

# Record Keeping and Risk Management

Eric Harris, EdD, JD

*Presented by*



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# Eric A. Harris, EdD, JD



Eric A. Harris, EdD, JD, is a licensed psychologist and attorney in Massachusetts. Dr. Harris has written, consulted and lectured extensively on risk management, legal issues, managed care and coaching. He has represented psychologists before both ethics committees and state licensing boards and has been a consultant to both plaintiffs and defendants in mental health malpractice actions. Dr. Harris also recently retired as the legal counsel to the Massachusetts Psychological Association, where he served as the Director of Professional Affairs for ten years.

# Disclosures/Conflicts of Interest

The presenter does not have any conflicts of interest to disclose.

NOTE: The information presented in this webinar is not intended to provide legal advice or to substitute for the advice of an attorney, but rather to provide information about considerations when dealing with records and requests for information.

# Learning Objectives

- Identify record keeping requirements and how they apply in a variety of practice situations, including those with EMR systems.
- Apply how to keep records in high risk situations and with high risk patients.
- Explain the elements of HIPAA psychotherapy notes and the kinds of privacy protection required in keeping them.

# Record Keeping

- Psychologists have a professional, ethical and legal responsibility to create and maintain records that document their professional work.
  - APA (2007). Record Keeping Guidelines, American Psychologist 62, 993-1004
  - Ethical Principles Section 6
  - Licensing board statutes and regulations
  - Judicially established standards of care
- However, there is very little specific guidance as to recommended content or structure in order to allow providers the flexibility and discretion to record what they think is necessary depending on their training, the facts and circumstances of the case.

# Record Keeping

What goes in the record depends on many factors:

- Experience and theoretical perspective
- Risk level of patient or situation
- Who is paying for services
- Practice type - Private or institutional setting
- State laws and regulations

# Many Functions of Records

Records should be adequate in order to:

- Assist the psychologist in providing treatment
- Establish medical necessity and adequacy for insurance reimbursement purposes
- Defend against accusations in the event of a complaint or audit
- Document for future treaters
- Meet legal and institutional requirements
- Provide patient with understanding of treatment
- Protect patient privacy

# Webinar Focus

This webinar will focus on the use of records to:

- Manage risk of licensing board discipline and malpractice law
- Meet insurance audit requirements
- Minimize disclosure of potentially damaging patient information

# Risk Levels

10% - Malpractice risk in 20-year career

- Most suits settle, and the agreement specifically denies any admission of guilt
- Less damage to career will in most cases be less than licensing board discipline, it will have to be reported, will take a long time, involving a lot of stress and distress.

40% - Licensing Board complaint risk in 20-year career

- Disciplinary sanctions pose greater potential damage to a career, particularly for those dependent on insurance reimbursement

# High Risk Patients and Situations

- Patients with strong Axis II features
- Contested custody issues, both before and after divorce
- Suicidal patients
- Serious breakdown in therapist-patient relationship
- Crisis or loss in therapist's personal life
- Third party evaluations, particularly involving children
- Significant negative or erotic transference
- Multiple relationship issues
- Hair on the back of therapist's neck standing up

# Risks of Licensing Board Complaint

- The license to practice is a privilege, not a right
- Licensing Board is a consumer protection agency which creates a bias in favor of the complainant:
  - Complaint process is primarily prosecutorial
  - Less due process protections for psychologist
  - Laws and regulations are usually somewhat vague giving board great prosecutorial discretion
  - Board can and will expand investigation beyond the initial complaint

# Responding to Legal and Administrative Actions

- Process is front-end loaded:
  - Primary task is to overcome hindsight bias
  - Initial investigation's conclusion is hard to overcome
  - Clinical issues are often more important than legal ones
  - Informal hearings or meetings with investigators are dangerous and stressful. Prepare!!!
- Good records are most crucial to an effective defense

# Responding to Licensing Board Complaint

- Need to be able to demonstrate:
  - That you have a good knowledge of basic ethical principles and rules governing professional practice
  - That you have the experience and knowledge about the type of therapy you are providing and the practice of psychology in general
  - That you know how to apply this knowledge to specific situations
  - That you are a careful, respectful professional
  - That you can recognize mistakes and learn from them

# Advice About Record Keeping

- “Ninth grade algebra” notes in high risk situations:
  - What you did and why you did it
  - Strategies you rejected and reasons for rejecting
  - How you resolved conflicts between potential benefits and potential risks
  - Ethical and legal principles which were involved in your decision making
  - Consultations and reasons that you rejected recommendations, if any

