

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

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).

Columbia with reference to several relevant state-by-state surveys retrieved from Lexis 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.

Minnesota 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

Minnesota 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 duty to protect contexts.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

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.

into this document.⁶ 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.”⁷ Whenever “Eurocentric therapeutic and interventions models”⁸ may impair the consideration of multicultural factors among the integrated health care team members, we urge that psychologists note the factors within the appropriate template fields. In light of the World Health Organization’s demonstrated commitment to the formulation of a diagnostic system that moves beyond biological causation and integrates the contributions of psychological, cultural, and social factors, and APA’s participation in the development of the *International Classification of Functioning, Disability and Health* (World Health Organization, 2010), our group recommends using ICD-10 whenever diagnoses are being made.⁹ The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

Statute or Rule

The Minnesota Board of Psychology has created its own rules of conduct and suggest that the APA Ethical Principles of Psychology and Code of Ethics “shall be used as an aid in resolving any ambiguity which may arise in the interpretation of the rules of conduct ... However, in a conflict between the rules of conduct and the ethical principles, the rules of conduct shall prevail.”¹⁰

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

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

⁸ *Id.* at p. 45.

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

¹⁰ See, MINN. R. 7200.4500, subpt. 4. – cites to the Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 2002, amended 2010), copies available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C. 20002-4242 (<http://www.apa.org/ethics/code/principles.pdf> (last accessed Aug. 1, 2012)).

Common Law

In *Culberson*, the client was enrolled in an inpatient chemical dependency treatment program and, during a group session with the clinician, stated that if he could “get away with it,” he would “kill him.”¹¹ While the client never specifically identified the victim, the clinician knew from prior sessions that the client had a great deal of anger toward his former boss.¹² After the client was discharged, the clinician warned the boss of the client’s threats.¹³ The client sued, contending that because he had not specifically threatened his former boss, the clinician had no duty to warn and thus not entitled to immunity under the statute.¹⁴ The court rejected this argument, and according to *Culberson*, the mental health professional (MHP) does not have to correctly determine “whether the client’s behavior was potentially sufficiently violent”¹⁵ or even “exercise due care” in evaluating the threat,¹⁶ because the purpose of the statute is protect MHPs from “judicial second-guessing.”¹⁷

Annotations to MINN. STAT. ANN. § 144.292 (re: patient rights)

- There may be circumstances under which child abuse report under Child Abuse Reporting Act could be health record under Health Records Act. “Health record,” for purposes of statute under which health care provider may be compelled to release health records to patient, is defined as complete and current information possessed by provider concerning any diagnosis, treatment and prognosis of the patient. Psychologist who released copy of child abuse report which was required to be made under Child Abuse Reporting Act to individual who was not designated recipient of report under Act was not entitled to immunity in defamation action brought by person who was named in report as having committed acts of child abuse, as report did not constitute “health record” under statute allowing patients to demand such records. Child abuse report which is required to be filed under Child Abuse Reporting Act is not “health record,” and cannot be released as such by health care provider under statute which allows patients to obtain records.¹⁸

¹¹ *Culberson v. Chapman*, 469 N.W.2d 821, 822 (Minn. Ct. App. 1993).

¹² *Id.* at 823.

¹³ *Id.* at 823.

¹⁴ *Id.* at 824.

¹⁵ *Id.*

¹⁶ *Id.* at 826.

¹⁷ *Id.*

¹⁸ *Bol v. Cole*, App.1996, 545 N.W.2d 408, review granted, reversed 561 N.W.2d 143, rehearing denied.

- Authorization signed by patient constituted consent to release her non-privileged medical records by law firm to its examiner, for purposes of patient's negligence action against law firm's client; the examiner was law firm's "representative" for purposes of patient's negligence lawsuit. Law firm did not violate statute prohibiting the release of a patient's health records to a third party, in patient's negligence action against law firm's client, when it allowed its examiner to inspect the records; the rule pertaining to the release of non-privileged medical records to an examiner specifically authorized the examiner to inspect the records obtained under the rule.¹⁹

Annotations to MINN. STAT. ANN. § 144.293 (re: release or disclosure of health benefits):

