The Duty to Record: Ethical, Legal, and Professional Considerations for Oregon 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 Columbia with reference to several relevant state-by-state surveys retrieved from Lexis

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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.

Oregon 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

Oregon 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, reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Oregon, and recommend that psychologists use this template, too.5

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

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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).

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

Oregon has adopted the APA Ethical Principles of Psychology and Code of conduct for psychologists in its administrative code.

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


8 Id. at p. 45.


10 OR. ADMIN. R. 858-010-0075 (adopting The Ethical Principles of Psychologists and Code of Conduct (American Psychological Association 2002, amended 2010), copies available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C. 20002-4242 and on the APA’s website at http://www.apa.org/ethics/code/principles.pdf (last accessed Aug. 1, 2012) (“The Board adopts for the code of professional conduct of psychologists in Oregon the American Psychological Association's “Ethical Principles of Psychologists and Code of Conduct” effective June 1, 2002.”); see also Or. Rev. Stat. § 675.110(12) (“The State Board of Psychologist Examiners shall have the following powers, in addition to the powers otherwise granted under ORS 675.010 to 675.150, and shall have all powers necessary or proper to carry the granted powers into effect: . . . (12) To formulate a code of professional conduct for the practice of
Common Law

There are a number of cases that interpret or refer to Oregon statutes and rules governing recordkeeping obligations for Oregon psychologists:

Citing Reference to Oregon Administrative Rule 858–010–0075 (adopting the APA Code of Ethics):

- “As noted by the majority, the legislature has authorized the board to formulate a code of professional conduct for psychologists. ORS 675.110(12). Pursuant to ORS 675.110(12) and (15), which give the board rulemaking authority, the board promulgated OAR 858–010–0075(1), adopting the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct as the code of professional conduct for psychologists in Oregon. To the extent that the board’s interpretations of that code are plausible and not inconsistent with other sources of law, we will defer to the board's interpretations. (“[B]y granting authority to *725 the Board to impose sanctions for ethical violations, the legislature intends that practitioners be on notice about what conduct the board’s code of ethics requires before sanctions are imposed [.]). Put simply, the Board lacks authority to impose discipline based on an implausible interpretation of the code, because practitioners can be deemed to be on notice only of interpretations that are plausible.”11

Citing Reference to Oregon Administrative Rule 858-010-0060:

“Because his assessment of “malingering probable” was significant, plaintiff's former counsel asked that Dr. Veith produce the underlying test data that purportedly supported that conclusion …Dr. Veith had destroyed his notes after writing his report. Counsel responded that this was “completely irresponsible,” and complained of this practice to the ALJ who conducted plaintiff’s hearings and then concluded that plaintiff was not disabled. Counsel asserted that, because the underlying test data had been destroyed, Dr. Veith's method in reaching “this ugliest of possible conclusions cannot now be reviewed.” [FN3 noted here-- Destruction of the underlying test data violated OAR 858–010–0060, which requires psychologists who render services to a third party payer, such as the Social Security Administration, to maintain “test results or other evaluative results obtained and any basic test data from which psychology giving particular consideration to the Ethical Standards of Psychologists promulgated by the American Psychological Association.”].

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Annotations to Oregon Revised Statutes § 40.230 (Re: psychotherapist-patient privilege)

- Psychotherapist-patient privilege does not apply to communications made during diagnosis or treatment of drug dependency when that is specific purpose of diagnosis or treatment. Rules of Evid., Rule 504(1)(c), (2).13
- In prosecution for various sex offenses in which trial court quashed subpoena duces tecum seeking alleged victim’s counseling records and refused to conduct an in camera inspection of the records, alleged victim did not waive psychotherapist-patient privilege when a worker from alleged victim’s former guardian signed a mutual release for disclosure of records between psychotherapist, child abuse assessment center, and former guardian; mutual release was for purposes of treatment and diagnosis and was therefore itself privileged. Nor was the defendant entitled to in camera inspection of alleged victim’s nondisclosable counseling records, where defendant failed to make threshold showing that the inspection might yield evidence that an exception to nondisclosure applied.14
- The State was not prevented from calling the defendant’s psychiatrist as its own witness inasmuch as the attorney-client privilege attaching to the defendant’s communications with the psychiatrist could be waived. ORS 40.225, 40.280.15

