

Mental Health Recordkeeping



WASHINGTON STATE COALITION OF
MENTAL HEALTH PROFESSIONALS AND CONSUMERS

Advocates for Ethical Mental Health Care

www.wacoalition.org

Fall 2008

Electronic Health Information and Mental Health Records

Laura Groshong, LICSW, Coalition Lobbyist

The use of electronic health care records has become a major topic in the delivery of health care services. It is likely that most public and private insurance plans will begin requiring electronic health records for reimbursement in the near future. This paper summarizes the problems faced by mental health clinicians (and consumers) in the creation of an electronic health care system that does not have adequate privacy standards in place for

mental health information or clear agreement as to who owns the records.

Many mental health clinicians have avoided this difficult topic by maintaining a fee-for-service practice, which does not require electronic storage or sending of patient information, or send only faxed paper records when a third-party payer is being used. The latter will probably not be available as an option for much longer; Medicare in some states is beginning to require that all claims be

sent electronically, and most insurers will likely follow their lead.

Though the electronic systems being proposed will save money, especially for large health care delivery systems, and may offer improvements in communication between health care providers, the lack of required privacy software is of great concern to mental health clinicians. In addition, questions are arising about who owns mental health records; who decides when

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Save the Date

- "YOU SAY TOMATO, I SAY TOMAHTO:" MENTAL HEALTH RECORDS REVISITED
JANUARY 26 / PAGE 5
2 ETHICS CEU'S

www.wacoalition.org

Coming Event!

January 26
Monday

Mental Health Records Revisited

2 Ethics CEU's

Steve Feldman, PhD, JD
Laura Groshong, LICSW

7:00 to 9:00 p.m.

Good Shepherd Center
Room 202
4649 Sunnyside Ave North
Seattle 98103

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President's Message Sue Wiedenfeld, PhD President

Dear Coalition Members,

We have a lot to celebrate!! We have many new and re-elected legislative folks who are in support of quality mental health. Kudos to all of you who supported these folks, and special thanks to our lobbyist, Laura Groshong, and the entire PAC board, who raised more than \$9500 and distributed the money among candidates who support our mental health values. This labor-

intensive effort continues to solidify our ability to have our concerns understood and protected in Olympia. Read more about the most impressive results of this election in Laura's PAC article in this newsletter.

A current issue and concern to the mental health community is electronic health records. Please read the featured

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they are disclosed, as well as whether records can really be kept private if they are stored and shared electronically.

BACKGROUND

Privacy of records is a fundamental part of the codes of ethics for all mental health disciplines. Disclosure of records pre-HIPAA (the Health Insurance Portability and Accountability Act) was a simple matter of obtaining the patient's consent to discuss the patient's therapy with anyone else. However, many mental health clinicians maintained the policy that they would not discuss the patient's condition or treatment with anyone else.

There was also an inherent belief by most patients that they could trust the judgment of their doctors and therapists when it came to how information about them was shared and that it would remain essentially private from employers and non-health care practitioners. There was a belief by many doctors and therapists that they had control of the information they disclosed about patients. Some clinicians did not keep records after the first few sessions, a practice that is legally valid in Washington if the patient agrees to this in writing. This practice puts clinicians at risk if a complaint is filed against the clinician, but some clinicians are willing to take that risk and have also been encouraged to not keep records in their training.

The use of computers has drastically changed that perspective, whether it was accurate or not. The increased use of ERISA, or self-insured, health care plans has increased access of employers to the health care records, even though it is prohibited by law. In testimony before the Senate HELP Committee, thirty-five percent of Fortune 500 companies admitted to looking at an employee's health records before making hiring and promotion decisions (2006, 65 Fed. Reg. 82,467).

As computers have become a ubiquitous part of our personal and work lives since the late 1990s, the flow of information about medical conditions of all kinds has increased exponentially. A related but separate issue that has emerged, along with the increased flow of information, is a demand for accountability that the treatment for a given condition is working. Additionally, insurers have more say about how information is communicated and what treatments for what conditions are covered.