- State statute giving patients a private right of action for improper disclosure of their medical records was not "contrary" to HIPAA and was therefore not preempted by HIPAA; it was not impossible to comply with both laws although penalties under the two laws differed, and state statute was not an obstacle to accomplishment and execution of HIPAA's stated purpose of improving Medicare and Medicaid programs and the efficiency and effectiveness of health care system by encouraging development of health information system through establishment of standards and requirements for electronic transmission of certain health information.²⁰

Annotations to MINN. STAT. ANN. § 144.294 (re: records relating to mental health):

- Doctors, who failed to test for and diagnose a genetic disorder in child, did not have a physician-patient relationship with spouse of child's mother and, thus, did not have a legal duty to spouse to convey child's medical information to spouse, where spouse was not a biological parent, spouse was not entitled to receive medical information regarding child's medical history, and spouse was not present at any of the doctor appointments.²¹

Relevant annotations to MINN. STAT. ANN. § 626.556 (Reporting of maltreatment of minors):

¹⁹ [*Newman v. Brendel & Zinn, Ltd.*, App.2005, 691 N.W.2d 480](#), review denied.

²⁰ [*Yath v. Fairview Clinics, N.P.*, App.2009, 767 N.W.2d 34](#).

²¹ [*Molloy v. Meier*, App.2003, 660 N.W.2d 444](#), review granted, affirmed [679 N.W.2d 711](#).

- Fact that psychologist who learned of sexual abuse may have concluded that the abuse occurred only in the past did not relieve him of duty to report the suspected abuse. It was not necessary that psychologist's client, the grandfather of a girl whom he was sexually abusing, have responsibility for care of the granddaughter in order for psychologist to be disciplined for failing to report the abuse; it was sufficient that the grandfather was alone with the granddaughter.²²
- Chemical-dependency counselor's intentional failure to report alleged sexual abuse of a client's daughter to county agency within 24 hours, as mandated by statute and as directed by her supervisor, was misconduct that disqualified her from receiving unemployment compensation benefits; counselor acknowledged the reporting requirement to her supervisor, but said she was biding her time while she thought about whether to report the alleged abuse.²³
- Social worker maintained appropriate records concerning investigation of maltreatment of son by mother, where social worker completed intake social service referral form generated when paternal grandparents met with social worker which documented their allegations of abuse, social services referral which documented minor's version of abusive incident, and personal narrative of events surrounding maltreatment determination.²⁴

Annotations to Minn. Stat. Ann. § 626.5572 (re: mandatory duty to report abuse of vulnerable adults):

- Vulnerable Adults Act mandates reporting of caregiver's conduct that is not an accident or therapeutic conduct which produces or could reasonably be expected to produce physical pain or injury or emotional distress in a reasonable person.²⁵
- An isolated and non-malicious statement does not, of itself, constitute conduct which could reasonably be expected to produce emotional distress, within the meaning of statute defining “abuse” of vulnerable adults. Nursing assistant's statement to vulnerable adult, “I forgot to put my [f-cking] gloves on and it's your fault, now you're going to [sh-t] all over my hands, you dumb [f-cker],” which she made while assisting the vulnerable adult in the bathroom at nursing facility, did not constitute conduct which could reasonably be expected to

²² [*Matter of Schroeder*, App.1987, 415 N.W.2d 436](#), review denied.

²³ [*Bannister-Rice v. Haven Chemical Health Systems, LLC*, App.2006, 2006 WL 2675239](#), Unreported.

²⁴ [*Zabler v. Minnesota Dept. of Human Services*, App.2001, 624 N.W.2d 297](#), review denied.

²⁵ [*In re Kleven*, App.2007, 736 N.W.2d 707](#).

produce emotional distress, within the meaning of statute defining “abuse” of vulnerable adults; there were no repeated statements at issue, other than the statement itself, there was no evidence in the record suggesting that the statement was malicious, and the statement, albeit humiliating and disparaging to the recipient, may have stemmed from transitory frustration and been made without any intent to harm or discomfort the recipient.²⁶

- Psychiatric patients whose treatment for dissociative identity disorder (DID), also known as multiple personality disorder (MPD), resulted in psychiatrist engaging in improper sexual relationships and violating personal and professional boundaries were “abused and neglected” vulnerable adults for purposes of Vulnerable Adult Act (VAA).²⁷

Relevant citing reference to MINN. STAT. ANN. § 148.975 (re: duty to warn/ violent behavior of patient):

