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

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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.

Louisiana 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**

Louisiana law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We believe that a termination note will likely reduce exposure to arguments about continued duty of care, and recommend that psychologists use this template, too.

Because the documents permit hovering over the underline fields with a cursor

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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.

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**

Louisiana has adopted the APA Ethical Principles of Psychology and Code of Ethics for psychologists.\(^\text{10}\)

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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.


Common Law

Louisiana courts interpreting the duty to warn statute have held that it limits the duty to specific threats\(^{11}\) and only applies to threats made by the client, not the client’s relatives.\(^{12}\)


- Under exception to social worker-patient privilege for any communications relevant to child abuse investigation or prosecution, any statements made during counseling with social worker will not be excluded in criminal proceeding against patient on basis of social worker-patient privilege or any other privilege of confidentiality.\(^{13}\)


- Arrestee brought action against emergency room doctor for defamation and false arrest and imprisonment after he was charged with second-degree murder based on emergency room doctor's report to police that defendant's deceased girlfriend had suffered a gunshot wound. The District Court, Orleans Parish, No.2003-9706, Division L-6, Kern A. Reese, J., denied doctor's motion for summary judgment. Doctor sought supervisory relief. Following Court of Appeal's initial denial of application, the Supreme Court granted writ and remanded. The Court of Appeal, Bonin, J., held that: 1) doctor possessed a qualified or conditional privilege against civil liability for a good faith report of a suspected gunshot wound, even though mandatory reporting statute did not contain an immunity provision for a medical reporter; 2) expert testimony that doctor's false report was “careless, reckless, and not supported by a proper evaluation at the time” was insufficient to support a finding of reckless disregard necessary to overcome qualified privilege; and 3) doctor was not liable for false arrest and imprisonment when police relied on doctor's erroneous report.\(^{14}\)

\(^{13}\)State v. Shirah, App. 3 Cir.1997, 702 So.2d 825, 1997-384 (La.App. 3 Cir. 10/8/97).
\(^{14}\)Mitchell v. Villien, 19 So. 3d 557 (La. App. 4th Cir. 2009) writ denied, 23 So. 3d 923 (La. 2009).
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- Witness' psychiatric and psychological records were privileged and not discoverable and did not constitute evidence of witness' general reputation for truthfulness so as to be admissible in murder trial for impeachment purposes.\(^\text{15}\)
- Psychologist was ordered to appear and report and defendant was ordered to furnish to State any medical reports or tests that psychologist had concerning defendant, by the 31st Judicial District Court, Parish of Jefferson Davis, Wm. N. Knight, J., and certiorari was applied for. The Court of Appeal held that State was not entitled to discover results or reports of physical or mental examinations of defendant from physicians, where defendant had not sought or been granted relief to seek results of such reports in possession, custody, control, or knowledge of state.\(^\text{16}\)
- Defendant was convicted in the Fourteenth Judicial District Court, Parish of Calcasieu, Fred R. Godwin, J., of molesting his children, and he appealed. The Court of Appeal, Laborde, J., held that: (1) error in failing to notify defendant of prescriptive period for postconviction relief was harmless, and (2) therapist-patient privilege did not apply in child abuse prosecutions.\(^\text{17}\)


- Physician-patient privilege was breached when counsel for drilling rig company went outside of proper discovery procedures by having ex-parte communications with treating physician of seaman injured on drilling rig about seaman's health; information regarding seaman's physical condition given to physician by counsel for drilling rig by way of meetings, documentation, and telephone calls was clearly not testimony at trial and was not provided to physician through proper discovery methods, and seaman did not have notice of such contact until day of trial.\(^\text{18}\)
- Brother's requests for nursing home resident's medical records were sufficient

\(^{15}\) State v. Baker, App. 4 Cir.1991, 582 So.2d 1320, writ denied 590 So.2d 1197, certiorari denied 113 S.Ct. 62, 506 U.S. 818, 121 L.Ed.2d 30.
\(^{16}\) State v Reviere, 529 So 2d 158 (LA. Ct. App 1988).
\(^{17}\) State v Rupp, 614 So 2d 1323 (La Ct App 1993).
\(^{18}\) Coutee v. Global Marine Drilling Co., App. 3 Cir.2005, 895 So.2d 631, 2004-1293 (La.App. 3 Cir. 2/16/05), writ granted 902 So.2d 1000, 2005-0756 (La. 5/13/05), reversed 924 So.2d 112, 2005-0756 (La. 2/22/06), rehearing denied.
under statute governing health care records, and thus, nursing home was in violation of statute in refusing to give him records; brother furnished valid power of attorney from resident, entitling him to request and receive medical records on her behalf, which was sufficient written authorization from patient for release of documents to brother, and although nursing home argued that brother failed to offer payment for records, as required by statute, there was no showing that facility ever copied records and informed him of charges.\textsuperscript{19}

