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

Introduction

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

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

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

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2 Christina Luini, 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.

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
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) How does the psychologist discharge the duty? (e) Are there laws related to the Maintenance and Security of Records? (f) What are the laws related to retention of records? (g) 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.

Massachusetts specific templates for the types and contents of the record are provided that are 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

Massachusetts law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the laws digested below. We also believe that a termination note will likely reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Massachusetts, and recommend that psychologists use this template, too.

Because the documents permit hovering over the underline fields with a cursor to select an option or permit filling in the shaded text boxes, they cannot be inserted into this document. Please access each of the documents on this website, separately.

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).
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.”6 Whenever “Eurocentric therapeutic and interventions models”7 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.

**Statute or Rule**

Massachusetts has adopted the APA Ethical Principles of Psychology and Code of conduct for psychologists in its administrative code, except to the extent it deviates from the provisions of 251 Code of Massachusetts Regulations 1.00 or Massachusetts General Laws, chapter 112, section 118 through 129A.8 In addition, Massachusetts Licensing Board of Psychologists has adopted the following to the extent they are not inconsistent with the APA Code of Ethics:

(a) The Casebook on Ethical Standards of Psychologists published by the American Psychological Association;
(b) Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations published in 1990 by the American Psychological Association; and
(c) AIDS Guidelines, a 1988 publication of the Inter-Agency Task Force on AIDS Issues, convened by the Office of Consumer Affairs and including members from 18 boards of registration.9

Additionally, Title 251 of the Code of Massachusetts Regulations, Chapter 1.10(4) sets forth specific requirements regarding the content, maintenance, inspection and retention of “patient records” of psychologists. However, the laws that apply to institutional record keeping, often laws that are much more specific, will apply to psychologists engaged in integrated health care practices. Those laws are reviewed

7 Id. at p. 45.
9 251 MASS. CODE REGS. 1.10(2).
below.

**Common Law**

There are a number of cases that interpret or refer to Massachusetts statutes and rules governing recordkeeping obligations for Massachusetts psychologists that appear relevant to consider:

*Citing reference to* Massachusetts General Laws, chapter 112, section 128 (re: investigation and discipline of psychologists).

- State licensing board determined that psychologist had exceeded the scope of her competence in compiling a written report (which contained, among other things, recommendations pertaining to custody arrangements and to a restraining order that the boy's mother had obtained against his father). As a sanction, the Board placed the psychologist on probation for a period of two years. Boy’s father had no standing to sue as a result of discipline.10

*Citing reference to* 251 Code of Massachusetts Regulations 1.10 (re: Ethical Standards)

- Psychologist sued for, *inter alia*, breach of fiduciary duty. Court discusses, in part, the psychologist’s failure to keep proper billing records.11

*Annotations and citing references to* Massachusetts General Laws, chapter 112, section 129A (re: confidential communications between psychologist and patient).

- Report from community access board and reviews from mental health treatment center were not privileged communications with a psychologist, supporting admission of records in sex offender classification proceeding before sex offender registry board; offender had refused to participate in treatment and hence could not have been the recipient of a psychologist’s professional services.12

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• Husband and wife brought suit against tax preparer alleging that preparer's unauthorized disclosure of husband's tax return information prompted the Internal Revenue Service (IRS) and the Massachusetts Department of Revenue to initiate criminal and civil investigations. On plaintiffs's motion to quash subpoena and defendants' cross-motion to compel, the District Court, Collings, Chief United States Magistrate Judge, held that: (1) under Massachusetts law, plaintiffs did not waive the psychotherapist privilege by alleging “garden-variety” claims for emotional distress in complaint; (2) plaintiffs did not waive psychotherapist privilege by identifying their mental health care providers, and the dates and costs of their treatment sessions; and (3) psychotherapist privilege was not waived when husband testified in deposition that he and his then fiancé sought the assistance of a counselor to help with their relationship.13

• Defendant was charged with incest, rape of child, and related crimes. The Superior Court, Suffolk County, granted defendant's request for child complainant's communications with counselor, based on finding that records were not privileged. Commonwealth petitioned for relief from order. The Supreme Judicial Court held that child complainant's communications with counselor were privileged.14