- Clinic was immune from liability under Minnesota civil commitment statute for phone call to the Sheriff's Office that triggered the deputy sheriff's response under the civil commitment statute; plaintiff was threatening suicide and clinic manager acted reasonably and in good faith by notifying the deputy sheriff of plaintiff's mental state. M.S.A. § 253B.23, subd. 4.²⁸

Contents of the record are mandated by law

Minnesota laws, and the Health Insurance Portability and Accountability Act (HIPAA)²⁹ identify several elements that must form the content of the psychological records:

Recordkeeping³⁰

Subpart 1. Record-keeping requirements. Providers shall maintain accurate and legible records of their services for each client. Records shall minimally contain:

A. client personal data;

²⁶ [*In re Appeal of Staley*, App.2007, 730 N.W.2d 289.](#)

²⁷ [*Wall v. Fairview Hosp. and Healthcare Services*, App.1997, 568 N.W.2d 194](#), review granted, affirmed in part, reversed in part [*584 N.W.2d 395*](#), rehearing denied.

²⁸ [*Anderson v. Yellow Med. County*, 37 F. App'x 849 \(8th Cir. 2002\).](#)

²⁹ 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).

³⁰ MINN. R. 7200.4750.

B. an accurate chronological listing of all client visits, fees charged to the client or a third-party payer, and payments received;

C. documentation of services, including, where applicable:

- (1) assessment methods, data, and reports;
- (2) an initial treatment plan and any subsequent revisions;
- (3) the name of the individual providing the services;
- (4) case notes for each date of service, including any interventions;
- (5) consultations with collateral sources;
- (6) diagnoses or problem descriptions;
- (7) documentation that informed consent for services was given, including written informed consent documents, where applicable;
- (8) documentation of supervision or consultation received; and
- (9) the name of the individual who is clinically responsible for the services provided;

D. copies of all correspondence relating to the client; and

E. copies of all client authorizations for release of information and any other documents pertaining to the client.

Minnesota law provides that a written notice of rights must be provided to patients:³¹

A provider shall provide to patients, in a clear and conspicuous manner, a written notice concerning practices and rights with respect to access to health records. The notice must include an explanation of:

- (1) disclosures of health records that may be made without the written consent of the patient, including the type of records and to whom the records may be disclosed; and
- (2) the right of the patient to have access to and obtain copies of the patient's health records and other information about the patient that is maintained by the provider.

³¹ MINN. STAT. ANN. § 144.292, subdiv. 4; For those psychologists working in civil commitment settings, *see*, MINN. STAT. ANN. § 253B.03(Rights of patients) that delineate various provisions about what needs to be noted in the patient's records.

The notice requirements of this subdivision are satisfied if the notice is included with the notice and copy of the patient and resident bill of rights under section 144.652 ...

A HIPAA notice of privacy practices³² 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 Minnesota law. Disclosure about the following exceptions for maintaining confidentiality should occur before providing psychological services:³³

...Private information may be disclosed without the informed written consent of the client when disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on the client or another individual. In such case the private information is to be disclosed only to appropriate professional workers, public authorities, the potential victim, or the family of the client.

...At the beginning of a professional relationship, a psychologist must inform a minor client that the law imposes a limit on the right of privacy of the minor with respect to the minor's communications with a psychologist.

...A psychologist shall limit access to client records and shall inform every individual associated with the agency or facility of the psychologist, such as a staff member, student, volunteer, or community aide, that access to client records shall be limited only to the psychologist with whom the client has a professional relationship, an individual associated with the agency or facility whose duties require access, and an individual authorized to have access by the informed written consent of the client.

...A psychologist may release private information upon court order or to conform with state or federal law, rule, or regulation.

...In the course of professional practice, a psychologist shall not violate any law concerning the reporting of abuse of children and vulnerable adults.

³² 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).

³³ MINN. ADMIN. CODE § 7200.4700.

...A psychologist must disclose to the board and its agents client records that the board and its agents consider to be germane to a disciplinary proceeding.

In addition, under the Health Records Act, the patient should be informed that under certain other circumstances confidential information must be released without the patient's permission for the following reasons:³⁴

...a provider must disclose health records relating to a patient's mental health to a law enforcement agency if the law enforcement agency provides the name of the patient and communicates that the: (1) patient is currently involved in an emergency interaction with the law enforcement agency; and (2) disclosure of the records is necessary to protect the health or safety of the patient or of another person. The scope of disclosure under this subdivision is limited to the minimum necessary for law enforcement to respond to the emergency. A law enforcement agency that obtains health records under this subdivision shall maintain a record of the requestor, the provider of the information, and the patient's name. Health records obtained by a law enforcement agency under this subdivision are private data on individuals as defined in section 13.02, subdivision 12, and must not be used by law enforcement for any other purpose.

