

## Practitioners: Take Note *HIPAA provides extra privacy protection for psychotherapy notes*



Practitioners face a number of issues in considering how to create and maintain their client records. When the focus is on psychotherapy notes as defined by the Health Insurance Portability and Accountability Act (HIPAA), several questions typically come to mind: Should I create psychotherapy notes? If I do so, what information should I include? Where should I keep the notes? What happens if I don't create separate psychotherapy notes?

The HIPAA Privacy Rule does not mandate what health care professionals must put in their patient records. But it does confer special privacy protections when mental health professionals keep psychotherapy notes that are separate from the rest of the clinical record.

The following issues and considerations for practitioners pertain to psychotherapy notes and HIPAA:

### How HIPAA defines “psychotherapy notes”

According to the text of the HIPAA Privacy Rule, “psychotherapy notes” means:

*... notes recorded (in any medium) by a health care provider, who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.*

The HIPAA rule also stipulates what psychotherapy notes *exclude*:

*... medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.*

Typically, these “excluded” items comprise the other part of the patient record (often referred to as the clinical record) that is separate from psychotherapy notes.

### Patient authorization required to release psychotherapy notes

The Privacy Rule requires psychologists and other entities covered under HIPAA to obtain specific patient authorization for the disclosure and use of “psychotherapy notes.” Under HIPAA, disclosing psychotherapy notes to others calls for more than just notice or general consent. Explicit patient authorization—written permission from the client that meets specific Privacy Rule requirements—is needed to release psychotherapy notes to, or let them be viewed by, anyone other than the therapist who created them.<sup>1</sup>

This authorization requirement applies to records requests from managed care and other health plans. It even protects clients from having other mental health professionals in the same group practice view the psychotherapy notes unless the client has authorized it.

### Insurance companies barred from access to psychotherapy notes

Before the HIPAA Privacy Rule took effect, insurance companies sometimes requested entire patient records, including what are now called psychotherapy notes, in making “medical necessity” decisions. Patients could decline to have this type of information released, but the insurance company might deny coverage for related services.

Now health plans cannot refuse to provide or authorize reimbursement to the patient or psychologist if a patient does not agree to release psychotherapy notes. The HIPAA Privacy Rule forbids such refusal to pay. Further, managed care companies may not require you to turn

over psychotherapy notes during an audit of your patient records. Even so, insurers can refuse to pay for services if medical necessity is not sufficiently documented in the clinical record. So it is advisable for the clinical record to provide adequate rationale for medical necessity.

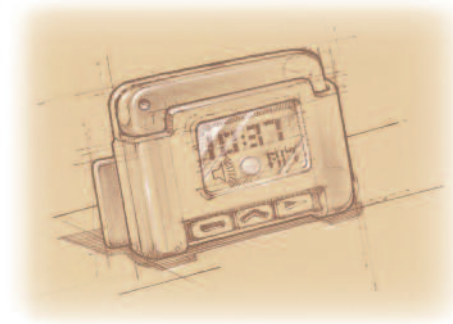
### Patient access to information in the client record

The HIPAA Privacy Rule also generally protects psychotherapy notes from being viewed by the patient. However, because this federal regulation does not preempt state laws that give patients greater access to their records than HIPAA does, patient access to psychotherapy notes varies from state to state.

In some states, the Privacy Rule prevails and the patient has no right to access psychotherapy notes. In other states, the psychologist has greater discretion to withhold psychotherapy notes than to withhold the clinical record. In a third group of states, psychotherapy notes have no greater protection from patient access than the clinical record.<sup>1</sup>

### Keeping “separate” psychotherapy notes

The HIPAA definition of “psychotherapy notes” explicitly states that these notes must be kept “separate” from the rest of



the patient record, but does not specify what “separate” means. It seems clear, however, that if the psychologist maintains the notes in a general chart along with other clinical information, the notes would *not* qualify for the heightened privacy protection that HIPAA provides for psychotherapy notes.

In light of the HIPAA rule wording, practitioners should consider whether someone else would be able to readily “distinguish” their psychotherapy notes from the rest of the record. If another person could do so, the psychotherapy notes likely would be considered as separate from the clinical record. As one approach, psychologists separate their psychotherapy notes by keeping them on one side of the patient’s file folder, while putting the clinical record on the other side.

When keeping separate records electronically, the psychotherapy notes should be located in a separate electronic file, or separate part of the electronic file, and preferably labeled as “confidential” and/or “psychotherapy notes.” In addition, they should have a higher level of security, such that only the therapist who created them has access (unless the patient has authorized broader access). Keep in mind that maintenance of electronic records also raises important issues related to HIPAA Security Rule compliance.