• Criminal defendant seeking access to records privileged by statute must show, at threshold, that records are likely to contain relevant evidence; if judge finds, based on defendant's proffer, that records are likely to be relevant to issue in case, judge shall review records in camera to determine whether communications, or any portion thereof, are indeed relevant; once judge determines that privileged records do, indeed, contain relevant communications, judge shall allow defense counsel and prosecutor access to relevant privileged materials for limited purpose of determining, upon motions by parties, whether disclosure of relevant communications to trier of fact is required to ensure defendant a fair trial.15

• While the scope of the privilege prohibiting the disclosure of mental health records is broad, it does not cover all hospital records concerning nonpsychiatric admissions simply because some psychiatric information appears in the hospital record; the records are privileged if they contain the

communications or notes of communications between the patient and a psychotherapist. \(16\)

- Trial court properly limited defense counsel's access to prosecution witness' mental hospital records where witness waived patient-psychotherapist privilege with respect to information disclosed during direct examination, but retained his privilege as to all other communications contained in records. \(17\)

- On motion for production of privileged records of Department of Social Services regarding complainant, trial court was required to apply Bishop-Fuller protocol to determine what information was subject to disclosure under psychotherapist-patient privilege and social worker-client privilege, in context of prosecution for aggravated rape, kidnapping, and other crimes. \(18\)

- If a health care provider's production of records in response to a summons violated an obligation to the patient or client, the immediate remedy would be to stay the disclosure of the material until such time as the patient or client, as the actual holder of the privilege, can be notified and given an opportunity to express his or her own wishes on the subject. \(19\)

- Psychological records of victim's mother were properly excluded from evidence in murder prosecution, where defendant failed to satisfy preconditions for their admission and failed to show how they were legally relevant to his defense, and where defendant's stated purpose in seeking their admission, to reveal to jury that victim's mother had “short fuse” and was “prone to emotional reactions and impulsive behavior[].” \(20\)

- In applying on remand Dwyer protocol to determine scope of disclosure of complainant's records with Department of Social Services under psychotherapist-patient privilege, trial court was required only to address inspection of presumptively privileged records and was not required to afford notice to third parties or demand filing and service of motion for production of privileged documents, in context of prosecution for aggravated rape, kidnapping, and other crimes; defendant's affidavit established specific basis for relevancy and identified source and reliability of hearsay, affidavit established that defendant was not engaged in mere fishing expedition, and complainant's children and their biological father did not need to be heard, since defendant

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sought records related to complainant.\textsuperscript{21}

\textit{Citing Reference to} Massachusetts General Law, chapter 112, section 12CC (re: Access to patient records)

- To the extent that the bankruptcy court found that patient records belong to the patient, Mass. Gen. Laws ch. 112, § 12CC suggests otherwise. Section 12CC states that a patient is only entitled to inspect his or her records and to obtain a copy of them.\textsuperscript{22}

\textbf{Contents of the record are mandated by law}

Chapter 1.10(4) sets forth specific requirements regarding the content, maintenance, inspection and retention of “patient records” of psychologists:

\textbf{Patient Records.}\textsuperscript{23}

(a) A psychologist shall maintain a record for each patient or client which meets the standards of usual and customary practice and which is adequate to enable the psychologist to provide proper diagnosis and treatment. A psychologist must maintain a patient or client's record for a minimum period of five years from the date of the last patient or client's encounter and in a manner which permits the former patient or client's or a successor psychologist access to it within the terms of 251 CMR 1.00. In the event that the patient or client is a minor, the psychologist must maintain the patient or client's record for at least one year after the patient or client has reached the age of majority as defined in M.G.L. c. 4, § 7, but in no event shall the record be retained for less than five years.