HIPAA began the process of building standards for electronic sharing of medical information in 1996. The standards went into place between 2003 and 2005, requiring electronic record-keeping in large institutions, but made the privacy protections listed above optional. The Rules governing the disclosure of patient information were

more specific than they had been but did not take into account the far more complex process of protecting information that is stored or sent on the Internet. The Rules also did not specify how patients should be kept aware of their own conditions and treatment.

Mental health clinicians have had a steep learning curve about the impact of sending paper and/or electronic records to insurers, as third-party coverage of mental health conditions became more common. Many clinicians have felt that third parties were intruding into the consulting room, even though insurance coverage may have allowed some patients to have access to treatment who could not afford to do so on their own.

The use of electronic records is the tip of the iceberg when it comes to understanding the brave new world of third-party payers, patient-owned records, and the HIPAA-endorsed decision-making of patients about their treatment. The question of how much information an insurer should receive about mental health treatment, through electronic or paper means, remains in flux and/or embattled. The question of how much patients should be told about the way the clinician understands their problems, with patients having HIPAA-required access to their medical records, has also been troublesome for some mental health clinicians.

The fact that information can never be 'erased' from the Internet the way it can from paper records is hard for many of us to grasp. Balancing the need for privacy with the need for patients and insurers to receive some information is complicated.

Mental health treatment does not generally fit well into the 'evidence-based' paradigms used by medicine and insurers. Assessment and outcomes tools, which are increasingly required by insurers, can feel like an intrusion into the relationship-based work of mental health treatment for many clinicians. These changes are related to the use of electronic health records and the way mental health treatment is conducted. Mental health clinicians and their associations need to come to terms with these changes and decide what is ethically and practically right for them.

Another related, but different, issue is the use of e-therapy and phone therapy. These methods of clinical practice raise additional questions about the privacy of mental health information and the context in which treatment is conducted. Again, mental health clinicians and their associations need to come to terms with these changes and decide what is ethically and practically right for them.

OWNERSHIP OF RECORDS

The whole idea of discussing the medical record with the patient, let alone seeing ourselves as stewards of the record that belongs to

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Legislative Champions Shine

On September 16, MH-PAC, the political action committee affiliated with the Coalition, held an event with more than 40 people attending at the lovely home of Gail Katz, LICSW, and MH-PAC board member, to honor the legislators who have done the most to support ethical mental health treatment in Washington.

The event was based on the theme of being "Mental Health Champions." Each legislator received a box of Wheaties with his or her name and picture on it, a Certificate proclaiming them a mental health "Champion", and a check for \$500 from MH-PAC.

The honorees attending included Rep. Eileen Cody, Rep. Dawn Morrell, Rep. Tami Green, and Rep. Mary Lou Dickerson. Also honored but not in attendance were Rep. Don Barlow, Rep. Jim Moeller, Rep. Ruth Kagi, and Rep. Tom Campbell. These legislators were the primary supporters of mental health parity, registered counselor reorganization, and increased funding for public mental health programs.

The tone of the event was jubilant as everyone basked in the accomplishments that have taken place to support access to quality ethical mental health treatment. Rep. Green proclaimed that this was the "best award" she had received, and she intended to keep it in her Olympia office.

Many thanks to the outstanding work of the MH-PAC board including Barbara Sardarov, Treasurer; Adrian Magnusen-Whyte; Samantha Ching, who created those brilliant Wheaties boxes; Erica Rubin; Gail Katz; and Laura Groshong, coordinator. The more than \$9500 collected and distributed by MH-PAC this year will help to give the Coalition the influence we need to promote ethical mental health treatment in Olympia.

On the right is a list of the candidates who were endorsed by MH-PAC after receiving questionnaires from about 175 candidates, and direct contact with many. More than 80 percent of MH-PAC candidates won their races. Congratulations to all!

MH-PAC Primary Endorsements – 2008 81% Won — 19% Lost

All MH-PAC primary endorsed candidates have demonstrated a commitment to access to quality ethical mental health treatment. (L) = lost.

