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,³³ “[p]sychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that

³⁰ *Id.*

³¹ *Id.*

³² Several record keeping laws relate to hospital or inpatient practices. *See*, IOWA CODE § 229.25. Medical records to be confidential—exceptions (Title VI. Human Services/ Subtitle 3 Mental Health / Chapter 229 Hospitalization of Persons with Mental Illness); IOWA CODE § 228.2. Mental health information disclosure prohibited--exceptions--record of disclosure (Title VI. Human Services [Chs. 216-255A], Subtitle 3. Mental Health [Chs. 220-230A], Chapter 228. Disclosure of Mental Health and Psychological Information.

³³ APA CODE OF ETHICS, *supra* note 10.

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 Fees³⁴

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.³⁵ In addition, patients have a right to amend any part of the record;³⁶ 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.³⁷

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...³⁸

(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

³⁴ *Id.*

³⁵ 45 CFR 164.524.

³⁶ 45 CFR 164.526 (a).

³⁷ 45 CFR 164.528.

³⁸ APA CODE OF ETHICS, *supra* note 10.

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.³⁹

Iowa has several record keeping provisions that apply to psychologists and the release of records:

Voluntary disclosures⁴⁰

An individual eighteen years of age or older or an individual's legal representative may consent to the disclosure of mental health information relating to the individual by a mental health professional, data collector, or employee or agent of a mental health professional, of a data collector, or of or for a mental health facility, by signing a voluntary written authorization. The authorization shall:

- a. Specify the nature of the mental health information to be disclosed, the persons or type of persons authorized to disclose the information, and the purposes for which the information may be used both at the time of the disclosure and in the future.
- b. Advise the individual of the individual's right to inspect the disclosed mental health information at any time.
- c. State that the authorization is subject to revocation and state the conditions of revocation.
- d. Specify the length of time for which the authorization is valid.
- e. Contain the date on which the authorization was signed.

2. A copy of the authorization shall:

³⁹ *Id.*

⁴⁰ IOWA CODE § 228.3.

- a. Be provided to the individual or to the legal representative of the individual authorizing the disclosure.
- b. Be included in the individual's record of mental health information.

Revocation of disclosure authorization⁴¹

An individual or an individual's legal representative may revoke a prior authorization by providing a written revocation to the recipient named in the authorization and to the mental health professional, data collector, or employee or agent of a mental health professional, of a data collector, or of or for a mental health facility previously authorized to disclose the mental health information. The revocation is effective upon receipt of the written revocation by the person previously authorized to disclose the mental health information. After the effective revocation date, mental health information shall not be disclosed pursuant to the revoked authorization. However, mental health information previously disclosed pursuant to the revoked authorization may be used for the purposes stated in the original written authorization.

Administrative disclosures⁴²

1. An individual or an individual's legal representative shall be informed that mental health information relating to the individual may be disclosed to employees or agents of or for the same mental health facility or to other providers of professional services or their employees or agents if and to the extent necessary to facilitate the provision of administrative and professional services to the individual.

2.
 - a. If an individual eighteen years of age or older or an individual's legal representative has received a written notification that a fee is due a mental health professional or a mental health facility and has failed to arrange for payment of the fee within a reasonable time after the notification, the mental health professional or mental health facility may disclose administrative information necessary for the collection of the fee to a person or agency providing collection services.

- b. If a civil action is filed for the collection of the fee, additional mental health information shall not be disclosed in the litigation, except to the extent necessary to respond to a motion of the individual or the individual's legal representative for greater specificity or to dispute a defense or counterclaim.

⁴¹ IOWA CODE § 228.4.

⁴² IOWA CODE § 228.5.

3. A mental health professional or an employee of or agent for a mental health facility may disclose mental health information if necessary for the purpose of conducting scientific and data research, management audits, or program evaluations of the mental health professional or mental health facility, to persons who have demonstrated and provided written assurances of their ability to ensure compliance with the requirements of this chapter. The persons shall not identify, directly or indirectly, an individual in any report of the research, audits, or evaluations, or otherwise disclose individual identities in any manner. A disclosure under this section is not subject to the requirements of section 228.2, subsection 2, with the exception that a person receiving mental health information under this section shall be provided a statement prohibiting redisclosure of information unless otherwise authorized by this chapter.