In addition, Massachusetts adopted the APA Code of Ethics into its administrative code by reference and the following ethical standards regulate the content of records kept by Massachusetts psychologists. The Health Insurance Portability and Accountability Act (HIPPA)\textsuperscript{24} also would apply to Massachusetts psychological records:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} Mass. Gen. Laws ch. 112, § 12CC. \textit{In re Watman}, 301 F.3d 3, 11 (C.A.1, 2002).
\item \textsuperscript{23} 251 MASS. CODE REGS. 1.10(4).
\end{itemize}
\end{footnotesize}
3.10 Informed Consent

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

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

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

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

Under Massachusetts law a psychologist would alert patients in the disclosure process about the following limitations of keeping confidences:

(1) …information which is acquired by a psychologist pursuant to the professional practice of psychology, whether directly or indirectly, may be disclosed, without client consent, written or otherwise, to another appropriate professional as part of a professional consultation which is designed to enhance the services provided to a client or clients. In disclosing such information, psychologists shall use their best efforts to safeguard the client's privacy by not disclosing the client's name or other identifying demographic information, or any other information by which the client might be identified by the consultant, unless such information is, in the psychologist's judgment, necessary for the consultation to be successful.

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25 APA CODE OF ETHICS, supra note 7.
26 251 MASS. CODE REGS. 1.11.
(2) (a) The reference to "initiation of the professional relationship" in M.G.L. c. 112, § 129A shall mean that the client must be informed of the limits on confidentiality by the end of the first professional session, unless there are documented substantial clinical reasons for withholding such information and the decision to withhold such information is reviewed and redocumented on a regular basis. If the client has come to the psychologist specifically for psychological evaluation, court ordered evaluation, or psychological testing, the client shall be informed about all confidentiality limitations before said evaluation or testing begins.

(b) In the event that, before the psychologist has an opportunity to inform the client concerning the limits on confidentiality, a client begins to discuss matters which the psychologist knows, or in the exercise of his/her professional judgment should know, are likely to result in the psychologist's having to reveal confidential information without the client's consent, then the psychologist shall immediately inform the patient of the limits on confidentiality.

(c) Where the client is an unemancipated minor, the psychologist shall have, in addition to the duties described in 251 CMR 1.11, the duty to inform the client's legal guardian in the event that the psychologist has determined pursuant to M.G.L. c. 112, § 129A(c)(1), (c)(2) or (c)(3), that a nonconsensual disclosure of information is warranted.

(3) The reference to "clear and present danger" in M.G.L. c. 112, § 129A(c)(1) shall mean that the client presents a clear and present danger to him/herself when:

(a) the psychologist, in the exercise of his/her professional judgment, believes that the client presents a substantial risk of physical impairment of injury to him/herself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; or

(b) the psychologist, in the exercise of his/her professional judgment, believes that the client presents a very substantial risk of physical impairment or injury to him/herself as manifested by evidence that such person's judgment is so affected that he or she is unable to protect him/herself in the community and that reasonable provision for his/her protection is not available in the community.

(4) The reference to "reasonable basis to believe that there is a clear and present danger of physical violence against a clearly identified or reasonably
identifiable victim” in M.G.L. c. 112, § 129A(c)(3) shall mean when the psychologist believes, in the exercise of his/her professional judgment, that the patient's words or behavior strongly suggest that there is a reasonable possibility that the client will attempt to kill or inflict serious bodily injury on a reasonably identified victim or victims whom the client's words or behavior or history have clearly identified as a likely target of such behavior.

A HIPPA notice of privacy practices that delineates the psychologist's scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient during the informed consent process specified by Standards 3.10, 9.03, and 10.01.

4.04 Minimizing Intrusions on Privacy

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

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

6.06 Accuracy in Reports to Payors and Funding Sources

In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

9.01 Bases for Assessments

(a) Psychologists base the opinions contained in their recommendations,

28 APA CODE OF ETHICS, supra note 7.
30 APA CODE OF ETHICS, supra note 7.

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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
32
(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
33
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…

The Massachusetts laws and APA Standards 6.06, 9.01, 9.02, and 9.10 suggest that psychologists would use an intake and evaluation note, progress notes, and termination templates.

Discharge of record keeping duty

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31 Id.
32 Id.
33 Id.
By creating, maintaining, disseminating, and disposing records in a manner that complies with Massachusetts state law, the APA Code of Ethics, and HIPPA.

