

The Duty to Record: **Ethical, Legal, and Professional Considerations for Texas 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>).

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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.

Texas 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

Texas 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 Texas, and recommend that psychologists use this template, too.⁵

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). Texas, 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.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

The laws of Texas do not explicitly adopt the APA’s Ethical Principles of Psychologists and Code of Conduct.¹⁰ The Board of Examiners of Psychologists has, however, adopted and published its own “code of ethics” for Texas psychologists,

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). Texas, 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 TEX. OCC. CODE § 501.003 (c)(4)(B). “The practice of psychology ...is based upon the standards of ethics established by the profession.” Copies of the APA Code of Ethics are available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C.

which set forth several obligations related to record keeping.¹¹

Common Law

In *Thapar v. Zezulka*, the Supreme Court of Texas held that in Texas, MHPs have no statutory or common-law duty to warn third parties of a client's specific threats.¹² In reaching this conclusion, the court relied heavily on the fact that Texas's confidentiality statute does not give MHPs the option to warn, and the court took this as an indication that the legislature had "established a policy against such a common-law cause of action."¹³ A mandatory duty to protect does not exist under the common law of Texas.¹⁴

Relevant citing references to Texas Admin Code, Title 22, § 465.22 (re: psychological records, test data, and protocols).

- At the administrative hearing on April 18, 1994, the Board proceeded against appellant on only two of the charges against him, those of ethical violations and failure to timely record his notes. The administrative law judge ("ALJ") dismissed the charges against appellant for ethical violations on the grounds that compliance with the ethical principles could not be compelled under the rules. The only issue remaining upon which suspension could be grounded was whether appellant violated Board Rule 465.22, which required the recording of notes within a reasonable time of treatment, and, if so, whether the Board could suspend his license pursuant to section 23 of the Act for such a violation.² The ALJ found that appellant had violated Rule 465.22 and recommended suspension of appellant's license solely on that basis. Adopting the ALJ's proposal and findings of fact and conclusions of law, the Board suspended appellant's license for one year, probating six months of the sentence. Seeking judicial review, appellant challenged the Board's order. The district court affirmed the Board's decision...¹⁵

20002-4242 and on the APA's website at <http://www.apa.org/ethics/code/principles.pdf> (last accessed Aug. 1, 2012) [hereinafter "APA CODE OF ETHICS"].

¹¹ See TEX. OCC. CODE §§ 501.001, *et. seq.*

¹² *Thapar v. Zezulka*, 994 S.W.2d 635, 639 (Tex. 1999).

¹³ *Id.* at 636.

¹⁴ *Van Horn v. Chambers*, 970 S.W.2d 542, 546 (Tex. 1977).

¹⁵ *Wanrykow v. Texas State Bd. of Examiners of Psychologists*, 1998 WL 91147 (Tex.App.-Austin), 1 (Tex.App.-Austin, 1998)

- At the hearing on the first motion for sanctions, counsel for the Coxes had noted that Dallas Police Department (DPD) had failed to produce the psychological records of Coleman, the officer who shot Cox, which had been ordered by the court. DPD had informed the Coxes that those records had been destroyed. DPD's counsel confirmed that those records were kept for two years and then destroyed. The Coxes' counsel then referred to a state administrative regulation mandating maintenance of psychological records. *See*, 22 Tex. Admin. Code § 465.22 (West Jan. 3, 1989) (Record Maintenance). According to its terms, the regulation is applicable to psychologists, and the record of the hearing shows that the DPD employed a police psychologist. When the trial court's order granting the first motion for sanctions was issued on December 4, 1987, DPD had recently found and delivered some of the psychological records of Darren Coleman that were allegedly destroyed, but the trial court's order recited that it “does not adjudicate any question of sanctions relating to the production or the failure to produce [Coleman's] psychological records by the Defendants or any related matter. The Court expressly reserves any ruling on such questions for a later time.” The trial court further ordered DPD to deliver those records to a specified questioned documents examiner ...The Coxes' second motion for sanctions was primarily addressed to DPD's initial contention that Coleman's psychological records no longer existed because they were destroyed in accordance with policy and DPD's subsequent determination that some of those records did in fact exist because they had not been destroyed. The Coxes alleged that DPD had materially misstated the policy regarding destruction of the psychological records of police officers, that DPD had materially misrepresented the nature and extent of any search or effort to locate Coleman's psychological records, and that the records ultimately produced did not appear to be complete, genuine, and authentic. The motion stated that this alleged conduct constituted an actual or constructive fraud on the court because DPD's agents and employees either knew or should have known that the statements concerning Coleman's psychological records were false. The motion requested, among other things, the striking of DPD's pleadings ...Even if the trial court was inclined to give Dallas the benefit of the doubt, the testimony of the custodian of the furnished records suggested that Dallas's efforts to locate the records were less than diligent.¹⁶

¹⁶ *City of Dallas v. Cox*, 793 S.W.2d 701, 709 (Tex.App. Dallas, 1990).

