

# The Duty to Record: Ethical, Legal, and Professional Considerations for Washington 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.<sup>1</sup>

The Division 31 and 42 EHR working group's<sup>2</sup> 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).<sup>3</sup>

In order to digest the laws accurately, we examined the annotated codes and regulations available on Westlaw and Lexis for the 50 states and the District of

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<sup>1</sup> Electronic Health Records: A Primer (retrieved Nov. 29, 2012 at <http://www.apapracticecentral.org/update/2012/11-29/electronic-records.aspx>).

<sup>2</sup> Christina Luini, JD, M.L.I.S.; Dinelía 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>.

<sup>3</sup> 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](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.<sup>4</sup> 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.

Washington 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**

Washington 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 Washington, and recommend that psychologists use this template, too.<sup>5</sup>

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<sup>4</sup> 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).

<sup>5</sup> 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.

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 into this document.<sup>6</sup> 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.”<sup>7</sup> Whenever “Eurocentric therapeutic and interventions models”<sup>8</sup> 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.<sup>9</sup> The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

### **Statute or Rule**

Neither the Revised Code of Washington (RCW; Statutes passed by the legislature), or the Washington Administrative Code (WAC; regulations promulgated by Washington’s Examining Board of Psychology) explicitly adopt the APA’s Ethical Principles of Psychologists and Code of Conduct. The Board has, however, adopted its own “rules of ethical conduct” for Washington psychologists, which set forth

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

<sup>7</sup> 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).

<sup>8</sup> *Id.* at p. 45.

<sup>9</sup> 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 10<sup>th</sup> edition in 2008. See, <http://www.apa.org/about/governance/council/08aug-crminutes.aspx> (last accessed August 1, 2012)).

several obligations related to record keeping.<sup>10</sup> In addition, Washington psychologists are subject to a number of provisions governing medical records of “health care providers”<sup>11</sup> that are part of the Uniform Healthcare Information Act<sup>12</sup> to the extent that they do not conflict with other laws.<sup>13</sup>

### Common Law

*Relevant annotations to RCW § 18.83.110 (re: psychotherapist-patient privilege):*

- The psychologist-patient privilege applies to **records of counseling** to the extent that they document statements made during the counseling session. *Redding v. Virginia Mason Medical Ctr.*, 75 Wn. App. 424, 878 P.2d 483 (1994).
- **Treatment records** of a party for substance abuse and sexual deviancy were discoverable and not protected by the psychologist-client privilege where the party had signed a release authorizing their disclosure and could have no reasonable expectation that his communications would remain confidential. *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999).
- Testimony of defendant's therapist and the therapist's forensic evaluator regarding his statements of repeated sexual contacts with one of his children was admissible because (1) the mandatory disclosure of such an admission under RCW 26.44.030 took precedence over the counselor-patient privilege in RCW 18.83.110; and (2) defendant's right to privacy under Wash. Const. art. I, § 7 was not violated where the State obtained a search warrant for his **medical records** instead of following the subpoena procedures under CrR 4.8 and CR

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<sup>10</sup> See WASH. ADMIN. CODE §§ 246-924-351, *et. seq.*

<sup>11</sup> For purposes of the laws set forth at Title 70, Chapter 70.02 (“Medical Records—Health Care Information Access and Disclosure”), a “health care provider” is defined as “a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.” WASH. REV. CODE ANN. § 70.02.010(9), *et. seq.* In addition, “[m]ental health counselors, marriage and family therapists, and social workers licensed under chapter 18.225 RCW are subject to this chapter.” *Id.* § 70.02.180.

<sup>12</sup> WASH. REV. CODE ANN. § 70.02.902 (“This act may be cited as the Uniform Healthcare Information Act.”).

<sup>13</sup> See WASH. REV. CODE ANN. § 70.02.900(2), *et. seq.*

#### **Conflicting laws.**

(1) This chapter does not restrict a health care provider, a third-party payor, or an insurer regulated under Title 48 RCW from complying with obligations imposed by federal or state health care payment programs or federal or state law.

(2) This chapter does not modify the terms and conditions of disclosure under Title 51 RCW and chapters 13.50, 26.09, 70.24, 70.96A, 71.05, 71.34, and 74.09 RCW and rules adopted under these provisions.

45(b)(2) and the notice requirements under RCW 70.02.060 of the Washington Uniform Health Care Information Act. *State v. Hyder*, 2011 Wash. App. LEXIS 16, 159 Wn. App. 234, 244 P.3d 454 (2011).

### **Contents of the record that are mandated by law**

Under the statutes regulating psychological practice, a duty to disclose certain information to all patients is required and would include the following written content:<sup>14</sup>

- (1) ...will inform clients of the purposes of and resources available under this chapter, including the right of clients to refuse treatment, the responsibility of clients for choosing the provider and treatment modality which best suits their needs, and the extent of confidentiality provided by this chapter... [It also] shall include any relevant education and training, the therapeutic orientation of the practice, the proposed course of treatment where known, any financial requirements...

