

The Duty to Record: Ethical, Legal, and Professional Considerations for South Dakota 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 policies 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

¹ Electronic Health Records: A Primer (retrieved Nov. 29, 2012 at <http://www.apapracticecentral.org/update/2012/11-29/electronic-records.aspx>.

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>.

³ Preparing the Interprofessional Workforce to Address Health Behavior Change. (retrieved Nov. 11, 2012 at http://www.hrsa.gov/advisorycommittees/bhpradvisory/acicbl/Reports/acicbl_tenth_report_final.pdf).

Columbia with reference to several relevant state-by-state surveys retrieved from Lexis and Westlaw.⁴ 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 Dakota 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 Dakota 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.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

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).

⁵ Benjamin, G. A. H., Kent, L., & Sirikantraporn, S. (2009). Duty to protect statutes. In J. L. Werth, E.R. Welfel, & G. A. H. Benjamin (Eds.), *The duty to protect: Ethical, legal, and professional responsibilities of mental health professionals* (pp. 9 – 28). Washington, DC: APA Press. doi:10.1037/11866-002.

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

South Dakota has adopted the APA Ethical Principles of Psychology and Code of Conduct for psychologists and the ASPPB Code of Conduct as standards of practice for South Dakota psychologists.¹⁰

⁶ Please use the most recent version of WORD to access the full capabilities of the EHR templates.

⁷ American Psychological Association. (2002). *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists* (pp.17-24; p. 11). Washington, DC: Authors (<http://www.apa.org/pi/oema/resources/policy/multicultural-guideline.pdf> (last accessed August 1, 2012)).

⁸ *Id.* at p. 45.

⁹ See ICD-10 at <http://apps.who.int/classifications/icd10/browse/2010/en> (last accessed August 1, 2012); The APA Policy and Planning Board recognized how psychology could move forward by turning to a diagnostic system that was based on the concept of functional impairments (APA Policy and Planning Board, (2005). APA 2020: A perfect vision for psychology: 2004 five-year report of the policy and planning board. *American Psychologist*, 60, 512-522, 518. (See, <http://www.apa.org/about/governance/bdcmte/five-year-report.pdf> ; and APA has helped fund the creation of the 10th edition in 2008. See, <http://www.apa.org/about/governance/council/08aug-crminutes.aspx> (last accessed August 1, 2012)).

¹⁰ See S.D. CODIFIED LAWS § 36-27A-28(6)—establishes that psychologists must not violate the Code of Ethics adopted by the Board of Examiners of Psychologists, which appear to include under S.D. CODIFIED LAWS § 36-27A-25, the Ethical Principles of Psychologists and Code of Conduct (American Psychological Association 2002, amended 2010), copies available from American Psychological Association Order Department, 750 First Street, NE, Washington, D.C. 20002-4242 (<http://www.apa.org/ethics/code/principles.pdf> (last accessed Aug. 1, 2012)), and under S.D.

Common Law

Relevant citing reference to South Dakota Administrative Rule 20:60:07:01 (adopting the ASPPB Code of Conduct):

- Psychologist, who examined mother and father as part of court proceeding to modify child custody in response to allegations that father abused child, did not fraudulently conceal any facts in report to court which would extend statute of limitations on wrongful death action mother brought against psychologist after she discovered that father murdered child; mother believed report had some omissions but did not ask whether any other omissions existed, and there was no evidence that psychologist took any affirmative steps to prevent mother from discovering her cause of action. SDCL 21-5-3. Court did, however, recognize a jury question about whether the licensed psychologist violated the above ASPPB code of conduct by possibly not interviewing the child; by not providing a report on the child; by not conducting a more comprehensive evaluation of the parents; by providing detrimental information about the mother and not providing similar information about the father; by omitting relevant and pertinent information about the father; and, by stating that his report contained the information provided by the father.¹¹

38: *Relevant citing reference to South Dakota Codified Laws 19-13-7, 19-13-8, 36-27A-*

Psychologist-patient privilege precluded trial court from ordering defendant psychotherapist to produce list of his patients from previous seven years, for purposes of professional negligence action arising from defendant's romantic relationship with plaintiff's wife; to compel disclosure of psychotherapy patient's identity is to directly harm her privacy interest, which harm is exacerbated by stigma that society often attaches to mental illness.¹²

Contents of the record are mandated by law

The psychologist rendering professional services to an individual client (or a dependent), or services billed to a third party payor, shall maintain professional records that include:¹³

ADMIN. R. 20:60:07:01, the Association of State and Provincial Psychology Boards (ASPPB) Code of Conduct (<http://www.asppb.net/i4a/pages/index.cfm?pageid=3353>) (last accessed Aug. 1, 2012).

