The Duty to Record: Ethical, Legal, and Professional Considerations for Connecticut 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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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.
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.

Connecticut 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**

Connecticut 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 reduce the risk of responsibility in a duty to protect/warn jurisdiction, such as Connecticut, and recommend that psychologists use this template, too.5

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

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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).


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into this document.6 Please access each of the documents on this website, separately.

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.”7 Whenever “Eurocentric therapeutic and interventions models”8 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.9 The EHR templates permit drop down diagnoses using the ICD-10 functional diagnoses.

Statute or Rule

The Department of Public Health and Board of Examiners of Psychologists licenses psychologists who are subject to the standards for “medical records” set forth at Regulations of Connecticut State Agencies §§ 19a-14-40, et. seq.10 Connecticut has not specifically adopted the American Psychological Associations’ Ethical Principles.

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6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
8 Id. at p. 45.
10 The Regulations of Connecticut State Agencies § 19a-14-41 regarding “Professions Involved” states, “Each person licensed or certified pursuant to the following chapters and Acts shall maintain appropriate medical records of the assessment, diagnosis, and course of treatment provided each patient, and such medical records shall be kept for the period prescribed: chapters 334b, 370 thru 373, 375, 376, 378 thru 381, 383 thru 384, 388, 398, 399, and Public Acts 83-352 and 83-441.” Psychologists are licensed pursuant to Chapter 383. See CONN. GEN. STAT. § 20-186 (located in
of Psychologists and Code of Conduct (2003) (“APA Code of Ethics”). However, the regulations imply that Connecticut psychologists are bound by these standards.

Common Law

Relevant Annotations to Connecticut General Statute § 20-192.

- Substantial evidence supported finding of Board Of Examiners Of Psychologists that wife of patient was also a patient of psychologist, who admitted to having a sexual relationship with wife, so as to support conclusion that psychologist violated standard of care in acting negligently, incompetently or wrongfully in conduct of the profession. Even though wife's treatment was omitted from medical records; wife and patient testified that they attended joint marriage counseling sessions with psychologist, wife testified that she received treatment from psychologist beyond those sessions, and trial court acknowledged evidence showed that psychologist was concerned about other clinicians learning of his outside contact with wife.

Relevant Annotation to Connecticut General Statute § 52-146h.

- The Department of Mental Health may require its grantee agencies to provide patient records and files without violating the § 52-146d psychiatric privilege.

Contents of the record are mandated by law

Contents of psychological records are mandated by Connecticut law as follows:


12 CONN. AGENCIES REGS. § 19a-14 (b)(6)(E). CONN. GEN. STAT. § 20-192: “…if the license holder …has been found …to have acted negligently, incompetently or wrongfully in the conduct of his profession…” CONN. AGENCIES REGS. § 19a-14(b)(6)(E): “Has committed an act which, if the applicant were licensed, would not conform to the accepted standards of practice of the profession…”


15 CONN. AGENCIES REGS. § 19a-14-40; CONN. AGENCIES REGS. § 19a-14-41: “Each person licensed [listed the chapter that applies to psychologists] …shall maintain appropriate medical records of the assessment, diagnosis, and course of treatment provided each patient …”

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The purpose of a medical record is to provide a vehicle for: documenting actions taken in patient management; documenting patient progress; providing meaningful medical information to other practitioners should the patient transfer to a new provider or should the provider be unavailable for some reason. A medical record shall include, but not be limited to, information sufficient to justify any diagnosis and treatment rendered, dates of treatment, actions taken by non-licensed persons when ordered or authorized by the provider…any other diagnostic data or documents specified in the rules and regulations. All entries must be signed by the person responsible for them.