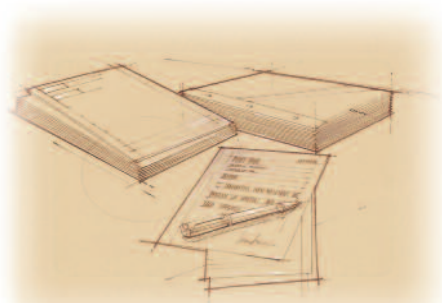
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### Why “psychotherapy notes” are offered special privacy protection

During the rule-making process, APA successfully advocated to the U.S. Department of Health and Human Services (HHS) that the final Privacy Rule should provide heightened protection for psychotherapy notes. In doing so, the Privacy Rule recognizes that the kinds of information contained in psychotherapy notes need a higher level of privacy protection than other types of information kept in patient records.

HHS accepted APA’s arguments that psychotherapy notes reflect communications whose confidentiality is essential to successful psychotherapy and that these notes serve as the therapist’s private notes for his or her own use. As such, they are not needed by or to be shared with others in the health care delivery system such as third party payers and other health care professionals.

*(continued on page 12)*



<sup>1</sup> State-specific patient authorization forms as well as state-by-state information about patient access to psychotherapy notes is part of *HIPAA for Psychologists*, the online Privacy Rule compliance tool from the APA Practice Organization designed for practicing psychologists. Visit the “HIPAA Compliance” and “APApractice.org Store” sections of [APApractice.org](http://APApractice.org) for details and ordering information.

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### Kinds of information included in psychotherapy notes in line with HIPAA

Psychotherapy notes are designed to protect information whose sanctity is important to maintaining the therapeutic relationship. Some practitioners reflect in these notes the patient's intimate confidences and sensitive information about persons other than the patient, along with the psychologist's speculations and unformed opinions.

Making decisions about what to keep, and what not to include, in psychotherapy notes may be found in the rationale embraced by HHS in finalizing the Privacy Rule—namely, that psychotherapy notes are the therapist's private notes that are not typically used by or shared with other professionals or with third party payers.

If the information should be shared with other health professionals involved with the patient's care, this constitutes a reason to put it in the clinical record. For example, a notation that the patient reported feeling irritable after taking psychotropic medication would fall into this category. And if the information is among the "exclusions" to the HIPAA definition of psychotherapy notes, that information should be included in the clinical record.

Sometimes the decision about what to record where is a matter of detail, as the psychologist keeps in mind who might ultimately have access to the information. For example, a practitioner might note in the clinical record the symptom that the patient is having night terrors. But the details of those nightmares and the psychologist's initial musings about their significance, which are less important to other health care

professionals, would go in the psychotherapy notes.

Although placing information in the psychotherapy notes always protects information from health insurers and may bar patient access, keep in mind that there are a variety of situations where outside parties may have access to psychotherapy notes. For example, a client might have to authorize their release for a military or government job application, or a court may order the disclosure of records. Accordingly, the psychologist should consider such potential disclosures when making psychotherapy note entries.

### What if a practitioner does not keep separate psychotherapy notes?

Practitioners subject to HIPAA need to consider the practical effect if they choose not to keep separate psychotherapy notes. In contrast to the clear protections for psychotherapy notes, psychologists who keep their records combined have only the Privacy Rule's vague "minimum necessary disclosure" standard to rely on when arguing that insurers and others should not see the entire record.

When "protected health information" is disclosed or used, the Privacy Rule requires psychologists to share the minimum amount of information necessary to conduct the activity. The requesting party will often argue that the

entire record is the "minimum" that they need, while the psychologist counters that a much narrower set of records is appropriate to release. It is conceivable that the final arbiter of what is "minimum necessary disclosure" in a case such as this could be a court of law in the event that a legal dispute ensued.

### Additional Considerations

Also be mindful of the following additional considerations related to keeping psychotherapy notes and other elements of patient records:

- Insurance company employees may not understand that HIPAA precludes them from looking at psychotherapy notes. Some practitioners report having interactions with managed care company representatives who are seemingly unaware of the HIPAA privacy protections that apply to psychotherapy notes.
- A number of other important considerations have a bearing on record keeping, including: applicable state law; APA's Record Keeping Guidelines (which are being revised in 2006); APA's ethical principles; and institutional policies governing record keeping (for example, policies that apply to psychologists employed in a health care facility).

## FIND OUT MORE

To learn more about the HIPAA rules and how to comply, visit the "HIPAA Compliance" section of [APApractice.org](http://APApractice.org).