4. Mental health information relating to an individual may be disclosed to other providers of professional services or their employees or agents if and to the extent necessary to facilitate the provision of administrative and professional services to the individual.

Compulsory disclosures⁴³

1. A mental health professional or an employee of or agent for a mental health facility may disclose mental health information if and to the extent necessary, to meet the requirements of section 229.24, 229.25, 230.20, 230.21, 230.25, 230.26, 230A.13, 232.74, or 232.147, or to meet the compulsory reporting or disclosure requirements of other state or federal law relating to the protection of human health and safety.

2. Mental health information acquired by a mental health professional pursuant to a court-ordered examination may be disclosed pursuant to court rules.

3. Mental health information may be disclosed by a mental health professional if and to the extent necessary, to initiate or complete civil commitment proceedings under chapter 229.

4. a. Mental health information may be disclosed in a civil or administrative proceeding in which an individual eighteen years of age or older or an individual's legal representative or, in the case of a deceased individual, a party claiming or defending through a beneficiary of the individual, offers the

⁴³ IOWA CODE § 228.6.

individual's mental or emotional condition as an element of a claim or a defense.

b. Mental health information may be disclosed in a criminal proceeding pursuant to section 622.10, subsection 4. 5. An individual eighteen years of age or older or an individual's legal representative or any other party in a civil, criminal, or administrative action, in which mental health information has been or will be disclosed, may move the court to denominate, style, or caption the names of all parties as “JOHN OR JANE DOE” or otherwise protect the anonymity of all of the parties.

Disclosures to family members⁴⁴

1. A mental health professional or an employee of or agent for a mental health facility may disclose mental health information to the spouse, parent, adult child, or adult sibling of an individual who has chronic mental illness, if all of the following conditions are met:

- a. The disclosure is necessary to assist in the provision of care or monitoring of the individual's treatment.
- b. The spouse, parent, adult child, or adult sibling is directly involved in providing care to or monitoring the treatment of the individual.
- c. The involvement of the spouse, parent, adult child, or adult sibling is verified by the individual's attending physician, attending mental health professional, or a person other than the spouse, parent, adult child, or adult sibling who is responsible for providing treatment to the individual.

2. A request for mental health information by a person authorized to receive such information under this section shall be in writing, except in an emergency as determined by the mental health professional verifying the involvement of the spouse, parent, adult child, or adult sibling.

3. Unless the individual has been adjudged incompetent, the person verifying the involvement of the spouse, parent, adult child, or adult sibling shall notify the individual of the disclosure of the individual's mental health information under this section.

4. Mental health information disclosed under this section is limited to the following:

⁴⁴ IOWA CODE ANN. § 228.8.

- a. A summary of the individual's diagnosis and prognosis.
- b. A listing of the medication which the individual has received and is receiving and the individual's record of compliance in taking medication prescribed for the previous six months.
- c. A description of the individual's treatment plan.

After the commencement of a legal action, further restrictions apply:⁴⁵

Communications in professional confidence--exceptions--required consent to release ...records after ...application to court

1. A ...mental health professional ...who obtains information by reason of the person's employment ...shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to ...mental health professionals ...in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.
3. a. In a civil action in which the condition of the plaintiff in whose favor the prohibition is made is an element or factor of the claim or defense of the adverse party or of any party claiming through or under the adverse party, the adverse party shall make a written request for records relating to the condition alleged upon the plaintiff's attorney for a legally sufficient patient's waiver under federal and state law. Upon receipt of a written request, the plaintiff shall execute a legally sufficient patient's waiver and release it to the adverse party making the request within sixty days of receipt of the written request. The patient's waiver may require a ...mental health professional to do all of the following:(1) Provide a complete copy of the patient's records including but not limited to any reports or diagnostic imaging relating to the condition alleged.(2) Consult with the attorney for the adverse party prior to providing testimony

