

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

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.

Vermont 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

Vermont law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We believe that a termination note will likely reduce exposure to arguments about continued duty of care and reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Vermont, 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

In addition to its own laws related to record keeping, Vermont has adopted the APA Ethical Principles of Psychology and Code of conduct for psychologists, or its successor principles and code,¹⁰ as well as the ASPPB Code of Conduct of 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 VT. STAT. ANN. tit. 26, § 3016(9) (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). See also, 20-4-1600 VT. CODE R. § 3.

Association of State and Provincial Psychology Boards,¹¹ or its successor code, as the standards of practice for Vermont psychologists.

Common Law

In *Peck v. Counseling Serv. of Addison County, Inc.*, the Supreme Court of Vermont held that “a mental health professional who knows or, based upon the standards of the mental health profession, should know that his or her client poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger.”¹² In *Peck*, the client was a son who set fire to his parents’ barn,¹³ but the court concluded that because arson “is a violent act and represents a lethal threat,” a warning was justified.¹⁴ However, the Court also noted that “due care [must] be exercised in order to insure that only that information which is necessary to protect the potential victim is revealed.”¹⁵

Relevant annotations to Title 26, section 3016 of the Vermont Statutes Annotated (re: Unprofessional Conduct of Psychologists):

- This section's prohibition against "moral unfitness to practice psychology" was not unconstitutionally vague even though term "moral fitness" was undefined; due process was satisfied where statute was sufficiently clear to inform ordinary person that honesty and truthfulness are required attributes of one seeking license as psychologist.¹⁶

Relevant annotations to Title 3, section 129a of the Vermont Statutes Annotated (re: unprofessional conduct – various professions):

- By establishing one standard of proof for all professions and occupations regulated by secretary of state, legislature did not intend to lower an extant burden of proof for nurse licensing actions, but rather intended to avoid inefficiency of administering a patchwork of standards adopted by various boards.¹⁷

¹¹ The Association of State and Provincial Psychology Boards (ASPPB) Code of Conduct, at ASPPB’s website: <http://www.asppb.net/i4a/pages/index.cfm?pageid=3353> (last accessed Aug. 1, 2012).

¹² *Peck v. Counseling Serv. of Addison County, Inc.*, 499 A.2d 422 (Vt. 1985).

¹³ *Id.*

¹⁴ *Id.* at 424.

¹⁵ *Id.* at 427.

¹⁶ *Brody v. Barasch* (1990) 155 Vt. 103, 582 A.2d 132.

¹⁷ *In re Smith* (1999) 169 Vt. 162, 730 A.2d 605.

- No error was found in the administrative law officer's conclusion that a midwife committed unprofessional conduct by failing to obtain written informed consent forms from her client, either for the home birth or for the special risks associated with a vaginal birth after cesarean.¹⁸

Relevant annotations to Title 18, section 7103 of the Vermont Statutes Annotated (re: Disclosure of Information):

- Although a court conducting an involuntary hospitalization hearing in a criminal case has the discretion to redact from an order of hospitalization or nonhospitalization terms or conditions that disclose confidential, clinical information, the court should not redact information necessary for the public to maintain its confidence in the judicial system, particularly given the often significant interrelationship between court records of a pending criminal proceeding and a civil commitment hearing on the same matter. 18 V.S.A. § 7103(a).¹⁹

Relevant Annotations to Title 12, section 1612 of the Vermont Statutes Annotated (re: “Patient’s Privilege”):

- Defendant's private statements to psychologist who was treating defendant's daughter were not privileged, even though defendant requested psychologist to keep information confidential and disclosed changes over years in relationship with wife and sexual patterns, where purpose and impetus of meeting with psychologist was to understand daughter's situation, and where defendant did not consult psychologist in regard to his own care or treatment. 12 V.S.A. § 1612(a).²⁰
- In summarily quashing subpoenas of psychiatrist's agents, based on patient privilege, trial judge failed to allow introduction of evidence as to whether information gathered was necessary for care and treatment of the patient, and therefore, there was insufficient information to conclude whether evidence sought from subpoenaed witnesses would have been protected by patient privilege. 12 V.S.A. § 1612(a).²¹
- In trial for felony-murder in which defense presented theory that victim's former boyfriend killed her in fit of anger after learning of her abortion, trial

¹⁸ *Devers-Scott v. Office of Professional Regulation*, 2007 VT 4, 181 Vt. 248, 918 A.2d 230.

