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

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.

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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.

North Dakota 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**

North Dakota 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 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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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**

North Dakota has adopted the APA Ethical Principles of Psychology and Code of Ethics for psychologists.\(^10\)

**Common Law**

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


\(^8\) *Id.* at p. 45.


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Relevant citing reference to N.D. CENT. CODE § 50-25.1-03 (re: mandatory child abuse reporting):


Contents of the record are mandated by law

North Dakota law incorporates the APA Code of Ethics and the Health Insurance Portability and Accountability Act (HIPPA)\(^\text{11}\) also would apply to psychological records:

3.10 Informed Consent\(^\text{12}\)

(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,


\(^{12}\) APA CODE OF ETHICS, supra note 10.
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 HIPPA notice of privacy practices\(^\text{13}\) 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. In addition, the North Dakota law would require disclosure about the following exception to protecting patient confidentiality:

- Mandatory duty to report child abuse or neglect.\(^\text{14}\)

In light of the North Dakota privilege standard, psychologists also should informed their patients that confidential information must be released if any of the three exceptions to the psychotherapist-patient rule applies:

**Psychotherapist-Patient Privilege\(^\text{15}\)**

(a) Definitions. As used in this rule:

(1) A “patient” is a person who consults or is examined or interviewed by a physician or psychotherapist.

…(3) A “psychotherapist” is …(ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.


\(^\text{14}\) N.D. CENT. CODE § 50-25.1-03; See, N.D. CENT. CODE ANN. § 25-01.3-04 (re: Reporting of abuse, neglect, or exploitation--Immunity for good-faith reports).

\(^\text{15}\) N.D. R. EVID. 503; See also, N.D. CENT. CODE ANN. § 25-03.3-05 “…any confidential information about a respondent or committed individual must be released to a state's attorney for proceedings pursuant to this chapter unless release results in the loss of federal funds …the psychotherapist-patient privilege do[es] not apply to communications relevant to an issue in proceedings to commit an individual as a sexually dangerous person if the …psychotherapist in the course of diagnosis or treatment determines the patient is in need of commitment and to communications with a committed individual…”
(4) A communication is “confidential” if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition, including alcohol or drug addiction, among himself, his psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for Hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, including alcohol or drug addiction, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by Order of Court. If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or
defense or, after the patient’s death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

APA Standard 4.04(a) 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**¹⁶
(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

The following standards set forth in the APA Code of Ethics create specific record keeping obligations for North Dakota psychologists:

**6.06 Accuracy in Reports to Payors and Funding Sources**¹⁷
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**¹⁸
(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

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¹⁷ *Id.*
¹⁸ *Id.*

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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 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 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 North Dakota would use an intake and evaluation note, progress note, and termination note templates.

Maintenance and Security of Records

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

19 Id.
20 Id.
21 Id.
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 permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient. 23 HIPPA 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. 24 In addition, patients have a right to amend any part of the record. 25 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. 26

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional… 27
(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.)

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22 Id.
24 45 CFR 164.524.
25 45 CFR 164.526 (a).
26 45 CFR 164.528.
27 APA CODE OF ETHICS, supra note 10.

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(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.)

A licensee who is the subject of an investigation by the board shall cooperate fully with the investigation. North Dakota psychologists must respond fully and promptly to any reasonable question raised by or on behalf of the board related to the subject of the investigation and provide copies of patient or client records if reasonably requested by the board and accompanied by the appropriate release.28

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

6.03 Withholding Records for Nonpayment30

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).31

Retention of Records

Although no North Dakota requirement exists for private practitioners, HIPPA32 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

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28 N.D. CENT. CODE § 43-32-27.1(3).
29 45 CFR 164.508.
30 APA CODE OF ETHICS, supra note 10.
31 45 CFR 164.508 (b)(4).

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Violations of the specific duty

Under the statute governing North Dakota psychologists permits the board to engage as follows:33

1. The board, after notice, hearing, and an affirmative vote of at least a majority of board members, may withhold, deny, revoke, or suspend any license issued or applied for under this chapter and may otherwise discipline a licensee or an applicant upon proof the applicant or licensee:
   a. Has been convicted of an offense determined by the board to have a direct bearing upon an individual's ability to serve the public as a psychologist or industrial-organizational psychologist, or if the board finds, after the conviction of any offense, that an individual is not sufficiently rehabilitated under section 12.1-33-02.1.
   
   …d. Has used fraud or deception in applying for a license or in taking an examination under this chapter.
   
   …g. Has engaged in any form of unethical conduct as defined in ethical principles of psychologists and code of conduct of the American psychological association adopted by the board by rule.
   
   h. Has become grossly negligent in the practice of psychology or industrial-organizational psychology.
   
   i. Has willfully or negligently violated this chapter.
   
   j. Has engaged in an act in violation of rules adopted by the board.
   
   k. Has had a license revoked or suspended or was disciplined in another jurisdiction.

32 45 CFR 164.530 (j)(2).
33 N.D. CENT. CODE § 43-32-27.