⁴⁵ IOWA CODE § 622.10.

regarding the plaintiff's medical history and the condition alleged and opinions regarding health etiology and prognosis for the condition alleged subject to the limitations in paragraphs "c" and "e".

b. If a plaintiff fails to sign a waiver within the prescribed time period, the court may order disclosure or compliance. The failure of a party to comply with the court's order may be grounds for dismissal of the action or any other relief authorized under the rules of civil procedure.

c. Any ...mental health professional who provides records, provides information during consultation, or otherwise responds in good faith to a request pursuant to paragraph "a" shall be immune with respect to all civil or criminal penalties, claims, or actions of any kind with respect to this section.

d. Any ...mental health professional who provides records or consults with the attorney for any party shall be entitled to charge a reasonable fee for production of the records, diagnostic imaging, and consultation. Any party seeking consultation shall be responsible for payment of all charges. The fees for copies of any records shall be as specified in subsection 6.

e. Defendant's counsel shall provide a written notice to plaintiff's attorney in a manner consistent with the Iowa rules of civil procedure providing for notice of deposition at least ten days prior to any meeting with plaintiff's ...mental health professional. Plaintiff's attorney has the right to be present at all such meetings, or participate in telephonic communication with the ...mental health professional and attorney for the defendant. Prior to scheduling any meeting or engaging in any communication with the ...mental health professional, attorney for the defendant shall confer with plaintiff's attorney to determine a mutually convenient date and time for such meeting or telephonic communication. Plaintiff's attorney may seek a protective order structuring all communication by making application to the court at any time.

f. The provisions of this subsection do not apply to actions or claims brought pursuant to chapter 85, 85A, or 85B.

4. a. Except as otherwise provided in this subsection, the confidentiality privilege under this section shall be absolute with regard to a criminal action and this section shall not be construed to authorize or require the disclosure of any privileged records to a defendant in a criminal action unless either of the following occur: (1) The privilege holder voluntarily waives the confidentiality

privilege.(2)(a) The defendant seeking access to privileged records under this section files a motion demonstrating in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case. Such a motion shall be filed not later than forty days after arraignment under seal of the court. Failure of the defendant to timely file such a motion constitutes a waiver of the right to seek access to privileged records under this section, but the court, for good cause shown, may grant relief from such waiver.(b) Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court shall conduct an in camera review of such records to determine whether exculpatory information is contained in such records.(c) If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder.(d) Upon the court's determination, in writing, that the privileged information sought is exculpatory and that there is a compelling need for such information that outweighs the privacy interests of the privilege holder, the court shall issue an order allowing the disclosure of only those portions of the records that contain the exculpatory information. The court's order shall also prohibit any further dissemination of the information to any person, other than the defendant, the defendant's attorney, and the prosecutor, unless otherwise authorized by the court.

b. Privileged information obtained by any means other than as provided in paragraph "a" shall not be admissible in any criminal action.

5. If an adverse party desires the oral deposition, either discovery or evidentiary, of a ...mental health professional to which the prohibition would otherwise apply or the ...mental health professional or desires to call a ...mental health professional to which the prohibition would otherwise apply or the ...mental health professional as a witness at the trial of the action, the adverse party shall file an application with the court for permission to do so. The court upon hearing, which shall not be *ex parte*, shall grant permission unless the court finds that the evidence sought does not relate to the condition alleged. At the request of any party or at the request of the deponent, the court shall fix a reasonable fee to be paid to a ...mental health professional by the party taking the deposition or calling the witness.