Some of the details to meet this standard include the contact information for the Department of Licensing in order to alert the patient about how to file a complaint, the specific information about the mandatory reporting duties that apply to psychologists, and some additional exceptions created by the Chapter 70.02 RCW:

- abuse, exploitation or neglect of a child under age 18, a developmentally disabled person, or an elderly person, a (RCW 26.44);
- an actual threat of physical violence against a reasonably identifiable person (RCW 71.05.120);
- a refusal of treatment by a mentally ill patient and the patient is unable to take care of basic needs or is a danger to self or others (RCW 71.05);
- the patient suffers from an infectious disease, such as HIV (WAC 246-101-101 & WAC 246-101-105);
- another health care provider is not able to practice with reasonable skill and safety due to a mental or physical condition and a patient has been harmed or is at risk (WAC 246-16-220 (1)(a) & WAC 246-16-235 (1)(b));
- to federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to

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<sup>14</sup> WASH. REV. CODE ANN. § 18.83.115.

determine compliance with state or federal licensure, certification or registration rules or laws; or when needed to protect the public health (RCW 70.02.050);

- to federal, state, or local law enforcement authorities, upon receipt of a written or oral request made to a nursing supervisor, administrator, or designated privacy official, in a case in which the patient is being treated or has been treated for a bullet wound, gunshot wound, powder burn, or other injury arising from or caused by the discharge of a firearm, or an injury caused by a knife, an ice pick, or any other sharp or pointed instrument which federal, state, or local law enforcement authorities reasonably believe to have been intentionally inflicted upon a person, or a blunt force injury that federal, state, or local law enforcement authorities reasonably believe resulted from a criminal act, the following information, if known (RCW 70.02.050):
  - (i) The name of the patient; (ii) The patient's residence; (iii) The patient's sex; (iv) The patient's age; (v) The patient's condition; (vi) The patient's diagnosis, or extent and location of injuries as determined by a health care provider; (vii) Whether the patient was conscious when admitted; (viii) The name of the health care provider making the determination in (v), (vi), and (vii) of this subsection; (ix) Whether the patient has been transferred to another facility; and (x) The patient's discharge time and date;
- to county coroners and medical examiners for the investigations of deaths (RCW 70.02.050); and
- a court orders the psychological records be released to another party (Chapter 71.05 RCW)

The regulations promulgated by Washington's Examining Board of Psychology set forth the following requirements for the content of records maintained by licensed psychologists:<sup>15</sup>

- (1) A psychologist who renders professional services to a client or clients, or renders services billed to a third party payor, shall document services except as provided in (g) of this subsection. The documentation must include:
  - (a) The presenting problem(s), purpose, or diagnosis;
  - (b) The fee arrangement;
  - (c) The date and service provided;
  - (d) A copy of all tests and evaluative reports prepared;

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<sup>15</sup> WASH. ADMIN. CODE § 246-924-354.

- (e) Notation and results of formal consults including information obtained from other persons or agencies through a release of information;
- (f) Progress notes reflecting on-going treatment and current status; and
- (g) If a client requests that no treatment records be kept and the psychologist agrees to the request, the client's request must be in writing and retained with the following information:
  - (i) Identity of the recipient of the services; (ii) Service dates and fees;
  - (iii) Description of services; (iv) The psychologist shall not agree to the request if maintaining records is required by other state or federal law.

**Client welfare<sup>16</sup>**

...(2) Termination of services. Whenever professional services are terminated, the psychologist shall offer to help locate alternative sources of professional services or assistance if necessary. Psychologists shall terminate a professional relationship when it would become clear to a reasonable, prudent psychologist that the client no longer needs the service, is not benefitting, or is being harmed by continued service.

In addition, psychologists, as “health care providers” may have further obligations to treat patient records in the following manner:

**Disclosure by health care provider<sup>17</sup>**

(1) Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

(2) A patient has a right to receive an accounting of disclosures of health care information made by a health care provider or a health care facility in the six years before the date on which the accounting is requested, except for disclosures:

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<sup>16</sup> WASH. ADMIN. CODE § 246-924-359.

<sup>17</sup> WASH. REV. CODE ANN. § 70.02.020.

- (a) To carry out treatment, payment, and health care operations;
- (b) To the patient of health care information about him or her;
- (c) Incident to a use or disclosure that is otherwise permitted or required;
- (d) Pursuant to an authorization where the patient authorized the disclosure of health care information about himself or herself;
- (e) Of directory information;
- (f) To persons involved in the patient's care;
- (g) For national security or intelligence purposes if an accounting of disclosures is not permitted by law;
- (h) To correctional institutions or law enforcement officials if an accounting of disclosures is not permitted by law; and
- (i) Of a limited data set that excludes direct identifiers of the patient or of relatives, employers, or household members of the patient.

**Disclosure without patient's authorization<sup>18</sup>**

(1) A health care provider or health care facility **may** disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

- (a) To a person who the provider or facility reasonably believes is providing health care to the patient;
- (b) To any other person who requires health care information for health care education, or to provide planning, quality assurance, peer review, or administrative, legal, financial, actuarial services to, or other health care operations for or on behalf of the health care provider or health care facility; or for assisting the health care provider or health care facility in the delivery of health care and the health care provider or health care facility reasonably believes that the person:
  - (i) Will not use or disclose the health care information for any other purpose; and
  - (ii) Will take appropriate steps to protect the health care information;
- (c) To any other health care provider or health care facility reasonably believed to have previously provided health care to the patient, to the extent necessary to provide health care to the patient, unless the patient has instructed the health care provider or health care facility in writing not to make the disclosure;

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<sup>18</sup> WASH. REV. CODE ANN. § 70.02.050.

