

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

Nebraska 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

Nebraska law suggests the need 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 the duty to warn a reasonably identifiable victim if a patient makes a serious threat of physical violence, and recommend that psychologists use this template, too.⁵

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

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.

to select an option or permit filling in the shaded text boxes, they cannot be inserted 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 Nebraska Board of Psychology has adopted and incorporated the standards of the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (2003) (“APA Code of Ethics”).¹⁰ In addition, a set of regulatory rules of professional code of conduct have been adopted by the

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)).

¹⁰ 172 NEB. ADMIN. CODE § 157-001 “The Board hereby adopts the Ethical Standards of Psychologists of the American Psychological Association as the Code of Professional Conduct for the practice of Psychology in Nebraska.” Copies of the APA Code of Ethics are available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C.

Board of Psychology to protect the public welfare.¹¹

Common Law

In *Munstermann v. Alegent Health*, the Supreme Court of Nebraska noted that Nebraska's statute restricts itself to mental health professionals including psychologists.¹² The Court considered adopting a broad *Tarasoff* duty for psychiatrists, but concluded that by adopting NEB. REV. STAT. ANN. § 71-1336, the Legislature had expressed a clear public policy preference for a more limited duty for mental health professionals.¹³

Annotations to NEB. REV. STAT. § 71-8403 (re: Access to medical records)

- Unpromulgated regulations of Department of Correctional Services, like state statutes, did not create a mandatory duty to release mental health records to prisoners, but instead provided for discretion to withhold such records, and thus trial court did not abuse its discretion by dismissing prisoner's action for declaratory judgment which sought declaration that regulations ought to have been promulgated. Prisoner did not have a clear right to access to his mental health records, even though he was not being treated at the time he made the request for his records, and thus prisoner was not entitled to mandamus requiring Department of Correctional Services (DCS) officials to provide such

20002-4242 and on the APA's website at <http://www.apa.org/ethics/code/principles.pdf> (last accessed Aug. 1, 2012) [hereinafter "APA CODE OF ETHICS"].

¹¹ NEB. REV. STAT. ANN. § 38-3105.

¹² *Munstermann v. Alegent Health*, 76 N.W.2d 73, 82 (Neb. 2006).

¹³ *Id.* at 83-84; *See*, NEB. REV. STAT. § 38-2137-- Mental health practitioner; duty to warn of patient's threatened violent behavior; limitation on liability(1) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified pursuant to the Mental Health Practice Act for failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims.(2) The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the mental health practitioner if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.(3) No monetary liability and no cause of action shall arise under section 38-2136 against a licensee or certificate holder for information disclosed to third parties in an effort to discharge a duty arising under subsection (1) of this section according to the provisions of subsection (2) of this section.

records; statute providing that inmates may obtain access to their medical records gave DCS the authority to withhold mental health and psychological records when appropriate, and statute giving patients access to medical records allowed discretionary exceptions when the records at issue involved mental health and psychological matters.¹⁴

Contents of the record are mandated by law

Nebraska laws provide for the following elements to the informed consent process:¹⁵

A psychologist shall obtain from a client or his or her legal representative informed and voluntary consent before providing or assisting in the care of treatment of the client. Failure to do so shall constitute unprofessional conduct. A client shall be deemed to have not given his or her informed and voluntary consent if the psychologist:

003.01 Fails to advise a client of a conflict of interest. A conflict of interest exists if the exercise of the psychologist's professional judgment on behalf of the client will be or reasonably will be impaired or adversely affected by his or her own financial, business, property or personal interest.

003.02 Fails to clarify the nature of the relationship to all parties directly affected by the services.

003.03 Fails to advise a client of a known bias or prejudice which seriously affects the psychologist's objectivity in dealing with the client.

The APA Code of Ethics also would be applied with the Health Insurance Portability and Accountability Act (HIPAA):¹⁶

3.10 Informed Consent

(a) When psychologists ...provide assessment, therapy, counseling or

¹⁴ [*State ex rel. Jacob v. Bohn*, 2006, 711 N.W.2d 884, 271 Neb. 424.](#)

¹⁵ 172 NEB. ADMIN. CODE § 156-003.

¹⁶ APA CODE OF ETHICS, *supra* note 10; 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).

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](#).)

A number of confidentiality standards under Nebraska law will require disclosure about the limitations in protecting certain types of confidences in order to satisfy the informed consent process:¹⁷

(1) The confidential relations and communications between psychologists and their clients and patients shall be on the same basis as those between physicians and their clients and patients as provided in section 27-504.

