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

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2 Christina Luini, J.D., M.L.I.S.; Dinelia Rosa, PhD; Mary Karapetian Alvord, PhD; Vanessa K. Jensen, PsyD; Jeffrey N. Younggren, PhD; G. Andrew H. Benjamin, JD, PhD, ABPP. The working group, came together to discharge the obligations of the CODAPAR grant that we wrote and received: http://www.apadivisions.org/division-31/news-events/grant-funding.aspx.

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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.

 Nevada 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**

 Nevada 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 recommend that psychologists use this template, too.

 Because the documents permit hovering over the underline fields with a cursor to select an option or permit filling in the shaded text boxes, they cannot be inserted

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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).

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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 Nevada Board of Psychological Examiners 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 also have been adopted by the Board to protect the public

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6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
8 Id. at p. 45.
welfare.

Common Law


- Statute requiring certain professionals to report incidents of suspected child abuse or neglect “immediately” after determining that there is reason to believe that abuse or neglect has occurred is unconstitutionally vague; term “immediately” vests prosecuting authorities with unbridled discretion to determine whether report was made quickly enough. N.R.S. 432B.220; U.S.C.A. Const.Amends. 5, 14.11


- Amendment of complaint brought by parents of preschool child against county school board and school district, stemming from alleged failure to report child abuse, to add negligence claim would not have been futile; although Nevada reporting statutes did not provide private right of action, violation of statutes would have been relevant to finding of negligence per se.12

- Genuine issue of material fact existed as to whether facial injury to foster child should have been reported by social worker under Nevada statute requiring social workers to report abuse or neglect, precluding summary judgment in negligence action by special administrators of child's estate following his death.13

- Genuine issue of material fact as to extent of knowledge school officials had of teacher's conduct towards female high school student precluded summary judgment in parents' action alleging that officials violated their duty under state law to report child abuse.14

Contents of the record are mandated by law

Under Nevada law, a psychologist:15

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1. Shall, in an appropriate manner, explain a patient’s condition clearly and truthfully to the patient or the person responsible for the care of the patient.

2. Shall keep each patient fully informed of the purpose and nature of any evaluation, treatment or other procedure and the patient’s right to choose the services provided.

3. Shall not perform any professional service that has not been authorized by the patient or his or her legal representative.

4. Shall explain clearly to a patient:
   (a) The basis and extent of all contemplated services, fees and charges;
   (b) The extent of the patient’s personal responsibility for those fees; and
   (c) The prospective benefits to be derived from and the known risks of such services.

Nevada psychologists must maintain a record for each patient or client that includes:  

(a) The presenting problem or purpose or diagnosis;
(b) The fee arrangement, if any;  
(c) The date and type of evaluation or treatment provided to the patient or client;
(d) The results of tests or other evaluations and the data from which the results were derived;
(e) A description of any consultations with other professionals regarding the patient or client and the results of such consultations; and
(f) A copy of all tests and other evaluative reports which were prepared in the course of the professional relationship.

Additional inform consent procedures are established by Nevada law:  

…5. If a psychologist …renders services to more than one person, including services rendered to an organization, family, couple, group, or a child and a parent, the psychologist …before he or she begins to render the services,

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17 Nev. Rev. Stat. § 629.071. Provider of health care required to furnish patient with itemized bill: “Each provider of health care shall, on the bill to a patient, itemize all charges for services, equipment, supplies and medicines provided for the patient in terms which the patient is able to understand. The bill must be timely provided after the charge is incurred at no additional cost to the patient.”

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explain to each person the relevant limitations on confidentiality during the course of the professional relationship. If appropriate, the psychologist …shall grant to each person an opportunity to discuss and accept the limitations on confidentiality that will apply.

6. If a patient or client is a child or has a legal guardian, a psychologist …shall, before he or she renders services, inform the patient or client to the extent that the patient or client can understand, of any legal limitations on the confidentiality of communications with the psychologist.

