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

South Carolina 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**

South Carolina law suggests the need 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 the duty to protect 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. 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 South Carolina Board of Psychology has created its own rules of Code of Ethics that constitutes standards against which professional conduct of psychologists are measured.

Common Law

South Carolina courts have adopted a Tarasoff duty to warn. In Bishop v. South Carolina Dep’t of Mental Health, the Supreme Court of South Carolina held that when

6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
8 Id. at p. 45.
the client, a mother, had in the past made specific threats to harm her child, and those threats were known, a duty to warn the child’s guardian and to protect arose when the mother was released from custody.\textsuperscript{11} The court held that “when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.”\textsuperscript{12}

Relevant annotations and citing references to S.C. Code Ann § 19-11-95 (re: psychotherapist-patient privilege)

- Records pertaining to defendant's hospitalization for anger management and substance abuse were relevant to jury's assessment of defendant's character in penalty phase of capital murder trial and, thus, were discoverable.\textsuperscript{13}
- Wife's presence during marriage counseling sessions did not prevent any communications between husband and licensed professional counselor from being private communications and therefore confidences subject to patient-provider privilege in divorce action; purpose of treatment would have been defeated if privilege was compromised by wife's presence, and application of privilege despite wife's presence was consistent with State's policy of supporting the marriage relationship and encouraging reconciliation of married couples.\textsuperscript{14}
- Former patient sued physician, who had disclosed information about patient's emotional health during divorce proceeding involving patient. Physician moved to strike claim based on breach of duty of confidentiality. The Circuit Court, Beaufort County, Thomas Kemmerlin, Jr., Special Judge, struck allegation, and patient appealed. The Court of Appeals, Anderson, J., held that common law tort claim for physician's breach of duty to maintain confidences of his or her patient, in absence of compelling interest or other justification for disclosure, would be recognized.\textsuperscript{15}

\textsuperscript{11} Bishop v. South Carolina Dep’t of Mental Health, 502 S.E.2d 78, 82 (S.C. 1998). But note: suit still dismissed because the court determined that although the duty element of the tort was fulfilled, the guardian’s negligence, and not the state’s, was the proximate cause of the victim’s injury.
\textsuperscript{12} Id.
\textsuperscript{14} Carpenter v. Burr, 381 S.C. 494, 673 S.E.2d 818 (S.C.App.,2009).
Relevant annotations to SC Code Ann § 63-7-310 (re: mandatory child abuse reports):

- Child abuse reporting statute did not create private cause of action for negligence per se based on failure to report suspected or known child abuse; statute did not include language creating civil liability for failure to report suspected or known child abuse, and the purpose of the statute was to protect the public and was not to protect an individual's private right.16

- Duty to warn did not exist for psychiatrist to all future foreseeable victims arising out of psychiatrist-patient relationship with physician who allegedly sexually abused minor child; physician did not specifically threaten any readily identifiable party, including minor child.17


- Foster caregiver brought action against supervising program center and its administrator for defamation and intentional infliction of emotional distress, after center terminated its contract with caregiver following allegations by foster care client of sexual abuse in caregiver’s licensed foster care home. The Circuit Court, Richland County, James W. Johnson, Jr., J., granted summary judgment in favor of program center and administrator. Caregiver appealed. Held: (1) disabled 21 year old client of foster care home was a “vulnerable adult” under the Omnibus Adult Protection Act who was entitled to special protections; (2) program administrator of facility covered by Act was a mandated reporter of suspected abuse; (3) on issue of first impression, administrator acted as the Act intended by promptly reporting statements of possible abuse to authorities without employing a “reasonable person” standard; and (4) administrator who was mandatory reporter had immunity under the Act from civil and criminal liability for reporting possible sexual abuse.18

Contents of the record are mandated by law

South Carolina law calls for the following contents of a record for psychological services rendered to individuals as clients or services billed to third-

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party payors:19

i. the presenting problem(s) or purpose or diagnosis;

ii. the fee arrangement;

iii. the date and substance of each billed or service – count contact or service;

iv. any test results or equivalent results obtained and any basic test data from which they were derived;

v. notation and results of formal consults with other providers;

vi. a copy of test or other evaluative reports prepared as part of the professional relationship.