(2) In judicial proceedings, whether civil, criminal, or juvenile, in legislative and

¹⁷ NEB. REV. STAT. ANN. § 38-3131; *See* 172 NEB. ADMIN. CODE § 156-006 (CONFIDENTIALITY). A psychologist shall hold in confidence information obtained from a client, except in those unusual circumstances in which to do so would result in clear danger to the person or to others or where otherwise required by law. Failure to do so shall constitute unprofessional conduct; *see also* 172 NEB. ADMIN. CODE § 5-003 (MANDATORY REPORTING BY HEALTH CARE PROFESSIONALS).

administrative proceedings, and in proceedings preliminary and ancillary thereto, a client or patient, or his or her legal guardian or personal representative, may refuse to disclose or may prevent the disclosure of confidential information, including information contained in administrative records, communicated to a psychologist, or to a person reasonably believed by the client or patient to be a psychologist, or the psychologist's or person's agents, for the purpose of diagnosis, evaluation, or treatment of any mental and emotional disorder. In the absence of evidence to the contrary, the psychologist shall be presumed to be authorized to claim the privilege on the client's or patient's behalf.

(3) This privilege may not be claimed by the client or patient, or on his or her behalf by authorized persons, in the following circumstances:

- (a) When abuse or harmful neglect of children, the elderly, or disabled or incompetent individuals is known or reasonably suspected;
- (b) When the validity of a will of a former client or patient of the psychologist is contested;
- (c) When such information is necessary for the psychologist to defend against a malpractice action brought by the client or patient;
- (d) When an immediate threat of physical violence against a readily identifiable victim is disclosed to the psychologist;
- (e) When an immediate threat of self-inflicted injury is disclosed to the psychologist;
- (f) When the client or patient, by alleging mental or emotional damages in litigation, puts his or her mental state in issue;
- (g) When the client or patient is examined pursuant to court order;
- (h) When the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the client or patient or any other cause of action arising out of the professional relationship; or

(i) In the context of investigations and hearings brought by the client or patient and conducted by the department, when violations of the Psychology Practice Act are at issue.

Subject's records; confidential; exceptions¹⁸

(1) All records kept on any subject shall remain confidential except as otherwise provided by law. Such records shall be accessible to (a) the subject, except as otherwise provided in subsection (2) of this section, (b) the subject's legal counsel, (c) the subject's guardian or conservator, if any, (d) the mental health board having jurisdiction over the subject, (e) persons authorized by an order of a judge or court, (f) persons authorized by written permission of the subject, (g) agents or employees of the Department of Health and Human Services upon delivery of a subpoena from the department in connection with a licensing or licensure investigation by the department, (h) individuals authorized to receive notice of the release of a sex offender pursuant to section 83-174, (i) the Nebraska State Patrol or the department pursuant to section 69-2409.01, or (j) the Office of Parole Administration if the subject meets the requirements for lifetime community supervision pursuant to section 83-174.03.

(2) Upon application by the county attorney or by the administrator of the treatment facility where the subject is in custody and upon a showing of good cause therefor, a judge of the district court of the county where the mental health board proceedings were held or of the county where the treatment facility is located may order that the records not be made available to the subject if, in the judgment of the court, the availability of such records to the subject will adversely affect his or her mental illness or personality disorder and the treatment thereof.

Along with the limitations of protecting confidences under Nebraska law, a HIPAA notice of privacy practices¹⁹ 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.

¹⁸ NEB. REV. STAT. § 71-961.

¹⁹ 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).

APA Standards suggests that psychologists focus the documentation in a manner that is very protective of their client's privacy rights:

4.04 Minimizing Intrusions on Privacy²⁰

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

6.06 Accuracy in Reports to Payors and Funding Sources²¹

In their reports to payors for services ...psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided ...the fees, 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 Assessments²²

(a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements, ...on information and techniques sufficient to substantiate their findings. (See also Standard [2.04, Bases for Scientific and Professional Judgments](#).)

(b) Except as noted in [9.01c](#), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards [2.01, Boundaries of Competence](#), and [9.06, Interpreting Assessment Results](#).)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

²⁰ APA CODE OF ETHICS, *supra* note 10.

²¹ *Id.*; see, 172 NEB. ADMIN. CODE 156-009 Fees For Services.

²² *Id.*

9.02 Use of Assessments²³

(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 Results²⁴

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...