- Pursuant to chapter 611 of the Health and Safety Code, which gives patients access to their patient records created or maintained by mental health professionals, the Texas State Board of Examiners of Psychologists has promulgated a rule that defines test results as patient records and excludes testing materials, test booklets, and protocols used in generating test results from the definition of patient records ...Where records of a psychologist are subject to the Open Records Act, the confidentiality provisions of chapter 611 will exempt “patient records” from disclosure to the public, but will not exempt the testing materials excluded from the definition of patient records.¹⁷
- A psychologist is authorized to disclose confidential information about a patient in a judicial or administrative proceeding where the court or agency has issued an order or subpoena without receiving a written waiver of confidentiality from the patient or patient's representative. A rule of the Board of Examiners of Psychologists interpreted by the board as requiring such a waiver is invalid to the extent of inconsistency with the exception to the confidentiality requirement found in section 611.006(a)(11) of the Health and Safety Code. If a psychologist has received a subpoena for patient mental health records he or she believes are privileged by rule 510 of the Rules of Evidence, he or she may raise the claim of privilege under applicable provisions of the Rules of Civil Procedure. Although it may be advisable for a psychologist to notify a patient that his records have been subpoenaed, we cannot determine that the action would be either necessary or sufficient to protect the psychologist from liability in tort in the event that the patient's privileged mental health information is disclosed in a judicial proceeding.¹⁸

Relevant annotations and citing references to TEX. HEALTH & SAFETY CODE ANN. § 611.0045 (re: Right to Mental Health Record)

- The father sought records that the psychologist refused to provide to either parent. The psychologist had determined that it was not in the child's best interest to release the information, and the supreme court held that section 153 .073 did not grant the father access to records that the psychologist would have withheld from both parents, pursuant to his authority under the health and

¹⁷ *The Honorable Sherry L. Lee*, ex. Atty. Gen. Op. LO-97-073 (Tex.A.G.), 1997 WL 532727, 3.

¹⁸ *Ms. Rebecca E. Forkner*, Tex. Atty. Gen. Op. LO-96-102 (Tex.A.G.); 1996 WL 554634, 4.

safety code, had they not been divorced. *See*, Tex. Health & Safety Code Ann. § 611.0045(b) Because statutory provision governing a patient's access to mental health records may limit a patient's rights to his or her own records, it can also limit a parent's or third party's right to a patient's records when the third party or parent stands in the patient's stead. Uncontradicted testimony by psychologist that, in his professional opinion, it would be harmful to child to release her mental health records to her father conclusively established harm to child, justifying psychologist's denial of access to records, even though father's testified that, in his opinion, his daughter did not object to their release. If a professional does deny a parent access to part of a child's mental health records, the parent has recourse: first, the professional denying access must allow examination and copying of the record by another professional selected by the parent acting on behalf of the patient to treat the patient for the same or a related condition; second, a parent denied access to a child's records has judicial recourse.¹⁹

Relevant annotations to TEX. HEALTH & SAFETY CODE ANN. § 611.0045 (re: unauthorized Disclosure of Confidential Information Other than in Judicial or Administrative Proceeding)

- Allegations that city police department required that police officer disclose her mental health records during her treatment following suicide attempt as condition to full reinstatement failed to state claim under Texas Medical Practices Act or under Texas Health and Safety Code providing legal remedies for improper disclosure of medical records by health care professionals, where officer alleged that she gave written authorization for release of medical records.²⁰
- Communications between psychologist and defendant concerning defendant's reasons for feeling suicidal were not admissible at defendant's murder trial, in spite of State's contention that defendant waived privilege of confidentiality by orally agreeing to psychologist's calling police, in light of fact that statute requires that in court proceedings, waiver of privilege of confidentiality must be

¹⁹ *Abrams v. Jones* (Sup. 2000) 35 S.W.3d 620.

