

Live Webinar
on

*Disposition of Records and Records
Retention for Medical Records, Including
Electronic Records*

Mark Brengelman

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Background about Mark R. Brengelman:

- Holds Bachelor's and Master's Degrees in Philosophy from Emory University, Atlanta, Georgia;
- Earned a Juris Doctorate from the University of Kentucky College of Law, Lexington, Kentucky;
- Served a successful twenty year career with state government in Kentucky, including....;



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Background about Mark R. Brengelman, con't.:

- Worked seventeen years as an Assistant Attorney General in the Kentucky Office of the Attorney General;
- Represented state licensure boards which licensed and regulated health care and other professions – general counsel and prosecutor;
- Presented continuing education for eighteen different state and national organizations;



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Background about Mark R. Brengelman, con't.:

- Was the founding presenter for “Ethics and Law for Mental Health Professionals: Ethical Practice; Risk Management, and Professional Codes of Ethics” – approved by five state mental health licensure boards in Kentucky and hosted at Midway College presented with a licensed clinical social worker in 2013 and 2014;
- Lobbied the Kentucky General Assembly as a registered Legislative Agent for the successful passage of Senate Bill 61 in 2014 for the Kentucky Association of Pastoral Counselors.



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Background about Mark R. Brengelman, con't.:

- This work involved examining many aspects of medical record keeping in multiple office and facility settings for a variety of health care practitioners in the Commonwealth of Kentucky.



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Based upon the content of this program, you will be able effectively:

- To identify sources of legal and contractual requirements for the retention and disposition of medical records;
- To understand different requirements and applications of retention and disposition of electronic medical records;
- To review examples of what information is mandated by state laws to be included in a medical record;



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Based upon the content of this program, you will be able effectively:

- To distinguish between medical records requirements of a health care facility versus medical records requirements of a specific health care practitioner;
- To know about professional wills and business succession plans for the health care practitioner, including solo practice and group or facility practice;
- To create and implement a succession plan for records.
- To review examples of what information is mandated by state laws to be included in a medical record;



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Goals of the content of this program – what this does and does not cover:

- Does provide a broad overview of medical records retention issues with examples high-lighted from Kentucky law;
- Does not cover laws in the fifty states, HIPAA confidentiality, or any specific health care profession;
- Does educate the person attending to ask the right questions in their own state, facility, and profession.



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An introduction on the importance of medical records:

- Enforcement perspective – in an investigation by a state agency (civil or criminal), medical records will either implicate or exonerate the practitioner;
- Financial perspective – medical records are dependent upon which to base payment for professional services rendered by the practitioner;
- Malpractice defense perspective – best defense to a lawsuit by a patient for negligent care.



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An introduction on the importance of medical records for the individual health care practitioner and the director of a medical office or health care facility:

- Multi-disciplinary health care practitioners entering data in different parts of the medical record of the patient;
- Raises fundamental questions of whether to retain a medical record;
- Raises fundamental questions of how to dispose of medical records.



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An introduction on the importance of medical records in the advent of electronic medical records:

- State laws still mandate the retention of medical records for a period of time, but nothing prevents that retention for longer than that, *even forever*;
- But, electronic medical records may then outlive the patient and especially the health care practitioner;
- Health care practitioners move to other jobs, and facilities close or combine certain departments.



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An introduction on the importance of medical records in the advent of electronic and paper medical records:

- For the individual health care practitioner, how does one handle medical records if the practitioner has withdrawn from practice, is incapacitated (temporarily or permanently), or has died?
- Is there an easy answer if the practitioner is in a group practice or facility setting?
- Records retention can work both ways



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What records do you have? What records should you have?

- For the individual health care practitioner, this is mandated by state law in the jurisdiction in which the practitioner holds a license;
- The laws vary from jurisdiction to jurisdiction (i.e., from state to state), and from profession to profession;
- Why? “States rights” – state “police power” to regulate for the health, welfare, safety, and morals.