Standard 6.06 implies that information about the *nature of the service provided...*, *the fees charged*, *the identity of the provider*, *findings*, and *diagnosis* should be maintained in the record when necessary for billing purposes. In addition, the requirements of standards 9.01, 9.02, and 9.10 suggest that psychologists in Nebraska would use an intake and evaluation note, progress note, and termination note templates.

Maintenance and Security of Records²⁵

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,²⁶ “[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 Fees²⁷

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

²³ *Id.*

²⁴ *Id.*

²⁵ See, [175 NEB. ADMIN. CODE § 19-006 \(STANDARDS OF OPERATION, CARE AND TREATMENT\)](#), which sets forth various recordkeeping requirements for licensed mental health centers.

²⁶ *Id.*

²⁷ *Id.*

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](#).)

Nebraska has enacted laws about access to records, and fees for obtaining the records:

Mental health practitioners; confidentiality; exception²⁸

No person licensed or certified pursuant to the Mental Health Practice Act shall disclose any information he or she may have acquired from any person consulting him or her in his or her professional capacity except:

- (1) With the written consent of the person or, in the case of death or disability, of the person's personal representative, any other person authorized to sue on behalf of the person, or the beneficiary of an insurance policy on the person's life, health, or physical condition. When more than one person in a family receives therapy conjointly, each such family member who is legally competent to execute a waiver shall agree to the waiver referred to in this subdivision. Without such a waiver from each family member legally competent to execute a waiver, a practitioner shall not disclose information received from any family member who received therapy conjointly;
- (2) As such privilege is limited by the laws of the State of Nebraska or as the board may determine by rule and regulation;
- (3) When the person waives the privilege by bringing charges against the licensee; or
- (4) When there is a duty to warn under the limited circumstances set forth in section 38-2137.

Access to medical records²⁹

²⁸ NEB. REV. STAT. § 38-2136.

²⁹ NEB. REV. STAT. ANN. § 71-8403; *See*, NEB. REV. STAT. § 71-8406 (Provider; immunity). A provider who transfers or submits information in good faith to a patient's medical record shall not be liable in damages to the patient or any other person for the disclosure of such medical records as provided in sections 71-8401 to 71-8407.

(1) A patient may request a copy of the patient's medical records or may request to examine such records. Access to such records shall be provided upon request pursuant to sections 71-8401 to 71-8407, except that mental health medical records may be withheld if any treating physician, psychologist, or mental health practitioner determines in his or her professional opinion that release of the records would not be in the best interest of the patient unless the release is required by court order. The request and any authorization shall be in writing. If an authorization does not contain an expiration date or specify an event the occurrence of which causes the authorization to expire, the authorization shall expire twelve months after the date the authorization was executed by the patient.

(2) Upon receiving a written request for a copy of the patient's medical records under subsection (1) of this section, the provider shall furnish the person making the request a copy of such records not later than thirty days after the written request is received.

(3) Upon receiving a written request to examine the patient's medical records under subsection (1) of this section, the provider shall, as promptly as required under the circumstances but no later than ten days after receiving the request: (a) Make the medical records available for examination during regular business hours; (b) inform the patient if the records do not exist or cannot be found; (c) if the provider does not maintain the records, inform the patient of the name and address of the provider who maintains such records, if known; or (d) if unusual circumstances have delayed handling the request, inform the patient in writing of the reasons for the delay and the earliest date, not later than twenty-one days after receiving the request, when the records will be available for examination. The provider shall furnish a copy of medical records to the patient as provided in subsection (2) of this section if requested.

(4) This section does not require the retention of records or impose liability for the destruction of records in the ordinary course of business prior to receipt of a request made under subsection (1) of this section. A provider shall not be required to disclose confidential information in any medical record concerning another patient or family member who has not consented to the release of the record.

Access; charges³⁰

Except as provided in sections 71-8405 and 71-8407, for medical records provided under section 71-8403 or under subpoena by a patient or his or her authorized representative a provider may charge no more than twenty dollars as a handling fee and may charge no more than fifty cents per page as a copying fee. A provider may charge for the reasonable cost of all duplications of medical records which cannot routinely be copied or duplicated on a standard photocopy machine. A provider may charge an amount necessary to cover the cost of labor and materials for furnishing a copy of an X-ray or similar special medical record. If the provider does not have the ability to reproduce X-rays or other records requested, the person making the request may arrange, at his or her expense, for the reproduction of such records.