²⁰ *Thompson v. City of Arlington, Tex.*, N.D.Tex.1993, 838 F.Supp. 1137.

in writing.²¹

- Admission of psychologist's testimony at competency hearing in murder prosecution was proper, where defendant had moved for psychiatric evaluation of certain persons, and psychologist who testified was working under psychiatrist; under the circumstances, psychologist's involvement was merely a component of psychiatrist's evaluation and was covered by the same waiver of confidentiality.²²
- In suit brought by father to modify original custody order, prohibition of father's cross-examination, of mother's psychologist concerning mother's sexual attitudes was not error in that there was no original waiver signed by mother of the patient-psychologist privilege and statute did not provide for implied waiver asserted by father.²³
- Statute requires only that patients be informed that communications with mental health professionals are not privileged, not that examining doctor so inform patient.²⁴

Relevant annotations and citing references to Tex. Health & Safety Code Ann. § 611.005. Legal Remedies for Improper Disclosure or Failure to Disclose

- Physician sought mandamus relief after trial court in medical malpractice action ordered him to turn over records concerning his treatment for medical, mental, or emotional condition. The Supreme Court, Gonzalez, J., held that: (1) 1988 amendments to patient-litigant exception to physician-patient and mental health information privileges were independent of “offensive use doctrine”; (2) under amendments, condition was part of party's claim or defense if condition itself was fact that carried some legal significance; (3) even if condition was part of party's claim or defense, patient records could be revealed only to extent necessary to provide relevant evidence relating to condition alleged; and (4) based on allegations in plaintiffs' amended complaint, plaintiffs were entitled to

²¹ *Tumlinson v. State* (App. 5 Dist. 1983) 663 S.W.2d 539, petition for discretionary review refused.

²² *Miles v. State* (App. 8 Dist. 1985) 688 S.W.2d 219, petition for discretionary review refused.

²³ *In Interest of T. L. H.* (App. 13 Dist. 1982) 630 S.W.2d 441, dismissed.

²⁴ *Jones v. State* (Civ.App. 1981) 613 S.W.2d 570.

discovery of certain of physician's medical and mental health records.²⁵

Relevant annotations and citing references to Tex. Health & Safety Code Ann. § 611.006
Authorized Disclosure of Confidential Information in Judicial or Administrative
Proceeding

- At the sentencing phase following defendant's guilty plea to theft, State was entitled to cross-examine defendant's psychiatrist about the psychiatrist's letter of recommendation that defendant himself submitted, and it was appropriate for trial judge to have all information relevant to a determination of an appropriate punishment, and thus, defendant could not assert psychiatrist-patient privilege, where psychiatrist was not involved in any treatment or examination for alcohol or drug abuse.²⁶
- Proposed patient's medical records, referenced by his treating physician, were not privileged in context of commitment proceeding for court-ordered treatment.²⁷

Contents of the record that are mandated by law

Both Texas law and the Health Insurance Portability and Accountability Act (HIPPA)²⁸ mandate the contents of psychological records. A HIPPA notice of privacy practices²⁹ 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 that is mandated by the Texas statutes regulating psychological practice.³⁰

²⁵ *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex.,1994).

²⁶ *Peto v. State* (App. 1 Dist. 2001) 51 S.W.3d 326, rehearing overruled, petition for discretionary review refused, rehearing on petition for discretionary review denied.

²⁷ *In re Best Interest of M.G.* (App. 12 Dist. 2002) 2002 WL 31854887, Unreported.

²⁸ HIPPA, 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 45 CFR 164.502 (a)(1)(ii) & 45 CFR 164.506 (c); HIPPA, 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).

³⁰ 22 TEX. ADMIN. CODE § 465.1(4).

"Informed Consent" means the written documented consent of the patient, client and other recipients of psychological services only after the patient, client or other recipient has been made aware of the purpose and nature of the services to be provided, including but not limited to: the specific goals of the services; the procedures to be utilized to deliver the services; possible side effects of the services, if applicable; alternate choices to the services, if applicable; the possible duration of the services; the confidentiality of and relevant limits thereto; all financial policies, including the cost and methods of payment; and any provisions for cancellation of and payments for missed appointments; and right of access of the patient, client or other recipient to the records of the services.