The Connecticut General Statutes also establish a number of standards regarding maintenance and security of records within hospitals16 that include electronic and paper formats,17 and specific requirements about the record.18

The APA Code of Ethics also would be applied with the Health Insurance Portability and Accountability Act (HIPAA)19 to psychological records:

3.10 Informed Consent20
(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

16 CONN. GEN. STAT. § 19a-25a; ““Hospital” means a psychiatric facility which primarily offers medically directed inpatient services for the diagnosis, treatment, care, protection and rehabilitation, as indicated, of individuals admitted with psychiatric disorders.” CONN. AGENCIES REGS. § 17-227-14a(G).
17 CONN. GEN. STAT. § 19a-25c.
18 CONN. AGENCIES REGS. § 17-227-14m.
20 APA CODE OF ETHICS, supra note 11.
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.)

A HIPAA notice of privacy practices 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. In addition, the following Connecticut law should be disclosed:

(b) Except as provided in subsection (c) of this section, in civil and criminal actions, in juvenile, probate, commitment and arbitration proceedings, in proceedings preliminary to such actions or proceedings, and in legislative and administrative proceedings, all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege and allow such disclosure. The person or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the individual with whom or the office in which the original consent was filed. The withdrawal of consent shall not affect communications disclosed prior to notice of the withdrawal.

(c) Consent of the person shall not be required for the disclosure of such person's communications:

22 CONN. GEN. STAT  § 52-146c.
(1) If a judge finds that any person after having been informed that the communications would not be privileged, has made the communications to a psychologist in the course of a psychological examination ordered by the court, provided the communications shall be admissible only on issues involving the person's psychological condition;

(2) If, in a civil proceeding, a person introduces his psychological condition as an element of his claim or defense or, after a person's death, his condition is introduced by a party claiming or defending through or as a beneficiary of the person, and the judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and psychologist be protected;

(3) If the psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other individuals;

(4) If child abuse, abuse of an elderly individual or abuse of an individual who is disabled or incompetent is known or in good faith suspected;

(5) If a psychologist makes a claim for collection of fees for services rendered, the name and address of the person and the amount of the fees may be disclosed to individuals or agencies involved in such collection, provided notification that such disclosure will be made is sent, in writing, to the person not less than thirty days prior to such disclosure. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact receiving psychological services, (B) the dates of such services, and (C) a general description of the types of services; or

(6) If the communications are disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the person where such person has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13.

4.04 Minimizing Intrusions on Privacy

23 APA CODE OF ETHICS, supra note 11.
(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.

**Maintenance and Security of Records**

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,24 “[p]sychologists 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**25

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.26 In addition, patients have a right to amend any part of the record;27 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). Finally, patients may obtain an accounting as to who has accessed the PHI and the details

24 APA CODE OF ETHICS, supra note 11.
25 Id.
26 45 CFR 164.524; See, CONN. GEN. STAT. § 20-7 et seq.: Delineates further detail about release of records.
27 45 CFR 164.526 (a).
about each disclosure.28

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional…29
(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.

(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.)

The Connecticut law limits patient access to their records:30

(a)(1) A provider, except as provided in section 4-194, shall supply to a patient upon request complete and current information possessed by that provider concerning any diagnosis, treatment and prognosis of the patient; and (2) a provider shall notify a patient of any test results in the provider's possession that indicate a need for further treatment or diagnosis.

...(d) The provisions of this section shall not apply to any information relative to any psychiatric or psychological problems or conditions.

Release of patient's medical records to another provider31
A copy of the patient's health record, including but not limited to, x-rays and copies of laboratory reports, prescriptions and other technical information used

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28 45 CFR 164.528.
29 APA CODE OF ETHICS, supra note 11.
30 conn. gen. stat § 20-7c.
31 conn. gen. stat § 20-7d.
in assessing the patient's condition shall be furnished to another provider upon the written request of the patient. The written request shall specify the name of the provider to whom the health record is to be furnished. The patient shall be responsible for the reasonable costs of furnishing the information.