(d) To any person if the health care provider or health care facility reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, however there is no obligation under this chapter on the part of the provider or facility to so disclose;

(e) To immediate family members of the patient, including a patient's state registered domestic partner, or any other individual with whom the patient is known to have a close personal relationship, if made in accordance with good medical or other professional practice, unless the patient has instructed the health care provider or health care facility in writing not to make the disclosure;

(f) To a health care provider or health care facility who is the successor in interest to the health care provider or health care facility maintaining the health care information;

(g) For use in a research project that an institutional review board has determined:

(i) Is of sufficient importance to outweigh the intrusion into the privacy of the patient that would result from the disclosure;

(ii) Is impracticable without the use or disclosure of the health care information in individually identifiable form;

(iii) Contains reasonable safeguards to protect the information from redisclosure;

(iv) Contains reasonable safeguards to protect against identifying, directly or indirectly, any patient in any report of the research project; and

(v) Contains procedures to remove or destroy at the earliest opportunity, consistent with the purposes of the project, information that would enable the patient to be identified, unless an institutional review board authorizes retention of identifying information for purposes of another research project;

(h) To a person who obtains information for purposes of an audit, if that person agrees in writing to:

(i) Remove or destroy, at the earliest opportunity consistent with the purpose of the audit, information that would enable the patient to be identified; and

(ii) Not to disclose the information further, except to accomplish the audit or report unlawful or improper conduct involving fraud in payment for health care by a health care provider or patient, or other unlawful conduct by the health care provider;

- (i) To an official of a penal or other custodial institution in which the patient is detained;
- (j) To provide directory information, unless the patient has instructed the health care provider or health care facility not to make the disclosure;
- (k) To fire, police, sheriff, or another public authority, that brought, or caused to be brought, the patient to the health care facility or health care provider if the disclosure is limited to the patient's name, residence, sex, age, occupation, condition, diagnosis, estimated or actual discharge date, or extent and location of injuries as determined by a physician, and whether the patient was conscious when admitted;
- (l) To federal, state, or local law enforcement authorities and the health care provider, health care facility, or third-party payor believes in good faith that the health care information disclosed constitutes evidence of criminal conduct that occurred on the premises of the health care provider, health care facility, or third-party payor;
- (m) To another health care provider, health care facility, or third-party payor for the health care operations of the health care provider, health care facility, or third-party payor that receives the information, if each entity has or had a relationship with the patient who is the subject of the health care information being requested, the health care information pertains to such relationship, and the disclosure is for the purposes described in RCW 70.02.010(8) (a) and (b); or
- (n) For payment.

### **Discovery request or compulsory process<sup>19</sup>**

It appears that RCW 70.02.060 (1) enables compulsory process through the use of a subpoena. However, RCW 70.02.900(2) specifically states that the act does not modify the terms or conditions of disclosure when Chapter 71.05 RCW applies. RCW 71.05.630(2)(d) establishes a duty on the part of a psychologist to not release confidential records unless a court order compels disclosure. As a result, prudent psychologists always respond to subpoenas, direct the lawyer to the correct law regarding compulsory process for mental health records, and do not wrongly release privileged records.

### **Maintenance and security of records**

The following regulations promulgated by Washington's Examining Board of

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<sup>19</sup> WASH. REV. CODE ANN. § 70.02.060.

Psychology set forth the standards for the maintenance and security of psychological records:<sup>20</sup>

. . . (2) . . . All records must be securely maintained with appropriate limited access in accordance with any other applicable state or federal laws.

(3) The psychologist rendering services must have a written policy to ensure the maintenance and confidentiality of the client records in the event of retirement, discontinuation of practice or employment, discontinuation of practice in the state of Washington, or inability to maintain practice or employment (e.g., illness or death of the psychologist).

This written policy must be made available to the board, upon written request, within sixty days. The written policy shall:

(a) Designate a qualified person(s) or, if appropriate, hospital, clinic or other health care facility, to make necessary clinically relevant referrals if the psychologist is unable to do so;

(b) Detail a plan for fulfilling record requests described under this subsection; and

(c) Require the subsequent record holder to maintain records in accordance with any other applicable state or federal laws or rules.

(4) In the case of psychological or neuropsychological evaluations, tests or assessments, the psychologist may exercise clinical judgment in determining whether or not to retain specific records beyond the minimum retention period specified in subsection (2) of this section.

(5) After the minimum records retention period is met for a client record, the psychologist may elect to dispose of the record. If the record is disposed of, it shall be done in a secure and confidential manner. Proper disposal means paper is shredded; electronic media is deleted, erased, or reformatted; and other readable forms of media is defaced or rendered unusable or unreadable.

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<sup>20</sup> WASH. ADMIN. CODE § 246-924-354.

### **Protecting confidentiality of clients.<sup>21</sup>**

(1) In general. The psychologist shall safeguard the confidential information obtained in the course of practice, teaching, research, or other professional duties. With the exceptions set forth below, the psychologist shall disclose confidential information to others only with the informed written consent of the client.

