The Duty to Record:  
Ethical, Legal, and Professional Considerations for Georgia Psychologists

Introduction

The American Psychological Association Practice Directorate has provided an excellent online presentation about electronic healthcare records (EHRs) and the basic terminology related to EHRs; the presentation dispels common myths about EHR systems and provides detail about their meaningful use in integrated health care settings.¹

The Division 31 and 42 EHR working group’s² primary goal was to create a series of State specific templates that would work well for psychologists as they transition into the use of EHRs, particularly in integrated health care settings where shared information is clinically essential and specific laws or regulations may dictate at least some of what is included in those records. To achieve this goal, we conducted a review of the laws related to record keeping, and the relevant and recent literature (particularly the last decade) regarding EHRs, including variations across states. Further, we consulted with key psychologists that have been using EHRs on a day to day basis, who have developed experience establishing polices and processes within their own institutions and practices. They have effectively used this developing technology to improve clinical care while protecting patient rights. They have found that the EHR enables collaborating professionals within the integrated health care settings to understand the behavioral risk factors that exist in each case and to be kept informed about the health behavior changes that occur with psychological service interventions (HRSA, 2012).³

In order to digest the laws accurately, we examined the annotated codes and regulations available on Westlaw and Lexis for the 50 states and the District of Columbia with reference to several relevant state-by-state surveys retrieved from Lexis

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and Westlaw. Our research answered the following questions for each jurisdiction: (a) Do record keeping duties created by statutes or administrative rules exist? (b) Have court rulings created a common-law duty or interpreted the statutes or administrative rules? (c) What are the contents of the record that are mandated by law? (d) Are there laws related to the maintenance and security of records? (e) What are the laws related to retention of records? (f) What are the consequences of violating specific duties?

Readers should view the narrative summary of their jurisdiction’s law as a starting point for interpreting how to meet the law within their own jurisdiction as they construct their electronic records. As laws can change, please check the law with your state associations to see if more current interpretations for meeting the record keeping duties. Many state professional associations have ethics committees that can be consulted as part of their benefits. In addition, your association can refer psychologists for individual consultation to lawyers specializing in legal practices focused on mental health practice. The professional liability carriers also provide free legal and professional consultation.

Georgia specific templates for the types and contents of the record are provided based upon a review of your jurisdiction’s law. The digest of your jurisdiction’s law should be read if you intend to use the templates.

**State Specific Template for contents of a record**

Georgia law calls for an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We believe that a termination note will likely reduce exposure to arguments about continued duty of care and recommend that psychologists use this template, too.

Because the documents permit hovering over the underline fields with a cursor to select an option or permit filling in the shaded text boxes, they cannot be inserted into this document. Please access each of the documents on this website, separately.

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4 50 State Surveys, Legislation & Regulations, Psychologists & Mental Health Facilities (Lexis March 2012); Lexis Nexis 50 State Comparative Legislation / Regulations, Medical Records (Lexis June 2011); 50 State Statutory Surveys: Healthcare Records and Recordkeeping (Thomson Reuters/ West October 2011).


6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
Our group also suggests that users of the templates consider how “behavior may be shaped by culture, the groups to which one belongs, and cultural stereotypes.” Whenever “Eurocentric therapeutic and interventions models” may impair the consideration of multicultural factors among the integrated health care team members, we urge that psychologists note the factors within the appropriate template fields. In light of the World Health Organization’s demonstrated commitment to the formulation of a diagnostic system that moves beyond biological causation and integrates the contributions of psychological, cultural, and social factors, and APA’s participation in the development of the International Classification of Functioning, Disability and Health (World Health Organization, 2010), our group recommends using ICD-10 whenever diagnoses are being made. The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

**Statute or Rule**

Georgia incorporates the American Psychological Association’s Ethical Principles for Psychologists and Code of Conduct (2003) (“APA Code of Conduct”). Georgia’s Board of Examiners of Psychologists into its own Code of Ethics and Standards of Conduct. Further, Georgia State Board of Examiners of Psychologists promulgated specific requirements related to the maintenance and retention of records by psychologists. In addition, licensed psychologists are subject to several

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8 Id. at p. 45.
11 GA. COMP. R. & REGS. § 510-5-.04.
Guidelines do not substitute for laws of each state and provincial jurisdiction. Such guidelines should not be used as a substitute for obtaining personal legal advice and consultation before making decisions regarding EHRs. Because statutory, administrative, and common law can change quickly, readers are well advised to seek legal advice about current laws and rules in their jurisdiction.