6. At any time, upon a written request from a patient, a patient's legal

representative or attorney, or an adverse party pursuant to subsection 3, any provider shall provide copies of the requested records or images to the requester within thirty days of receipt of the written request. The written request shall be accompanied by a legally sufficient patient's waiver unless the request is made by the patient or the patient's legal representative or attorney.

a. The fee charged for the cost of producing the requested records or images shall be based upon the actual cost of production. If the written request and accompanying patient's waiver, if required, authorizes the release of all of the patient's records for the requested time period, including records relating to the patient's mental health, substance abuse, and acquired immune deficiency syndrome-related conditions, the amount charged shall not exceed the rates established by the workers' compensation commissioner for copies of records in workers' compensation cases. If requested, the provider shall include an affidavit certifying that the records or images produced are true and accurate copies of the originals for an additional fee not to exceed ten dollars.

b. A patient or a patient's legal representative or a patient's attorney is entitled to one copy free of charge of the patient's complete billing statement, subject only to a charge for the actual costs of postage or delivery charges incurred in providing the statement. If requested, the provider or custodian of the record shall include an affidavit certifying the billing statements produced to be true and accurate copies of the originals for an additional fee not to exceed ten dollars.

c. Fees charged pursuant to this subsection are exempt from the sales tax pursuant to section 423.3, subsection 96. A provider providing the records or images may require payment in advance if an itemized statement demanding such is provided to the requesting party within fifteen days of the request. Upon a timely request for payment in advance, the time for providing the records or images shall be extended until the greater of thirty days from the date of the original request or ten days from the receipt of payment.

d. If a provider does not provide to the requester all records or images encompassed by the request or does not allow a patient access to all of the patient's medical records encompassed by the patient's request to examine the patient's records, the provider shall give written notice to the requester or the patient that providing the requested records or images would be a violation of the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

e. As used in this subsection: (1) "Records" and "images" include electronic media and data containing a patient's health or billing information and "copies" includes patient records or images provided in electronic form,

regardless of the form of the originals. If consented to by the requesting party, records and images produced pursuant to this subsection may be produced on electronic media. (2) “Provider” means any ...mental health professional, ...entity, facility, or organization that furnishes, bills, or is paid for health care in the normal course of business.

7. For the purposes of this section, “mental health professional” means a psychologist licensed under chapter 154B...

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.⁴⁶ Concrete security standards are established for all electronic healthcare information (45 CFR 160).⁴⁷

6.03 Withholding Records for Nonpayment⁴⁸

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).⁴⁹

Retention of Records

Although no Iowa requirement exists, HIPAA⁵⁰ 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

A licensee's license to practice a profession shall be revoked or suspended, or the licensee otherwise disciplined by the board for that profession, when the licensee is guilty of any of the following acts or offenses:⁵¹

1. Fraud in procuring a license.

⁴⁶ 45 CFR 164.508.

⁴⁷ See, IOWA CODE §§ 135.154 – 135.156 – provisions related to Health Information Technology System. Several provisions relate to electronic records.

⁴⁸ APA CODE OF ETHICS, *supra* note 10.

⁴⁹ 45 CFR 164.508 (b)(4).

⁵⁰ 45 CFR 164.530 (j)(2).

⁵¹ IOWA CODE § 147.55.

2. Professional incompetence.
3. Knowingly making misleading, deceptive, untrue, or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of a crime related to the profession or occupation of the licensee or the conviction of any crime that would affect the licensee's ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements.
8. Willful or repeated violations of the provisions of this chapter, chapter 272C, or a board's enabling statute.
9. Other acts or offenses as specified by board rule.

The board has the authority to impose the following disciplinary sanctions:⁵²

1. Revocation of license.
2. Suspension of license until further order of the board or for a specific period.
3. Prohibit permanently, until further order of the board, or for a specific period the licensee's engaging in specified procedures, methods, or acts.
4. Probation.
5. Require additional education or training.
6. Require a reexamination.
7. Order a physical or mental evaluation, or order alcohol and drug screening within a time specified by the board.
8. Impose civil penalties not to exceed \$1000.
9. Issue a citation and warning.
10. Such other sanctions allowed by law as may be appropriate.

⁵² IOWA ADMIN. CODE r. 645-242.3.