Informed Consent/Describing Psychological Services.³¹

(a) Licensees obtain and document in writing informed consent concerning all services they intend to provide to the patient, client or other recipient(s) of the psychological services prior to initiating the services, using language that is reasonably understandable to the recipients unless consent is precluded by applicable federal or state law.

(b) Licensees provide appropriate information as needed during the course of the services about changes in the nature of the services to the patient client or other recipient(s) of the services using language that is reasonably understandable to the recipient to ensure informed consent.

(c) Licensees provide appropriate information as needed, during the course of the services to the patient client and other recipient(s) and afterward if requested, to explain the results and conclusions reached concerning the services using language that is reasonably understandable to the recipient(s).

(d) When a licensee agrees to provide services to a person, group or organization at the request of a third party, the licensee clarifies to all of the parties the nature of the relationship between the licensee and each party at the outset of the service and at any time during the services that the circumstances change. This clarification includes the role of the licensee with each party, the probable uses of the services and the results of the services, and all potential

³¹ 22 TEX. ADMIN. CODE § 465.11.

limits to the confidentiality between the recipient(s) of the services and the licensee.

(e) When a licensee agrees to provide services to several persons who have a relationship, such as spouses, couples, parents and children, or in group therapy, the licensee clarifies at the outset the professional relationship between the licensee and each of the individuals involved, including the probable use of the services and information obtained, confidentiality, expectations of each participant, and the access of each participant to records generated in the course of the services.

(f) At any time that a licensee knows or should know that he or she may be called on to perform potentially conflicting roles (such as marital counselor to husband and wife, and then witness for one party in a divorce proceeding), the licensee explains the potential conflict to all affected parties and adjusts or withdraws from all professional services in accordance with Board rules and applicable state and federal law. Further, licensees who encounter personal problems or conflicts as described in Rule 465.9(i) that will prevent them from performing their work-related activities in a competent and timely manner must inform their clients of the personal problem or conflict and discuss appropriate termination and/or referral to insure that the services are completed in a timely manner.

(g) When persons are legally incapable of giving informed consent, licensees obtain informed consent from any individual legally designated to provide substitute consent.

(h) When informed consent is precluded by law, the licensee describes the nature and purpose of all services, as well as the confidentiality of the services and all applicable limits thereto, that he or she intends to provide to the patient, client, or other recipient(s) of the psychological services prior to initiating the services using language that is reasonably understandable to the recipient(s).

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

- Texas Family Code, Chapter 261, Duty to Report Child Abuse and Neglect
- Texas Human Resource Code, Chapter 48, Duty to Report Elder Abuse and Neglect
- Texas Civil Practice and Remedy Code, Chapter 81, Duty to Report Sexual Exploitation of a Patient by a Mental Health Services Provider

The regulations promulgated by Texas's Examining Board of Psychology set forth the following requirements for the content of records maintained by licensed psychologists:³²

(a) General Requirements.

- (1) All licensees shall create and maintain accurate, current, and pertinent records of all psychological services rendered by or under the supervision of the licensee.
- (2) All records shall be sufficient to permit planning for continuity in the event that another care provider takes over delivery of services to a patient or client for any reason, including the death, disability or retirement of the licensee and to permit adequate regulatory and administrative review of the psychological service.
- (3) All licensees shall identify impressions and tentative conclusions as such in patient or client records.
- (4) All records and record entries shall be created in as timely a manner as possible after the delivery of the specific services being recorded.
- (5) Records, test data and test protocols shall be maintained and stored in a way that permits review and duplication.
- (6) Licensees working in public school settings shall comply with all federal and state laws and regulations relative to the content, maintenance, control, access, retention and destruction of psychological and educational records, test data and test protocols.

³² 22 TEX. ADMIN. CODE § 465.22. Psychological Records, Test Data and Test Protocols; 22 TEX. ADMIN. CODE § 465.1 (12): "Records" are any information, regardless of the format in which it is maintained, that can be used to document the delivery, progress or results of any psychological services including, but not limited to, data identifying a recipient of services, dates of services, types of services, informed consents, fees and fee schedules, assessments, treatment plans, consultations, session notes, test results, reports, release forms obtained from a client or patient or any other individual or entity, and records concerning a patient or client obtained by the licensee from other sources; *See*, 22 TEX. ADMIN. CODE § 465.21— sets forth specific record keeping requirements for psychologists engaging in "forensic services."