Common Law

Georgia courts have adopted §319 of the Second Restatement of Torts, finding that mental health professionals have a duty to warn or protect third persons only when the clinician has control over the client (because the client is within an inpatient setting) and knows, or should know, that the client is likely to harm others. In Jacobs et al. v. Taylor et al., a Georgia appellate court found no duty to report for generalized threats or if the victim knew of the client’s violent tendencies.

Contents of the record are mandated by law

Rules and Regulations of the State of Georgia promulgated by the State Board of Examiners of Psychologists state records include information that may be used to document the nature, delivery, progress, and results of psychological services, and include the following:

1. identifying data (e.g., name, client ID number);
2. contact information (e.g., phone number, address, emergency contact);
3. fees and billing information;
4. where appropriate, guardianship or conservatorship status;
5. documentation of informed consent or assent for treatment (Ethics Code 3.10);
6. documentation of waivers of confidentiality and authorization or consent for release of information (Ethics Code 4.05);
7. documentation of any mandated disclosure of confidential information (e.g., report of child abuse, release secondary to a court order);
8. complaint, diagnosis, or basis for request for services;
9. plan for services, updated as appropriate (e.g., treatment plan, supervision plan, intervention schedule, community interventions, consultation contracts);
10. relevant health and developmental history;
11. date of service and duration of session;
12. types of services (e.g., consultation, assessment, treatment, training);
13. nature of professional intervention or contact (e.g., type of treatment, referral, letters, e-mail, phone contacts);

12 GA. CODE. ANN. §§ 31-33-1, et. seq.
15 GA. COMP. R. & REGS. § 510-5-.04(1)(a).
In addition, Georgia incorporates the APA Code of Ethics into its Rules and Regulations and the following ethical standards regulate the content of records kept by Georgia Psychologists. The Health Insurance Portability and Accountability Act (HIPAA)\(^\text{16}\) also would apply to Georgia psychological records.

3.10 Informed Consent\(^\text{17}\)

(a) When psychologists …provide assessment, therapy, counseling or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons… (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)


\(^{17}\)GA. COMP. R. & REGS. § 510-4-.02(3)(j).
A HIPAA notice of privacy practices\textsuperscript{18} that delineates the psychologist’s scope of and limitations of confidentiality works in tandem with the disclosure document provided to the patient during the informed consent process specified by Standards 3.10, 9.03, and 10.01. Details to meet this standard include describing the specific information about the mandatory reporting duties that apply to psychologists:

- Duty to report abuse or neglect of a child under age 18;\textsuperscript{19}
- Duty to report a physical injury or injuries inflicted upon such disabled adult or elder, other than by accidental means, or that the person has been neglected or exploited;\textsuperscript{20}
- Duty to furnish copies of psychological …evaluation to law enforcement officer upon request.\textsuperscript{21}

\textbf{4.04 Minimizing Intrusions on Privacy}\textsuperscript{22}

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

Standard 4.04(a) suggests that psychologists focus the documentation in a manner that is very protective of their client’s privacy rights.


\textsuperscript{19} GA. CODE Ann. § 19-7-5.

\textsuperscript{20} GA. CODE Ann. § 30-5-4(a)(1) & (b).

\textsuperscript{21} GA CODE. ANN. § 31-33-7: (a) …if a law enforcement officer employed by a governmental entity is required to submit to a psychological …examination for the purpose of assessing the law enforcement officer's fitness for duty, employment status, or assignment of duties, then, upon the written request of the law enforcement officer, the employer shall furnish to the law enforcement officer a complete copy of the evaluation or report; (b) Any employer or health care provider furnishing or making a report or evaluation in good faith pursuant to the provisions of this Code section shall not be civilly or criminally liable to the law enforcement officer or any other person for furnishing or making such report or evaluation; (c) If an employer reasonably determines that disclosure of the evaluation or report to the law enforcement officer will be detrimental to the mental health of the law enforcement officer, would present a risk of harm to other persons, would involve the disclosure of confidential information or would violate the privacy of a third party, then the employer may refuse to furnish the record of evaluation; provided, however, that upon such refusal the evaluation or report shall, upon written request by the law enforcement officer, be furnished by the employer to a psychiatrist or psychologist treating the law enforcement officer.

\textsuperscript{22} GA. COMP. R. & REGS. § 510-4-.02(4)(d)(1).
The following standards set forth in the APA Code of Ethics create specific record keeping obligations for Georgia psychologists:

6.06 **Accuracy in Reports to Payors and Funding Sources**

In their reports to payors for services …psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided …the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

9.01 **Bases for Assessments**

(a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements,…on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

9.02 **Use of Assessments**

(a) Psychologists administer, adapt, score, interpret or use assessment techniques, interviews, tests or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and

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23 GA. COMP. R. & REGS. § 510-4-.02(6)(f).
24 GA. COMP. R. & REGS. § 510-4-.02(9)(a).
25 GA. COMP. R. & REGS. § 510-4-.02(9)(b).
proper application of the techniques…

9.10 Explaining Assessment Results
Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative…

Some Georgia psychologists are bound by the following provisions regarding health records, which are applicable to certain “providers” and a disclosure about the extent of confidentiality should occur. The Georgia laws and APA Standards 6.06, 9.01, 9.02, and 9.10 suggest that psychologists in Georgia would use an intake and evaluation note, and progress notes templates.