Governor Christine Gregoire

District	Name	District	Name
1	Sen. Rosemary McAuliffe, Rep. Al O'Brien	26	Rep. Larry Seaquist, Kim Abel (L)
2	Rep. Tom Campbell	27	Sen. Deb Regala, Rep. Troy Kelley
3	Sen. Lisa Brown	28	Rep. Tami Green, Debi Srail (L)
4	Rep. Timm Ormsby	30	Ron Weigelt (L), Carol Gregory (L)
5	John Viebrock (L)	32	Rep. Ruth Kagi, Rep. Maralyn Chase
6	Rep. Don Barlow (L)	33	Tina Orwall
7	Sue Lani Madsen (L)	34	Sen. Joe McDermott, Rep. Eileen Cody, Rep. Sharon Nelson
8	Rep. Larry Haler	35	Rep. Kathy Haigh, Fred Finn
10	Tim Knue	36	Rep. Mary Lou Dickerson, John Burbank (L)
11	Sen. Margarita Prentice	41	Rep. Fred Jarrett, Marcie Maxwell
14	Vicki Ybarra (L)	43	Rep. Frank Chopp
16	Rep. Maureen Walsh	44	Rep. Hans Dunshee, Rep. Liz Loomis
17	Rep. Deb Wallace, Tim Probst, David Carrier (L)	45	Rep. Roger Goodman
18	Jonathan Fant (L), Jon Haugen (L)	48	Rep. Deb Eddy
20	Rep. Gary Alexander	49	Sen. Craig Pridemore, Rep. Jim Moeller
21	Rep. Marco Liias		
23	Sen. Phil Rockefeller, Rep. Christina Rolfes, Rep. Sherry Appleton		
24	Sen. Jim Hargrove, Rep. Kevin Van de Wege		
25	Sen. Jim Kastama, Rep. Dawn Morrell, Rob Cerqui (L)		

Please support candidates
who support MH-PAC goals!

Non-members Welcome

Register at wacoalition@verizon.net
E-mail your name and phone

Good News on Long-Term Therapy

The October 1, 2008 issue of the *Journal of the American Medical Association* describes a study showing that people with complex mental disorders who received psychodynamic vs. short-term therapy had significantly better outcomes. Medscape summarizes the article in *JAMA*, 2008;300:1551-1565, 1587-1589. Check it out. The article addresses the issue that long-term therapy is a declining trend, interesting in light of these findings.

the patient, is at odds for many clinicians with the empathic relationship that is the basis for most psychotherapy. This is partly why clinicians have a hard time incorporating HIPAA concepts about patient ownership of records into their thinking, including the patient's right to amend the record. Clinicians have generally had a dual way of thinking about patients, i.e., a didactic way of conceptualizing emotional problems through DSM-IV diagnoses or other conceptual frameworks, and the experience of being with the patient and using the experience of the relationship and the self to help the patient. These dual concepts can be a dichotomy that is problematic when it comes to thinking about patient records according to HIPAA Standards. What we tell patients about their mental health problems may be very different from what we put in the medical record.

The question of who owns the records of a patient receiving mental health treatment, electronic or otherwise, is a crucial issue. HIPAA created a special category for

“Psychotherapy Notes,” allowing a therapist to have a ‘record’ that belonged to the therapist, not the patient. Psychotherapy Notes must be filed separately from the medical record, which must contain 16 items. It is the medical record that the patient ‘owns,’ according to HIPAA. This highlights a difference in the views many clinicians hold about patient records and patient material. The latter is a more detailed description of what goes on in the treatment session, which is often the basis for clinical literature, a source of controversy.

Clinicians have wrestled with the issue for many years of whether to use patient material in papers or lectures without gaining prior consent. This topic has been widely debated and is still not resolved [Gabbard, G. (2000) “Disguise or Consent: Problems and Recommendations Concerning the Publication and Presentation of Clinical Material,” *International Journal of Psychoanalysis*, Vol. 81, pp.1071-1085]. This struggle highlights the difficulty clinicians faced, long before HIPAA or electronic records, about the disclosure of patient information, disguised or not, with or without prior consent, in writing about the treatment process.