...a provider providing mental health care and treatment may disclose health record information described ...about a patient to a family member of the patient or other person who requests the information if: (1) the request for information is in writing; (2) the family member or other person lives with, provides care for, or is directly involved in monitoring the treatment of the patient; (3) the involvement under clause (2) is verified by the patient's mental health care provider, the patient's attending physician, or a person other than the person requesting the information, and is documented in the patient's medical record; (4) before the disclosure, the patient is informed in writing of the request, the name of the person requesting the information, the reason for the request, and the specific information being requested; (5) the patient agrees

³⁴ MINN. R. § 144.294; *See*, MINN. STAT. ANN. § 595.02 (Testimony of witnesses) (privilege) ... (g) A ...psychologist, consulting psychologist ...engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the professional to act in that capacity...

to the disclosure, does not object to the disclosure, or is unable to consent or object, and the patient's decision or inability to make a decision is documented in the patient's medical record; and (6) the disclosure is necessary to assist in the provision of care or monitoring of the patient's treatment ...The information disclosed under this paragraph is limited to diagnosis, admission to or discharge from treatment, the name and dosage of the medications prescribed, side effects of the medication, consequences of failure of the patient to take the prescribed medication, and a summary of the discharge plan...

Patients also should be informed orally and in writing about the more likely disclosures of patient confidentiality because of the following reporting duties:

- Mandatory duty to report child abuse or neglect,³⁵ which includes prenatal exposure to controlled substances by the mother;³⁶
- Mandatory duty to report a vulnerable adult's physical abuse or other maltreatment;³⁷
- Mandatory duty to warn when a client makes threats against an identifiable victim.³⁸

Written disclosures must occur about fees under Minnesota law:³⁹

A psychologist shall, when asked by a client about the cost of professional services, disclose the cost of services provided.

...A psychologist shall itemize fees for all services for which the client or a third party is billed and make the itemized statement available to the client. The statement shall identify at least the date on which the service was provided, the nature of the service, the name of the individual providing the service, and the name of the individual who is professionally responsible for the service.

Minnesota law specifically requires that certain elements to assessments be

³⁵ MINN. STAT. ANN. § 626.556, subdiv. 3.

³⁶ MINN. STAT. ANN. § 626.556, subdiv. 1.

³⁷ MINN. STAT. ANN. § 626.5572, subdiv. 16.

³⁸ MINN. STAT. ANN. § 148.975, subdiv. 2.

³⁹ MINN. R. § 7200.5200.

present in reports:⁴⁰

The provision of a written or oral report, including testimony of a psychologist as an expert witness, concerning the psychological or emotional health or state of a client, is a psychological service. The report must include:

- A. a description of all assessments, evaluations, or other procedures upon which the psychologist's conclusions are based;
- B. any reservations or qualifications concerning the validity or reliability of the conclusions formulated and recommendations made, taking into account the conditions under which the procedures were carried out, the limitations of scientific procedures and psychological descriptions, and the impossibility of absolute predictions;
- C. a notation concerning any discrepancy, disagreement, or conflicting information regarding the circumstances of the case that may have a bearing on the psychologist's conclusions; and
- D. a statement as to whether the conclusions are based on direct contact between the psychologist and the client.

Conclusions and reports⁴¹

Subpart 1. Bases for assessments. An assessment process must be appropriate and sufficient for the purposes for which it is intended.

Subp. 2. Bases for conclusions. Providers shall base their conclusions on information and procedures sufficient to substantiate those conclusions.

Subp. 3. Administration and interpretation of tests. Providers shall use psychological tests as follows:

- A. standardized tests shall be used preferentially over nonstandardized tests;
- B. all tests shall be administered and responses shall be recorded, scored, and interpreted based on practice or scientific foundations;
- C. whether a test is used in a nonstandard manner, the limitations of the test and the reasons for its nonstandard use shall be clearly stated in the report;
- D. a test's reliability, validity, and normative data shall be taken into account in its selection, use, and interpretation; and

⁴⁰ MINN. R. § 7200.5000.