¹⁹ *State v. Koch*, 1999, 730 A.2d 577, 169 Vt. 109.

²⁰ *State v. Parker*, 1988, 149 Vt. 393, 545 A.2d 512.

²¹ *State v. Springer*, 1981, 139 Vt. 471, 431 A.2d 460.

court did not abuse its discretion in ruling that victim's medical records were inadmissible on basis that their probative value was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; any medical records showing that victim had procured abortion would not by itself establish that victim's boyfriend knew of event, and medical records would be cumulative due to boyfriend's admission that he knew that victim was pregnant, victim's friend's testimony that victim had abortion, and medical examiner's testimony that victim was not pregnant within 30 days prior to her death. Rules of Evid., Rules 403, 503(d)(3); 12 V.S.A. § 1612.²²

- Party could be compelled to produce for inspection and copy, copies of medical records of treating doctors and hospitals, which records were in actual possession of doctors and hospitals and not in actual possession of treated party, in light of fact that treated party had practical ability to obtain requested material and hence had control over them. Rules Civ.Proc., Rule 34.²³
- Admission of patients' medical charts in physician's prosecution for Medicaid fraud was not violation of physician/patient privilege, even though patient waivers were not obtained until after State had seized records from custodian pursuant to subpoena *duces tecum* issued under subsequently rejected claim that federal and state law gave it access to records despite patient privilege, where patients participated fully in investigation and did not object to discussing consultations they had had with physician and testified without invoking privilege; furthermore, physician made no attempt to protect privilege for almost one year after records were seized. Rules of Evid., Rules 503, 503(b); 12 V.S.A. § 1612.²⁴

Contents of the record are mandated by law

The Vermont Board of Psychological Examiners has set forth a number of standards governing the content of psychological records. The actual content of the record must include, whether for the client or when services are billed to a third party:²⁵

- 1) the name of the client and other identifying information,

²² *State v. Wright*, 1989, 154 Vt. 512, 581 A.2d 720, certiorari denied 111 S.Ct. 692, 498 U.S. 1032, 112 L.Ed.2d 682.

²³ *Castle v. Sherburne Corp.*, 1982, 141 Vt. 157, 446 A.2d 350.

²⁴ *State v. Chenette*, 1989, 151 Vt. 237, 560 A.2d 365.

²⁵ VT. ADMIN. CODE § 20-4-1600 (III)(A) (7).

- 2) the presenting problem(s) or purpose or diagnosis,
- 3) the fee arrangement,
- 4) the date and substance of each billed or service-count contact or service,
- 5) any test results or other evaluative results obtained and any basic test data from which they were derived,
- 6) notation and results of formal consults with other providers,
- 7) a copy of all test or other evaluative reports prepared as part of the professional relationship,
- 8) any releases executed by the client.

3.12 Record Keeping²⁶

Rule III(A)(6) of the “ASPPB Code of Conduct - 1990” (or the pertinent rule of its successor code) governs the content, maintenance, and retention of records in the practice of psychology. A violation of this or any other provision of the Code constitutes unprofessional conduct under 26 V.S.A. § 3016(10). A copy of the 1990 Code is appended to these rules.

Per the rules of the Board, Vermont psychologists should also document that they have made appropriate disclosures to patients as required by the following:

3.9 Disclosure of Information²⁷

(a) Each psychologist shall disclose to each client, whether current or new and whether residing in Vermont or elsewhere, the following information, printed or typed in easily readable format:

(1) The psychologist's professional qualifications and experience, including (A) all relevant graduate programs attended and all graduate degrees and certificates earned, including the full legal name of the granting institution, (B) a brief description of any special qualifications and areas of practice, and (C) if providing direct human services in a service or technique that is new to the profession, clear and concise information about the innovative nature of and known risks associated with the services, so that the client can exercise

²⁶ 20-4-1600 VT. CODE R. § 3.