SHARED HEALTH CARE INFORMATION

As the National Research Council on Computer Science noted, “Protection of electronic

health information ... requires a combination of both technical and organizational practices, the selection of which involves implicit trade-offs among cost, complexity, and the degree of privacy provided.” (*For the Record: Protecting Electronic Health Information*, National Academy Press, 1997, p. 4.) The emphasis on interoperability and “ubiquitous data exchange” (*HIIAB Progress Report*, August 1, 2006, p. 20) seems to minimize the importance of keeping the patient or provider in charge of who sees what information. There has already been a high degree of ‘interoperability’ as *For the Record* notes: In 1997, there were 30 distinct agencies and systems that had access to a given patient’s health care information without a patient’s consent. The capacity for information sharing that exists if all health records are accessible by all clinicians will be exponentially greater.

The plan in HIPAA was that all records were to be ‘managed’ or disclosed with the permission of the patient, with the exception of shared information for treatment, payment, or operations (TPO). This plan is far from being implemented. Patients would need to have much more knowledge of who needs what information, the technical expertise to provide such information, and to be far more knowledgeable about what



conditions they have and how those medical conditions have been treated.

The hospitals, insurers, and electronic software companies who are benefiting from the creation of an electronic medical record system may not be as concerned about the way the records are managed as they are about the financial benefits of such a system. There is cause for concern when the privacy and security safeguards for an all-electronic mental health record are not in place. The primary safeguards for electronic records are “encryption,” which uses a code to prevent information from being readable without having the same code or passwords, and “audit trails,” which create a record of anyone who has accessed a record and used a password to do so. An alternative form of protection is encrypted Web sites, such as Office Ally, where sensitive information can be stored and accessed without being sent through unencrypted servers. HIPAA does not require encryption or audit trails, and state laws governing electronic

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Dues	
Member	\$65
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Organization	\$124

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Mental Health Recordkeeping

The Washington State **Coalition of Mental Health Professionals and Consumers** invites **YOU!!**

You Say Tomato, I Say Tomahto

Mental Health Records Revisited



2 ETHICS CEUs

\$35 Coalition members
\$45 Non-members

This talk by two experts in the field of mental health regulation, **Steve Feldman, PhD, JD,** and **Laura Groshong, LICSW,** will give an overview of the differences and similarities in mental health record keeping across disciplines in Washington.

Mental health clinicians in Washington have some record-keeping standards that are required by Federal HIPAA Rules, some

that are required by Washington state licensure standards, and some that are recommended by our professional codes of ethics in psychology, psychiatry, clinical social work, counseling, marriage and family therapy, and psychiatric nursing.

Keeping all these standards straight is a challenge.

Come see which are “tomatoes” and which are “tomahtoes” on January 26.

**Monday
January 26
7:00 to 9:00 p.m.**

**Good Shepherd Center
Room 202
4649 Sunnyside Ave N
Seattle 98103**

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President's Message

article to better understand the issues. It is likely that this will be a future focus of Coalition, and we will continue our watchdog efforts to see how we might become involved. Laura Groshong has been a member of the Washington State Information Infrastructure Advisory Committee for the past three years. As the only clinician, Laura brings an important clinical perspective to the issue. Thank you, Laura, for representing our concerns.

Fall is a reflective time. Recently, the Coalition board met and did just that. We met at my home for a retreat-type dinner

meeting and reflected on the upcoming year for the Coalition. We identified our primary activities as protecting ethical mental health, watch-dogging for related issues of concern, and lobbying and advocating for our values.

While we are always recruiting new members, it was clear that we need to do this in a way that is consistent with our mission and vision. Due to its success last year, we will be offering an ethics evening again with Steve Feldman, JD, PhD, and Laura Groshong, LICSW. Watch for details.

You should have

received an e-mail that it is time to renew your Coalition membership! Please renew now, and invite your friends to check out our Website,

www.wacoalition.org

We appreciate and value your commitment to ethical mental health.

Sue Wiedenfeld
Coalition Chair

Who Ya Gonna Call !?!?!?!?

Coalition Helpline: 206-444-4304

**Who's My Legislator: 1-800-448-4881
(State and Federal)**

Legislative Hotline: 1-100-562-6000

The implementation of electronic health care records is underway, and mental health clinicians need to educate themselves about the impact this will have on mental health treatment.



information are still in development. In addition, there have been numerous examples of health care data that were inadvertently lost, or maliciously stolen, on computers.