⁴¹ MINN. R. § 7200.5010.

E. the reliability and validity of test statements and interpretations in reports shall be the responsibility of the provider, including when automated testing services are used.

Subp. 4. Reports. Reports shall include:

A. a description of all sources of information upon which the provider's conclusions are based;

B. any reservations or qualifications concerning the validity or reliability of the opinions and conclusions formulated and recommendations made, taking into account the conditions under which the procedures were carried out, including any nonstandard use of a test, the limitations of scientific procedures and psychological descriptions, base rate and baseline considerations, and the impossibility of absolute predictions;

C. a statement concerning any discrepancy, disagreement, or inconsistent or conflicting information regarding the circumstances of the case that may have a bearing on the provider's conclusions;

D. a statement of the nature of and reasons for any use of a procedure that differs from the purposes, populations, or referral questions for which it has been designed or validated, or that is administered, recorded, scored, or interpreted in other than a standard and objective manner; and

E. a statement indicating if any test interpretations or report conclusions are not based on direct contact between the provider and the client.

In light of the Minnesota laws, and HIPAA, psychologists would use an intake and evaluation note, progress note, and termination templates.

Maintenance and Security of Records

Minnesota law is quite protective of records and has created several standards of practice:⁴²

Upon the written request of a spouse, parent, child, or sibling of a patient being evaluated for or diagnosed with mental illness, a provider shall inquire of a patient whether the patient wishes to authorize a specific individual to receive information regarding the patient's current and proposed course of treatment. If the patient so authorizes, the provider shall communicate to the designated

⁴² MINN. STAT. ANN. § 144.294.

individual the patient's current and proposed course of treatment. Section 144.293, subdivisions 2 and 4, apply to consents given under this subdivision.

Accessing And Releasing Private Information⁴³

Subpart 1. Right to access and release private information. A client has the right to access and consent to release of private information maintained by the provider, including client records as provided in Minnesota Statutes, sections 144.291 to 144.298, relating to the provider's psychological services to that client, except as otherwise provided by law or court order.

Subp. 2. Release of private information. When a client initiates a request for the release of private information, the provider shall comply with Minnesota Statutes, sections 144.291 to 144.298. However, if the provider initiates the release of private information to a third party, a written authorization for release of information must be obtained that minimally includes:

- A. the name of the client;
- B. the name of the individual or entity providing the information;
- C. the name of the individual or entity to which release is to be made;
- D. the specific information to be released;
- E. the purpose of the release, such as whether the release is to coordinate professional care with another provider, to obtain insurance payments for services, or for other specified purposes;
- F. the time period covered by the release;
- G. a statement that the release is valid for one year, except as otherwise allowed by law, or for a period that is specified in the release;
- H. a declaration that the individual signing the statement has been told of and understands the nature and purpose of the authorized release;
- I. a statement that the release may be rescinded, except to the extent that the release has already been acted upon;
- J. the signature of the client or the client's legally authorized representative, whose relationship to the client shall be stated; and
- K. the date on which the release is signed.

Subp. 3. Multiple client records. Whenever psychological services are provided to multiple psychotherapy clients, each client has a right to access only that part of the records that includes information provided directly by the client or

⁴³ MINN. R. 7200.4710.

authorized by the client to be part of the record, unless otherwise directed by law or court order. Upon a request by one client to access or release multiple client records, that part of the records that contains information that has not been provided directly or by authorization of the requesting client shall be redacted unless written authorization to disclose this information has been obtained from the other client. Alternatively, the provider may, at the beginning of the service, obtain written informed consent from the clients stating that each client has the right to access or authorize release of all information that is part of the record.

Subp. 4. Board investigations. The provider shall release to the board and its agents private information that the board and its agents consider to be germane to the investigation of all matters pending before the board that relate to its lawful regulation activities. Redacting identifying information of individuals in the record is not required when providing information to the board as part of a board investigation.

Records also can be released under several other conditions:⁴⁴

...Subd. 2. Patient consent to release of records.

A provider, or a person who receives health records from a provider, may not release a patient's health records to a person without:

- (1) a signed and dated consent from the patient or the patient's legally authorized representative authorizing the release;
- (2) specific authorization in law; or
- (3) a representation from a provider that holds a signed and dated consent from the patient authorizing the release.

