

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

Michigan 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

Michigan 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 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

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.

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

The Board of Psychology regulates Michigan psychologists and has created its own Code.⁸ Michigan psychologists are subject to the record keeping requirements created by statutes and rules promulgated by the Board.

Common Law

Annotations to to MICH ADMIN. CODE R. 338.1609 (re: summary suspension of license)

- Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations did not preclude enforcement of subpoena to procure patient records in Department of Community Health's investigation of dentist's alleged insurance fraud; HIPAA permitted a health care provider to disclose health information in circumstances described by administrative regulation, including civil, administrative, or criminal investigations by an agency or authority of the state authorized to oversee the health care system. Health Insurance Portability and Accountability Act of 1996, § 262(a), 42 U.S.C.A. § 1320d; 45 C.F.R. § 164.512(a),(d).⁹

Annotations to MICH. COMP. LAWS. ANN. § 330.1141 (re: Patients' Records)

- A recipient of mental health services may not be required to agree to hold a record holder harmless as a condition of disclosure of information in the recipient's mental health record. The holder of mental health records must adopt policies and procedures governing the mechanics of the release of records but may not attach additional conditions not authorized by § 748 of the Mental Health Code. The judgment to withhold information because its release would be detrimental to the recipient or others must be recorded in the file of the recipient of mental health services. A decision to withhold mental

⁶ 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).

⁷ *Id.* at p. 45.

⁸ MICH. ADMIN. CODE r 338.2501, *et seq.*

⁹ *In re Petition of Atty. Gen. for Investigative Subpoenas*, 274 Mich. App. 696, 736 N.W.2d 594 (2007).

health records may be appealed to the Director of Department of Mental Health, and the Director's decision may be reviewed by the courts.¹⁰

Annotations MICH. COMP. LAWS ANN. § 333.18237 (re: duty of confidentiality)

- Purpose of this section is to protect confidential nature of psychologist-patient relationship.¹¹
- In the absence of evidence that patient had waived psychologist-patient privilege or had been informed at the time of her meeting with the psychologist that any communications would not be privileged, it was error to admit the psychologist's testimony in parental rights hearing. However, trial court did not err in admitting testimony of psychologist over objection that it was protected by the psychiatrist-patient privilege where there was evidence of a signed waiver by the patient and the patient nowhere on the record claimed that she had not executed the waiver.¹²
- In sentencing defendant, trial court's consideration of information that defendant had “fetish” for women's clothing, that defendant had violent tendencies, and that defendant had extremely difficult time relating to others did not violate defendant's physician-patient or psychologist-patient privileges, but, rather, such information, which was contained in presentence report, was not confidential, where defendant and defendant's estranged wife provided some of information, and it was defendant's attorney who focused on defendant's psychological history and encouraged court to consider psychological problems in sentencing.¹³
- Patient records of psychologist were exempt from Department of Community Health's investigative subpoena power, and, thus, psychologist could not be compelled to disclose patients' confidential information in connection with investigation of billing practices, although statute authorized investigative subpoena for patient records; Department had important function and broad authority to protect the public by investigating, regulating, and disciplining health care providers, but investigative subpoena authority did not imbue with ambiguity plain language of statute that established that a psychologist could not be compelled to disclose confidential information acquired from patient if the information was necessary to enable the psychologist to render services.¹⁴

¹⁰ Op.Atty.Gen.1993, No. 6764, 1993 WL 614616.

¹¹ *People v. Lobaito* (1984) 351 N.W.2d 233, 133 Mich.App. 547, appeal denied.

¹² *Matter of Atkins* (1982) 316 N.W.2d 477, 112 Mich.App. 528.

¹³ *People v. Daniels* (1986) 386 N.W.2d 609, 149 Mich.App. 602, appeal denied.

¹⁴ *In re Petition of Attorney General for Investigative Subpoenas* (2009) 766 N.W.2d 675, 282 Mich.App. 585.

Annotations to MICH. COMP. LAWS. ANN. § 330.1946 (re: duty to warn)

- Michigan courts have interpreted the Michigan duty to warn statute several times, finding that third parties cannot sue mental health professionals (MHPs) for failure to warn when the threat is specific but not a threat of violence against the suing party,¹⁵ and that the statute also bars suit when the client is dangerous but communicates no threat targeting the suing party.¹⁶ The Sixth Circuit Court of Appeals, applying Michigan law, has found that the statute also allows MHPs to testify to the client's threats in court because it would be unreasonable for the warned victim "to learn of the threat without having any recourse in a court of law to protect him or her from the person making the threat."¹⁷ In *Saur v. Probes*, the Court of Appeals of Michigan found a nonstatutory privilege to breach confidentiality "where it is reasonably necessary to protect the interests of the client or others."¹⁸ Saur sued his psychiatrist for disclosing information to a probate court doctor assigned after Saur's wife sought to have him committed.¹⁹
- Statute governing mental-health professional's duty to protect third persons from a patient abrogates all other common-law duties to protect third persons, including third persons who are also patients of the mental-health professional. Mental-health professional does not have a duty to protect third persons from a patient unless four criteria are met: (1) a mental-health professional is presently treating a patient, (2) that patient communicates a threat of physical violence to the mental-health professional, (3) that threat of physical violence is directed against a readily identifiable third person, and (4) the patient has the apparent intent and ability to carry out the threat in the foreseeable future. Psychiatrist did not have a duty, under statute governing a mental-health professional's duty to protect third persons from a patient, to warn or protect plaintiff patient from a former patient who entered psychiatric office and shot the psychiatrist, the plaintiff, and other members of therapy group, even though former patient had indicated to psychiatrist that he wanted to hurt someone at the practice, where there was no evidence that former patient made