Annotations to Oregon Revised Statutes §§ 192.553, et. seq. (re: Protected Health Information):

- Patients whose unencrypted medical records were stolen from car of medical care provider’s employee failed to identify a heightened duty of care on part of provider to protect patients against economic harm, and therefore could not recover against provider under a negligence theory for purely economic damages that patients had allegedly incurred or would incur in protecting against increased risk of identity theft; while federal and state laws established standards of conduct concerning health information, any violation of those

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standards did not give rise to a negligence per se claim for economic damages in absence of a special relationship that protected against that type of injury.¹⁶

Annotations to Oregon Revised Statutes § 675.070 (re: Sanctions for misconduct):

- Board of Psychologist Examiners acted within its delegated authority in adopting ethical standards of American Psychological Association (APA) as standards to be followed by Oregon practitioners. ORS § 675.070(2)(d).¹⁷
- Board of Psychologist examiners could properly consider expert testimony to support finding that licensed psychologist had violated professional responsibilities with her submission of affidavit and testimony in support of client’s motion to modify interim child custody order. ORS 675.070(2)(d).¹⁸
- Psychologist who challenged order of Board of Psychologist Examiners revoking her license had burden of showing bias, and her general disagreement with the proceedings did not meet her burden.¹⁹
- Conclusion of Board of Psychologist Examiners that licensed psychologist violated her professional responsibilities was supported by evidence that she submitted affidavit in dissolution proceeding in which she stated as fact that her client was battered spouse and stated that best interests of children required more time with their mother, and by evidence that she testified as to best disposition of custody issue despite having admitted her bias toward her client. ORS 675.070(2)(d).²⁰

Contents of the record are mandated by law

The Oregon Administrative Rules set forth the following specific requirements regarding the content of psychological records.

Psychological Records²¹

(1) Maintenance and retention of records. . . . The records shall include:

(a) The name of the client and other identifying information;

²⁰ Loomis v. Board of Psychologists Examiners, supra note 4.
²¹ OR. ADMIN. RULE 858-010-0060.
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(b) The presenting problem(s) or purpose or diagnosis;
(c) The fee arrangement;
(d) The date and substance of each billed or service-count contact or service;
(e) Any test results or other evaluative results obtained and any basic test data from which they were derived;
(f) Notation and results of formal consults with other providers;
(g) A copy of all test or other evaluative reports prepared as part of the professional relationship;
(h) Any releases executed by the client;
(i) Any signed informed consents.

In addition, Oregon adopted the APA Code of Ethics into its Administrative Code by reference and the following ethical standards regulate the content of records kept by Oregon psychologists. The Health Insurance Portability and Accountability Act (HIPAA) also would apply to Oregon psychological records:

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.


APA CODE OF ETHICS, supra note 10.
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.)

Under Oregon law a health care provider would alert patients in the disclosure process about the following limitations of keeping confidential Protected Health Information (PHI):

(1) May use or disclose PHI of an individual in a manner that is consistent with an authorization provided by the individual or a personal representative of the individual.

(2) May use or disclose PHI of an individual without obtaining an authorization from the individual or a personal representative of the individual:
   (a) For the provider’s or plan’s own treatment, payment or health care operations; or
   (b) As otherwise permitted or required by state or federal law or by order of the court.