Subd. 3. Release from one provider to another.

A patient's health record, including, but not limited to, laboratory reports, x - rays, prescriptions, and other technical information used in assessing the patient's condition, or the pertinent portion of the record relating to a specific condition, or a summary of the record, shall promptly be furnished to another provider upon the written request of the patient. The written request shall specify the name of the provider to whom the health record is to be furnished. The provider who furnishes the health record or summary may retain a copy of

⁴⁴ MINN. STAT. ANN. § 144.293.

the materials furnished. The patient shall be responsible for the reasonable costs of furnishing the information.

...Subd. 5.Exceptions to consent requirement.

This section does not prohibit the release of health records:

- (1) for a medical emergency when the provider is unable to obtain the patient's consent due to the patient's condition or the nature of the medical emergency;
- (2) to other providers within related health care entities when necessary for the current treatment of the patient; or
- (3) to a health care facility licensed by this chapter, chapter 144A, or to the same types of health care facilities licensed by this chapter and chapter 144A that are licensed in another state when a patient:
 - (i) is returning to the health care facility and unable to provide consent; or
 - (ii) who resides in the health care facility, has services provided by an outside resource under Code of Federal Regulations, title 42, section 483.75(h), and is unable to provide consent.

Subd. 7.Exception to consent.

Subdivision 2 does not apply to the release of health records to the commissioner of health or the Health Data Institute under chapter 62J, provided that the commissioner encrypts the patient identifier upon receipt of the data.

...Subd. 9.Documentation of release.

- (a) In cases where a provider releases health records without patient consent as authorized by law, the release must be documented in the patient's health record. In the case of a release under section 144.294, subdivision 2, the documentation must include the date and circumstances under which the release was made, the person or agency to whom the release was made, and the records that were released.
- (b) When a health record is released using a representation from a provider that holds a consent from the patient, the releasing provider shall document:
 - (1) the provider requesting the health records;
 - (2) the identity of the patient;
 - (3) the health records requested; and
 - (4) the date the health records were requested.

HIPAA permits sharing protected health information (PHI) with other health

care professionals who are engaged in the evaluation and treatment of the same patient.⁴⁵ 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.⁴⁶ In addition, patients have a right to amend any part of the record;⁴⁷ 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.⁴⁸

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.⁴⁹ 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).⁵⁰ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

Retention of Records

Minnesota law contains two provisions related to retention of records:⁵¹

Subp. 2. Duplicate records. The provider need not maintain client records that duplicate those maintained by the agency, clinic, or other facility at which services are provided.

Subp. 3. Records retention. The provider shall retain a client's records for a minimum of eight years after the date of the provider's last professional service to the client, except as otherwise provided by law. If the client is a minor, the

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

⁴⁶ 45 CFR 164.524.

⁴⁷ 45 CFR 164.526 (a).

⁴⁸ 45 CFR 164.528.

⁴⁹ 45 CFR 164.508.

⁵⁰ 45 CFR 164.508 (b)(4).

⁵¹ MINN. R. 7200.4750.

records retention period shall not commence until the client reaches the age of 18, except as otherwise provided by law.

Violations of the specific duty

Under the statute governing Minnesota psychologists permits the board to take one or more of the following actions:⁵²

- (1) refuse to grant or renew a license;
- (2) revoke a license;
- (3) suspend a license;
- (4) impose limitations or conditions on a licensee's practice of psychology, including, but not limited to, limiting the scope of practice to designated competencies, imposing retraining or rehabilitation requirements, requiring the licensee to practice under supervision, or conditioning continued practice on the demonstration of knowledge or skill by appropriate examination or other review of skill and competence;
- (5) censure or reprimand the licensee;
- (6) refuse to permit an applicant to take the licensure examination or refuse to release an applicant's examination grade if the board finds that it is in the public interest; or
- (7) impose a civil penalty not exceeding \$7,500 for each separate violation. The amount of the penalty shall be fixed so as to deprive the applicant or licensee of any economic advantage gained by reason of the violation charged, to discourage repeated violations, or to recover the board's costs that occur in bringing about a disciplinary order. For purposes of this clause, costs are limited to legal, paralegal, and investigative charges billed to the board by the Attorney General's Office, witness costs, consultant and expert witness fees, and charges attendant to the use of an administrative law judge.

⁵² MINN. STAT. ANN. § 148.941.