When a corporation or other organization is the client, rules of confidentiality apply to information pertaining to the organization, including personal information about individuals when obtained in the proper course of that contract. Such information about individuals is subject to confidential control of the organization, not of the individual, and can be made available to the organization, unless the information was obtained in a separate professional relationship with that individual.

(2) Disclosure without informed written consent. The psychologist may disclose confidential information without the informed written consent of the client only in compliance with the Uniform Health Care Information Act, chapter 70.02 RCW.

(3) Services involving more than one interested party. In a situation in which more than one party has a legally recognized interest in the professional services rendered by the psychologist to a recipient, the psychologist shall, to the extent possible, clarify to all parties, in writing, prior to rendering the services the dimensions of confidentiality and professional responsibility that shall pertain in the rendering of services. Such clarification is specifically indicated, among other circumstances, when the client is an organization.

(4) Legally dependent clients. At the beginning of a professional relationship, to the extent that the client can understand, the psychologist shall inform a client who is under the age of thirteen or who has a legal guardian of the limit the law imposes on the right of confidentiality with respect to his/her communications with the psychologist. For clients between the age of thirteen and eighteen, the psychologist shall clarify any limits to confidentiality between the minor and legal guardians at the outset of services. The psychologist will act in the minor's

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<sup>21</sup> WASH. ADMIN. CODE § 246-924-363.

best interests in deciding whether to disclose confidential information to the legal guardians without the minor's consent.

(5) Limited access to client records. The psychologist shall limit access to client records and shall ensure that all persons working under his/her authority are familiar with the requirements for confidentiality of client material.

(6) When rendering psychological services as part of a team which includes nonhealth care professionals, if the psychologist shares confidential information about the client when so authorized by the client, the psychologist shall advise all persons receiving the information from the psychologist that the information should be maintained in a confidential manner.

(7) Reporting of abuse of children and vulnerable adults. The psychologist shall comply with chapter 26.44 RCW.

(8) Observation and electronic recording. The psychologist shall obtain documented informed consent of the client, guardian or agent for observed or electronically recorded sessions.

(9) Disguising confidential information. When case reports or other confidential information are used as the basis of teaching, research, or other published reports, the psychologist shall exercise reasonable care to insure that the reported material is appropriately disguised to prevent client identification.

(10) Confidentiality if client is deceased. The psychologist shall comply with the Uniform Health Care Information Act, chapter 70.02 RCW.

(11) Confidentiality after termination of professional relationship. The psychologist shall continue to treat information regarding a client as confidential after the professional relationship between the psychologist and the client has ceased.

In addition, psychologists, as “health care providers” are subject to the following laws:

## **Security safeguards<sup>22</sup>**

A health care provider shall effect reasonable safeguards for the security of all health care information it maintains.

Reasonable safeguards shall include affirmative action to delete outdated and incorrect facsimile transmission or other telephone transmittal numbers from computer, facsimile, or other databases. When health care information is transmitted electronically to a recipient who is not regularly transmitted health care information from the health care provider, the health care provider shall verify that the number is accurate prior to transmission.

## **Patient authorization of disclosure<sup>23</sup>**

(1) A patient may authorize a health care provider or health care facility to disclose the patient's health care information. A health care provider or health care facility shall honor an authorization and, if requested, provide a copy of the recorded health care information unless the health care provider or health care facility denies the patient access to health care information under [RCW 70.02.090](#).

(2) A health care provider or health care facility may charge a reasonable fee for providing the health care information and is not required to honor an authorization until the fee is paid.

(3) To be valid, a disclosure authorization to a health care provider or health care facility shall:

- (a) Be in writing, dated, and signed by the patient;
- (b) Identify the nature of the information to be disclosed;
- (c) Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed;
- (d) Identify the provider or class of providers who are to make the disclosure;
- (e) Identify the patient; and
- (f) Contain an expiration date or an expiration event that relates to the patient or the purpose of the use or disclosure.

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<sup>22</sup> WASH. REV. CODE ANN. § 70.02.150.

<sup>23</sup> WASH. REV. CODE ANN. § 70.02.030.

(4) Unless disclosure without authorization is otherwise permitted under [RCW 70.02.050](#) or the federal health insurance portability and accountability act of 1996 and its implementing regulations, an authorization may permit the disclosure of health care information to a class of persons that includes:

(a) Researchers if the health care provider or health care facility obtains the informed consent for the use of the patient's health care information for research purposes; or

(b) Third-party payors if the information is only disclosed for payment purposes.

(5) Except as provided by this chapter, the signing of an authorization by a patient is not a waiver of any rights a patient has under other statutes, the rules of evidence, or common law.

(6) When an authorization permits the disclosure of health care information to a financial institution or an employer of the patient for purposes other than payment, the authorization as it pertains to those disclosures shall expire ninety days after the signing of the authorization, unless the authorization is renewed by the patient.

(7) A health care provider or health care facility shall retain the original or a copy of each authorization or revocation in conjunction with any health care information from which disclosures are made.