²⁷ 20-4-1600 VT. CODE R. § 3; Vermont has developed laws related to practices within hospitals and public home care practices (set forth in Title Eighteen. Health; Part 8. Mental Health; Chapter 183. Care and Treatment): *See*, VT. STAT. ANN. tit. 18, § 7707 -- Record of civil right restrictions; *See*, VT. STAT. ANN. tit. 18, § 7103-- Disclosure of information.

freedom of choice concerning such services. A psychologist providing services under subsection (C) above shall also provide the Board with a copy of the written information provided to the client.

(2) A copy of the statutory definition of unprofessional conduct (26 V.S.A. § 3016 and 3 V.S.A. § 129a).

(3) Information on the process for filing a complaint with, or making a consumer inquiry to, the Director of the Office of Professional Regulation. Sample information cards are available from the Office.

(b) Disclosure means, at a minimum, (1) posting the information and informing the client where the information is posted, or (2) having the information printed, displaying the printed information in an easily accessible location, and informing the client where the information is displayed, or (3) having the information printed and directly handing a copy of the information to the client.

(c) Not later than the third office visit, the psychologist shall present to the client for signature a document stating that the information required to be disclosed in paragraphs (1), (2), and (3) above has been disclosed to the client. The psychologist shall also sign the document and shall prepare and shall retain the signed original. If, by the third office visit, disclosure cannot be made or the client declines to sign, the psychologist shall prepare and sign a written statement explaining the omission, which shall be retained in place of the signed copy.

(d) When the client is not able to understand the disclosure, as in the case of a minor or an adult who is under the supervision of guardian, the disclosure shall be made to a suitable parent or guardian. If no guardian has been appointed but guardianship application has been made, the disclosure should be to the person named in the petition. If the guardianship petition is contested or soon to be awarded, the licensee may either wait or have the client sign and then subsequently, if a guardian is appointed, have the guardian sign.

(e) When the client is a patient or resident in an institution, including a hospital, nursing home, school, correctional facility or community mental health center, psychologists providing care are excused from obtaining a signed receipt of disclosure so long as the information required in (a) and (b) above is readily available from the institution. The psychologist must make individual disclosure

as provided in (a) and (b) above in cases where the institution's disclosure is inadequate.

(f) Psychologists employed by or belonging to a private practice group (partnership or corporation) or managed care group (corporation or other form of business organization) are considered to be practicing independently and subject to the disclosure requirements of these rules.

(g) Employees or persons under contract with an institution which is under the oversight of a governmental agency are exempt from the disclosure requirements of these rules but must inform clients that the information listed in Rule 3.9(a) above is available upon request.

(h) At its discretion, the Board may inspect and audit a licensee's records of information disclosure. The Board will inspect only general materials relating to information disclosure and will not inspect individual client records or notes, unless a complaint has been filed by or concerning a particular client. The Board will select individuals to be audited on a random basis or in response to a complaint.

The APA Code of Conduct also would be applied with the Health Insurance Portability and Accountability Act (HIPAA)²⁸ to psychological records in Vermont:

3.10 Informed Consent²⁹

(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,

²⁸ 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).

²⁹ APA CODE OF CONDUCT, *supra* note 10.

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 HIPAA notice of privacy practices³⁰ 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 Vermont law would require disclosure about the following exceptions to protecting patient confidentiality:

- Mandatory duty to report child abuse or neglect;³¹
- Mandatory duty to report vulnerable adult abuse, neglect or exploitation;³²
- Mandatory duty to warn of threatened or actual violent behavior of physical violence against a reasonably identifiable victim or victims appears to apply only to those psychologists who have a duty to control the conduct of the third person.³³

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

³⁰ 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).

