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

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² Christina Luini, J.D., M.L.I.S.; Dinelia Rosa, PhD.; Mary Karapetian Alvord, PhD; Vanessa K. Jensen, PsyD; Jeffrey N. Younggren, PhD; G. Andrew H. Benjamin, JD, PhD, ABPP. The working group came together to discharge the obligations of the CODAPAR grant that we wrote and received: http://www.apadivisions.org/division-31/news-events/grant-funding.aspx.
Columbia with reference to several relevant state-by-state surveys retrieved from Lexis 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.

Mississippi 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**

Mississippi law suggests Psychologists include within their records an intake and evaluation note, and progress notes. The contents of the two templates for these documents comply with the law digested below. We also believe that a termination note will likely reduce exposure to arguments about continued duty of care, and reduce the risk of responsibility if a duty to protect/warn context should emerge.5

Because the documents permit hovering over the underline fields with a cursor

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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.

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**

The existing rules and regulations are quite limited in providing direction regarding records. Although the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (2003) (“APA Code of Ethics”) are not adopted by the Board and incorporated by reference in the rules regulating psychologists, they are mentioned by the rules and a link to the Code of Ethics is provided by the Board.

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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 See e.g., Miss. Admin. Code 30-21-1:4.28 (re: “Specialty Recognition”) (“The Board also expects the psychologist to use in any public statement only those titles to which the psychologist is entitled.

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

Annotations to MISS. CODE ANN. 43-21-353 (re: reporting abuse or neglect):

- Lack of any protected state-created liberty interest precluded claim, under §§ 1983, that state violated federal procedural due process rights of children allegedly in need of protection by not enforcing state statute mandating procedure by which state Department of Human Services (DHS) was required to submit all reports of suspected child abuse or neglect to Youth Court, which in turn was required to take no action, dispose of matter informally, monitor situation, or initiate formal proceedings; statute did not confer on children right to certain outcome, as required for due process, but rather guaranteed certain procedure, which was insufficient for due process purposes.13

- Single purpose for enactment of mandatory reporting duty under child abuse reporting statute was to advance state's fundamental objective of eliminating child abuse and neglect. Persons under duty to report child abuse, who have reasonable cause to suspect child abuse must, under child abuse reporting statute, report their suspicion, and if suspicion is reported in good faith, they are immune from civil liability for doing so; immunity, therefore, is conditioned on report being made in good faith.14

Annotations to MISS. CODE ANN. § 41-21-97 (re: Confidentiality)

- Psychiatrist did not owe duty to member of patient's family, under Mississippi law, to warn them of possibility that patient might attempt to injure them, and consequently government did not have Federal Tort Claims Act liability for patient's killing of his daughter; at time of incident Mississippi statute precluded release of confidential patient information except in certain instances, which in accordance with the Ethical Code of Psychologists of the of the American Psychological Association.”).


14 Howe v. Andereck, 2004, 882 So.2d 240, rehearing denied, certiorari denied 882 So.2d 772.

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did not include possibility of harm to specific individuals.15

- Psychologist at correctional facility did not violate the psychotherapist-patient privilege when he testified about a defendant's intimidating a judge trial; defendant expressed an intent to harm two judges to psychologist, psychologist told defendant he had a duty to warn the judges, defendant stated that he did not care and affirmed his intentions, and a few weeks later defendant asked psychologist whether he had warned the judges and when psychologist indicated that he had, defendant approved.16

- Psychotherapist-patient privilege precluded admission of documents from parties' joint counseling sessions in divorce action; husband objected to admission of documents, and husband did not place his physical, mental, or emotional condition before trial court. Rules of Evid., Rule 503(b).17

- Evidence rule creating psychotherapist-patient privilege defines “psychotherapist” not only by those persons who are licensed, but also by subjective impressions of patient. Rules of Evid., Rule 503.18

- Exception to psychotherapist-patient privilege did not exist in parental rights termination case based on alleged mental illness of both parents. Rules of Evid., Rules 503, 503(b).19

Annotation to Miss. Code Ann. § 73-31-21 (re: License denial, suspension, or revocation)

- In disciplinary proceedings before State Board of Psychological Examiners, charges must be proved by clear and convincing evidence. Matters disclosed by psychologist in affidavit filed in divorce action between two of his patients and concerning his opinion that temporary custody of the patients' child should be placed with his father were protected from disclosure by confidentiality strictures of the ethical principles of psychologists.20

Contents of the record are mandated by law

The APA Code of Ethics also would be applied with the Health Insurance

16 Hearn v. State (Miss. 2008) 3 So.3d 722, rehearing denied.
20 Mississippi State Bd. of Psychological Examiners v. Hosford (Miss. 1987) 508 So.2d 1049.
Portability and Accountability Act (HIPAA)\textsuperscript{21} to psychological records:

3.10 Informed Consent\textsuperscript{22}

(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.)

A HIPAA notice of privacy practices\textsuperscript{23} 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


\textsuperscript{22} APA CODE OF ETHICS, supra note 10.

3.10, 9.03, and 10.01. In addition, the Mississippi law would require disclosure about the following exceptions to protecting patient confidentiality:

- Mandatory duty to inform the court of suspected child abuse;\(^{24}\)
- Mandatory duty to report the abuse, neglect or exploitation of a vulnerable adult.\(^{25}\)

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

**4.04 Minimizing Intrusions on Privacy\(^{26}\)**

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

In light of the Mississippi confidentiality and privilege standards, psychologists also should informed their patients that confidential information must be released if any of the exceptions to the psychotherapist-patient rule applies:

**Privileged communications with client\(^{27}\)**

A psychologist shall not be examined without the consent of his or her client as to any communication made by the client to the psychologist or the psychologist's advice given thereon in the course of professional employment; nor shall a psychologist's secretary, stenographer or clerk be examined without the consent of his or her employer concerning any fact, the knowledge of which he or she has acquired in that capacity.

