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Recordkeeping, Patient Access, and Other Legal and Risk Management Issues: How the impending Open Notes Rule, proposed HIPAA changes, and the pandemic will impact your practice

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Panelists

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Disclaimer

- Legal issues are complex and highly fact-specific and state-specific. They require legal expertise that cannot be provided in this forum. Moreover, APA attorneys do not, and cannot, provide legal advice to our members or state associations. The information in this presentation does not constitute and should not be relied upon as legal advice and should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions.



How does LSA help you? Sample LSA Work & Successes Since Last PLC

(In collaboration with SPTAs, OHCF, Advocacy, etc.)

- **Legal work on psychology's sudden pivot to telehealth and pandemic concerns:**
- 3 waves of letters to 50 states successfully urging the expansion/extension of telehealth policies
- Resources for members/leaders including: 50-state and 50-insurer guides to changing/expanded telehealth policies, and articles and FAQs
- Supporting state and federal telehealth bills
- Collaborated with Directors of Professional Affairs to assess various critical pandemic issues, e.g., narrow telehealth networks like MDLive
- **Other Work: SPTA legislative grants** – integrating 100K in grants with Practice strategy, initiatives & priorities, e.g., focus on PYSPECT



Examples of LSA Work & Successes/Other work cont'd

(In collaboration with SPTAs, OHCF, Advocacy, etc.)

- **Other Work: Insurance/MH parity:** Stopped abusive audit demands by Wellmark BCBS as high as 100K; supported CA legislation extending parity and Wit rulings; helped Kennedy Forum modify bill for model legislation for other states; Federal bill to fill vacuum on federal parity enforcement of regular insurance
- Objected to CMS on the proposed rule to allow non-psychologists to supervise psych and neuropsych testing; supported SPTA scope battles on same
- Supporting PSYPACT efforts and successes in multiple states
- Legal analysis for promoting psychologists' use of digital therapeutics



How Allied World Helps You

- Risk Management Helpline provided to Association member psychologists insured by **American Professional Agency Inc. (APA Inc.)**
- Educational Sessions (mini talks and Exchange Sessions) provided annually at the American Psychological Association Annual Convention
- Various publications including Alerts and Tip Sheets on risk management topics
- Regular webinars with the American Psychological Association



What are the Basics of Documentation?

- Complete
- Accurate
- Timely
- Objective
- Tell the story – paint the picture

RETAIN PSYCHOTHERAPY NOTES SEPARATE FROM THE CHART (more on that later)



What are the Minimal Elements for Documentation?

- Consent to treat
- Consent to talk with other providers, family, other(s)
- Emergency plan
- Communications related to care
- Evaluation
- Treatment plan
- Client's response to treatment plan/progress note
- Client/family teaching and response to teaching
- Client quotes



Minimal Elements for Documentation cont'd

- Start and stop times
- Scope and frequency according to policy or client needs
- Unusual occurrences that impact care
- Emails
- Texts
- Telephone calls



What should be added for Telemental Health Documentation?

- In addition to that documented for in-person session:
 - Location of client
 - Your location (city/state but not home address)
 - Those in attendance and role (parent, guardian)
 - Technology used
 - Technology glitches, if any, and plan for communication (call)



What to add for Couples/Family Counseling Documentation?

- Consents for treatment
- Counseling vs. periodic partner participation
- Treating multiple family members
- Treating one partner of couple
- Single entry vs. separate entries
- Impact on release of records



How do I document Information About Patient from External Sources?

- Other/Previous providers
- Family/Friends
- Court or Child Protective Services



Audits

The importance of record keeping practices when facing payor audits



How do I respond to Risk Adjustment Audits?

- Annual occurrence
- Directed by HHS to assess risk pool of insurers
- Aggregated data – not based on medical necessity
- Consent to release still required – check informed consent forms to ensure broad permission for release to insurers was given
- Additional authorization / Notice only required in only few states
- No penalties we're aware of for refusal to comply



How will I know it's a Risk Adjustment Audit?

- The nature of the audit is typically stated in the first paragraph.
- Look for other descriptions – they don't always use "risk adjustment audit" in the letter but they will reference the requirement imposed by HHS
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- Further reading -
<https://www.apaservices.org/practice/update/2016/04-07/risk-adjustment> (this information is still valid)



What do I do with 90837 audits and letters?

- Time based code for face-to-face sessions lasting 53 minutes or more
- "Educational" Letters for those using 90837 more than their peers
- Documentation needed to demonstrate medical necessity, such as:
 - Diagnosis
 - Complicating factors
 - Symptoms
 - Treatment plan
 - Additional information outlined in payor policies



What if they demand repayment?