(8) Where the patient is under the supervision of the department of corrections, an authorization signed pursuant to this section for health care information related to mental health or drug or alcohol treatment expires at the end of the term of supervision, unless the patient is part of a treatment program that requires the continued exchange of information until the end of the period of treatment.

#### **Patient's revocation of authorization for disclosure<sup>24</sup>**

A patient may revoke in writing a disclosure authorization to a health care provider at any time unless disclosure is required to effectuate payments for health care that has been provided or other substantial action has been taken in

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<sup>24</sup> WASH. REV. CODE ANN. § 70.02.040.

reliance on the authorization. A patient may not maintain an action against the health care provider for disclosures made in good-faith reliance on an authorization if the health care provider had no actual notice of the revocation of the authorization.

### **Certification of record<sup>25</sup>**

Upon the request of the person requesting the record, the health care provider or facility shall certify the record furnished and may charge for such certification in accordance with RCW 36.18.016(5). No record need be certified until the fee is paid. The certification shall be affixed to the record and disclose:

- (1) The identity of the patient;
- (2) The kind of health care information involved;
- (3) The identity of the person to whom the information is being furnished;
- (4) The identity of the health care provider or facility furnishing the information;
- (5) The number of pages of the health care information;
- (6) The date on which the health care information is furnished; and
- (7) That the certification is to fulfill and meet the requirements of this section.

### **Patient's examination and copying -- Requirements<sup>26</sup>**

(1) Upon receipt of a written request from a patient to examine or copy all or part of the patient's recorded health care information, a health care provider, as promptly as required under the circumstances, but no later than fifteen working days after receiving the request shall:

- (a) Make the information available for examination during regular business hours and provide a copy, if requested, to the patient;
- (b) Inform the patient if the information does not exist or cannot be

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<sup>25</sup> WASH. REV. CODE ANN. § 70.02.070.

<sup>26</sup> WASH. REV. CODE ANN. § 70.02.080.

found;

(c) If the health care provider does not maintain a record of the information, inform the patient and provide the name and address, if known, of the health care provider who maintains the record;

(d) If the information is in use or unusual circumstances have delayed handling the request, inform the patient and specify in writing the reasons for the delay and the earliest date, not later than twenty-one working days after receiving the request, when the information will be available for examination or copying or when the request will be otherwise disposed of; or

(e) Deny the request, in whole or in part, under [RCW 70.02.090](#) and inform the patient.

(2) Upon request, the health care provider shall provide an explanation of any code or abbreviation used in the health care information. If a record of the particular health care information requested is not maintained by the health care provider in the requested form, the health care provider is not required to create a new record or reformulate an existing record to make the health care information available in the requested form. The health care provider may charge a reasonable fee for providing the health care information and is not required to permit examination or copying until the fee is paid.

**Patient's request -- Denial of examination and copying<sup>27</sup>**

(1) Subject to any conflicting requirement in the public records act, chapter 42.56 RCW, a health care provider may deny access to health care information by a patient if the health care provider reasonably concludes that:

(a) Knowledge of the health care information would be injurious to the health of the patient;

(b) Knowledge of the health care information could reasonably be expected to lead to the patient's identification of an individual who provided the information in confidence and under circumstances in which confidentiality was appropriate;

(c) Knowledge of the health care information could reasonably be expected to cause danger to the life or safety of any individual;

(d) The health care information was compiled and is used solely for litigation, quality assurance, peer review, or administrative purposes; or

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<sup>27</sup> WASH. REV. CODE ANN. § 70.02.090.

(e) Access to the health care information is otherwise prohibited by law.

(2) If a health care provider denies a request for examination and copying under this section, the provider, to the extent possible, shall segregate health care information for which access has been denied under subsection (1) of this section from information for which access cannot be denied and permit the patient to examine or copy the disclosable information.

(3) If a health care provider denies a patient's request for examination and copying, in whole or in part, under subsection (1)(a) or (c) of this section, the provider shall permit examination and copying of the record by another health care provider, selected by the patient, who is licensed, certified, registered, or otherwise authorized under the laws of this state to treat the patient for the same condition as the health care provider denying the request. The health care provider denying the request shall inform the patient of the patient's right to select another health care provider under this subsection. The patient shall be responsible for arranging for compensation of the other health care provider so selected.

#### **Correction or amendment of record<sup>28</sup>**

(1) For purposes of accuracy or completeness, a patient may request in writing that a health care provider correct or amend its record of the patient's health care information to which a patient has access under RCW 70.02.080.

(2) As promptly as required under the circumstances, but no later than ten days after receiving a request from a patient to correct or amend its record of the patient's health care information, the health care provider shall:

(a) Make the requested correction or amendment and inform the patient of the action;

(b) Inform the patient if the record no longer exists or cannot be found;

(c) If the health care provider does not maintain the record, inform the patient and provide the patient with the name and address, if known, of the person who maintains the record;

(d) If the record is in use or unusual circumstances have delayed the

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<sup>28</sup> WASH. REV. CODE ANN. § 70.02.100.

handling of the correction or amendment request, inform the patient and specify in writing, the earliest date, not later than twenty-one days after receiving the request, when the correction or amendment will be made or when the request will otherwise be disposed of; or

(e) Inform the patient in writing of the provider's refusal to correct or amend the record as requested and the patient's right to add a statement of disagreement.

