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

---

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.
Columbia with reference to several relevant state-by-state surveys retrieved from Lexis and Westlaw. Our research answered the following questions for each jurisdiction: (a) Do record keeping duties created by statutes or administrative rules exist? (b) Have court rulings created a common-law duty or interpreted the statutes or administrative rules? (c) What are the contents of the record that are mandated by law? (d) Are there laws related to the maintenance and security of records? (e) What are the laws related to retention of records? (f) What are the consequences of violating specific duties?

Readers should view the narrative summary of their jurisdiction’s law as a starting point for interpreting how to meet the law within their own jurisdiction as they construct their electronic records. As laws can change, please check the law with your state associations to see if more current interpretations for meeting the record keeping duties. Many state professional associations have ethics committees that can be consulted as part of their benefits. In addition, your association can refer psychologists for individual consultation to lawyers specializing in legal practices focused on mental health practice. The professional liability carriers also provide free legal and professional consultation.

Montana 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**

Montana 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 reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Montana, and recommend that psychologists use this template, too.

---

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).


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

**Statute or Rule**

The Montana Board has adopted its own rules of “unprofessional conduct” for psychologists, which set forth several obligations related to record keeping.

**Common Law**

The State was immune from liability, in wrongful death action filed by mother after her son killed his brother six days after son was released from state mental

---

6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.  
8 Id. at p. 45.  
10 Id.
hospital; there was no proof that son made an actual threat of physical violence by specific means against a clearly identified or reasonably identifiable victim to his mental health care providers.\textsuperscript{11}

**Contents of the record that are mandated by law**

Under the rules regulating psychological practice, a duty to disclose certain information to all patients is required. The Health Insurance Portability and Accountability Act (HIPAA)\textsuperscript{12} calls for a notice of privacy practices\textsuperscript{13} that delineates the psychologist’s scope of and limitations of confidentiality. It works in tandem with the disclosure document provided to the patient during the informed consent process specified by Montana law.

**Informed client**

As part of the informed consent process, Montana psychologists must make the following disclosures to their patients before providing services and:\textsuperscript{14}

\begin{itemize}
  \item[a)] shall disclose fees and confidentiality prior to initiating the defined professional relationship with clients, except in the case of a clinical emergency. Upon initiating the defined professional relationship there must be a discussion of the nature and anticipated course of contracted services, limitations of confidentiality and modalities of communication by which treatment is provided, and mandated reporting situations. When services rendered involve more than one interested party, the psychologist shall clarify the dimensions of confidentiality and professional responsibility to all participating parties;
  \item[\ldots(c)] shall, when initiating conjoint services to several persons who have a relationship (e.g. familial, communal or business), attempt to clarify which of the individuals are clients and the relationship the psychologist will have with...\end{itemize}

---


\textsuperscript{14} MONT. ADMIN. R. 24.189.2305; see also MONT. ADMIN. R. 24.189.817 (detail needed for parenting plan evaluations) and MONT. ADMIN. R. 24.189.607 (detail needed for supervisory relationships).
each person. This clarification includes the role of the psychologist and the probable uses of the services provided or the information obtained;

(d) shall keep the client fully informed as to the purpose and nature of any evaluation, treatment or other procedures, and of the client’s right to freedom of choice regarding services provided…

**Psychologist-client privilege**

The confidential relations and communications between a psychologist and a client must be placed on the same basis as provided by law for those between an attorney and a client. Nothing in any act of the legislature may be construed to require the privileged communications to be disclosed.

**Limits of confidentiality**

At the beginning of a professional relationship a psychologist must inform the patient of the legal limits of confidentiality as specified by Montana law:

(1) Psychologists shall inform all participants, including parents, children when feasible, other family members, and third party contacts such as teachers, physicians, and child care providers, as to the limits of confidentiality which can be expected with regard to any information they may provide to the psychologist over the course of the evaluation. This includes the limits of confidentiality applicable to the general practice of psychology, such as a duty to warn in instances of possible imminent danger to a participant or to others, or legal obligations to report suspected child abuse or elder abuse, and also exceptions to confidentiality stemming from the specific requirements of a parenting plan evaluation, including:

(a) the potential need to disclose information provided by any participant to other participants, in order to obtain accounts of circumstances pertinent to the issues being evaluated;

(b) the expectation of disclosure of relevant information provided by

---

16 MONT. ADMIN. R. 24.189.813.
17 MONT. CODE ANN. § 27-1-1102 (Duty to warn of violent behavior) & MONT. CODE ANN. § 27-1-1103 (Immunity from liability).
18 MONT. CODE ANN. § 41-3-201 (Reports – abuse of minors).
19 MONT. CODE ANN. § 52-3-811 (Reports – elder abuse / developmentally disabled abuse).
individual participants to the attorneys involved in the case, to the court, and to the guardian ad litem, if one has been appointed; and

(c) the likely disclosure of the psychologist's findings, professional opinions and recommendations regarding the resolution of contested matters which fall within the scope of the evaluation to parents, their attorneys, the court, and any other party, such as a guardian ad litem.

(2) Psychologists shall obtain written waivers of confidentiality from the parents who are participating in the evaluation, encompassing all disclosures of information to other persons, including other participants in the evaluation, attorneys, and the court.

...(4) Psychologists recognize that disclosures of statements by abused spouses may pose special risks to the safety and well being of persons who claim to be victims of domestic abuse. Prior to disclosure of such allegations to an alleged perpetrator or to other persons who may support, collude with, or otherwise increase the risk of abuse, the psychologist shall inform the alleged victim that the disclosure will take place. If appropriate, information will be provided as to available community resources for protection, planning, and personal assistance, and counseling for victims of domestic abuse.