- Contact us ASAP!
 - Email us at praclegal@apa.org
 - Tell your SPTA
- Read the rationale
 - Medical necessity?
 - Failure to follow their guidelines?
 - Record deficiencies?
- Compare with your provider contract and their policies
- Go through the appeals process



What is an insurer's "Special Investigations Unit"?

- Typically sent by SIU if looking for evidence of fraud and abuse
 - Less ability to avoid providing information
- Seeing now in cases of regular reviews
- Read letters carefully to determine the nature of the request before responding



Do I have to respond to audits/info requests if I'm Out of Network?

- As out of network, there is no contract between psychologist and insurance company
- Contract exists between patient and insurance company
- Insurance company may request records – failure to provide documents may result financial ramification for patients



Information Blocking



Where does it come from? ONC Cures Act Final Rule

- This Rule implements certain changes required by the 21st Century Cures Act:
 - Increase data interoperability across EHR systems and apps
 - Enhance patient access to digital health data
 - Compel app developers to create standardized, secure APIs to enable patients to more easily & inexpensively access their health data
- To take effect **April 5, 2021** (but may further extended)
- The Rule applies to:
 - Clinicians/hospitals (including psychologists) that maintain EHRs
 - Health IT developers
 - Health information networks, health information exchanges
 - Patients
- Information blocking prohibitions are a major part of the Final Rule



What is Information Blocking?

- Defined as a practice likely to interfere with access, exchange, or use of electronic health information (EHI) by the patient or patient's representative
- Certain “reasonable and necessary activities” have been identified as exceptions to information blocking
- Those activities are divided into 2 categories:
 - Exceptions that involve not fulfilling requests to access, exchange, or use EHI; and
 - Exceptions that involve procedures for fulfilling requests to access, exchange, or use EHI
- Open notes is the underlying philosophy.



What are the Information Blocking Exceptions?

- There are recognized circumstances involving practices access, exchange, or use of EHI are not considered information blocking.
- Exceptions that involve not fulfilling requests to access, exchange, or use EHI:
 1. **Preventing Harm Exception**
 2. **Privacy Exception**
 3. Security Exception
 4. **Infeasibility Exception**
 5. Health IT Performance Exception
- Exceptions that involve procedures for fulfilling requests to access, exchange:
 1. Content & Manner Exception
 2. Fees Exception
 3. Licensing Exception



What does this mean for psychologists?

- Are there no longer limits on patient access to their records?
 - Myth: Information Blocking gives patients access to all records.
 - Fact: Information Blocking doesn't change what records patients have access to under HIPAA and state law.
- If you already comply with HIPAA regarding what kinds of information your patients can access, you'll likely be covered by the Information Blocking exceptions.
- How you comply with the Information Blocking Rule depends on whether or not your EHR system is certified (by ONC).
 - Most systems commonly used by private practice psychologists are not certified, do not have direct access capability, and are not likely to become certified in near future due to expense.



Non-Certified vs. Certified EHR systems – What’s the Difference?

- Non-certified EHR systems do not typically have the capability to give patients direct & immediate access to their EHR via a mobile app or a patient portal.
- If a patient wants immediate direct access, most solo or small practices may be able to rely on the infeasibility exception.
- What Information Blocking exceptions might apply if I’m working with a certified EHR?
- These are discussions to have with your compliance or legal department, information systems department, or designated EHR/Information Blocking team, if available.

What's the Infeasibility Exception to Information Blocking?

“Infeasible Under the Circumstances”:

- For this exception, you would document that:
 - It would be infeasible to upgrade to a certified EHR
 - due to the cost of such a system
 - and the burden on your practice of changing EHR systems
 - taking into consideration your practice's available financial and technical resources.

////// **Infeasibility Exception cont'd**

- “Segmentation: Can't grant access because you can't unambiguously segment (separate) the requested EHI from EHI that:
 - cannot be made available either due to patient's preference or because the EHI cannot be made available by law; or
 - may be withheld under with Harm exception.

Potential applications: comingled test data, multiple patients

- Uncontrollable Events: Cannot provide access due to unforeseen events like a public health emergency, natural disaster or telecommunication or internet service disruption.

What is the Privacy exception to Information Blocking?

