

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

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.

Kansas 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

Kansas law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We also believe that a termination note will likely reduce exposure to arguments about continued duty of care, and reduce the risk of responsibility in a duty to protect/warn jurisdiction.⁵

Because the documents permit hovering over the underline fields with a cursor to select an option (click then select) or permit filling in the shaded text boxes, they

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, Records Retention (Thomson Reuters/ West October 2011); 50 State Statutory Surveys: Healthcare, Healthcare Facilities: Maintaining Privacy of Health Information (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.

cannot be inserted into this document.⁶ Please access each of the documents.

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

Kansas Administrative Regulations section 102-1-20 governs recordkeeping by psychologists in Kansas.

Common Law

Applying Kansas law, the United States District Court found a duty to warn where a recently discharged client with a history of pedophilia and sexual violence raped and killed two neighborhood children.¹⁰ On the defense’s motion for summary judgment, the District Court held that the client’s history and recent remarks made the children foreseeable victims.

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

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 *Mabomes-Vinson v. U.S.*, 751 F. Supp 913 (D. Kan. 1990).

No case decisions interpreting Kansas Administrative Regulations Section 102-1-20 exist.

Contents of the record are mandated by law

The Kansas Administrative Regulations require the following contents of psychological records.

Content of psychological records¹¹

Each licensed psychologist shall maintain a record for each client or patient that accurately reflects the licensee's contact with the client or patient and the results of the psychological service provided. . . . Each record shall be completed in a timely manner and shall include the following information for each client or patient who is a recipient of clinical psychological services:

- (1) Adequate identifying data;
- (2) the date or dates of services the licensee or the licensee's supervisee provided;
- (3) the type or types of services the licensee or the licensee's supervisee provided;
- (4) initial assessment, conclusions, and recommendations;
- (5) a plan for service delivery or case disposition;
- (6) clinical notes of each session; and
- (7) sufficient detail to permit planning for continuity that would enable another psychologist to take over the delivery of services.

The Health Insurance Portability and Accountability Act (HIPAA)¹² would apply to Kansas psychological records. A HIPAA notice of privacy practices¹³ that delineates the psychologist's scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient before services are provided. Kansas mandatory reporting duties must be disclosed to meet this standard:

- Duty to report abuse or neglect of a child under age 18;¹⁴

¹¹ KAN. ADMIN. REGS. § 102-1-20(b).

¹²HIPAA, 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).

¹³ 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).

¹⁴ KAN. STAT. ANN. § 38-2223.

- Duty to report abuse, neglect or exploitation of an adult.¹⁵

In light of the Kansas law and HIPAA, psychologists in Kansas would use an intake and evaluation note, and progress note, and termination note templates.

Maintenance and Security of Records

The Kansas Administrative Regulations provide as follows with respect to maintenance and security of records by psychologists:

Each licensee shall have ultimate responsibility for the content of the licensee's records and the records of those persons under the licensee's supervision. The record may be maintained in a variety of media, if reasonable steps are taken to maintain confidentiality, accessibility, and durability.¹⁶

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.¹⁷ In addition, patients have a right to amend any part of the record;¹⁸ 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). 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).¹⁹

HIPAA also permits sharing PHI with other health care professionals who are engaged in the evaluation and treatment of the same patient.²⁰ Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.²¹

HIPAA establishes privacy protections for all transmissions of PHI records,

¹⁵ KAN. STAT. ANN. § 39-1431(a)-(b).

¹⁶ KAN. ADMIN. REGS. § 102-1-20(b).

¹⁷ 45 CFR 164.524.

¹⁸ 45 CFR 164.526 (a).

¹⁹ 45 CFR 164.508 (b)(4).

²⁰ 45 CFR 164.520.

²¹ 45 CFR 164.528.

and requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties.²² Concrete security standards are established for all electronic healthcare information (45 CFR 160).

Retention of records

The Kansas Administrative Regulations require the following with respect to the retention of records by psychologists.

Retention of records

If a licensee is the owner or custodian of client or patient records, the licensee shall retain a complete record for the following time periods, unless otherwise provided by law:²³

- (1) At least five years after the date of termination of one or more contacts with an adult; and
- (2) for a client or patient who is a minor on the date of termination of the contact or contacts, at least until the later of the following two dates:
 - (A) Two years past the age of majority; or
 - (B) five years after the date of termination of the contact or contacts with the minor.

Violations of the specific duty

In Kansas the “[f]ailure of a psychologist to comply with the recordkeeping requirements established in [Kansas Administrative Regulations Section 102-2-20] shall constitute unprofessional conduct.”²⁴

²² 45 CFR 164.508.

²³ KAN. ADMIN. REGS. § 102-1-20(c).

²⁴ KAN. ADMIN. REGS. § 102-1-20(a); *see also* KAN. ADMIN. REGS. § 102-1-10a(m) (“Each of the following shall be considered unprofessional conduct: . . . (m) failing to maintain and retain records as outlined in K.A.R. 102-1-20.”)