(5) Psychologists shall provide judges, attorneys and other appropriate parties with access to the results of the evaluation, but make reasonable efforts to avoid the release of notes, test booklets, structured interview protocols and raw test data to persons untrained in their interpretation. If legally required to release such information to untrained persons, psychologists shall first offer alternative steps such as providing the information in the form of a report, or releasing the information to another psychologist who is qualified in the interpretation of the data and who will discuss or provide written interpretations of the data with the person(s) who are seeking the information.

(6) Psychologists shall not agree to requests by participants in a parenting plan evaluation that information shared with the psychologist be concealed. When such requests are made, the psychologist shall clarify the requirements of the evaluation as regards confidentiality, and may advise the participant to consult with the participant’s attorney before proceeding with the evaluation. The psychologist must ultimately respect the right of any participant to withhold information from the evaluation. Whether the refusal to provide information should itself be made known to others, must be decided by the psychologist.
based on the relevance of such refusal to the issues before the court in the particular case at hand.

(7) Psychologists recognize the possibility that the need to disclose information obtained in the evaluation may limit the validity of data acquired during the evaluation by inhibiting the free and complete disclosure of information by participants.

A psychologist …rendering professional individual services to a client, or services billed to a third-party payer, shall maintain a professional record that includes:\(^{20}\)

(i) the presenting problem(s) or purpose of diagnosis;
(ii) the fee arrangement;
(iii) the date and substance of each billed contact or service;
(iv) any test results or other evaluative results obtained and any basic test data from which they were derived;
(v) notation and results of formal consults with other providers; and
(vi) a copy of all test or other evaluative reports prepared as part of the defined professional relationship.

Psychologists licensed in other jurisdictions may practice within Montana if they provide the following notice, which presumably also would be disclosed to any client who was being provided services in Montana:\(^{21}\)

(1) Nonresident consulting psychological services defined in 37-17-104 (4), MCA, may be rendered to individuals, groups, corporations or the public for compensation or fee.

(2) To provide such services and engage in such activities in the state of Montana, a psychologist duly licensed in the state of his residence shall file with the board a completed and notarized form provided by the board, stating the nature, location and duration of said services that exceed ten days within any calendar year. Notification shall be provided to the board each year nonresident

---


\(^{21}\) MONT. ADMIN. R. 24.189.414.
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.

Montana psychologists must terminate a professional relationship when “the psychologist is, or could reasonably be expected to be impaired due to mental, emotional, physiologic, pharmacologic or substance abuse conditions. If such a condition develops after a defined professional relationship has been initiated, the psychologist shall terminate the relationship in an appropriate manner, shall notify the client in writing of the termination and shall assist the client in obtaining services from another professional.”22

Finally, note that the Uniform Health Care Information Act (MONT. CODE. ANN. §§ 50-16-501 through 50-16-553) does not apply to health care providers subject to HIPAA.23

Maintenance and security of records

Montana law has established a series of confidentiality protections that affects the maintenance and security of the record:24

(1) In regard to privileged information and records, the licensee:

(a) shall not reproduce or describe psychological tests or assessment procedures in popular publications, lectures or public presentations in ways that might invalidate them;

...(c) shall administer, store and dispose of written, electronic and other records in such a manner as to insure their confidentiality;

(d) shall not withhold records under their control that are requested and imminently needed for a client's treatment solely because payment has not been received, except as otherwise provided by law;

22 MONT. ADMIN. R. 24.189.2309 (4)(c).
23 MONT. CODE ANN. § 50-16-505 (“The provisions of this part apply only to a health care provider that is not subject to the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, et seq., and administrative rules adopted in connection with HIPAA.”).
24 MONT. ADMIN. R. 24.189.2318.
(e) shall continue to treat as confidential information regarding a client after the defined professional relationship between the psychologist and the client has ceased.

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, including Psychotherapy Notes created by the psychologist, as long as those records are maintained. In addition, patients have a right to amend any part of the record; Under this section, a denial of the proposed amendment can occur if the record was not created by the psychologist (unless the patient provides a reasonable basis to believe that the originator of PHI is no longer available to act on the requested amendment) or if the record is accurate and complete (other subsections are not discussed as they are unlikely to arise for psychologists). Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.

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

Retention of Records
Psychologists must maintain and not destroy patient records:

(a) for a period of seven years after the patient reaches the age of 18, for patients who are minors; and

(b) for a period of seven years after the last professional patient contact, including a release of records, for patients who are adults.

---

25 45 CFR 164.524.
26 45 CFR 164.526 (a).
27 45 CFR 164.528.
28 45 CFR 164.508.
Violations of the specific duties
The Board may:\textsuperscript{30}

(a) revoke and suspend licenses;

(b) conduct hearings upon complaints concerning persons licensed under this chapter;

(c) cause the prosecution and enjoiner of all persons violating this chapter, by the complaint of its secretary signed with the county attorney, in the county where the violation took place and incur necessary expenses for the prosecution…

\textsuperscript{30}\textsc{mont. code ann. § 37-17-202(2); see, mont. admin. r. 24.189.2305 (3): “in regard to judicial or disciplinary situations, a licensee or license applicant:(a) shall cooperate with an investigation by: (i) furnishing any papers or documents in the possession and under the control of the licensee, as per the appropriate health care records act;(ii) furnishing in writing a full and complete explanation covering the matter contained in the complaint; and(iii) responding to subpoenas issued by the board or the department, whether or not the recipient of the subpoena is the respondent in the proceedings.”}