³¹ 33 VT. STAT. ANN. tit. 49, § 4913.

³² 33 VT. STAT. ANN. tit. 69, § 6903(a).

³³ *Peck v. Counseling Serv. of Addison County, Inc.*, 499 A.2d 422 (Vt. 1985).

4.04 Minimizing Intrusions on Privacy³⁴

(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 Vermont psychologists:

6.06 Accuracy in Reports to Payors and Funding Sources³⁵

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 Assessments³⁶

(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.

³⁴ APA CODE OF CONDUCT, *supra* note 10.

³⁵ *Id.*

³⁶ *Id.*

9.02 Use of Assessments³⁷

(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 Results³⁸

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...

In light of the Vermont's laws, and the requirements of standards 9.01, 9.02, and 9.10, psychologists would use an intake and evaluation note, progress note, and termination templates.

Maintenance and Security of Records

The Vermont Board of Psychological Examiners has set forth the following standard governing the content, maintenance, and retention of psychological records:

Charges for access to medical records³⁹

(a) A custodian may impose a charge that is no more than a flat \$5.00 fee or no more than \$0.50 per page, whichever is greater, for providing copies of an individual's health care record. A custodian shall provide an individual or the authorized recipient with an itemized bill for the charges assessed. A custodian shall not charge for providing copies of any health care record requested to support a claim or an appeal under any provision of the Social Security Act [FN1] or for any other federal or state needs-based benefit or program.

(b) A custodian may charge an individual a fee, reasonably related to the associated costs, for providing copies of x-rays, films, models, disks, tapes, or other health care record information maintained in other formats.

(c) As used in this section:

³⁷ *Id.*

³⁸ *Id.*

³⁹ 18 VT. STAT. ANN. tit. 18, § 9419.

- (1) “Custodian” means any person who maintains health care information for any lawful purpose, including a health care provider, a health care facility, or a health insurer.
- (2) “Health care record” means all written and recorded health care information about an individual maintained by a custodian.
- (3) “Individual” means a natural person, alive or dead, who is the subject of health care information and includes, when appropriate, the individual's attorney-in-fact, legal guardian, health care agent, as defined in 18 V.S.A. chapter 111, executor or administrator.

Health information technology plan⁴⁰

(a) The secretary of administration or designee shall be responsible for the overall coordination of Vermont's statewide health information technology plan. The secretary or designee shall administer and update the plan as needed, which shall include the implementation of an integrated electronic health information infrastructure for the sharing of electronic health information among health care facilities, health care professionals, public and private payers, and patients. The plan shall include standards and protocols designed to promote patient education, patient privacy, physician best practices, electronic connectivity to health care data, and, overall, a more efficient and less costly means of delivering quality health care in Vermont.

(b) The health information technology plan shall:

- (1) support the effective, efficient, statewide use of electronic health information in patient care, health care policymaking, clinical research, health care financing, and continuous quality improvements;
- (2) educate the general public and health care professionals about the value of an electronic health infrastructure for improving patient care;
- (3) ensure the use of national standards for the development of an interoperable system, which shall include provisions relating to security, privacy, data content, structures and format, vocabulary, and transmission protocols;
- (4) propose strategic investments in equipment and other infrastructure elements that will facilitate the ongoing development of a statewide infrastructure;
- (5) recommend funding mechanisms for the ongoing development and

⁴⁰ 18 VT. STAT. ANN. tit. 18, § 9352.

maintenance costs of a statewide health information system, including funding options and an implementation strategy for a loan and grant program;

(6) incorporate the existing health care information technology initiatives to the extent feasible in order to avoid incompatible systems and duplicative efforts;

(7) integrate the information technology components of the Blueprint for Health established in chapter 13 of this title, the agency of human services' enterprise master patient index, and all other Medicaid management information systems being developed by the department of Vermont health access, information technology components of the quality assurance system, the program to capitalize with loans and grants electronic medical record systems in primary care practices, and any other information technology initiatives coordinated by the secretary of administration pursuant to 3 V.S.A. § 2222a; and

(8) address issues related to data ownership, governance, and confidentiality and security of patient information.