The Connecticut General Statutes set forth the following specific duties related to transferring records:

**Transfer of information to Commissioner of Mental Health and Addiction Services. Storage of records and communications**

(a) Any facility or individual under contract with the Department of Mental Health and Addiction Services to provide behavioral health services shall transmit information and records, if requested, to the Commissioner of Mental Health and Addiction Services pursuant to his obligation under section 17a-451 to maintain the overall responsibility for the care and treatment of persons with psychiatric disorders or substance use disorders. The Commissioner of Mental Health and Addiction Services may collect and use the information and records for administration, planning or research, subject to the provisions of section 52-146g. The Commissioner of Mental Health and Addiction Services may enter into contracts within the state and into interstate compacts for the efficient storage and retrieval of the information and records.

(b) Identifiable data shall be removed from all information and records before issuance from the individual or facility which prepared them, and a code, the key to which shall remain in possession of the issuing facility and be otherwise available only to the Commissioner of Mental Health and Addiction Services for purposes of planning, administration or research, shall be the exclusive means of identifying patients. The key to the code shall not be available to any data banks in which the information is stored or to any other persons, corporations or agencies, private or governmental.

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.

HIPAA establishes privacy protections for all transmissions of PHI records, and

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32 CONN. GEN. STAT § 52-146h.
33 Id.
requires specific patient authorizations (with a right of revocation) to transfer PHI records to third parties.\textsuperscript{34} Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment\textsuperscript{35}
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).\textsuperscript{36}

Retention of records
The Connecticut Code of Regulations sets forth the following standards for retention of records:

Retention schedule\textsuperscript{37}
Unless specified otherwise herein, all parts of a medical record shall be retained for a period of seven (7) years from the last date of treatment, or, upon the death of the patient, for three (3) years…

Exceptions\textsuperscript{38}
Nothing in these regulations shall prevent a practitioner from retaining records longer than the prescribed minimum. When medical records for a patient are retained by a health care facility or organization, the individual practitioner shall not be required to maintain duplicate records and the retention schedules of the facility or organization shall apply to the records. If a claim of malpractice, unprofessional conduct, or negligence with respect to a particular patient has been made, or if litigation has been commenced, then all records for that patient must be retained until the matter is resolved. A consulting health care provider need not retain records if they are sent to the referring provider, who must retain them. If a patient requests his records to be transferred to another

\textsuperscript{34} 45 CFR 164.508.
\textsuperscript{35} APA CODE OF ETHICS, \textit{supra} note 11; \textit{See}, CONN. GEN. STAT. § 20-7c(c): Charges can occur under the law at 45 cents per page, including any research fees, handling fees or related costs, and the cost of first class postage can be charged to furnish the patient’s health record.
\textsuperscript{36} 45 CFR 164.508 (b)(4).
\textsuperscript{37} CONN. AGENCIES REGS. § 19a-14-42.
\textsuperscript{38} CONN. AGENCIES REGS. § 19a-14-43.
provider who then becomes the primary provider to the patient, then the first provider is no longer required to retain that patient's records.

Discontinuance of practice

Upon the death or retirement of a practitioner, it shall be the responsibility of the practitioner or surviving responsible relative or executor to inform patients. This must be done by placing a notice in a daily local newspaper published in the community which is the prime locus of the practice. This notice shall be no less than two columns wide and no less than two inches in height. The notice shall appear twice, seven days apart. In addition, an individual letter is to be sent to each patient seen within the three years preceding the date of discontinuance of the practice. Medical records of all patients must be retained for at least sixty days following both the public and private notice to patients.

Violations of the specific duty

Connecticut’s Department of Health will discipline a psychologist who violate the law, APA Code of Ethics or HIPAA:

Powers of department concerning regulated professions

(a) The Department of Public Health shall have the following powers and duties with regard to the boards and commissions listed in subsection (b) which are within the Department of Public Health. The department shall:

…(6) Determine the eligibility of all applicants for permits, licensure, certification or registration, based upon compliance with the general statutes and administrative regulations. The department may deny the eligibility of an applicant for a permit or for licensure by examination, endorsement, reciprocity or for reinstatement of a license voided pursuant to subsection (f) of section 19a-88, or may issue a license pursuant to a consent order containing conditions that must be met by the applicant if the department determines that the applicant:

(A) Has failed to comply with the general statutes and administrative regulations governing his profession;
(B) Has been found guilty or convicted as a result of an act which constitutes a felony under (i) the laws of this state, (ii) federal law or (iii) the laws of another jurisdiction and which, if committed within this

39 CONN. AGENCIES REGS. § 19a-14-44.
40 CONN. AGENCIES REGS. § 19a-14.
state, would have constituted a felony under the laws of this state;
(C) Is subject to a pending disciplinary action or unresolved complaint
before the duly authorized professional disciplinary agency of any state,
the District of Columbia, a United States possession or territory, or a
foreign jurisdiction;
(D) Has been subject to disciplinary action similar to an action specified
in subsection (a) of section 19a-17 by a duly authorized professional
disciplinary agency of any state, the District of Columbia, a United States
possession or territory, or a foreign jurisdiction;
(E) Has committed an act which, if the applicant were licensed, would
not conform to the accepted standards of practice of the profession…

…(10) Conduct any necessary review, inspection or investigation regarding
qualifications of applicants for licenses or certificates, possible violations of
statutes or regulations, and disciplinary matters. In connection with any
investigation, the Commissioner of Public Health or said commission's
authorized agent may administer oaths, issue subpoenas, compel testimony and
order the production of books, records and documents. If any person refuses
to appear, to testify or to produce any book, record or document when so
ordered, a judge of the Superior Court may make such order as may be
appropriate to aid in the enforcement of this section;
(11) Conduct any necessary investigation and follow-up in connection with
complaints regarding persons subject to regulation or licensing by the
department…

Disciplinary action by department, boards and commissions
(a) Each board …with respect to professions under its jurisdiction which have
no board or commission may take any of the following actions, singly or in
combination, based on conduct which occurred prior or subsequent to the
issuance of a permit or a license upon finding the existence of good cause:

(1) Revoke a practitioner's license or permit;
(2) Suspend a practitioner's license or permit;
(3) Censure a practitioner or permittee;
(4) Issue a letter of reprimand to a practitioner or permittee;
(5) Place a practitioner or permittee on probationary status and require
the practitioner or permittee to:
   (A) Report regularly to such board, commission or department
upon the matters which are the basis of probation;

41 CONN. AGENCIES REGS. § 19a-14.
(B) Limit practice to those areas prescribed by such board, commission or department;
(C) Continue or renew professional education until a satisfactory degree of skill has been attained in those areas which are the basis for the probation;
(6) Assess a civil penalty of up to ten thousand dollars; or
(7) Summarily take any action specified in this subsection against a practitioner’s license or permit upon receipt of proof that such practitioner has been:
   (A) Found guilty or convicted as a result of an act which constitutes a felony under (i) the laws of this state, (ii) federal law or (iii) the laws of another jurisdiction and which, if committed within this state, would have constituted a felony under the laws of this state; or
   (B) Subject to disciplinary action similar to that specified in this subsection by a duly authorized professional agency of any state, the District of Columbia, a United States possession or territory or a foreign jurisdiction. The applicable board or commission, or the department shall promptly notify the practitioner or permittee that his license or permit has been summarily acted upon pursuant to this subsection and shall institute formal proceedings for revocation within ninety days after such notification.

(b) Such board or commission or the department may withdraw the probation if it finds that the circumstances which required action have been remedied.

(c) Such board or commission or the department where appropriate may summarily suspend a practitioner’s license or permit in advance of a final adjudication or during the appeals process if such board or commission or the department finds that a practitioner or permittee represents a clear and immediate danger to the public health and safety if he is allowed to continue to practice.

(d) Such board or commission or the department may reinstate a license which has been suspended or revoked if, after a hearing, such board or commission or the department is satisfied that the practitioner or permittee is able to practice with reasonable skill and safety to patients, customers or the public in general. As a condition of reinstatement, the board or commission or the department may impose disciplinary or corrective measures authorized under this section…

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