(7) Licensees are prohibited from falsifying, altering, fabricating, or back-dating patient records and reports.

Specific information about the treatment plan must be recorded under Texas law:³³

- (1) Licensees create specific written treatment plans that include, at a minimum, agreed upon goals of the treatment, the techniques to be used, and the tentative duration of the treatment for any therapy or counseling that they provide.
- (2) Licensees explain the treatment plan to all recipients of the therapy or counseling before commencing the services.
- (3) Licensees alter and document the alteration in the treatment plan when clinically indicated.
- (4) Licensees confer with and obtain consent from the patient, or client or other recipient(s) of services concerning significant alterations in the treatment plan in accordance with Board rule §465.11(b) of this title (relating to Informed Consent/Describing Psychological Services).

Maintenance and security of records

The following regulations promulgated by the Board set forth the standards for the maintenance and security of psychological records:³⁴

- (1) Licensees shall maintain records and test data in a manner that protects the confidentiality of all services delivered by the licensee.
- (2) Licensees are responsible for the maintenance, confidentiality and contents of, and access to, all records and test data.
- (3) Licensees shall make all reasonable efforts to protect against the misuse of any record or test data.
- (4) Licensees shall maintain control over records and test data to the extent necessary to ensure compliance with all applicable Board rules and all state and federal laws.
- (5) In situations where it becomes impossible for a licensee to maintain control over records and test data as required by applicable Board rule and state and federal law, the licensee shall make all necessary arrangements for transfer of

³³ 22 TEX. ADMIN. CODE § 465.17.

³⁴ 22 TEX. ADMIN. CODE § 465.22(b).

the licensee's records to another licensee who will ensure compliance with all applicable Board rules and state and federal laws concerning records.

(6) Records and test data of psychological services rendered by a licensee as an employee of an agency or organization remain the property of the employing agency upon termination of the employment of the individual unless legal ownership of such records is controlled by applicable state or federal law or legal agreement.

Access to Records and Test Data.³⁵

(1) Records shall be entered, organized and maintained in a manner that facilitates their use by all authorized persons.

(2) Records may be maintained in any media that ensure confidentiality and durability.

(3) A licensee shall release information about a patient or client only upon written authorization by the patient, client or appropriate legal guardian pursuant to a proper court order or as required by applicable state or federal law.

(4) Test data are not part of a patient's or client's record. Test data are not subject to subpoena. Test data shall be made available only:

(A) to another qualified mental health professional and only upon receipt of written release from the patient or client, or

(B) pursuant to a court order.

(5) Licensees cooperate in the continuity of care of patients and clients by providing appropriate information to succeeding qualified service providers as permitted by applicable Board rule and state and federal law.

(6) Licensees who are temporarily or permanently unable to practice psychology shall implement a system that enables their records to be accessed in compliance with applicable Board rules and state and federal law.

(7) Access to records may not be withheld due to an outstanding balance owed by a client for psychological services provided prior to the patient's request for records. However, licensees may impose a reasonable fee for review and/or reproduction of records and are not required to permit examination until such fee is paid, unless there is a medical emergency or the records are to be used in support of an application for disability benefits.

³⁵ 22 TEX. ADMIN. CODE § 465.22(c).

(8) No later than 15 days after receiving a written request from a patient to examine or copy all or part of the patient's mental health records, a psychologist shall:

- (A) make the information available for examination during regular business hours and provide a copy to the patient, if requested; or
- (B) inform the patient in writing that the information does not exist or cannot be found; or
- (C) provide the patient with a signed and dated statement that having access to the mental health records would be harmful to the patient's physical, mental or emotional health. The written statement must specify the portion of the record being withheld, the reason for denial and the duration of the denial.

HIPPA also permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.³⁶ 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).³⁷

HIPPA enables the patient to inspect and obtain Protected Health Information (PHI) records, to include the Psychotherapy Notes, created by the psychologist, as long as those records are maintained.³⁸

In addition, patients have a right to amend any part of the record;³⁹ 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). Texas law also addresses inspection, amendment and denial:⁴⁰

³⁶ 45 CFR 164.520; HIPPA, 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).

³⁷ 45 CFR 164.508 (b)(4).

³⁸ 45 CFR 164.524.

³⁹ 45 CFR 164.526 (a).

⁴⁰ TEX. HEALTH AND SAFETY CODE § 611.0045.