(3) May disclose PHI of an individual without obtaining an authorization from the individual or a personal representative of the individual:
   (a) To another covered entity for health care operations activities of the entity that receives the information if:
      (A) Each entity has or had a relationship with the individual who is the subject of the PHI; and
      (B) The PHI pertains to the relationship and the disclosure is for the purpose of:
         (i) Health care operations as listed in ORS 192.556 (4)(a) or (b); or
         (ii) Health care fraud and abuse detection or compliance;
   (b) To another covered entity or any other health care provider for treatment activities of a health care provider; or

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24 OR. REV. STAT. § 192.558: “Health care provider and state health plan authority.”
(c) To another covered entity or any other health care provider for the payment activities of the entity that receives that information.

Other disclosures must be made to law enforcement and other named agencies as part of an investigation of child abuse.26

A HIPAA notice of privacy practices27 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.

4.04 Minimizing Intrusions on Privacy28
(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

Standard 4.04(a) suggests that psychologists focus the documentation in a manner that is very protective of their client’s privacy rights.

6.06 Accuracy in Reports to Payors and Funding Sources29
In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, 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 Assessments30
(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.)

26 OR. REV. STAT. § 419B.050.
28 APA CODE OF ETHICS, supra note 10.
29 APA CODE OF ETHICS, supra note 10.
30 Id.
(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 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…

The Oregon laws and APA Standards 6.06, 9.01, 9.02, and 9.10 suggest that psychologists would use an intake and evaluation note, progress notes, 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

31 Id.
32 Id.
33 Id.
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.)

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. Oregon psychologists who receive an authorization to disclose PHI may charge:

(1) (a) No more than $30 for copying 10 or fewer pages of written material, no more than 50 cents per page for pages 11 through 50 and no more than 25 cents for each additional page; and
   (b) A bonus charge of $5 if the request for records is processed and the records are mailed by first class mail to the requester within seven business days after the date of the request;

(2) Postage costs to mail copies of protected health information or an explanation or summary of PHI, if requested by an individual or a personal representative of the individual; and
(3) Actual costs of preparing an explanation or summary of PHI, if requested by an individual or a personal representative of the individual.

In addition, patients have a right to amend any part of the record; Under this

34 Id.
35 45 CFR 164.524.
36 OR. REV. STAT. § 192.563.
37 45 CFR 164.526 (a).
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.38

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional…39

(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.)

Additionally, APA Code of Ethics Standard 6.02(b) requires the use coding or other techniques to avoid the inclusion of personal identifiers when confidential patient information is entered into databases or systems of records that are available to persons whose access has not been consented to by the patient.40

HIPAA establishes privacy protections for all transmissions of PHI records,41 Oregon law requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties.42 Concrete security standards are established for all electronic healthcare information (45 CFR 160).

38 45 CFR 164.528.
39 APA CODE OF ETHICS, supra note 10.
40 Id.
41 45 CFR 164.508.
42 OR. REV. STAT. § 192.566.
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).

In addition, the Oregon Administrative Rules set forth the following specific requirement regarding the maintenance and security of psychological records.

**Psychological Records**

…(2) Disposition in case of death or incapacity of the licensee. Psychologists and psychologist associates shall make necessary arrangements for maintenance of and access to client records to ensure confidentiality in case of death or incapacity of the licensee.

(3) Oregon licensees shall name a Qualified Person to intercede for client welfare and to make necessary referrals, when appropriate, and shall keep the Board notified of the name of the qualified person. The Board shall not release the name of the qualified person except in the case of the death or incapacity of the licensee or if the licensee is inactive or has resigned and the former client is unable to locate the licensee.

(4) Qualified Person. A qualified person under this rule is an active or semi-active Oregon licensed psychologist.

**Retention of Records**

The Oregon Administrative Rules set forth the following specific requirement regarding the retention of psychological records.

**Psychological Records**

(1) Maintenance and retention of records. The psychologist or psychologist associate rendering professional services to an individual client or services

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43 APA CODE OF ETHICS, supra note 10.
44 45 CFR 164.508 (b)(4).
45 OR. ADMIN. RULE 858-010-0060.
46 OR. ADMIN. RULE 858-010-0060.
billed to a third party payer, shall maintain professional records for a client for a minimum of seven years from the date of last service.