### **Correction or amendment or statement of disagreement -- Procedure<sup>29</sup>**

(1) In making a correction or amendment, the health care provider shall:

(a) Add the amending information as a part of the health record; and

(b) Mark the challenged entries as corrected or amended entries and indicate the place in the record where the corrected or amended information is located, in a manner practicable under the circumstances.

(2) If the health care provider maintaining the record of the patient's health care information refuses to make the patient's proposed correction or amendment, the provider shall:

(a) Permit the patient to file as a part of the record of the patient's health care information a concise statement of the correction or amendment requested and the reasons therefor; and

(b) Mark the challenged entry to indicate that the patient claims the entry is inaccurate or incomplete and indicate the place in the record where the statement of disagreement is located, in a manner practicable under the circumstances.

(3) A health care provider who receives a request from a patient to amend or correct the patient's health care information, as provided in RCW 70.02.100, shall forward any changes made in the patient's health care information or health record, including any statement of disagreement, to any third-party payor or insurer to which the health care provider has disclosed the health care information that is the subject of the request.

### **Notice of information practices -- Display conspicuously<sup>30</sup>**

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<sup>29</sup> WASH. REV. CODE ANN. § 70.02.110.

<sup>30</sup> WASH. REV. CODE ANN. § 70.02.120.

(1) A health care provider who provides health care at a health care facility that the provider operates and who maintains a record of a patient's health care information shall create a "notice of information practices" that contains substantially the following:

**NOTICE**

"We keep a record of the health care services we provide you. You may ask us to see and copy that record. You may also ask us to correct that record. We will not disclose your record to others unless you direct us to do so or unless the law authorizes or compels us to do so. You may see your record or get more information about it at . . . . ."

(2) The health care provider shall place a copy of the notice of information practices in a conspicuous place in the health care facility, on a consent form or with a billing or other notice provided to the patient.

**Consent by others -- health care representatives<sup>31</sup>**

(1) A person authorized to consent to health care for another may exercise the rights of that person under this chapter to the extent necessary to effectuate the terms or purposes of the grant of authority. If the patient is a minor and is authorized to consent to health care without parental consent under federal and state law, only the minor may exercise the rights of a patient under this chapter as to information pertaining to health care to which the minor lawfully consented. In cases where parental consent is required, a health care provider may rely, without incurring any civil or criminal liability for such reliance, on the representation of a parent that he or she is authorized to consent to health care for the minor patient regardless of whether:

- (a) The parents are married, unmarried, or separated at the time of the representation;
- (b) The consenting parent is, or is not, a custodial parent of the minor;
- (c) The giving of consent by a parent is, or is not, full performance of any agreement between the parents, or of any order or decree in any action entered pursuant to chapter 26.09 RCW.

(2) A person authorized to act for a patient shall act in good faith to represent

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<sup>31</sup> WASH. REV. CODE ANN. § 70.02.130.

(3) the best interests of the patient.

### **Representative of deceased patient<sup>32</sup>**

A personal representative of a deceased patient may exercise all of the deceased patient's rights under this chapter. If there is no personal representative, or upon discharge of the personal representative, a deceased patient's rights under this chapter may be exercised by persons who would have been authorized to make health care decisions for the deceased patient when the patient was living under [RCW 7.70.065](#).

### **Civil remedies<sup>33</sup>**

(1) A person who has complied with this chapter may maintain an action for the relief provided in this section against a health care provider or facility who has not complied with this chapter.

(2) The court may order the health care provider or other person to comply with this chapter. Such relief may include actual damages, but shall not include consequential or incidental damages. The court shall award reasonable attorneys' fees and all other expenses reasonably incurred to the prevailing party.

(3) Any action under this chapter is barred unless the action is commenced within two years after the cause of action is discovered.

(4) A violation of this chapter shall not be deemed a violation of the consumer protection act, chapter 19.86 RCW.

Further, psychologists providing treatment in settings (both outpatient and inpatient) governed by Title 71 of the Revised Code of Washington (adjudicated treatment of mental illness provisions) may be subject to the following standards regarding recordkeeping:

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<sup>32</sup> WASH. REV. CODE ANN. § 70.02.140.

<sup>33</sup> WASH. REV. CODE ANN. § 70.02.170.

**Treatment records - Confidential - Release (as amended by 2009 c 398)<sup>34</sup>**

(1) Except as otherwise provided by law, all treatment records shall remain confidential and may be released only to the persons designated in this section, or to other persons designated in an informed written consent of the patient.

(2) Treatment records of a person may be released without informed written consent in the following circumstances:

(a) To a person, organization, or agency as necessary for management or financial audits, or program monitoring and evaluation. Information obtained under this subsection shall remain confidential and may not be used in a manner that discloses the name or other identifying information about the person whose records are being released.

(b) To the department, the director of regional support networks, or a qualified staff member designated by the director only when necessary to be used for billing or collection purposes. The information shall remain confidential.

(c) For purposes of research as permitted in chapter 42.48 RCW.

(d) Pursuant to lawful order of a court.

(e) To qualified staff members of the department, to the director of regional support networks, to resource management services responsible for serving a patient, or to service providers designated by resource management services as necessary to determine the progress and adequacy of treatment and to determine whether the person should be transferred to a less restrictive or more appropriate treatment modality or facility. The information shall remain confidential.