**Maintenance and Security of Records**

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality, 34 “[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 keeping standards:

6. Record Keeping and Fees 35

6.01 Documentation of Professional …Maintenance of Records
Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

HIPPA enables the patient to inspect and obtain PHI records, to include Psychotherapy Notes created by the psychologist, as long as those records are maintained. 36 Massachusetts law that applies to independently practicing psychologists follows:

**Patient Records** 37

…(b) Except as otherwise provided by law, a psychologist shall permit inspection of records maintained for a patient or client by such patient or client or the authorized representative of the patient or client, and upon request, shall make a copy of such patient or client's record available to such patient or client or representative. If, in the reasonable exercise of professional judgment a psychologist believes that providing the entire record would adversely affect the patient's well-being, the psychologist shall provide a summary of the record

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34 APA CODE OF ETHICS, supra note 7.
35 Id.
36 45 CFR 164.524.
37 251 MASS. CODE REGS. 1.10(4).

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to the patient. A psychologist must make the entire record available to the patient's attorney or other psychotherapist designated by the patient, if requested by the patient (M.G.L. c.112, § 12CC).

All health care services provided to groups of people are regulated through the Massachusetts Department of Public Health and each clinic, as a licensed entity, has specific legal requirements as to records:

(A) Each clinic shall keep in one centralized location on its premises records indicating all the services rendered to clinic patients. Records shall contain sufficient information to justify the diagnosis(es) and treatment, and to document the results accurately...

(B) Each patient shall have a single integrated record, except that mental health ...upon approval of the Commissioner ...may be filed separately on the premises, provided there is an effective cross-referencing system. Each entry into each patient record shall be dated and authenticated by the staff member making the entry, indicating name and title. Each page of each patient's record shall have two unique forms of identification. The record with respect to each patient shall include the following:

1. Patient's name, date of birth, sex, home address and telephone number, and sponsor or responsible party if any.
2. Date of each patient visit with clinic staff at the clinic, satellite clinic or at mental health outreach sites.
3. Medical or dental history, as appropriate.
4. Diagnostic observations, evaluations, and therapeutic plans.
5. Orders for any medication, test, or treatment.

38 "Clinic means any entity, however organized, whether conducted for profit or not for profit, which is advertised, announced, established, or maintained for the purpose of providing ambulatory, medical ...or mental health services ...which includes the word clinic, "dispensary", or "institute", and which suggests that ambulatory medical, surgical, dental, physical rehabilitation, or mental health services are rendered therein. ...With respect to any entity ...clinic shall not include ...one or more practitioners engaged in a solo or group practice, whether conducted for profit or not for profit, and however organized, so long as such practice is wholly owned and controlled by one or more of the practitioners so associated, or, in the case of a not for profit organization, its only members are one or more of the practitioners so associated or a clinic established solely to provide service to employees or students of such corporation or institution ...Clinic shall not include ad hoc health promotion and screening programs." 105 MASS. CODE REGS. § 140.020.
39 105 MASS. CODE REGS. § 140.302; Massachusetts has created a series of record keeping laws that apply to public mental health inpatient, drug treatment, and community mental health facilities regulated by the Department of Mental Health that are beyond the scope of this digest (see, MASS. GEN. LAWS. ch. 123, § 36; MASS. GEN. LAWS. ch. 111E, § 18; MASS. GEN. LAWS. ch. 19, § 16).
(6) Records of any administration of medications, treatment, or therapy.
(7) Laboratory, radiology, and other diagnostic reports.
(8) Progress notes.
(9) Reports of any consultations, special examinations, or procedures.
…(11) Social service reports.
(12) Referrals to other agencies.
(13) Documentation that informed consent has been obtained for surgical procedures and other treatment where required by law and in accordance with 105 CMR 140.301(B)(5)(e).
(14) Discharge summary, when appropriate.

...(C)(3) Medical records retained by the clinic in accordance with 105 CMR 140.302(C) shall be made available for inspection and copying upon written request of the patient or his/her authorized representative. The clinic may charge a reasonable fee for copying, not to exceed the rate of copying expenses, as specified in M.G.L. c. 111, § 70.