¹¹ *Purdy v. Fleming*, 655 N.W. 2d 424 (S.D. 2002).

¹² *Weisbeck v. Hess*, 1994, 524 N.W.2d 363.

¹³ *Id.*

1. the name of the client and other identifying information,
2. the presenting problem(s) or purpose or diagnosis,
3. the fee arrangement,
4. the date and substance of each billed or service-count contractor service,
5. any test results or other evaluative results obtained and any basic test data from which they were derived,
6. notation and results of formal consults with other providers,
7. a copy of all test or other evaluative reports prepared as part of the professional relationship,
8. any releases executed by the client.

The APA Code of Conduct also would be applied with the Health Insurance Portability and Accountability Act (HIPAA)¹⁴ to psychological records:

3.10 Informed Consent¹⁵

(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,

¹⁴ HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart C--SECURITY STANDARDS FOR THE PROTECTION OF ELECTRONIC PROTECTED HEALTH INFORMATION](#) ; [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

¹⁵ APA CODE OF CONDUCT, *supra* note 10.

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 practices¹⁶ 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 South Dakota law would require disclosure about the following exception to protecting patient confidentiality:

- Mandatory duty to report under S.D. CODIFIED LAWS § 26-8A-3. Child Abuse or Neglect Reporting Requirements;

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 Privacy¹⁷

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

South Dakota law is very protective of psychologist-patient confidentiality:¹⁸

The confidential relations and communications between a licensed psychologist and a person consulting him in his professional capacity are confidential. Nothing in this chapter may be construed as to require those privileged communications to be disclosed; nor may a psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

Maintenance and Security of Records

¹⁶ 45 CFR 164.502 (a)(1)(ii) & 45 CFR 164.506 (c); HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

¹⁷ APA CODE OF CONDUCT, *supra* note 10.

¹⁸ S.D. CODIFIED LAWS § 36-27A-38.

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,¹⁹ “[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 Fees²⁰

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](#).)

Nevertheless, the ASPPB CODE OF CONDUCT permits the following disclosures without the patient’s informed consent:²¹

2. Disclosure without informed written consent. The psychologist may disclose confidential information without the informed written consent of the client when the psychologist judges that disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on the client or another person. In such case, the psychologist shall limit disclosure of the otherwise confidential information to only those persons and only that content which would be consistent with the standards of the profession in addressing such problems. When the client is an organization, disclosure shall be made only after the psychologist has made a reasonable and unsuccessful attempt to have the problems corrected within the organization.

...7. Release of confidential information. The psychologist may release

¹⁹ APA CODE OF CONDUCT, *supra* note 10.

²⁰ *Id.*

²¹ ASPPB CODE OF CONDUCT: III. RULES OF CONDUCT, E. Protecting Confidentiality of Clients, *supra* note 10.

confidential information upon court order, as defined in Section II of this Code, or to conform with state, federal or provincial law, rule, or regulation.

8. Reporting of ...vulnerable adults. The psychologist shall be familiar with any relevant law concerning the reporting of abuse of ...vulnerable adults, and shall comply with such laws.

9. Discussion of client information among professionals. When rendering professional services as part of a team or when interacting with other appropriate professionals concerning the welfare of the client, the psychologist may share confidential information about the client provided the psychologist takes reasonable steps to assure that all persons receiving the information are informed about the confidential nature of the information and abide by the rules of confidentiality.

HIPAA permits sharing protected health information (PHI) with other health care professionals who are engaged in the evaluation and treatment of the same patient.²² HIPAA 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.²³ In addition, patients have a right to amend any part of the record;²⁴ 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.²⁵

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional...²⁶

(a) Psychologists maintain confidentiality in creating, storing, accessing,

²² 45 CFR 164.520; HIPAA, U.S. Government Printing Office Electronic Code Of Federal Regulations website at: [Subpart E--PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION](#) (last accessed Aug. 1, 2012).

²³ 45 CFR 164.524.

²⁴ 45 CFR 164.526 (a).

²⁵ 45 CFR 164.528.

²⁶ APA CODE OF ETHICS, *supra* note 10.

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.²⁷ Concrete security standards are established for all electronic healthcare information (45 CFR 160).

6.03 Withholding Records for Nonpayment²⁸

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).²⁹

The South Dakota law also establishes a number of standards regarding maintenance and security of records within public programs:

- Chapter 27A-12. Care, Treatment, and Rights of Patients with Mental Illness
Individual records required--Contents--Confidentiality³⁰

²⁷ 45 CFR 164.508.