Informed Consent20

… A psychologist shall give, subject to professional judgment, a truthful, understandable, and complete account of the clients condition to the client or those responsible for the care of the client. The psychologist shall keep the client fully informed as to the purpose and nature of any evaluation, treatment or other procedures and of the client's right to freedom of choice regarding services provided.

The Health Insurance Portability and Accountability Act (HIPPA)21 also would be applied to psychological records. A HIPPA notice of privacy practices22 that delineates the psychologist’s scope of and limitations of confidentiality works in tandem with the disclosures provided to the patient during the informed consent process. In addition, the South Carolina law would require disclosure about the following exceptions to protecting patient confidentiality:23

- Confidences when required by statutory law or by court order for good
cause shown to the extent that the patient’s care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce;

- Confidences pursuant to a lawfully issued subpoena by a duly constituted professional licensing or disciplinary board or panel;
- Confidences when an investigation, trial, hearing, or other proceeding by a professional licensing or disciplinary board or panel involves the question of granting a professional license or the possible revocation, suspension, or other limitation of a professional license.

In addition, two mandatory duties to report exist within South Carolina and should be disclosed to patients in advance of providing evaluation or treatment services:

- Mandatory duty to report child abuse or neglect,24
- Mandatory duty to report suspected abuse, neglect, or exploitation of a vulnerable adult.25

Maintenance and Security of Records

Under South Carolina law psychologists "shall safeguard the confidential information of cane in the course of practice …or other professional duties. With the exception set forth below, the psychologist shall disclose confidential information to others only with the informed written consent of the client agreed."26

Maintenance of Records27

The psychologists shall store and dispose of written, electronic and other records in such a manner as to assure their confidentiality.

Disclosure without informed written consent28

The psychologist may disclose confidential information without the informed written consent …when the psychologist judges that disclosure is necessary to

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24 S.C. CODE ANN. § 63-7-310.
26 S.C. CODE REGS § 100-4 G. (1).
27 S.C. CODE ANN. REGS § 100-4 C. (c); see also S.C. CODE ANN. REGS. 100-App. B (Principle 5 – Confidentiality: “Psychologists make provisions for maintaining confidentiality in the storage and disposal of records.”).
28 S.C. CODE REGS § 100-4 G. (2).
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Record Keeping and Fees

The psychologist shall itemize fees for all services for which the client or a third-party payer is billed and ensure that the itemized statement is available to the client. This statement shall identify the date on which the service was performed, the nature of the service, the name of the individual providing the service and the name of the individual who is professionally responsible for the service.

HIPPA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient. It also 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. HIPPA permits the release and transfer of PHI records without the release being conditioned on payment or other conditions (such as enrollment in the health plan that employs the psychologist). HIPPA also 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 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.35

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

Retention of Records

South Carolina law calls for “all data entries in the professional records” to be “maintained for a period of not less than five years after the last date of service was rendered;”36 The law also calls for abiding by other legal requirements for record retention, even if longer periods of retention are required for other purposes. HIPPA37 mandates that a covered entity must retain the documentation …for six years from the date of its creation or the date when it last was in effect, whichever is later.

Violations of the specific duty

South Carolina Board may revoke or suspend or restrict the license or permit of the psychologist or reprimand a psychologist when it is established that the psychologist is guilty of misconduct. Misconduct is satisfactory showing to the board that a license or permit holder:38

(1) Has used a false, fraudulent or forged statement or document or has practiced a fraudulent, deceitful, or dishonest act in connection with a license requirement;
(2) has been convicted of a felony or other crime involving moral turpitude…
(6) has caused to be published or circulated directly or indirectly a fraudulent, false, or misleading statement as to the skill or methods of practice of a psychologist;
(8) has violated the principles of ethics as adopted by the board and

35 45 CFR 164.528.
36 S.C. CODE REGS § 100-4 C. (b).
37 45 CFR 164.530 (j)(2).
38  S.C. CODE ANN. § 40-55-150.
published in its regulations;
(9) has engaged in conduct that is deceptive, fraudulent, or harmful to the public;
(10) is guilty of obtaining fees or assisting in obtaining fees under deceptive, false, or fraudulent circumstances;
(11) is guilty of the use of an intentionally false or fraudulent statement in a document connected with the practice of psychology;
...(13) has violated a provision of this chapter regulating the practice of psychology.