¹⁵ *Jenks v. Brown*, 557 N.W.2d 114 (Mich. Ct. App. 1996) (Father's suit invalid when psychiatrist did not warn father that mother had threatened to kidnap son because there was no threat of violence to father).

¹⁶ *Swan v. Wedgewood Christian Youth & Family Serv.*, 583 N.W.2d 719 (Mich. Ct. App. 1998) (residential patient on leave killed victim but did not threaten to kill a specific person).

¹⁷ *United States v. Snellenberger*, 24 F.3d 799, 802 (6th Cir. 1994).

¹⁸ *Saur v. Probes*, 476 N.W.2d 496, 499 (Mich. Ct. App. 1991).

¹⁹ *Id.* at p. 497.

a threat of physical violence against plaintiff patient, either individually or as a member of the therapy group.²⁰

Contents of the record are mandated by law

Under the statutes the following contents of the record must be present:²¹

A licensee shall maintain a complete record for each patient. The record shall contain at a minimum a written assessment and individual plan of services for the patient, a statement of the purpose of ...treatment, a description of any tests and examinations performed, and a description of any observations made and treatments provided.

Confidentiality²²

...Any individual covered by these rules shall store and dispose of written, electronic and other patient records so as to ensure their confidentiality, except as otherwise provided by law or pursuant to the written authorization of a patient specifically requesting or authorizing release or disclosure of the patient's psychological records.

In addition, the Health Insurance Portability and Accountability Act (HIPAA)²³ would apply to Michigan psychological records. A HIPAA notice of privacy practices²⁴ that delineates the psychologist's scope of and limitations of confidentiality

²⁰ [Dawe v. Dr. Reuven Bar-Levav & Associates, P.C. \(2010\) 780 N.W.2d 272, 485 Mich. 20](#), on remand [808 N.W.2d 240, 289 Mich.App. 380](#).

²¹ MICH. COMP. LAWS ANN. § 330.1141; *see* 1974 Mich. Pub. Acts page no. 258, MENTAL HEALTH CODE applies to "...private agencies and individuals."

²² MICH. ADMIN. CODE r. 338.2516; *See*, MICH. COMP. LAWS ANN. § 333.18237 that establishes "A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services. Information may be disclosed with the consent of the individual consulting the psychologist, or if the individual consulting the psychologist is a minor, with the consent of the minor's guardian, pursuant to section 16222 if the psychologist reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. In a contest on the admission of a deceased individual's will to probate, an heir at law of the decedent, whether a proponent or contestant of the will, and the personal representative of the decedent may waive the privilege created by this section."

²³HIPAA, 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).

would work in tandem with several mandatory disclosures should be identified to the patient as part of the informed consent process:

- Mandatory duty to report child abuse or neglect;²⁵
- Mandatory duty to report suspected abuse, neglect, or financial exploitation of an adult;²⁶
- Mandatory duty to warn or protect when a client who has intent and ability to carry out the threat communicates “a threat of physical violence” against an identifiable third person.²⁷

Maintenance and Security of Records

Michigan has established laws that affect the maintenance and security of psychological records:²⁸

...Any individual covered by these rules shall store and dispose of written, electronic and other patient records so as to ensure their confidentiality, except as otherwise provided by law or pursuant to the written authorization of a patient specifically requesting or authorizing release or disclosure of the patient's psychological records.

In addition, the following laws apply to psychologists who are licensed under Article 15: Occupations:

Patient medical records; creation and maintenance generally; maintenance of records for licensee; transfer of records; destruction of records; penalties for noncompliance; ownership rights in records²⁹

(1) An individual licensed under this article shall keep and maintain a record for each patient for whom he or she has provided medical services, including a full and complete record of tests and examinations performed, observations made, and treatments provided... The records shall be maintained in such a manner

²⁴ 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).

²⁵ MICH. COMP. LAWS ANN. § 722.623.

²⁶ MICH. COMP. LAWS ANN. § 400.11a(1) and (4) – (5)

²⁷ MICH. COMP. LAWS ANN. § 330.1946(1).

²⁸ MICH. ADMIN. CODE r.338.2516; Several record keepings law exist for public facilities and hospitals, *see*, [Outpatient Programs](#) (MICH. ADMIN. CODE r. 325.14701 - 325.14712) & [Inpatient Programs](#) (MICH. ADMIN. CODE r. 325.14801 - 325.14807).

²⁹ MICH. COMP. LAWS ANN. § 333.16213.

as to protect their integrity, to ensure their confidentiality and proper use, and to ensure their accessibility and availability to each patient or his or her authorized representative as required by law...