**Psychotherapist-Patient Privilege\(^{28}\)**

(a) Definitions. As used in this rule:

(1) A “patient” is a person who consults or is examined or interviewed by a physician or psychotherapist.

…(3) A “psychotherapist” is (1) a person authorized to practice medicine in

\(^{24}\) *Miss. Code Ann.* § 43-21-353.


\(^{26}\) *APA Code of Ethics*, *supra* note 10.


\(^{28}\) *Miss. R. Evid.* 503.
any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (2) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged (4) A communication is “confidential” if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the …psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his …psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the …psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.
(1) Proceedings for Hospitalization. There is no privilege under this rule in a proceeding to hospitalize the patient for mental illness, if the physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.
(2) Examination by Order of Court. If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, there is no privilege under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.
(3) There is no privilege under this rule as to an issue of breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist.
(4) There is no privilege under this rule for communications, including past and current records of whatever nature, regarding a party's physical, mental, or emotional health or drug or alcohol condition relevant to child custody, visitation, adoption, or termination of parental rights. Upon a hearing in chambers, a judge, in the exercise of discretion, may order release of such records relevant to the custody, visitation, adoption, or termination action. The court may order the records sealed.

(e) In an action commenced or claim made against a person for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the privilege under this rule.

(f) Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party.

The following standards set forth in the APA Code of Ethics create specific record keeping obligations for Mississippi 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

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29 APA CODE OF ETHICS, supra note 10.
30 Id.
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(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 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…

Standard 6.06 implies that information about the nature of the service provided…, the fees charged, the identity of the provider, findings, and diagnosis should be maintained in the record when necessary for billing purposes. In addition, the requirements of standards 9.01, 9.02, and 9.10 suggest that psychologists in Mississippi would use an intake and evaluation note, and progress notes templates.

31 Id.
32 Id.
Maintenance and Security of Records

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. In addition, patients have a right to amend any part of the record; 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

33 Hospitals have specific record keeping standards, see MISS. CODE ANN. § 41-9-61: records “shall mean, without restriction, those …histories, records, reports, summaries, diagnoses and prognoses, records of treatment …ordered and given, notes, entries, …other written …data prepared, kept, made or maintained …that pertain to …services rendered to patients… Such records shall also include abstracts of the foregoing data customarily made or made as provided in Section 41-9-75. Such records shall not, however, include ordinary business records pertaining to patients' accounts…” MISS. CODE. ANN. § 41-9-63 (Duty to prepare and maintain records); MISS. CODE. ANN. § 41-9-64 (Electronic medical record containing electronic signature); MISS. CODE. ANN. § 41-9-65 (Property rights and access); MISS. CODE. ANN. § 41-9-71 (Early Disposal of Records); MISS. CODE ANN. § 41-21-97: “Confidentiality …exceptions…”

34 APA CODE OF ETHICS, supra note 10.

35 Id.

36 45 CFR 164.524.

37 45 CFR 164.526 (a).
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 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.

(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.) 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.40 Concrete security standards are established for all electronic healthcare information (45 CFR 160).

**6.03 Withholding Records for Nonpayment**41
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.

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38 45 CFR 164.528.
39 APA CODE OF ETHICS, supra note 11.
40 45 CFR 164.508.
41 APA CODE OF ETHICS, supra note 11.
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{42}

**Retention of Records**

Mississippi law mandates the following retention standards:\textsuperscript{43}

...records shall be retained, preserved and properly stored ....for such periods of reasonable duration as may be prescribed in rules and regulations adopted by the licensing agency ... complete hospital records shall be retained for a period after discharge of the patient of at least (a) seven (7) years in cases of patients discharged at death, except as may be otherwise hereinafter provided; (b) ten (10) years in cases of adult patients of sound mind at the time of discharge, except as may be otherwise hereinafter provided; (c) for the period of minority or other known disability of the patient plus seven (7) additional years, but not to exceed twenty-eight (28) years, in cases of patients under disability of minority or otherwise; or (d) for the period of minority or other known disability of any survivors hereinafter mentioned plus seven (7) additional years, but not to exceed twenty-eight (28) years, in all cases where the patient was discharged at death, or is known by the hospital to have died within thirty (30) days after discharge, and the hospital knows or has reason to believe that such patient or former patient left one or more survivors under disability of minority or otherwise who are or are claimed to be entitled to damages for wrongful death of the patient under Section 11-7-13, or laws amendatory thereof. Upon the expiration of the applicable period of retention, any [the psychologist] may retire the …record.”

**Violations of the specific duty**

Mississippi Board of Psychology after “conduct[ing] hearings upon complaints concerning the disciplining or licensing of applicants and psychologists [could]:\textsuperscript{44}

...(f) Deny, approve, withhold, revoke, suspend and/or otherwise discipline applicants and licensed psychologists.

\textsuperscript{42} 45 CFR 164.508 (b)(4).

\textsuperscript{43} MISS. CODE ANN. § 41-9-69.

\textsuperscript{44} MISS. CODE ANN. § 73-31-7.
(g) Issue an educational letter to a licensee in order to assist that individual in his or her practice as a psychologist. Such a letter will not be considered to be disciplinary action.

(h) Cause the prosecution and enjöinder of all persons violating this chapter, and incur necessary expenses therefor.

(i) Charge a fee of not more than Seven Hundred Dollars ($ 700.00) to a qualified psychologist as determined by the board who is applying for certification by the board to conduct examinations in civil commitment proceedings.