Maintenance and Security of Records
The following law regulates the content of records kept by Georgia Psychologists:

The psychologist shall store and dispose of written, electronic, and other records of patients and clients in such a manner as to ensure their confidentiality.

Electronic records; application to psychiatric, psychological, or other mental health records
(a) Notwithstanding any other provision of the law to the contrary, any provider may, in its sole discretion, create, maintain, transmit, receive, and store…

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26 GA. COMP. R. & REGS. § 510-4-.02(9)(j).
27 “Provider” is defined by the applicable chapter as, “All hospitals, including public, private facilities; health maintenance organizations; and home health agencies. It shall also mean any person licensed to practice under Chapter …39 of Title 43.” GA. CODE. ANN. § 31-33-1(2).
Psychologists are licensed pursuant to Chapter 39 of Title 43 and are therefore covered by the definition. The Code, however, excludes, mental health records from most of the provisions of the chapter entitled “Health Records.” GA. CODE. ANN. § 31-33-4 (“The provisions of this chapter, except as otherwise provided in Code Sections 31-33-7 and 31-33-8, shall not apply to psychiatric, psychological, or other mental health records of a patient.”). Note also that “record” for purposes of this section of the code means, “[A] patient's health record, including, but not limited to, evaluations, diagnoses, prognoses, laboratory reports, X-rays, prescriptions, and other technical information used in assessing the patient's condition, or the pertinent portion of the record relating to a specific condition or a summary of the record.” GA CODE. ANN. § 31-33-1(3).
28 GA. COMP. R. & REGS. § 510-5-.04(3).
29 GA CODE ANN. § 31-33-8.
records in an electronic format within the meaning of Code Section 10-12-2 and may, in its sole discretion, temporarily or permanently convert records into an electronic format.

(b) A provider shall not be required to maintain separate tangible copies of electronically stored records.

(c) The other provisions of this chapter shall apply to electronic records to the same extent as those provisions apply to tangible records.

(d) This Code section is subject to all applicable federal laws governing the security and confidentiality of a patient's personal health information.

(e) A tangible copy of a record reproduced from an electronically stored record shall be considered an original for purposes of providing copies to patients or other authorized parties and for introduction of the records into evidence in administrative or court proceedings.

(f) Except as provided otherwise under federal law, upon receiving a request for a copy of a record from a patient or an authorized person under Code Section 31-33-3, a provider shall provide copies of the record in either tangible or electronically stored form.

(g) Subsections (a), (b), (d) and (e) of this Code section shall apply to … psychological … of a patient.

Additionally, Georgia psychologists working in certain mental health facilities may be subject to the following provisions regarding inspection of records:

**Patients' care and treatment rights:**

. . . (b) Each patient shall have the right to participate in his care and treatment. The board shall issue regulations to ensure that each patient participates in his

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30 For purposes of the following provisions the term “facility . . . means any state owned or state operated hospital, community mental health center, or other facility utilized for the diagnosis, care, treatment, or hospitalization of persons who are mentally ill; any facility operated or utilized for such purpose by the United States Department of Veterans Affairs or other federal agency; and any other hospital or facility within the State of Georgia approved for such purpose by the department.” GA CODE ANN. § 37-3-1(7).

31 GA CODE ANN. § 37-3-162.
care and treatment to the maximum extent possible. Unless the disclosure to the patient is determined by the chief medical officer or the patient's treating physician or psychologist to be detrimental to the physical or mental health of the patient, and unless a notation to that effect is made a part of the patient's record, the patient shall have the right to reasonable access to review his medical file, to be told his diagnosis, to be consulted on the treatment recommendation, and to be fully informed concerning his medication, including its side effects and available treatment alternatives.

**Right of patient to examine his records and to request correction of inaccuracies; promulgation of rules and regulations; judicial supervision of files and records relating to proceedings under this chapter**

(a) Except as provided in subsection (b) of Code Section 37-3-162, every patient shall have the right to examine all medical records kept in the patient's name by the department or the facility where the patient was hospitalized or treated.

(b) Every patient shall have the right to request that any inaccurate information found in his medical record be corrected.