- Plaintiff could not recover on unjust enrichment claim against medical records company, arising from company's alleged wrongful charges to plaintiff's attorney for obtaining certification of requested records, since plaintiff had a remedy in tort for company's alleged wrongful actions, even though plaintiff's tort claims had been held to be prescribed.\textsuperscript{20}
- Following the plain language of R.S. 40:1299.96, health care providers are statutorily obligated to produce the medical records referenced by R.S. 40:1299.96 to those persons stated in the statute. Furthermore, R.S. 40:1299.96 sets forth the maximum fee health care providers may charge for producing said records. Health care providers have no authority to charge a fee that is higher than the fee established by R.S. 40:1299.96. R.S. 40:1299.96 also applies to any third-party contractor who produces medical records on behalf of the health care provider.\textsuperscript{21}

Contents of the record are mandated by law

Louisiana law incorporates the APA Code of Ethics, and the Health Insurance Portability and Accountability Act (HIPAA)\textsuperscript{22} also would apply to psychological records:

3.10 Informed Consent\textsuperscript{23}

(a) When psychologists …provide assessment, therapy, counseling or consulting services in person or via electronic transmission or other forms of

\textsuperscript{19} In re Gould, App. 2 Cir.2003, 852 So.2d 1123, 37,400 (La.App. 2 Cir. 8/20/03).
\textsuperscript{20} Walters v. MedSouth Record Management, LLC, Sup.2010, 38 So.3d 245, 2010-0351 (La. 6/4/10),
rehearing denied 44 So.3d 705, 2010-0351 (La. 9/3/10).
\textsuperscript{22} 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).
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\(^\text{24}\) 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 Louisiana law would require disclosure about the following exception to protecting patient confidentiality:

- Mandatory duty to report child abuse or neglect;\(^\text{25}\)

\(^{23}\) APA CODE OF ETHICS, supra note 10.


\(^{25}\) LA. REV. STAT. ANN. § 14:403; Louisiana State Board of Examiners of Psychologists Opinion No. 014: Mandatory Reporting of Child Abuse-- “…psychologists are mandatory reporters and shall report suspected child abuse or neglect to the appropriate agency, regardless if it is a concurrent report.”
• Mandatory duty to report an adult's (elder, disabled, or incompetent) physical or mental health or welfare has been or may be further adversely affected by abuse, neglect, or exploitation;26
• Mandatory duty to warn “[w]hen a client has communicated a threat of physical violence…deemed to be significant in the clinical judgment” of the clinician, the threat must be “against a clearly identified victim or victims,” and the client must have the “apparent intent and ability to carry out” the threat.27

In the context of a supervisory relationship, the supervising psychologist has record keeping obligations that should be disclosed in advance of psychological services being provided:28

The supervising psychologist is responsible for the maintenance of information and files relevant to the client. The client shall be fully informed, to whatever extent is necessary for that client to understand, that the supervising psychologist or the employing agency is to be the source of access to this information in the future.

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 Privacy29
(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

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

6.06 Accuracy in Reports to Payors and Funding Sources30
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,

26 LA. REV. STAT. ANN. § 14:403.2(C), (D)(1)-(4) and (E)(6).
27 LA. REV. STAT. ANN. § 9:2800.2(A).
29 APA CODE OF ETHICS, supra note 10.
30 Id.

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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.)

(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,

31 Id.
32 Id.
33 Id.

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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 Louisiana would use an intake and evaluation note, progress note, and termination note templates.

**Maintenance and Security of 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 APA 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.)

Louisiana law is quite protective of confidentiality protections and has created strong privilege protections:

A. In judicial proceedings, whether civil, criminal, or juvenile, legislative and administrative proceedings ...a patient ...or his legal representative, may refuse

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34 Id.
36 LA. REV. STAT. ANN. § 37:2363.

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B. In the absence of evidence to the contrary, the psychologist is presumed to be authorized to claim the privilege on behalf of the patient or client.

C. This privilege may not be claimed by or on behalf of the patient or client in the following circumstances:

(1) Where child abuse, elder abuse, or the abuse of disabled or incompetent individuals is known or reasonably suspected.

(2) Where the validity of a will of a deceased former patient or client is contested or his mental or emotional condition is in issue otherwise in any judicial or administrative proceeding.

(3) Where such information is necessary for the defense of the psychologist in a malpractice action brought by the patient or client.

(4) Where an immediate threat of physical violence against a clearly identified victim or victims is disclosed to the psychologist.