(c) The secretary of administration or designee shall update the plan annually to reflect emerging technologies, the state's changing needs, and such other areas as the secretary or designee deems appropriate. The secretary or designee shall solicit recommendations from Vermont Information Technology Leaders, Inc. (VITL) and other entities in order to update the health information technology plan pursuant to this section, including applicable standards, protocols, and pilot programs, and may enter into a contract or grant agreement with VITL or other entities to update some or all of the plan. Upon approval by the secretary, the updated plan shall be distributed to the commissioner of information and innovation; the commissioner of financial regulation; the commissioner of Vermont health access; the secretary of human services; the commissioner of health; the commissioner of mental health; the commissioner of disabilities, aging, and independent living; the senate committee on health and welfare; the house committee on health care; affected parties; and interested stakeholders.

(d) The health information technology plan shall serve as the framework within which the commissioner of financial regulation reviews certificate of need applications for information technology under section 9440b of this title. In addition, the commissioner of information and innovation shall use the health

information technology plan as the basis for independent review of state information technology procurements.

(e) The privacy standards and protocols developed in the statewide health information technology plan shall be no less stringent than applicable federal and state guidelines, including the “Standards for Privacy of Individually Identifiable Health Information” established under the Health Insurance Portability and Accountability Act of 1996 and contained in 45 C.F.R., Parts 160 and 164, and any subsequent amendments, and the privacy provisions established under Subtitle D of Title XIII of Division A of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, sections 13400 et seq. [FN1] The standards and protocols shall require that access to individually identifiable health information is secure and traceable by an electronic audit trail.

(f) Qualified applicants may seek grants to invest in the infrastructure necessary to allow for and promote the electronic exchange and use of health information from federal agencies, including the Office of the National Coordinator for Health Information Technology, the Health Resources and Services Administration, the Agency for Healthcare Research and Quality, the Centers for Medicare and Medicaid Services, the Centers for Disease Control and Prevention, the U.S. Department of Agriculture, and the Federal Communications Commission. The secretary of administration or designee shall require applicants for grants authorized pursuant to Section 13301 of Title XXX of Division A of the American Recovery and Reinvestment Act of 2009, Public Law 111-5 [FN2], to submit the application for state review pursuant to the process established in federal Executive Order 12372, Intergovernmental Review of Federal Programs. Grant applications shall be consistent with the goals outlined in the strategic plan developed by the Office of the National Coordinator for Health Information Technology and the statewide health information technology plan.

In addition, Vermont recognizes a psychotherapist-patient privilege that may also affect disclosure of psychological records.⁴¹

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,⁴²

⁴¹ VT. STAT. ANN. tit. 12, § 1612(a) (“Patient’s Privilege”); VT. R. EVID. 503 (“Patient’s Privilege”).

Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.

“[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 also supports the record keeping standards:

6. Record Keeping and Fees⁴³

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.⁴⁴ In addition, patients have a right to amend any part of the record;⁴⁵ 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.⁴⁶

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...⁴⁷

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are

⁴² APA CODE OF ETHICS, *supra* note 10.

⁴³ *Id.*

⁴⁴ 45 CFR 164.524.

⁴⁵ 45 CFR 164.526 (a).

⁴⁶ 45 CFR 164.528.

⁴⁷ APA CODE OF ETHICS, *supra* note 10.

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](#).)

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.⁴⁸ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment⁴⁹

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).⁵⁰

Retention of Records

Vermont has specified a set of laws related to retention of records:⁵¹

...b. To meet the requirements of this rule, so as to provide a formal record for review, but not necessarily for other legal purposes, the psychologist shall

⁴⁸ 45 CFR 164.508.

⁴⁹ APA CODE OF ETHICS, *supra* note 10; See, MO. REV. STAT. § 191.227. "Medical records to be released to patient ... [applies to] other duly licensed practitioners in this state."