The APA Code of Ethics also establishes further inform consent procedures that Nevada psychologists must satisfy:

3.10 Informed Consent

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

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

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

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)
Patients have a privilege\textsuperscript{20} to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and the patient’s psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family. Nevertheless, a number of Nevada laws will require disclosure about the limitations in protecting certain types of confidences in order to satisfy the informed consent process:

**Confidential information\textsuperscript{21}**

1. If a psychologist …provides services to an organization, information he or she obtains in the course of providing the services is confidential, including any personal information concerning a person in the organization if the information was properly obtained within the scope of his or her professional contract with the organization. Personal information concerning a person in the organization is subject to the confidential control of the organization unless the person who disclosed the information had a reasonable expectation that the information was disclosed pursuant to a separate professional relationship with the psychologist …and would not be disclosed to the organization.

2. During the course of a professional relationship with a patient or client and after the relationship is terminated, a psychologist …shall protect all confidential information obtained in the course of his or her practice …or in

\textsuperscript{20} There also is no privilege under circumstances specified by NRS 49.209 or 49.211: 1) For communications relevant to an issue in a proceeding to hospitalize the patient for mental illness, if the psychologist in the course of diagnosis or treatment has determined that the patient requires hospitalization. 2) For communications relevant to an issue of the treatment of the patient in any proceeding in which the treatment is an element of a claim or defense. 3) If disclosure is otherwise required by state or federal law. 4) For communications relevant to an issue in a proceeding to determine the validity of a will of the patient. 5) If there is an immediate threat that the patient will harm himself or herself or other persons. 6) For communications made in the course of a court-ordered examination of the condition of a patient with respect to the specific purpose of the examination unless the court orders otherwise. 7) For communications relevant to an issue in an investigation or hearing conducted by the Board of Psychological Examiners if the treatment of the patient is an element of that investigation or hearing. 8) For communications relevant to an issue in a proceeding relating to the abuse or neglect of a person with a disability or a person who is legally incompetent. See, Potter v. West Side Transp., Inc., 1999, 188 F.R.D. 362: Under Nevada law, plaintiffs waived patient-psychotherapist privilege with respect to records of their treatment when they voluntarily placed their emotional distress in issue in action arising from motor vehicle accident.

\textsuperscript{21} Nev. Admin. Code § 641.224.
the performance of any other services related to his or her profession. Except as otherwise provided in this section, a psychologist …may disclose confidential information only if he or she obtains the informed written consent of the patient or client.

3. A psychologist …may disclose confidential information without the informed written consent of a patient or client if the psychologist …believes that disclosure of the information is necessary to protect against a clear and substantial risk of imminent serious harm by the patient or client to the patient or client or another person and:
   (a) The disclosure is limited to such persons and information as are consistent with the standards of the profession of psychology or applied behavior analysis in addressing such problems.
   (b) If the patient or client is an organization, the psychologist …has made a reasonable but unsuccessful attempt to correct the problems within the organization.

4. A psychologist …may disclose confidential information without the informed written consent of a patient or client if:
   (a) A member of the judiciary, or a court magistrate or administrator to whom authority has been lawfully delegated, orders the disclosure; or
   (b) Disclosure is required by a state or federal law or regulation, including a law or regulation that requires a psychologist …to report the abuse of a child or elderly person.

…7. With the written consent of a patient, a psychologist …shall provide in a timely manner to another responsible professional who is treating the patient or client any information which is important for the professional to know in making decisions concerning the ongoing diagnosis and treatment of the patient or client.

8. If a psychologist …uses the case history of a patient or client in his or her teaching, research or published reports, he or she shall exercise reasonable care to ensure that all confidential information is appropriately disguised to prevent the identification of the patient or client.

…10. As used in this section, “confidential information” means information disclosed by a patient or client to a psychologist …during the course of a
professional relationship, or otherwise obtained by the psychologist ...during the course of the relationship, if there is a reasonable expectation that because of the relationship between the patient or client and the psychologist ...or the circumstances under which the information was obtained, the information will not be disclosed by the psychologist ...without the informed written consent of the patient or client.