Violations of the specific duty

Oregon adopted the APA Code of Ethics into its Administrative Code and the standards discussed, including HIPAA infractions, can all lead to disciplinary actions being prosecuted by the Oregon State Board of Psychological Examiners.

Sanctions; civil penalty\(^{47}\)

(1) Where any of the grounds enumerated in subsection (2) of this section exist, the State Board of Psychologist Examiners may impose any of the following sanctions:

(a) Deny a license to any applicant;
(b) Refuse to renew the license of any psychologist or psychologist associate;
(c) Suspend the license of any psychologist or psychologist associate for a period of not less than one year;
(d) Issue a letter of reprimand;
(e) Impose probation with authority to restrict the scope of practice of a psychologist or psychologist associate or require practice under supervision;
(f) Revoke the license of any psychologist or psychologist associate; or
(g) Impose a civil penalty as set forth in subsection (3) of this section.

(2) Grounds exist for imposition of any of the sanctions enumerated in subsection (1) of this section against any psychologist or psychologist associate or applicant, or, where applicable, any unlicensed person found in violation of ORS 675.010 to 675.150, when, in the judgment of the board, the person:

(d) Is guilty of immoral or unprofessional conduct or of gross negligence in the practice of psychology which includes but is not limited to:

(A) Any conduct or practice contrary to recognized standard of ethics of the psychological profession or any conduct or practice that constitutes a danger to the health or safety of a patient or the public, or any conduct, practice or condition that adversely affects a psychologist or psychologist associate's ability to practice psychology safely and skillfully.
(B) Willful ordering or performing of unnecessary tests or studies, administration of unnecessary treatment, failure to obtain consultations or perform referrals when failing to do so is not consistent with the standard of care, or otherwise ordering or performing any psychological service or treatment which is contrary to recognized standards of

\(^{47}\) Or. Rev. Stat. § 675.070.
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practice of the psychological profession;

. . .(h) Has violated any provision of ORS 675.010 to 675.150 or any provision of the code of professional conduct formulated under ORS 675.110 (12); or

(i) Has obtained a fee or payment from a patient or third party payer through fraud or intentional misrepresentation.

(3) The board may impose a civil penalty under subsection (1) of this section:

(a) In an amount not to exceed $5,000; or

(b) In an amount not to exceed $10,000, if any of the following conditions exist:

(A) The conduct giving rise to the penalty had a serious detrimental effect on the health or safety of another person;

(B) The person subject to the penalty has a history of discipline for the same or similar conduct;

(C) The conduct giving rise to the penalty involves a willful or reckless disregard of the law;

(D) The conduct giving rise to the penalty was perpetrated against a minor, an elderly person or a person with a disability; or

(E) The person subject to the penalty violated ORS 675.020 by practicing psychology or representing that the person is a psychologist without having a license.

In addition, the Oregon Administrative Rules set forth these specific duties and responsibilities with respect to the disclosure of psychological records:

Form of Complaints48

. . . (2) If the complainant is a client or former client of the respondent, the complainant must sign a waiver of confidentiality allowing the Board and its counsel access to records and other materials which are the ethical and legal responsibility of the respondent. Refusal by a complainant to comply with this requirement may result in dismissal of the complaint.

Notice and Investigation Process49

. . .(5) Cooperation. Failure by Respondent to cooperate with a board investigation constitutes unprofessional conduct per ORS 675.070(2).

48 OR. ADMIN. R. 858-020-0035.
49 OR. ADMIN. R. 858-020-0045.
Cooperation by respondent includes:
(a) Submitting client records to the Board's investigator, with or without a signed release by the client, for a full investigation of the allegations presented in the notice letter;
(b) Sending a complete case file to the Board's investigator…