(f) Within the treatment facility where the patient is receiving treatment, confidential information may be disclosed to persons employed, serving in bona fide training programs, or participating in supervised volunteer programs, at the facility when it is necessary to perform their duties.

(g) Within the department as necessary to coordinate treatment for mental illness, developmental disabilities, alcoholism, or drug abuse of persons

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<sup>34</sup> WASH. REV. CODE ANN. § 71.05.630 (as amended by 2009 c 398); this statute was amended three times during the 2009 legislative session, each without reference to the other. The last version is listed here. However readers should view all three versions given the rule of construction concerning sections amended more than once during the same legislative session, see RCW [1.12.025](#). Please see, <http://apps.leg.wa.gov/rcw/default.aspx?cite=71.05.630>

who are under the supervision of the department.

(h) To a licensed physician who has determined that the life or health of the person is in danger and that treatment without the information contained in the treatment records could be injurious to the patient's health. Disclosure shall be limited to the portions of the records necessary to meet the medical emergency.

(i) Consistent with the requirements of the health information portability and accountability act, to a licensed mental health professional, as defined in RCW 71.05.020, or a health care professional licensed under chapter 18.71, 18.71A, 18.57, 18.57A, 18.79, or 18.36A RCW who is providing care to a person, or to whom a person has been referred for evaluation or treatment, to assure coordinated care and treatment of that person. Psychotherapy notes, as defined in 45 C.F.R. Sec. 164.501, may not be released without authorization of the person who is the subject of the request for release of information.

(j) To administrative and office support staff designated to obtain medical records for those licensed professionals listed in (i) of this subsection.

(k) To a facility that is to receive a person who is involuntarily committed under chapter 71.05 RCW, or upon transfer of the person from one treatment facility to another. The release of records under this subsection shall be limited to the treatment records required by law, a record or summary of all somatic treatments, and a discharge summary. The discharge summary may include a statement of the patient's problem, the treatment goals, the type of treatment which has been provided, and recommendation for future treatment, but may not include the patient's complete treatment record.

(l) Notwithstanding the provisions of RCW 71.05.390(7), to a correctional facility or a corrections officer who is responsible for the supervision of a person who is receiving inpatient or outpatient evaluation or treatment. Except as provided in RCW 71.05.445 and 71.34.345, release of records under this section is limited to:

(i) An evaluation report provided pursuant to a written supervision plan.

(ii) The discharge summary, including a record or summary of all somatic treatments, at the termination of any treatment provided as part of the supervision plan.

(iii) When a person is returned from a treatment facility to a correctional facility, the information provided under (iv) of this subsection.

(iv) Any information necessary to establish or implement changes in the person's treatment plan or the level or kind of supervision as determined by resource management services. In cases involving a person transferred back to a correctional facility, disclosure shall be made to clinical staff only.

(m) To the person's counsel or guardian ad litem, without modification, at any time in order to prepare for involuntary commitment or recommitment proceedings, reexaminations, appeals, or other actions relating to detention, admission, commitment, or patient's rights under chapter 71.05 RCW.

(n) To staff members of the protection and advocacy agency or to staff members of a private, nonprofit corporation for the purpose of protecting and advocating the rights of persons with mental disorders or developmental disabilities. Resource management services may limit the release of information to the name, birthdate, and county of residence of the patient, information regarding whether the patient was voluntarily admitted, or involuntarily committed, the date and place of admission, placement, or commitment, the name and address of a guardian of the patient, and the date and place of the guardian's appointment. Any staff member who wishes to obtain additional information shall notify the patient's resource management services in writing of the request and of the resource management services' right to object. The staff member shall send the notice by mail to the guardian's address. If the guardian does not object in writing within fifteen days after the notice is mailed, the staff member may obtain the additional information. If the guardian objects in writing within fifteen days after the notice is mailed, the staff member may not obtain the additional information.

(o) For purposes of coordinating health care, the department may release without informed written consent of the patient, information acquired for billing and collection purposes as described in (b) of this subsection to all current treating providers of the patient with prescriptive authority who have written a prescription for the patient within the last twelve months. The department shall notify the patient that billing and collection information has been released to named providers, and provide the substance of the information released and the dates of such release. The department shall not release counseling, inpatient psychiatric hospitalization, or drug and alcohol treatment information without a signed written release from the client.

(3) Whenever federal law or federal regulations restrict the release of

information contained in the treatment records of any patient who receives treatment for chemical dependency, the department may restrict the release of the information as necessary to comply with federal law and regulations.

**Treatment records -- Access procedures<sup>35</sup>**

(1) Procedures shall be established by resource management services to provide reasonable and timely access to individual treatment records. However, access may not be denied at any time to records of all medications and somatic treatments received by the person.

(2) Following discharge, the person shall have a right to a complete record of all medications and somatic treatments prescribed during evaluation, admission, or commitment and to a copy of the discharge summary prepared at the time of his or her discharge. A reasonable and uniform charge for reproduction may be assessed.