(D) Each clinic shall maintain and use patient records in a manner that protects the confidentiality of the information contained therein. Printed copies of electronically stored records shall be disposed of in a manner that assures the confidentiality of patient information.

(E) Each clinic shall make all patient records available promptly to any agent of the Department.

…(G) A clinic shall provide written notice to a patient of the patient’s right to inspect and to receive a copy of the patient’s medical records and the clinic’s medical record retention policy, as specified in M.G.L. c. 111, § 70.

Massachusetts also regulates the distribution and cost of providing records from hospitals or clinics:40

Hospitals or clinics subject to licensure by the department of public health or supported in whole or in part by the commonwealth, shall keep records of the treatment of the cases under their care …These records may be handwritten, printed, typed or in electronic digital media or converted to electronic digital media as originally created by such hospital or clinic, by the photographic or microphotographic process, or any combination thereof. …such records …

40 MASS. GEN. LAWS ch. 111, § 70.

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except a hospital or clinic under the control of the department of mental health, may be inspected by the patient to whom they relate, the patient's attorney upon delivery of a written authorization from said patient, the duly appointed executor or administrator of the deceased person's estate or the attorney for such executor or administrator upon delivery of a written authorization from such executor or administrator, and a copy shall be furnished upon the request and a payment of a reasonable fee”, and a copy shall be furnished upon the payment of a reasonable fee, which for the purposes of this section shall mean a base charge of not more than $15 for each request for a hospital or clinic medical record; a per page charge of not more than $0.50 for each of the first 100 pages of a hospital or clinic medical record that is copied per request; and not more than $0.25 per page for each page in excess of 100 pages of a hospital or clinic medical record that is copied per request, except that no fee shall be charged to any applicant, beneficiary or individual representing said applicant or beneficiary for furnishing a record if the record is requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act or any federal or state financial needs-based benefit program; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise …Notwithstanding the foregoing, a hospital or clinic served with a subpoena for such records of any party named in that proceeding as shown by the case caption appearing on the subpoena, shall deliver certified copies of the subpoenaed records in its custody to the court or place of hearing designated on the subpoena…

The reasonable fee under this section may be adjusted to reflect the consumer price index for medical care services, such that the base amount and the per page charge shall be increased by the proportional consumer price index in effect as of October of the calendar year in which the request is made, rounded to the nearest dollar. A hospital or clinic may also charge an additional fee to cover the cost of postage, other priority mailing and preparation of an explanation or summary of the hospital or clinic medical record if so requested.

For independent practicing psychologists, the following Massachusetts law and APA standards apply to the inspection, charges for records, maintaining and disposing of records:41

A health care provider who maintains records for a patient treated or examined

41 MASS. GEN. LAWS. ch. 112, § 12CC.
by such provider shall permit inspection of such records by such patient or an authorized representative of the patient, and upon request a copy of such patient's record shall be furnished upon payment of a reasonable fee, as defined in section 70 of chapter 111 available to such patient or such representative. For purposes of this section, “health care provider” shall mean a person or entity providing medical care or services, including but not limited to, physicians …psychologists…

For purposes of this section, in the case of a psychotherapist the term “records” in this section shall mean, at the discretion of the psychotherapist, the patient's entire record maintained by such psychotherapist or a summary of the patient's record. If in the reasonable exercise of his professional judgment, the psychotherapist believes providing the entire record would adversely affect the patient's well-being, in such instances, the psychotherapist shall make a summary of the record available to the patient. If a patient requests the entire record, notwithstanding a determination that providing said record is deemed to adversely affect the patient's well-being, the psychotherapist shall make the entire record available to either the patient's attorney, with the patient's consent, or to such other psychotherapist as designated by the patient…

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.)

42 The definition in this section includes licensed psychologists.
43 APA CODE OF ETHICS, supra note 7.
Additionally, APA Code of Ethics Standard 6.02(b) requires the use of 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.\textsuperscript{44}

HIPPA establishes privacy protections for all transmissions of PHI records.\textsuperscript{45} Concrete security standards are established for all electronic healthcare information (45 CFR 160).