- (a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.
- (b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.
- (c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.
- (d) The professional who denies access to a portion of a record under this section shall redetermine the necessity for the denial at each time a request for the denied portion is made. If the professional again denies access, the professional shall notify the patient of the denial and document the denial as prescribed by Subsection (c).
- (e) If a professional denies access to a portion of a confidential record, the professional shall allow examination and copying of the record by another professional if the patient selects the professional to treat the patient for the same or a related condition as the professional denying access.
- (f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.
- (g) A professional shall delete confidential information about another person who has not consented to the release, but may not delete information relating to the patient that another person has provided, the identity of the person responsible for that information, or the identity of any person who provided information that resulted in the patient's commitment.
- (h) If a summary or narrative of a confidential record is requested by the patient or other person requesting release under this section, the professional shall prepare the summary or narrative.
- (i) The professional or other entity that has possession or control of the record shall grant access to any portion of the record to which access is not specifically denied under this section within a reasonable time and may charge a reasonable fee.
- (j) Notwithstanding Section 159.002, Occupations Code, this section applies to the release of a confidential record created or maintained by a professional, including a physician, that relates to the diagnosis, evaluation, or treatment of a

mental or emotional condition or disorder, including alcoholism or drug addiction.

(k) The denial of a patient's access to any portion of a record by the professional or other entity that has possession or control of the record suspends, until the release of that portion of the record, the running of an applicable statute of limitations on a cause of action in which evidence relevant to the cause of action is in that portion of the record.

Texas psychologists may disclose confidential information to others under certain circumstances:⁴¹

...(e) Licensees disclose confidential information without the consent of a patient or client only in compliance with applicable state and federal law.

(f) Licensees who release confidential records relating to a patient or client that also contain confidential information relating to a second patient or client that the licensee obtained through the provision of services to that second individual, and who lack consent or other legal authority to disclose the second individual's identity and/or records, must remove all identifying and confidential information relating to the second individual before releasing the records.

(g) Licensees may share information for consultation purposes without a consent only to the extent necessary to achieve the purposes of the consultation. Licenses shall exclude information that could lead to the identification of the patient or client...

A professional may disclose confidential information only:⁴²

- (1) to a governmental agency if the disclosure is required or authorized by law;
- (2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient;
- (3) to qualified personnel for management audits, financial audits, program evaluations, or research, in accordance with Subsection (b);

⁴¹ 22 TEX. ADMIN.CODE § 465.12.

⁴² TEX. HEALTH AND SAFETY CODE § 611.004.

- (4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs;
- (5) to the patient's personal representative if the patient is deceased;
- (6) to individuals, corporations, or governmental agencies involved in paying or collecting fees for mental or emotional health services provided by a professional;
- (7) to other professionals and personnel under the professionals' direction who participate in the diagnosis, evaluation, or treatment of the patient;
- (8) in an official legislative inquiry relating to a state hospital or state school as provided by Subsection (c);
- (9) to designated persons or personnel of a correctional facility in which a person is detained if the disclosure is for the sole purpose of providing treatment and health care to the person in custody;
- (10) to an employee or agent of the professional who requires mental health care information to provide mental health care services or in complying with statutory, licensing, or accreditation requirements, if the professional has taken appropriate action to ensure that the employee or agent:
 - (A) will not use or disclose the information for any other purposes; and
 - (B) will take appropriate steps to protect the information; or
- (11) to satisfy a request for medical records of a deceased or incompetent person pursuant to Section 74.051(e), Civil Practice and Remedies Code.

In addition, Texas law permits a professional to disclose confidential information in judicial or administrative proceedings as follows:⁴³

- (a)(1) a judicial or administrative proceeding brought by the patient or the patient's legally authorized representative against a professional, including malpractice proceedings;
- (2) a license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;
- (3) a judicial or administrative proceeding in which the patient waives the patient's right in writing to the privilege of confidentiality of information or when a representative of the patient acting on the patient's behalf submits a

⁴³ TEX. HEALTH AND SAFETY CODE § 611.006.

written waiver to the confidentiality privilege;

(4) a judicial or administrative proceeding to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(5) a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, except that those communications may be disclosed only with respect to issues involving the patient's mental or emotional health;

(6) a judicial proceeding affecting the parent-child relationship;

(7) any criminal proceeding, as otherwise provided by law;

(8) a judicial or administrative proceeding regarding the abuse or neglect, or the cause of abuse or neglect, of a resident of an institution, as that term is defined by Chapter 242;

(9) a judicial proceeding relating to a will if the patient's physical or mental condition is relevant to the execution of the will;

(10) an involuntary commitment proceeding for court-ordered treatment or for a probable cause hearing under:

(A) Chapter 462;

(B) Chapter 574; or

(C) Chapter 593; or

(11) a judicial or administrative proceeding where the court or agency has issued an order or subpoena.