Along with the limitations of protecting confidences under Nevada law, a HIPPA notice of privacy practices that delineates the psychologist’s scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient during the informed consent process specified by Standards 3.10, 9.03, and 10.01.

Some of the details to meet the inform consent standard include providing the specific information about confidentiality limits due to the mandatory reporting duties that apply to psychologists:

- Mandatory duty to report child abuse or neglect;
- Mandatory duty to report suspected abuse, neglect, or exploitation of an “elder” adults;
- Duty to report patients having been injured by firearm or knife;
- Duty to report that patient’s body has been seriously burned.

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 Privacy**

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23 NEV. REV. STAT. § 432B.220.

24 NEV. REV. STAT. § 200.5093(1) - (4).

25 NEV. REV. STAT. § 629.041.

26 NEV. REV. STAT. § 629.045; “(a) Second or third degree burns to 5 percent or more of the body; (b) Burns to the upper respiratory tract or laryngeal edema resulting from the inhalation of heated air; or (c) Burns which may result in death.”

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(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 Sources
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 Assessments
(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.

9.02 Use of Assessments
(a) Psychologists administer, adapt, score, interpret or use assessment

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27 APA CODE OF ETHICS, supra note 10.
28 Id.
29 Id.
30 Id.

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9.10 Explaining Assessment Results
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 Nevada would use an intake and evaluation note, progress notes, and termination note templates.

Maintenance and Security of Records
Nevada psychologists must:

(a) Store and dispose of any written, electronic or other records in a manner which ensures the confidentiality of the content of the records;

(b) Limit access to the records of his or her patients or clients to protect the confidentiality of the information contained in the records;

(c) Ensure that all persons working under his or her authority comply with the requirements of this section to protect the confidentiality of each patient or client; and

(d) Obtain the informed written consent of a patient or client before the

31 Id.
psychologist …electronically records or allows another person to observe a diagnostic interview or therapeutic session with the patient or client.

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality, psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship.” (See also Standard 2.05, Delegation of Work to Others.) This standard supports the record keeping standards:

6. Record Keeping and Fees

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

HIPPA enables the patient to inspect and obtain Protected Health Information (PHI) records, which includes the 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.

33 APA CODE OF ETHICS, supra note 10.
34 Id.
35 45 CFR 164.524.
36 45 CFR 164.526 (a).
37 45 CFR 164.528.
6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional…

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

HIPPA 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).

6.03 Withholding Records for Nonpayment

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).

Retention of Records

A psychologist ...shall maintain the record of each patient or client for not less

38 APA CODE OF ETHICS, supra note 10.
39 45 CFR 164.508.
40 APA CODE OF ETHICS, supra note 10.
41 45 CFR 164.508 (b)(4).

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than 5 years after the last date that service was rendered to the patient or client, except
that the record of a patient or client who is a minor must be maintained for not less
than 5 years after the last date that service was rendered or 1 year after the patient or
client reaches 21 years of age, whichever is longer. A psychologist …shall comply with
all other state and federal laws and regulations concerning the maintenance of records,
including a law or regulation which requires him or her to maintain records for a
longer period than required by this subsection.42

In addition, other health care records retention and disclosure duties
concerning destruction of records apply to psychologists:43

1. Except as otherwise provided in this section and in regulations adopted by
the State Board of Health pursuant to NRS 652.135 …unless a longer period is
provided by federal law,44 each provider of health care shall retain the health
care records of his or her patients as part of his or her regularly maintained
records for 5 years after their receipt or production. Health care records may be
retained in written form, or by microfilm or any other recognized form of size
reduction, including, without limitation, microfiche, computer disc, magnetic
tape and optical disc, which does not adversely affect their use for the purposes
of NRS 629.061. Health care records may be created, authenticated and stored
in a computer system which meets the requirements of NRS 439.581 to
439.595, inclusive, and the regulations adopted pursuant thereto.