The Massachusetts law, HIPPA, and an APA Standard suggest that records cannot be withheld for nonpayment:

\begin{quote}
\ldots (c) A psychologist may charge a reasonable fee for the expense of providing the material described in 251 CMR 1.10(4)(b); however, a psychologist may not require prior payment of the charges for such psychological services as a condition for making records available.\textsuperscript{46}
\end{quote}

\textbf{6.03 Withholding Records for Nonpayment}\textsuperscript{47}

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).\textsuperscript{48}

\textbf{Retention of Records}

Massachusetts law for independent psychologists has a very short period of record retention in contrast to those psychologists with “clinic” settings:

\begin{quote}
(4) \textbf{Patient Records}.\textsuperscript{49}
(a) \ldots A psychologist must maintain a patient or client's record for a minimum period of five years from the date of the last patient or client's encounter and in
\end{quote}

\begin{footnotes}
\item[44] Id.
\item[45] 45 CFR 164.508.
\item[46] 251 MASS. CODE REGS. 1.10(4).
\item[47] APA CODE OF ETHICS, \textit{supra} note 7.
\item[48] 45 CFR 164.508 (b)(4).
\item[49] 251 MASS. CODE REGS. 1.10(4).
\end{footnotes}
a manner which permits the former patient or client's or a successor psychologist access to it within the terms of 251 CMR 1.00. In the event that the patient or client is a minor, the psychologist must maintain the patient or client's record for at least one year after the patient or client has reached the age of majority as defined in M.G.L. c. 4, § 7, but in no event shall the record be retained for less than five years.

However, all health care services provided in clinics, as a licensed entity, has specific legal requirements as to records:

(C) Retention of Medical Records.
(1) In accordance with M.G.L. c. 111, § 70 a clinic shall maintain records of the diagnosis and treatment of patients under its care for a minimum of 20 years after the discharge or the final treatment of the patient to whom the record relates. Medical records may be handwritten, printed, typed or in electronic digital format, or converted to electronic digital format or an alternative archival method. Handwritten, printed or typed medical records that have been converted to electronic digital format or an alternative archival format may be destroyed before the expiration of the 20 year retention period. The manner of destruction must ensure the confidentiality of patient information. For purposes of section 105 CMR 140.302, medical records in electronic digital format shall have the same force and effect as the original records from which they were made.

(2) For the purpose of 105 CMR 140.302, a clinic shall not be required to consider the following as part of the medical record subject to the retention requirements in M.G.L. c. 111, § 70: …raw psychological testing data …provided that any signed narrative reports, interpretations or sample tracings that are generated to report the results of such tests and procedures shall be maintained as part of the record. Such records as described in 105 CMR 140.302(C)(2) shall be retained for a period of at least five years following the date of service.

Massachusetts also regulates the destruction of records by hospitals or clinics:

The hospital or clinic may destroy records only after the applicable retention period has elapsed and after notifying the department of public health, in

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50 105 MASS. CODE REGS. § 140.020: “Clinic” definition, supra note 38.
51 105 MASS. CODE REGS. § 140.302.
52 MASS. GEN. LAWS ch. 111, § 70.

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.
accordance with its regulations, that the records will be destroyed. The department, through its regulations, shall establish an appropriate notification process. On the notice of privacy practices distributed to its patients, a hospital or clinic shall provide: (i) information concerning the provisions of this section and (ii) the hospital or clinic's records termination policy. Such records shall be in the custody of the hospital or clinic. Section ten of chapter sixty-six shall not apply to such records; provided, however, that

Violations of the specific duty

Massachusetts adopted the APA Code of Ethics into its Administrative Code and the standards discussed, including HIPPA infractions, and violations of the law can all lead to disciplinary actions being investigated and prosecuted by the Board of Registration of Psychologists. Misconduct also may include any violation of the standards of ethics and practice listed in 251 CMR 1.10 and 1.11. 53 Violations of law can lead to revocation, suspension, or cancellation of license; the process of notice, hearing, and review is delineated within the law. 54

53 251 MASS. CODE REGS. 1.01.
54 MASS. GEN. LAWS. ch. 112, § 128.