Charges; exemptions³¹ (1) A provider shall not charge a fee for medical records requested by a patient for use in supporting an application for disability or other benefits or assistance or an appeal relating to the denial of such benefits or assistance under:

- (a) Sections 43-501 to 43-536 regarding assistance for certain children;
- (b) The Medical Assistance Act relating to the medical assistance program;
- (c) Title II of the federal Social Security Act, as amended, 42 U.S.C. 401 et seq.;
- (d) Title XVI of the federal Social Security Act, as amended, 42 U.S.C. 1382 et seq.; or
- (e) Title XVIII of the federal Social Security Act, as amended, 42 U.S.C. 1395 et seq.

(2) Unless otherwise provided by law, a provider may charge a fee as provided in section 71-8404 for the medical records of a patient requested by a state or federal agency in relation to the patient's application for benefits or assistance or an appeal relating to denial of such benefits or assistance under subsection (1) of this section.

³⁰ NEB. REV. STAT. ANN. § 71-8404.

³¹ NEB. REV. STAT. ANN. § 71-8405.

(3) A request for medical records under this section shall include a statement or document from the department or agency that administers the issuance of the assistance or benefits which confirms the application or appeal.

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, which includes the Psychotherapy Notes created by the psychologist, as long as those records are maintained.³² In addition, patients have a right to amend any part of the record;³³ 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.³⁴

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...³⁵

(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](#).)

³² 45 CFR 164.524; HIPAA is more expansive of the patient's rights so the more restrictive State law would not apply (TENN. CODE ANN. § 63-2-101).

³³ 45 CFR 164.526 (a).

³⁴ 45 CFR 164.528.

³⁵ APA CODE OF ETHICS, *supra* note 10.

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.³⁶ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment³⁷

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).³⁸

Retention of Records

Although no Nebraska requirement exists, HIPAA³⁹ mandates that a covered entity must retain the documentation ...for six years from the date of its creation or the date when it last was in effect, whichever is later.

Violations of the specific duty

The Nebraska Board has several grounds upon which discipline a psychologist for record keeping violations:

Disciplinary actions; grounds⁴⁰

Except as otherwise provided in sections 38-1,119 to 38-1,123, a credential to practice a profession may be denied, refused renewal, or have other disciplinary measures taken against it in accordance with section 38-185 or 38-186 on any of the following grounds:

- (1) Misrepresentation of material facts in procuring or attempting to procure a credential;
- (2) Immoral or dishonorable conduct evidencing unfitness to practice the

³⁶ 45 CFR 164.508.

³⁷ APA CODE OF ETHICS, *supra* note 10.

³⁸ 45 CFR 164.508 (b)(4); HIPAA is more expansive of the patient's rights so the more restrictive State law would not apply (TENN. CODE ANN. § 63-2-102).

³⁹ 45 CFR 164.530 (j)(2).

⁴⁰ NEB. REV. STAT. ANN. § 38-178.

profession in this state;

...(6) Practice of the profession (a) fraudulently, (b) beyond its authorized scope, (c) with gross incompetence or gross negligence, or (d) in a pattern of incompetent or negligent conduct;

...(10) Permitting, aiding, or abetting the practice of a profession or the performance of activities requiring a credential by a person not credentialed to do so;

(11) Having had his or her credential denied, refused renewal, limited, suspended, revoked, or disciplined in any manner similar to section 38-196 by another state or jurisdiction based upon acts by the applicant or credential holder similar to acts described in this section;

...(15) Violations of the Uniform Credentialing Act or the rules and regulations relating to the particular profession;

(16) Unlawful invasion of the field of practice of any profession regulated by the Uniform Credentialing Act which the credential holder is not credentialed to practice;

...(18) Failure to file a report required by section 38-1,124, 38-1,125, or 71-552;

(19) Failure to maintain the requirements necessary to obtain a credential;

(20) Violation of an order issued by the department;

(21) Violation of an assurance of compliance entered into under section 38-1,108;

(22) Failure to pay an administrative penalty;

(23) Unprofessional conduct as defined in section 38-179...

Additional grounds for disciplinary action⁴¹

In addition to the grounds for disciplinary action found in sections 38-178 and 38-179, a credential subject to the Psychology Practice Act may be denied, refused

⁴¹ NEB. REV. STAT. ANN. § 38-3127.

renewal, limited, revoked, or suspended or have other disciplinary measures taken against it in accordance with section 38-196 when the applicant or licensee fails to disclose the information required by section 38-3124.