2. A provider of health care shall post, in a conspicuous place in each location
at which the provider of health care performs health care services, a sign which
discloses to patients that their health care records may be destroyed after the
period set forth in subsection 1.

3. When a provider of health care performs health care services for a patient
for the first time, the provider of health care shall deliver to the patient a
written statement which discloses to the patient that the health care records of
the patient may be destroyed after the period set forth in subsection 1.

42 NEV. ADMIN. CODE § 641.250(2).
43 NEV. REV. STAT. § 629.051.
44 See, 45 CFR 164.530 (j)(2); HIPPA 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.
So Nevada psychologists should hold their records for six years or more, not five years.
4. If a provider of health care fails to deliver the written statement to the patient pursuant to subsection 3, the provider of health care shall deliver to the patient the written statement described in subsection 3 when the provider of health care next performs health care services for the patient.

5. In addition to delivering a written statement pursuant to subsection 3 or 4, a provider of health care may deliver such a written statement to a patient at any other time.

6. A written statement delivered to a patient pursuant to this section may be included with other written information delivered to the patient by a provider of health care.

7. A provider of health care shall not destroy the health care records of a person who is less than 23 years of age on the date of the proposed destruction of the records. The health care records of a person who has attained the age of 23 years may be destroyed in accordance with this section for those records which have been retained for at least 5 years or for any longer period provided by federal law…

Violations of the specific duty

The Nevada Board has several grounds upon which to discipline a psychologist for record keeping violations and psychologists: 45

1. Shall display his or her license in a conspicuous place on the premises of his or her office or place of employment.

2. Shall, except as otherwise provided in this subsection, respond within 30 days after receiving any written communication from the Board and shall make available any relevant record with respect to an inquiry or complaint about his or her professional conduct. If a communication is mailed to a psychologist by the Board, he or she shall respond to the communication within 30 days after it is mailed to him or her at the address shown on the records of the Board.

3. Shall notify the Board in writing of a change of address or telephone number within 30 days after the change.

4. Shall not mislead or withhold from a patient, prospective patient or other person who will be responsible for payment of the psychologist’s services, information concerning the fee for the professional services of the psychologist.

5. Shall not directly or indirectly offer, give, solicit, receive or agree to receive any fee or other consideration for the referral of a patient.

6. Shall not permit any person, other than:
   (a) A partner, employee or associate in his or her professional firm or corporation;
   (b) A psychologist retained as a subcontractor or consultant; or
   (c) A properly registered psychological assistant practicing under his or her supervision, to share in a fee for professional services. The prohibition of this subsection includes any arrangement or agreement whereby the amount paid for office space, facilities, equipment or personal services used by the psychologist is based upon the income or receipts of his or her practice.

7. Shall exercise appropriate supervision over any person who is authorized to practice psychological services under his or her supervision.

8. Shall not exploit a person who is authorized to practice psychological services under his or her supervision.

Other grounds for disciplining Nevada Psychologists for record keeping violations include:  

The Board may suspend or revoke a person’s license as a psychologist …place the person on probation, require remediation for the person or take any other action specified by regulation if the Board finds by substantial evidence that the person has:

1. BEEN convicted of a felony relating to the practice of psychology...

2. BEEN convicted of any crime or offense that reflects the inability of the person to practice psychology …with due regard for the health and safety of others.

46 NEV. REV. STAT. § 641.230.
...4. Engaged in gross malpractice or repeated malpractice or gross negligence in the practice of psychology...

...7. Violated a regulation adopted by the Board.

...9. Failed to report to the Board within 30 days the revocation, suspension or surrender of, or any other disciplinary action taken against, a license or certificate to practice psychology ...issued to the person by another state or territory of the United States, the District of Columbia or a foreign country.

10. Violated or attempted to violate, directly or indirectly, or assisted in or abetted the violation of or conspired to violate a provision of this chapter.

...13. Been convicted of abuse or fraud in connection with any state or federal program which provides medical assistance.

14. Been convicted of submitting a false claim for payment to the insurer of a patient or client.