(b) On granting an order under Subsection (a)(5), the court, in determining the extent to which disclosure of all or any part of a communication is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.⁴⁴ HIPPA also 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.⁴⁵ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

⁴⁴ 45 CFR 164.528.

⁴⁵ 45 CFR 164.508.

Retention of Records

The regulations promulgated by Texas Board of Examiners of Psychologists set forth the following requirements regarding the retention of records by psychologists:⁴⁶

...(2) In the absence of applicable state and federal laws, rules and regulations, records and test data shall be maintained for a minimum of ten years after the last contact with the client. If the client is a minor, the record retention period is extended until ten years after the minor reaches the age of majority.

(3) All records shall be maintained in a manner which permits timely retrieval and production.

Termination of Services⁴⁷

Licensees who are employed by an organization or agency to provide psychological services must, upon termination of that employment, work with the employer to facilitate access to records of all services provided by the licensee to patients or clients as otherwise required by Board rules and applicable law.

Record Duties after Disposition and Assumption of the Practice of a Mental Health Professional⁴⁸

...(a)(4) A licensee shall make provisions for the transfer of his or her practice in the event of the licensee's death or disability in compliance with this section, all applicable Board rules, and state and federal laws.(5) A non-licensee administrator or executor of a licensee's estate should be encouraged to dispose of the licensee's practice in accordance with this section.

(b) Notice and Referral of Patients and Clients.(1) A licensee who intends to sell, retire, or otherwise dispose of a practice must make reasonable efforts to notify current and former patients or clients that on a given date the practice is being sold and that patient or client records will be transferred to the referent unless the patient or client provides the name of an alternative mental health care provider to receive the records. This notice must provide a reasonable time to the patients and clients to make suitable responses and arrangements.(2) A licensee who assumes the practice of another mental health

⁴⁶ TEX. OCC. CODE § 465.22(d).

⁴⁷ 22 TEX. ADMIN. CODE § 465.21(2)

⁴⁸ *Id.*

service provider may state his or her willingness to provide services to all patients or clients the licensee is competent to treat.⁽³⁾ A licensee who assumes a practice must provide an appropriate referral to a qualified mental health services provider to any patient or client who notifies the licensee that they do not want to receive services from the licensee or to a patient or client to whom the licensee declines to offer services.⁽⁴⁾ If the patient or client accepts a referral, the referring licensee must forward the patient or client's records to that mental health professional.

Outdated Records⁴⁹

- (1) Licensees take reasonable steps when disclosing records to note information that is outdated.
- (2) Disposal of records shall be done in an appropriate manner that ensures confidentiality of the records in compliance with applicable Board rules and state and federal laws.

Violations of the specific duties

Texas psychologists are may be sanctioned as follows:

Legal Remedies for Improper Disclosure or Failure to Disclose⁵⁰

- (a) A person aggrieved by the improper disclosure of or failure to disclose confidential communications or records in violation of this chapter may petition the district court of the county in which the person resides for appropriate relief, including injunctive relief. The person may petition a district court of Travis County if the person is not a resident of this state.
- (b) In a suit contesting the denial of access under Section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access.
- (c) The aggrieved person also has a civil cause of action for damages.

Grounds For Disciplinary Action⁵¹

The board shall revoke or suspend a holder's license, place on probation a person whose license has been suspended, or reprimand a license holder who:

- (1) violates this chapter or a rule adopted by the board;

⁴⁹ TEX. OCC. CODE § 465.22(e).

⁵⁰ TEX. HEALTH AND SAFETY CODE § 611.005.

⁵¹ TEX. OCC. CODE § 501.401.

(2) is convicted of a felony or of any offense that would be a felony under the laws of this state, or of a violation of a law involving moral turpitude;
...(4) engages in fraud or deceit in connection with services provided as a psychologist;
...(6) commits an act for which liability exists under Chapter 81, Civil Practice and Remedies Code.