(2) If a licensee is unable to comply with this section, the licensee shall employ or contract, arrange, or enter into an agreement with another health care provider, a health facility or agency, or a medical records company to protect, maintain, and provide access to those records required under subsection (1).

(3) If a licensee or registrant sells or closes his or her practice, retires from practice, or otherwise ceases to practice under this article, the licensee or the personal representative of the licensee, if the licensee is deceased, shall not abandon the records required under this section and shall send a written notice to the department that specifies who will have custody of the medical records and how a patient may request access to or copies of his or her medical records and shall do either of the following:

(a) Transfer the records required under subsection (1) to any of the following:

(i) A successor licensee.

(ii) If requested by the patient or his or her authorized representative, to the patient or a specific health facility or agency or other health care provider licensed under article 15.¹

(iii) A health care provider, a health facility or agency, or a medical records company with which the licensee had contracted or entered into an agreement to protect, maintain, and provide access to those records required under subsection (1).

(b) In accordance with subsection (1), as long as the licensee or the personal representative of the licensee, if the licensee is deceased, sends a written notice to the last known address of each patient for whom he or she has provided medical services and receives written authorization from the patient or his or her authorized representative, destroy the records required under subsection (1). The notice shall provide the patient with 30 days to request a copy of his or her record or to designate where he or she would like his or her medical records transferred and shall request from the patient within 30 days written authorization for the destruction of his or her medical records. If the patient fails to request a copy or transfer of his or her medical records or to provide the licensee with written authorization for the destruction, then the licensee or the personal representative of the licensee shall not

destroy those records that are less than 7 years old but may destroy, in accordance with subsection (4), those that are 7 years old or older.

...(5) A person who fails to comply with this section is subject to an administrative fine of not more than \$10,000.00 if the failure was the result of gross negligence or willful and wanton misconduct.

(6) Nothing in this section shall be construed to create or change the ownership rights to any medical records.

(7) As used in this section:

(a) “Medical record” or “record” means information, oral or recorded in any form or medium, that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a licensee in the process of providing medical services.

(b) “Medical records company” means a person who contracts for or agrees to protect, maintain, and provide access to medical records for a health care provider or health facility or agency in accordance with this section.

(c) “Patient” means an individual who receives or has received health care from a health care provider or health facility or agency. Patient includes a guardian, if appointed, and a parent, guardian, or person acting in loco parentis, if the individual is a minor, unless the minor lawfully obtained health care without the consent or notification of a parent, guardian, or other person acting in loco parentis, in which case the minor has the exclusive right to exercise the rights of a patient under this section with respect to his or her medical records relating to that care.

HIPAA also 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.³⁰ In addition, patients have a right to amend any part of the record;³¹ 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

³⁰ 45 CFR 164.524.

³¹ 45 CFR 164.526 (a).

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).³² Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.³³

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.³⁴ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

Retention of Records

Patient records in Michigan must be preserved for a minimum of 7 years.³⁵ A licensee may destroy a record that is less than 7 years old only if both of the following are satisfied:³⁶

(1)(a) The licensee sends a written notice to the patient at the last known address of that patient informing the patient that the record is about to be destroyed, offering the patient the opportunity to request a copy of that record, and requesting the patient's written authorization to destroy the record.

(b) The licensee receives written authorization from the patient or his or her authorized representative agreeing to the destruction of the record.

...(4) Except as otherwise provided under this section or federal or state laws and regulations, records required to be maintained under subsection (1) may be destroyed or otherwise disposed of after being maintained for 7 years. If records maintained in accordance with this section are subsequently destroyed or otherwise disposed of, those records shall be shredded, incinerated, electronically deleted, or otherwise disposed of in a manner that ensures continued confidentiality of the patient's health care information and any other personal information relating to the patient. If records are destroyed or otherwise disposed of as provided under this subsection, the department may take action including, but not limited to, contracting for or making other arrangements to ensure that those records and any other confidential identifying information related to the patient are properly destroyed or disposed of to protect the confidentiality of

³² 45 CFR 164.508 (b)(4).

³³ 45 CFR 164.528.

³⁴ 45 CFR 164.508.

³⁵ MICH. ADMIN. CODE r. 338.2516.

³⁶ MICH. COMP. LAWS ANN. § 333.16213.

patient's health care information and any other personal information relating to the patient. Before the department takes action in accordance with this subsection, the department, if able to identify the licensee responsible for the improper destruction or disposal of the medical records at issue, shall send a written notice to that licensee at his or her last known address or place of business on file with the department and provide the licensee with an opportunity to properly destroy or dispose of those medical records as required under this subsection unless a delay in the proper destruction or disposal may compromise the patient's confidentiality. The department may assess the licensee with the costs incurred by the department to enforce this subsection.

Violations of the specific duty

If the Board finds that violations of the record keeping laws occur, it may impose a monetary penalty,³⁷ suspend,³⁸ or revoke a license.³⁹

³⁷ MICH. ADMIN. CODE r. 338.2513.

³⁸ MICH. ADMIN. CODE r. 338.1609.

³⁹ MICH. ADMIN. CODE r. 338.1635.