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What records do you have? What records should you have?

- Example: mental health records of a licensed psychologist;
- 201 Kentucky Administrative Regulation 26:145 § 3(6)(a)(1-6)(effective February 17, 1998), Code of Conduct, mandates these six components of a psychologist's record;

201 KAR 26:145 § 3(6)(a)(1-6):

- (a) The credential holder rendering professional services to an individual client, or services billed to a third-party payor, shall maintain professional records that include:



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What records do you have? What records should you have?

1. The presenting problem, purpose or diagnosis;
2. The fee arrangement;
3. The date and substance of each professional contact or service;
4. Test results or other evaluative results obtained and the basic test data from which the results were derived;
5. Notation and results of a formal consult with another provider, and;
6. A copy of all test or other evaluative reports prepared as part of the professional relationship.



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What records do you have? What records should you have?

- Example: licensed clinical social worker for “informed consent”;
- 201 KAR 23:080 § 4(1)(a)-(f). “Code of Ethical Conduct.”
Informed Consent. (4) A social worker shall obtain informed consent from the client or his legal guardian in writing to provide a social work service. To obtain informed consent, a social worker shall inform the client of the following:



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What records do you have? What records should you have?

- (a) The client’s condition;
- (b) The recommended social work service;
- (c) Reasonable expectations of the benefits from the service;
- (d) Possible foreseeable risks or negative consequences of the service;
- (e) Possible alternative services; and
- (f) The right to refuse a service.



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What records do you have? What records should you have?

- In Kentucky, 201 KAR 26:145 § 3(6)(b)(effective February 17, 1998), Code of Conduct, mandates the length of time for records of the patient of a psychologist:
- The credential holder shall ensure that all records are maintained for a period of not less than six (6) years after the last date that services were rendered.



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What other records do you have? What other records should you have?

- In Kentucky, 201 KAR 26:145 § 3(6)(d)(effective February 17, 1998), Code of Conduct, mandates the length of time for records of supervision of other psychologists:
- For each person supervised pursuant to KRS Chapter 319, the credential holder shall maintain for a period of not less than six (6) years after the last date of supervision a record of each supervisory session that shall include the type, place, date, and general content of the session.



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What other records do you have? What other records should you have?

- Two types of records here, but similar retention requirements – six years from the last date of service to the patient and six years from the last date of supervision for a psychologist for whom clinical supervision is provided;
- There are records for a professional service to a client or patient, and there are records for the clinical supervision to another health care professional (psychologist).



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What about the disposition of records? Some similarities emerge:

- “[the CADC/LMFT/LPC] shall store or dispose of a client record so as to maintain confidentiality”
 - 201 KAR 35:030 § 2(4)(CADC)
 - 201 KAR 32:050 § 2(5)(LMFT)
 - 201 KAR 36:040 § 3(4)(LPC)
- More on “states rights” – but plagiarism is okay!
- Nothing defines what “maintain confidentiality” means.



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Final comments on legal sources of record keeping for the individual health care practitioner:

- State law in an individual practice act for the profession;
- No statute of limitations for action against your professional license – in most states; issue of evidentiary problem only;
- May include patient record, specific things to be in a patient record, and records involving the practice itself – clinical supervision of others or continuing education hours.



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Sources of contractual requirements:

- Professional malpractice insurance – know what your own insurance policy requires;
- Are you required to have such insurance in your state in your profession?
- If you have professional malpractice insurance, know what that policy requires – and know your own state’s statute of limitations on a civil claim, including for minor patients.



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Sources of contractual requirements :

- Know your own state's statute of limitations on a civil claim, as well as for criminal actions;
- Generally, there is no statute of limitations on felonies, that is, on those criminal statutes of limitations;
- Should you just keep records forever? But would records be helpful in a criminal case? What could be claimed against you that might be a felony?