# Advice About Record Keeping

- It is a business decision: how much time is spent in order to protect oneself?
- If you didn't write it down, you didn't do it
- Never alter a record in an attempt to make yourself look better

Record keeping advice for those who depend, directly or indirectly, on third party reimbursement



# Elements of Audit Ready Record

- Initial Evaluation including:
  - Patient's descriptions of problems which brought him to therapy and ways in which he believes they negatively impact his health, his functioning at work or home, and his relationships with others
  - Patient's current stressors, coping strategies, social support system, strengths and weaknesses, and risk factors
  - Patient's relevant medical and psychological history
  - Patient's goals for treatment
  - DSM or ICDM diagnosis
  - Treatment plan including goals which are behavioral, measurable and achievable

# Session/Progress Note Guidelines

- Notes should be able to demonstrate to a knowledgeable observer that appropriate, competent psychotherapy occurred
- Must reflect knowledge of medical necessity definitions and documentation guidelines of payer/managed care company
- Should be legible
- Length, comprehensiveness determined by length of treatment, risks, and likelihood of UR

# Session Note Content Guidelines

- Must be specific
- Need to be related to treatment goals
- Should be expressed in terms of changes in patient's functioning
- Must include reasonable explanation for limited progress
- Should be drafted with the understanding that they will be seen by others, including the patient

# Patient Access Rules Post HIPAA

- Major purpose of HIPAA is to protect the privacy of medical records and to put access to records under control of the patient
- What HIPAA defines as the clinical record, which is very similar to record keeping content, can only be withheld from a patient if significant risk to life or physical safety
- One exception is “psychotherapy notes”

# HIPAA “Psychotherapy Notes”

- There is still a good deal of confusion about psychotherapy notes
- This is partly because the language of the rule is unclear, and when broadly interpreted, is in conflict with HHS commentary
- The rule does not provide as much privacy protection as practitioners wish it did

# Harris-Younggren Definition of “Psychotherapy Notes”

“Psychotherapy notes include my impressions and analysis of the process of therapy; what goes on in the therapy relationship. Sometimes these are just working hypotheses which help me to make sense of what you are telling me and which could interfere with the therapeutic process if they are revealed to you. It also includes intimate details which you provide to me that are not central to the therapy and would not be necessary for other professionals to understand your treatment.”

# HIPAA “Psychotherapy Notes”

- Must be kept separately from basic records
- Not a substitute for individual session notes
- Cannot be released without separate patient authorization
- Psychologists are not legally or ethically required to keep psychotherapy notes; they are completely optional.
- The decision can vary from patient to patient, and from session to session, depending on the facts and circumstances of the case
- Best usage seems to be by psychodynamic therapists in self-pay situations with low-risk clients
- Many psychologists will elect to keep one set of records to minimize complexity

# Problems with Psychotherapy Notes

- Only protected if state law provides discretion to withhold to protect patients emotional wellbeing
- Even when this discretion is allowed, there are substantial exceptions which limit utility
- Withholding records with high risk patients and high risk situations often seriously damages the relationship, increases patient determination to secure records , increases negative impact if successful and increases possibility of complaints.
- HIPAA minimum necessary rule provides method of limiting information in response to overbroad requests

# High Risk Case Examples

- Adolescent (16) year old girl, experimenting with boys, soft drugs and other risky behaviors, whose joint custody parents had contentious divorce 3 years earlier, and can barely agree on anything including what they need to know from therapist.
- Long term client who develops an intense transference, particularly erotic, towards therapist which leads to dangerous demands on therapist
- Adult client with a number of suicidal gestures (rehearsals?) who is also being treated by psychiatrist but is frequently resistant to regular medication schedule and is adamantly resistant to inpatient treatment. No possibility of involuntary commitment under state law.

# References

- APA (2007). Record Keeping Guidelines, American Psychologist 62, 993-1004, or APA.org , Record Keeping Guidelines
- Knapp, S; Younggren, J.; VandeCreek,L; Harris,E.; and Martin, J. (2013) Assessing and Managing Risk in Psychological Practice (Second Edition) The Trust, Rockville, Md.
- Ethical Principles and Code of Conduct, [www.apa.org/ethics/code](http://www.apa.org/ethics/code)
- Kahneman, D., (2013) Thinking Fast and Slow; Farar, Straus and Giroux

# Q&A



- Dr. Sammons will select questions that were submitted via the Q&A feature throughout the presentation.
- Due to time constraints, we will not be able to address every question asked.