⁵⁰ 45 CFR 164.508 (b)(4).

⁵¹ VT. ADMIN. CODE § 20-4-1600 (III)(A) (7).

assure that all data entries in the professional records are maintained for a period of not less than five years after the last date that service was rendered. The psychologist shall also abide by other legal requirements for record retention, even if longer periods of retention are required for other purposes.

c. The psychologist shall store and dispose of written, electronic and other records in such a manner as to ensure their confidentiality. The psychologist shall maintain the confidentiality of all psychological records in the psychologist's possession or under the psychologist's control except as otherwise provided by law or pursuant to written or signed authorization of a client specifically requesting or authorizing release or disclosure of the client's psychological records.

d. For each person professionally supervised, the psychologist shall maintain, for a period of not less than five years after the last date of supervision, a record of the supervisory session that shall include, among other information, the type, place, and general content of the session.

Violations of the specific duty

Under the psychologist licensing laws "'Unprofessional conduct" means conduct prohibited by section 3016 of [Title 26] or by other statutes relating to the practice of psychology, whether or not taken by a license holder."⁵² Under section 3016,⁵³ conduct listed in Title 3, section 129a of the Vermont Statutes annotated, also constitutes unprofessional conduct.⁵⁴ The following unprofessional conduct may subject a psychologist to sanctions related to recordkeeping:

- Failing to make available, upon written request of a person using psychological services to succeeding health care professionals or institutions, copies of that person's records in the possession or under the control of the licensee.⁵⁵
- Notwithstanding the provisions of 3 V.S.A. § 129a(a)(10), in the course of practice, failure to use and exercise that degree of care, skill, and proficiency which is commonly exercised by the ordinary skillful, careful, and prudent

⁵² VT. STAT. ANN. tit. 26, § 3001(7).

⁵³ VT. STAT. ANN. tit. 26, § 3016.

⁵⁴ VT. STAT. ANN. tit. 3, § 129a (Title 3 Executive, Part 1 Generally, Chapter 5 Secretary of State, Subchapter 3 Professional Regulation, section 129a Unprofessional Conduct)

⁵⁵ VT. STAT. ANN. tit. 26, § 3016(1).

psychologist engaged in similar practice under the same or similar conditions, whether or not actual injury to a client or patient has occurred.⁵⁶

- Conduct which violates the "Ethical Principles of Psychologists and Code of Conduct" of the American Psychological Association, effective December 1, 1992, or its successor principles and code.⁵⁷
- Conduct which violates the "ASPPB Code of Conduct-1990" of the Association of State and Provincial Psychology Boards, or its successor code.⁵⁸
- Failing to comply with provisions of federal or state statutes or rules governing the practice of the profession.⁵⁹
- Willfully making or filing false reports or records in the practice of the profession; willfully impeding or obstructing the proper making or filing of reports or records or willfully failing to file the proper reports or records.⁶⁰
- Failing to make available promptly to a person using professional health care services, that person's representative, or succeeding health care professionals or institutions, upon written request and direction of the person using professional health care services, copies of that person's records in the possession or under the control of the licensed practitioner, or failing to notify patients or clients how to obtain their records when a practice closes.⁶¹
- Failing to retain client records for a period of seven years, unless laws specific to the profession allow for a shorter retention period. When other laws or agency rules require retention for a longer period of time, the longer retention period shall apply.⁶²

⁵⁶ VT. STAT. ANN. tit. 26, § 3016(8).

⁵⁷ VT. STAT. ANN. tit. 26, § 3016(9).

⁵⁸ VT. STAT. ANN. tit. 26, § 3016(10).

⁵⁹ VT. STAT. ANN. tit. 3, § 129a(3).

⁶⁰ VT. STAT. ANN. tit. 3, § 129a(7).

⁶¹ VT. STAT. ANN. tit. 3, § 129a(8).

⁶² VT. STAT. ANN. tit. 3, § 129a(9).