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Sources of contractual requirements:

- Records retention can be contracted away;
- Examples: buying and selling a medical practice;
- Examples: what would a buyer want in the way of records? What would a seller want to get out of in the way of records?
- Nothing would prevent an action against the original health care practitioner, but it would be a mitigating defense.



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Sources of contractual requirements:

- Medical office contracts or facility contracts;
- This could be the source of a contract between health care practitioners in a group practice where the physical records belong to the practice, but the practitioner always has rights to access the records forever;
- Or, between a facility and the individual health care practitioner in the same way.



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Sources of contractual requirements:

- Intra-practice contractual agreements would solve the coming issue of the individual practitioner's withdrawal from practice, incapacity, or death;
- If you are not in such a group practice or facility setting, you may implement a professional will to handle this.



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What about HIPAA – Health Insurance Portability and Accountability Act – effective April 14, 2003?

- In the United States, the federal law of HIPAA *does not govern* the length of time medical records of health care providers are to be kept. That is governed by individual, state law, which we have explored;
- From the Department of Health and Human Resources, Frequently Asked Questions:
<http://www.hhs.gov/ocr/privacy/hipaa/faq/safeguards/580.html>



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What about HIPAA -- Health Insurance Portability and Accountability Act – effective April 14, 2003, cont.:

- HIPAA Privacy Rules do not include medical record retention requirements. Rather, state laws generally govern how long medical records are to be retained. However, the HIPAA Privacy Rule does require that covered entities apply appropriate administrative, technical, and physical safeguards to protect the privacy of medical records and other protected health information (PHI) for whatever period such information is maintained by a covered entity, including through disposal. *See* 45 CFR 164.530(c).



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications:

- In Kentucky, 201 KAR 26:145 § 3(6)(c)(effective February 17, 1998):
(c) The credential holder shall store and dispose of written, electronic and other records in a manner which shall ensure their confidentiality.
- This governs their disposition.



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

- In Kentucky, 201 KAR 26:310 § 3(4) and (5)(effective March 4, 2011) specifically governs records used in telepsychology and telepractice:
(4) Follow the record-keeping requirements of 201 KAR 26:145, Section 6; and
(5) Ensure that confidential communications obtained and stored electronically cannot be recovered and accessed by unauthorized persons when the credential holder disposes of electronic equipment and data.



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

- This goes beyond the prior, generic disposal requirement of all records (including electronic records) “to ensure their confidentiality”;
- Specific mandates about confidentiality of existing records: “Ensure that confidential communications obtained and stored electronically cannot be recovered and accessed by unauthorized persons when the credential holder disposes of electronic equipment and data.”



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- Obtain alternative means of contacting the client other than electronically;
- Provide to the client alternative means of contacting the credential holder other than electronically;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- Use secure communications with clients, including encrypted text messages via e-mail or secure Web sites, and not use personal identifying information in non-secure communications;
- Inform the client in writing about:



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- Use the limitations of using technology in the provision of telepsychology;
- Potential risks to confidentiality of information due to technology in the provision of telepsychology;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- Potential risks of disruption in the use of telepsychology;
- When and how the credential holder will respond to routine electronic messages;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- In what circumstances the credential holder will use alternative communications for emergency purposes;
- Who else may have access to client communications with the credential holder;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- How communications can be directed to a specific credential holder;
- How the credential holder stores electronic communications from the client;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- How the credential holder disposes of electronic equipment and data;
- How the credential holder shall use secure text messages via e-mail or secure Web sites, and not use personal identifying information in non-secure communications;



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What about electronic records? This has been anticipated in state law – not only may medical records be electronic, but there have long been electronic communications, cont.:

In Kentucky, psychologists must (as part of their telehealth law):

- Inform the client in writing about:
- Potential risks to confidentiality of information due to technology in the provision of telepsychology.



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What about electronic records? Electronic records are no different in their confidentiality, but their handling and retention are unique.