(5) In the context of civil commitment proceedings, where an immediate threat of self-inflicted damage is disclosed to the psychologist.

(6) Where the patient or client puts his mental state in issue by alleging mental or emotional damages or condition in any judicial or administrative proceedings.

(7) Where the patient or client is examined pursuant to court order.

(8) Where the board is conducting an investigation or hearing based on a complaint made by the patient or client.

In addition, Louisiana law has delineated several directives about the release of records:

A. (1) Each health care provider shall furnish each patient, upon request of the patient, a copy of any information related in any way to the patient which the health care provider has transmitted to any company, or any public or private agency, or any person.

(2) (a) ...records of a patient maintained in a health care provider's office are

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37 LA. REV. STAT. ANN. § 40:1299.96.
the property and business records of the health care provider.

(b) Except as provided in R.S. 44:17, a patient or his legal representative, or in the case of a deceased patient, the executor of his will, the administrator of his estate, the surviving spouse, the parents, or the children of the deceased patient, or, after suit has been instituted, the defense counsel or the defense insurance company seeking any medical, hospital, or other record relating to the patient’s medical treatment, history, or condition, either personally or through an attorney, shall have a right to obtain a copy of such record upon furnishing a signed authorization and upon payment of a reasonable copying charge, not to exceed one dollar per page for the first twenty-five pages, fifty cents per page for twenty-six to five hundred pages, and twenty-five cents per page thereafter, a handling charge not to exceed fifteen dollars for hospitals, nursing homes, and other health care providers, and actual postage…

(c) If a copy of the record is not provided within a reasonable period of time, not to exceed fifteen days following the receipt of the request and written authorization, and production of the record is obtained through a court order or subpoena duces tecum, the health care provider shall be liable for reasonable attorney fees and expenses incurred in obtaining the court order or subpoena duces tecum…

(d) A health care provider may deny access to a record if the health care provider reasonably concludes that knowledge of the information contained in the record would be injurious to the health or welfare of the patient or could reasonably be expected to endanger the life or safety of any other person.

(e) Nothing in this Section shall be construed to limit or prohibit access to the information contained in the records of a patient maintained by a health care provider in any legally permissible manner other than those delineated pursuant to R.S. 22:213.2 and in this Section, subject to the provisions of R.S. 13:3734.

HIPAA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.\footnote{45 CFR 164.520; HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: \url{Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION} (last accessed Aug. 1, 2012).} HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records including the Psychotherapy Notes that are created by the psychologist, as long as those records are maintained.\footnote{45 CFR 164.524.} 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, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

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

40 45 CFR 164.526 (a).
41 45 CFR 164.528.
42 APA CODE OF ETHICS, supra note 10.
43 45 CFR 164.508.
44 APA CODE OF ETHICS, supra note 10.
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).45

**Retention of Records**

Although no Louisiana concrete requirement exists for private practitioners,46 HIPAA47 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**

Under the statute governing Louisiana psychologists permits the board to engage as follows:48

B. The board shall have the power and duty to suspend, place on probation, require remediation for a specified time, revoke any license to practice psychology, or take any other action specified in the rules and regulations whenever the board, by affirmative vote of at least four of its five members, shall find by a preponderance of the evidence that a psychologist has engaged in any of the following acts or offenses:

(1) Fraud or deception in applying for or procuring a license to practice psychology.

(2) Practicing psychology in such a manner as to endanger the welfare of clients or patients, including but not limited to:

... (c) Gross malpractice, repeated malpractice, or gross negligence in the practice of psychology.

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45 45 CFR 164.508 (b)(4).
46 Louisiana State Board of Examiners of Psychologists, Opinion No. 006: Records Retention
47 45 CFR 164.530 (j)(2).
48 LA. REV. STAT. ANN. § 37:2359.
(3) Conviction of a felony. A copy of the record of conviction, certified by the clerk of the court entering the conviction, shall be conclusive evidence.

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

…(7) Conviction of fraud in filing Medicare or Medicaid claims or in filing claims to any third party payor. A copy of the record of conviction, certified by the clerk of the court entering the conviction, shall be conclusive evidence.

…(9) The suspension or revocation by another state of a license to practice psychology. A certified copy of the record of suspension or revocation of the state making such a suspension or revocation shall be conclusive evidence thereof.

(10) Refusal to appear before the board after having been ordered to do so in writing by a duly authorized agent of the board.

(11) Making any fraudulent or untrue statement to the board.

(12) Violation of the code of ethics adopted in the rules and regulations of the board or other immoral, unprofessional, or dishonorable conduct as defined in the rules and regulations of the board…