There are specific protections in HIPAA that allow practitioners to decide when a patient may be harmed by having access to detailed information about any disorder, including mental disorders. The integration of this sensitive issue with an interoperable medical record needs much more study and attention before information, privacy, and clinical judgment are fully in balance.

STATE AND NATIONAL LEGISLATION

As described above, privacy protections for electronically stored health information rest in three possible areas: 1) the encryption of all data stored electronically; 2) the use of audit trails that require passwords and create a record of anyone who has seen protected health information (ePHI in HIPAA-speak); and/or 3) the use of encrypted Web sites where all health information is stored.

Washington state adopted HIPAA standards in 2005. Our state has stronger privacy protections than HIPAA but has not applied these standards to the development of electronic health care records. In 2005, the Health Information Infrastructure Advisory

Board (HIIAB) was created specifically to develop standards for developing an interoperable electronic health care system. In the last three years, intensive work has been done on this very complex topic but is still not implemented. I have raised privacy concerns to HIIAB, which slowed the previously rapid development of this program.

In 2007, Sen. Edward Kennedy (D-MA) introduced the *Wired for Health Care Quality Act, S 1693*, in Congress that would serve the same purpose on a Federal level. This bill had a 'hold' placed on it in 2008 by Sens. Snowe and Coburn, unusual partners, in part because of the lack of privacy protections. It is still pending in the Senate at this time.

In 2008, Rep. John Dingell (D-MI) introduced H.R. 6357, the "Protecting Records, Optimizing Treatment, and Easing Communication through Healthcare Technology Act of 2008," or the PRO (TECH)T Act in Congress, which would also promote the use of electronic health records. There were no privacy protections, and four amendments that would create them are pending.

There are also 10 other bills pending nationally that

would create requirements and standards for the use of electronic health care records. President-elect Obama has endorsed the move to electronic health care records, which means it is likely that they will be implemented in the new administration. In short, it is likely that electronic health care records will become a requirement for reimbursement in the near future and perhaps even for records of private-pay clients.

SUMMARY

The implementation of electronic health care records is underway, and mental health clinicians need to educate themselves about the impact this will have on mental health treatment. Knowledge of HIPAA standards, Washington state standards as they develop, and careful incorporation of the meaning of electronic health records into the way we practice as clinicians will all be important to maintaining our professional ethics and integrity. We need to think carefully about the legal meaning of our records and their disclosure, how we can balance patient ownership of records with the treatment relationship, and how electronic health care records will affect the privacy of patient records.

IF YOU ARE NOT GETTING E-MAILS ABOUT OUR EVENTS, please E-mail us with your CURRENT E-mail address: wacoalition@verizon.net. This is the best way to get Coalition news.

It's Time to Renew Your Membership

The Coalition

of Mental Health Professionals and Consumers
P. O. Box 30087 • Seattle, Washington 98103
206-444-4304

Your dues support the Coalition's efforts to preserve ethical mental health treatment. Your dues also provide funding that supports legislative efforts, continuing education programs, our Web site, a Helpline, the newsletter, brochures, and publishing our directory.

Thank you for your continued support! It makes possible what we do. Please renew promptly to be listed in this year's directory.

Send this form to:
THE COALITION, ATTN: MEMBERSHIP
P. O. Box 30087
Seattle, WA 98103

NAME _____ Degree _____

ADDRESS (if different from last renewal)

City _____ State _____ ZIP _____

PHONE Work (_____) _____-_____ Home (_____) _____-_____

Fax (_____) _____-_____ Email _____

_____ Please check if you do not want your information published in the Membership Directory

_____ Please check if you are willing to volunteer for the Coalition

___ occasional time-limited tasks _____ I will help with political efforts

___ ask me about other needs you have _____ I will help with newsletter or membership (circle)

Legislative District: WA: _____ National: _____

Don't know? Call 1-800-448-4881

I/WE can support the Coalition at the following level:

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Fall 2008

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The Coalition of Mental Health
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