Mostly involves informed consent:

- Many disclaimers to be documented;
- 201 KAR 26:310, “Telehealth and telepsychology.”



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How does one handle or dispose of medical records in the event of withdrawal from practice, incapacity, or death of the individual health care practitioner?

- First covered in the prior topic of facility practice and group practice – can be contracted away;
- Licensure problems are not an issue;
- Malpractice lawsuits might be an issue?



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How does one handle or dispose of medical records in the event of withdrawal from practice, incapacity, or death of the individual health care practitioner?

- A “professional will” -- better term may be a “small business or professional succession plan”;
- Common need in a small businesses of whatever nature;
- Governs what happens to business assets and medical records upon the incapacity/death of a principal of the business.



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How does one handle or dispose of medical records in the event of withdrawal from practice, incapacity, or death of the individual health care practitioner? What should be in it?

- A professional succession plan should govern what happens to business assets and records – including medical records -- upon the incapacity/death of a principal of the business;
- The plan should specifically designate a custodian of the records naming a person who will be available to handle records requests for a duration of time;



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How does one handle or dispose of medical records in the event of withdrawal from practice, incapacity, or death of the individual health care practitioner? What should be in it?

- The plan should specifically reference applicable state law on records retention and confidentiality;



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How does one handle or dispose of medical records in the event of withdrawal from practice, incapacity, or death of the individual health care practitioner?

What should be in it? Final comments:

- A professional succession plan – I have little experience with them in a professional or business context;
- Usually applied only to business assets and such of a small business, and;
- Could be referenced in a person's Last Will and Testament.



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Conclusions and final comments:

- Know what questions to ask about medical records retention by state law that is specific to the individual health care practitioner or facility;
- Identify what is required by a professional malpractice insurance policy;
- Understand what happens to the records if the practitioner is no longer practicing – job change, withdrawal from practice, incapacity, or death.



Questions

- If you have any other questions that we were not able to get to today, please feel free to contact me through Mentor Health.



Upcoming Webinars by Mark R. Brengelman

- **The Basics of Professional Regulatory Law: Licensure and Certification, with an Emphasis on Health Professions.**
- **Tuesday, February 2, 2016 10:00 AM PDT | 01:00 PM EDT**
- **What Did I Do Wrong?! Legal and Ethical Analysis of State Licensure Board Complaints Against Psychologists.**
- **Tuesday, February 23, 2016 10:00 AM PDT | 01:00 PM EDT**



Upcoming Webinars by Mark R. Brengelman

- **Shooting first and asking questions later: How a health care practitioner can lose their license immediately on the spot.**
- **Tuesday, March 8, 2016 10:00 AM PDT | 01:00 PM EDT**
- **Top violations of law committed by physical therapists. What did I do wrong?!**
- **Wednesday, March 23, 2016 10:00 AM PDT | 01:00 PM EDT**



Upcoming Webinars by Mark R. Brengelman

- **What practitioners need to know about the difference in ethics and law for mental health professionals.**
- **Tuesday, April 5, 2016 10:00 AM PDT | 01:00 PM EDT**
- **The drunk, high, or otherwise impaired health care practitioner: What can be done to help?**
- **Tuesday, April 19, 2016 10:00 AM PDT | 01:00 PM EDT**



Upcoming Seminars by Mark R. Brengelman

- **Navigating ethics and law for mental health practitioners: Ethical practice, risk management, and; professional codes of ethics.**
- **Thursday-Friday, January 21-22, 2016 – Boston.**



Upcoming Seminars by Mark R. Brengelman

- **Beyond HIPAA: Patient medical records and client confidentiality in mental health.**
- **Thursday-Friday, March 17-18, 2016 – Atlantic City.**
- **Navigating ethics and law for mental health practitioners: Ethical practice, risk management, and; professional codes of ethics.**
- **Thursday-Friday, April 14-15, 2016 – San Diego.**



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