(3) Treatment records may be modified prior to inspection to protect the confidentiality of other patients or the names of any other persons referred to in the record who gave information on the condition that his or her identity remain confidential. Entire documents may not be withheld to protect such confidentiality.

(4) At the time of discharge all persons shall be informed by resource management services of their rights as provided in RCW 71.05.390 and 71.05.620 through 71.05.690.

**Treatment records -- Access under false pretenses, penalty<sup>36</sup>**

Any person who requests or obtains confidential information pursuant to RCW 71.05.620 through 71.05.690 under false pretenses shall be guilty of a gross misdemeanor.

**Treatment records -- Rules<sup>37</sup>**

The department shall adopt rules to implement [RCW 71.05.620](#) through [71.05.680](#).

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<sup>35</sup> WASH. REV. CODE ANN. § 71.05.640.

<sup>36</sup> WASH. REV. CODE ANN. § 71.05.680.

<sup>37</sup> WASH. REV. CODE ANN. § 71.05.690.

Further, the Washington Administrative Code provides the following regarding how much a medical providers charge for searching and duplicating medical records:

**How much can a medical provider<sup>38</sup> charge for searching and duplicating medical records?<sup>39</sup>**

RCW 70.02.010(15) allows medical providers to charge fees for searching and duplicating medical records. The fees a provider may charge cannot exceed the fees listed below:

- (1) Copying charge per page:
  - (a) No more than one dollar and four cents per page for the first thirty pages;
  - (b) No more than seventy-nine cents per page for all other pages.
  
- (2) Additional charges:
  - (a) The provider can charge a twenty-three dollar clerical fee for searching and handling records;
  - (b) If the provider personally edits confidential information from the record, as required by statute, the provider can charge the usual fee for a basic office visit.
  
- (3) This section is effective July 1, 2011, through June 30, 2013.
  
- (4) HIPAA covered entities: See HIPAA regulation Section 164.524 (c)(4) to determine applicability of this rule.

**Retention of Records**

The regulations promulgated by Washington’s Examining Board of Psychology set forth the following requirements regarding the retention of records by psychologists:<sup>40</sup>

- . . . (2) All records must be retained for at least eight years following the last

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<sup>38</sup> The authority of RCW 70.02 speaks in terms of “healthcare providers.” It is quite likely that this regulation would be viewed by the courts as using the term “medical provider” interchangeably with “health care provider” for the laws related to records.

<sup>39</sup> WASH. ADMIN. CODE § 246-08-400.

<sup>40</sup> WASH. ADMIN. CODE § 246-924-354.

professional contact with the client(s). In the case of minors under the age of eighteen, the records must be retained until the client reaches the age of twenty-two or for eight years, whichever is longer....

(5) After the minimum records retention period is met for a client record, the psychologist may elect to dispose of the record. If the record is disposed of, it shall be done in a secure and confidential manner. Proper disposal means paper is shredded; electronic media is deleted, erased, or reformatted; and other readable forms of media is defaced or rendered unusable or unreadable.

In addition, the following provision applies to “health care providers” generally:<sup>41</sup>

A health care provider shall maintain a record of existing health care information for at least one year following receipt of an authorization to disclose that health care information under RCW 70.02.040, and during the pendency of a request for examination and copying under RCW 70.02.080 or a request for correction or amendment under RCW 70.02.100.

Further, psychologists working in hospitals may be subject to the following provisions set forth under Chapter 70.41 (Hospital Licensing and Regulation) of the Revised Code of Washington:

**Medical records of patients -- Retention and preservation<sup>42</sup>**

Unless specified otherwise by the department, a hospital shall retain and preserve all medical records which relate directly to the care and treatment of a patient for a period of no less than ten years following the most recent discharge of the patient; except the records of minors, which shall be retained and preserved for a period of no less than three years following attainment of the age of eighteen years, or ten years following such discharge, whichever is longer.

If a hospital ceases operations, it shall make immediate arrangements, as approved by the department, for preservation of its records.

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<sup>41</sup> WASH. REV. CODE ANN. § 70.02.160.

<sup>42</sup> WASH. REV. CODE ANN. § 70.41.190.

The department shall by regulation define the type of records and the information required to be included in the medical records to be retained and preserved under this section; which records may be retained in photographic form pursuant to chapter 5.46 RCW.

## **Violations of the specific duties**

### **Unprofessional conduct<sup>43</sup>**

In addition to those acts defined in chapter 18.130 RCW, the board may take disciplinary action under RCW 18.130.160 for the following reasons:

- (1) Failing to maintain the confidentiality of information under RCW 18.83.110;
- (2) Violating the ethical code developed by the board under RCW 18.83.050;
- ... (8) Violating any state statute or administrative rule specifically governing the practice of psychology....

### **Fraud, misrepresentation, or deception<sup>44</sup>**

The psychologist shall not use fraud, misrepresentation, or deception in obtaining a psychology license, in passing a psychology licensing examination, in assisting another to obtain a psychology license, or to pass a psychology licensing examination, in billing clients or third party payors, in providing psychological service, in reporting the results of psychological evaluations or services, or in conducting any other activity related to the practice of psychology.

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<sup>43</sup> WASH. REV. CODE ANN. § 18.83.121.

<sup>44</sup> WASH. ADMIN. CODE §246-924-366.