- Denial of patient access to **psychotherapy notes** ---> **not** information blocking
 - Psychotherapy notes won't be immediately available to patients without any warning to you.
 - In most states, patients can still access them, but they will be under the traditional system that allows you to review these notes and talk to the patient before providing access
 - Psychotherapy notes may also be useful if you need time to sort out multiple patients, minor proxy issues with therapy records



Privacy Exception cont'd

- **Consent, verifying authority** and other legal preconditions
 - Necessary to verify legal authority of patient's personal representative, or rights of parents in divorce/custody situations
- **Respecting a patient's request not to share information**
 - Not Information Blocking if the patient has requested limitations on sharing his/her EHI
 - But cannot improperly encourage or induce the patient's request to limit sharing EHI



What is the Preventing Harm Exception to Information Blocking?

- Refusing to disclose EHI where that would endanger the life or physical safety of a patient or another person
 - Determination based on current or prior psychologist-patient relationship

What are some Recordkeeping/Patient Communication Strategies for Adapting to Immediate Direct Patient Access?

- Keep lean records → “minimum necessary” and/or psychotherapy notes
- Document with the expectation that patients will read it w/o your knowledge or ability to offer context & explanation
- For proxy or multiple patients:
 1. Provide clear explanation to patients/proxies
 2. Written agreement re what goes in whose EHR and who has access
 3. Clear policy for yourself re segregating EHI that aligns with the parties' agreement/understanding
- Offer ability to request restrictions for patients who wish to limit access to their sensitive information



Additional Considerations

- Review your policies governing patient access:
 - Look for unjustified barriers/inconvenience
 - Long forms that patients must fill out to request access?
 - Must patients answer questions or provide information not essential to your response to their request?
 - Does you offer limited or inconvenient times for patients to come in to inspect their records?



Resources

- APA Detailed FAQs about the Information Blocking Rule:

<https://www.apaservices.org/practice/business/hipaa/rule-change-access-records>

- ONC Final Rule Information Blocking Exceptions:

<https://www.healthit.gov/sites/default/files/cures/2020-03/InformationBlockingExceptions.pdf>

- ONC Information Blocking FAQs:

<https://www.healthit.gov/curesrule/resources/information-blocking-faqs>

- ONC – USCDI current data classes & elements

<https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi>

- Email: praclegal@apa.org



What are the Proposed Changes to HIPAA Privacy Rule?

- Expansion of patient right of access:
 - Time for response cut from 30 to 15 days (with one 15-day extension)
 - Expanded right to inspect
 - Patients can take photos of record
 - “While I’m here” access: right to instant access to files onsite when at your office for an appt
 - Clarifies patient’s right to direct to a 3rd party electronic copies of PHI in an EHR



Proposed Changes to HIPAA cont'd

Other Proposed Changes:

- Adding exception to Minimum Necessary Rule for care coordination and case management *by insurance plans*
- Change to standard for dangerous patient exception, e.g., change from “imminent” to “reasonably foreseeable” standard
- Notice of Privacy Practice changes , e.g., adding that some to access records will be free, how to direct PHI to 3rd parties
- Caregiver provisions: Broader disclosures to family members based on good faith belief that providing access is in the best interests of patient incapacitated by health emergency



Psychotherapy Notes: Any recent trends making them more worth considering?

- Increased **payor audits**
- Psychotherapy notes not subject to **Information Blocking Rule**
- **Proposed HIPAA Privacy Rule changes** that don't apply to psychotherapy notes - Expansion of patients' right to inspect their PHI:
 - Take photos of record on phone
 - Right to inspect w/o notice when in the office for an appointment
- Proposed exception to "minimum necessary" rule for case management and care coordination by insurers

Psychotherapy Notes: what does it means for them to be “separate”?

Simplified HIPAA definition :

- Notes by a MH professional
- Documenting or analyzing conversation content during a counseling session
- **Separated from** the rest of the patient’s medical record

Rest of the record typically includes what’s *excluded* from PN definition:

- Any summary of: Dx; functional status; Tx plan; symptoms; prognosis & progress to date
- The modalities and frequencies of treatment furnished
- Results of clinical tests
- Session start and stop times; and Rx prescription and monitoring



Psych Notes: “separate”? cont’d

- If something happens to you, can someone else can easily tell what is psychotherapy notes vs. rest of the record?
- For paper files: clearly marked separate file or part of file
- For EHRs: most EHRs for smaller MH practices (e.g., TherapyNotes and SimplePractice) have capability to store psychotherapy notes separately
- For larger hospital/health systems: Large EHRs typically can separate sensitive PHI, but your system may not allow psychotherapy notes
- Helps to understand theory behind notes and “separate”
- Resource: <https://www.apaservices.org/practice/good-practice/Winter07-Note.pdf>

More Resources

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QUESTIONS & ANSWERS

Later questions for LSA: praclegal@apa.org

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