(c) The board shall promulgate reasonable rules and regulations to implement subsections (a) and (b) of this Code section. Nothing contained in this Code section shall be construed to require the deletion of information by the department nor constrain the department from destroying patient records after a reasonable passage of time.

(d) (1) Notwithstanding paragraphs (7) and (8) of Code Section 15-9-37 or any provisions of Article 4 of Chapter 18 of Title 50, all files and records of a court in a proceeding under this chapter since September 1, 1978, shall remain sealed and shall be open to inspection only upon order of the court issued after petition by, or notice to, the patient and subject to the provisions of Code Section 37-3-166 pertaining to the medical portions of the record.

(2) If any official or employee of any court or archival facility assists a person who is not an official or employee of that court or facility in attempting to gain access to any court record which the official or employee knows concerns examination, evaluation, treatment, or commitment for mental illness, such record was created prior to September 1, 1978, and such record contains no

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32 GA CODE ANN. § 37-3-167.
information concerning the patient which is ordinarily public, such as the fact that a guardianship was created, such official or employee shall seal the record if it is in the possession of the court or facility and shall inform the person seeking access that if such a record exists it is open to inspection only upon order of the court issued after petition by, or notice to, the patient and subject to the provisions of Code Section 37-3-166 pertaining to the medical portions of the record.

(3) Upon a petition for access to such files or records referred to in paragraphs (1) and (2) of this subsection, the court should allow inspection by the person who is the subject of a record unless there are compelling reasons why it should not but should require anyone other than the person who is the subject of a court record to show compelling reasons why the record should be opened. If access is granted, the court order shall restrict dissemination of the information to certain persons or for certain purposes or both.

(4) The court may refer to such files and records referred to in paragraphs (1) and (2) of this subsection in any subsequent proceeding under this chapter concerning the same patient on condition that the files and records of such subsequent proceeding will then be sealed in accordance with this subsection. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, but without personal identifying information and under whatever conditions upon their use and distribution the court may deem proper. The court may punish by contempt any violations of any such conditions.

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality, psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.) This standard supports the record keeping standards:

6. Record Keeping and Fees
6.01 Documentation of Professional …Maintenance of Records
Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, including Psychotherapy Notes created by the psychologist, as long as those records are maintained. 35 In addition, patients have a right to amend any part of the record; 36 Under this section, a denial of the proposed amendment can occur if the record was not created by the psychologist (unless the patient provides a reasonable basis to believe that the originator of PHI is no longer available to act on the requested amendment) or if the record is accurate and complete (other subsections are not discussed as they are unlikely to arise for psychologists). HIPAA also permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient. 37 Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure. 38

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional… 39
(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

35 45 CFR 164.524.
36 45 CFR 164.526 (a).
37 45 CFR 164.520.
38 45 CFR 164.528.
39 GA. COMP. R. & REGS. § 510-4-.02(6)(b).
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(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

Additionally, APA Code of Ethics Standard 6.02(b) requires the use coding or other techniques to avoid the inclusion of personal identifiers when confidential patient information is entered into databases or systems of records that are available to persons whose access has not been consented to by the patient.40 HIPAA establishes privacy protections for all transmissions of PHI records, and requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties.41 Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment42
Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received.

Release and transfer of PHI records cannot be conditioned on payment or other conditions (such as enrollment in the health plan that employs the psychologist).43

RetentionPolicy
Rules and Regulations of the State of Georgia promulgated by the State Board of Examiners of Psychologists state the following regarding the retention of psychological records:44

... (2) Psychologists are aware of relevant federal state and local laws and regulations governing records. Laws and regulations supersede requirement of these rules. In the absence of such laws and regulations, psychologists maintain complete records for seven years after the last date of service delivery for adults. If the client is a minor, the record period is extended until three years after the age of majority.

40 Id.
41 45 CFR 164.508.
42 GA. COMP. R. & REGS. § 510-4-.02(6)(c).
43 45 CFR 164.508 (b)(4).
44 GA. COMP. R. & REGS. § 510-5-.04(2).
Violations of the Specific Duty

Under the Rules and Regulations of the State of Georgia promulgated by the State Board of Examiners of Psychologists, Georgia psychologists owe the following specific duty:

Code of Ethics and Supplemental Code of Conduct\textsuperscript{45}

...This Code of Ethics and Supplemental Code of Conduct constitutes the standards against which the required professional conduct of a psychologist is measured. The psychologist shall be governed by the rules delineated in this Code of Ethics and Supplemental Code of Conduct whenever he/she provides psychological services in any context. ...A violation ...constitutes unprofessional conduct and may constitute sufficient grounds for disciplinary action, or for denial of licensure.

\textsuperscript{45}GA. COMP. R. & REGS. § 510-4-.01.