²⁸ APA CODE OF ETHICS, *supra* note 10.

²⁹ 45 CFR 164.508 (b)(4).

³⁰ S.D. CODIFIED LAWS § 27A-12-25.

- Chapter 36-2. Practitioners of Healing Arts in General
Medical records released to patient or designee on request--Expenses paid by patient--Violation as misdemeanor³¹
- Department of Health (Articles 44:02 to 44:04)Article 44:04 Medical Facilities
44:04:09 Medical Record Services
Record services for hospitals and nursing facilities³²
- All hospitals and nursing facilities must comply with §§ 44:04:09:02 to 44:04:09:05, inclusive.
Medical record department³³
Medical record department staff³⁴
Written policies and confidentiality of records³⁵
Record content³⁶
- Title 27A. Mentally Ill Persons
Chapter 27A-12. Care, Treatment, and Rights of Patients with Mental Illness
Confidentiality of information acquired in course of providing mental health services³⁷

Retention of Records

Psychologists must maintain records for at least 5 years from the last date of

³¹ S.D. CODIFIED LAWS § 36-2-16. *Note:* Licensed psychologists would appear to fall under the general definition of a licensee of the healing arts. *See* S.D. CODIFIED LAWS § 36-2-1(3) (“Healing art,’ ‘healing,’ ‘art of healing,’ ‘practicing healing,’ ‘practicing of healing,’ any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, unhealthy or abnormal physical or mental condition[.]”). However, the code contains exemptions that may apply to most licensed psychologists. *See* S.D. CODIFIED LAWS 36-2-4 (“Nothing contained in this chapter shall be construed to apply to any legally qualified person when engaged exclusively in the practice of his profession, as defined by law.”); S.D. CODIFIED LAWS 36-2-6 (“Nothing contained in this chapter shall be construed to apply to any qualified lay psychoanalyst who is practicing psychoanalysis in cooperation with a physician or doctor of medicine.”); 36-2-7 (“Nothing contained in this chapter shall be construed to interfere in any way with a qualified psychologist in the discharge of his professional duties while employed by any state or governmental agency, or any recognized college or university.”).

³² S.D. CODIFIED LAWS 44:04:09:01.

³³ S.D. ADMIN. R. 44:04:09:02.

³⁴ S.D. ADMIN. R. 44:04:09:03.

³⁵ S.D. ADMIN. R. 44:04:09:04.

³⁶ S.D. ADMIN. R. 44:04:09:05.

³⁷ S.D. CODIFIED LAWS § 27A-12-26.

service.³⁸

Violations of the specific duty

Under the statute governing licensed professionals generally, “unprofessional conduct” for which South Dakota psychologists may be sanctioned includes:

Recommendations of civil action against violations³⁹

The Board of Examiners of Psychologists shall recommend to the attorney general the bringing of civil actions to seek injunctions and other relief against violations of this chapter.

Revocation or suspension of license—Grounds⁴⁰

The board may suspend or revoke the license of a psychologist or require remediation or impose other sanctions on a psychologist, may deny licensure to any applicant, or require remediation prior to the issuance of a license, upon the following grounds:

(1) The licensee is guilty of fraud or deceit in the licensee's admission to practice or in the practice of psychology, or an applicant for licensure is guilty of fraud or deceit in the applicant's attempted admission to practice psychology;

(2) The licensee or applicant for licensure has been convicted of a felony or a serious crime during the past five years. The term, felony, means an offense which, if committed in South Dakota, would be a felony under South Dakota law. The term, serious crime, means a felony or a lesser crime involving moral turpitude as defined in subdivision 22-1-2(25);

(3) The licensee or applicant for licensure is or has been engaged in the practice of psychology under a false or assumed name and has not registered that name pursuant to chapter 37-11, or is impersonating another practitioner of a like or different name;

...(6) The licensee or applicant for licensure has been found in violation of the code of ethics adopted by the board;

(7) The licensee has obtained or attempted to obtain a license, certificate or renewal thereof by bribery or fraudulent representation;

³⁸ ASPPB CODE OF CONDUCT: III. RULES OF CONDUCT, 7.B. MAINTENANCE AND RETENTION OF RECORDS, *supra* note 10.

³⁹ S.D. CODIFIED LAWS § 36-27A-27.

⁴⁰ S.D. CODIFIED LAWS § 36-27A-28.

(8) The licensee knowingly made a false statement in connection with any application required by this chapter;

...(10) The licensee knowingly made a false statement on any form promulgated pursuant to this chapter; or

(11) The licensee has violated any provision of this chapter or the rules promulgated by the board.