

# Legal Brief

## Retention, Transfer, and Disposition of Medical Records

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of February 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

### Summary

*Under state law, medical records must be maintained for at least ten (10) years. In the case of minors, records must be kept until the child is twenty (20) years old. The HIPAA mandated privacy rules provide that patients are entitled to copies of their records for as long as they are maintained. After ten (10) years, records may be destroyed, but an index of all destroyed records must be maintained. Notice must be provided to active patients prior to records destruction. Records may only be transferred to certain entities named in state law. State law also specifically addresses the disposition of medical records in case of facility closure.*

### Discussion

#### Retention of Medical Records

South Dakota law requires physicians and clinics to retain medical records for a minimum of ten (10) years after the last date of patient care. ARSD 44:04:09:08. Records relating to minors must be retained for a period of ten (10) years or until the minor reaches the age of twenty (20), whichever is longer. As a result, in some cases records will be kept much longer than ten (10) years. Health care facilities must provide for safe storage of, and easy access to, medical records. Further, the records must be preserved as original records or in some other readily retrievable and reproducible form. Finally, the records must be protected against access by unauthorized individuals. ARSD 44:04:09:09.

Records must be made available to a requesting patient, or the patient's designee, at the patient's expense, but the patient may only be charged the reasonable cost of retrieval and reproduction of records. SDCL §36-2-16. The physician may require prepayment of the cost of retrieval and reproduction. Failing or refusing to provide records when requested, or charging an unreasonable fee, is a Class 2 misdemeanor, punishable by thirty (30) days in jail, a \$200 fine, or both. Practitioners have statutory immunity from any damages that result from a good faith effort to comply with a records request. SDCL §36-2-17.

Although the Health Insurance Portability and Accountability Act of 1996 (herein "HIPPA") mandated privacy rules have no formal requirements for the length of record retention, individuals have the right under the rules to review and obtain a copy of available "protected health information." "Protected health information" includes records that are maintained by or for a provider that are used, in whole or part, to make decisions about individuals; billing records about individuals or health plan enrollment, payment, or claims adjudication; and case or medical management record systems. 45 C.F.R. § 164.501. However, the following records are exempt from the general rule of patient accessibility: psychotherapy notes,

information compiled for legal proceedings, laboratory results to which the Clinical Laboratory Improvement Act (CLIA) prohibits access, or information held by certain research laboratories. (See “Patient’s Right of Access” Legal Brief for additional detail.)

Practitioners should also be aware of the HIPPA “disclosure requirements.” Subject to few exceptions, the HIPPA privacy rules require practitioners to provide an accounting of disclosures of protected health information made within the six (6) years preceding the date of the last disclosure. 45 C.F.R. § 164.528.

### **Transfer of Medical Records upon Patient Termination**

The medical records of an active patient may only be transferred to another physician, clinic, or other health care facility, a corporation organized for the purpose of operating a health care clinic, or a patient or her representative who has been properly designated by or in accordance with state or federal law. SDCL § 36-4-37. Thirty (30) days notice must be given by mail to the patient or her properly designated representative at her last known address prior to the transfer of an active patient’s records. The notice provided to the patient must state the details of the proposed transfer of records and give a deadline prior to which the records may be claimed. If active patient records cannot be transferred as the rule requires, they must either be retained or destroyed as permitted by applicable law.

### **Destruction of Medical Records – Inactive Patients**

After the minimum ten (10) year retention period, a medical facility may, at its discretion, destroy medical or care records of a patient that has become inactive or the whereabouts of whom are no longer known. SDCL § 36-4-38. Prior to destruction of the inactive patient records, the facility must prepare and retain a patient or resident index or abstract. ARSD 44:04:09:10. Such index or abstract must include the name of the individual whose records were destroyed, medical record number, date of birth, a summary of visit dates, the attending or admitting physician, and diagnosis or diagnosis code.

### **Destruction of Medical Records – Active Patients**

After the required retention period, active patient records may also be destroyed. However, thirty (30) days notice must be given, by mail, to the patient or the patient’s properly designated representative at the patient’s or designee’s last known address prior to destruction of any such records. The notice provided to the patient must give a deadline prior to which the records may be claimed. SDCL § 36-4-37. The South Dakota State Medical Association recommends providing patients with the thirty (30) day notice required by law, but then setting the records retrieval deadline for sixty (60) days after the date of the notice.

Prior to destruction of the active patient records, the facility must prepare and retain a patient or resident index or abstract. ARSD 44:04:09:10. Such index or abstract must include the name of the individual whose records were destroyed, medical record number, date of birth, a summary of visit dates, the attending or admitting physician, and diagnosis or diagnosis code.

### **Disposition of Medical Records upon Facility Closure, Physician Retirement, or Change of Ownership**

When a health care facility ceases operation, the facility may transfer or destroy medical records pursuant to the aforementioned state laws. In addition, ARSD 44:04:09:11 sets forth requirements specific to facility closure. The rule allows the closing health care facility to make arrangements for the records to be transferred to another facility of the same licensure classification, transferred to another provider at the patient’s request, released to the patient, or stored with a third party vendor who undertakes such a storage activity. However, the rule requires that, at least thirty (30) days before closure, the health care facility provides written notification to the South Dakota Department of Health regarding its plans for the safe preservation of medical or care records in its possession. Additionally, the facility must publish the records storage location and disposition arrangements in a local newspaper. If facility ownership simply changes and the facility remains open, the new owner must maintain all records as the prior facility owner was required to do.

Specifically in the case of retiring physicians, the South Dakota State Medical Association recommends the provision of thirty (30) days notice as required for the transfer of records in addition to the thirty (30) day notice period for closure or change of ownership, for a total of sixty (60) days notice.

### Conclusion

*Medical records must be maintained for at least ten (10) years, and, in addition, a minor's records must be kept until the child is twenty (20) years old. After the required retention period, records may be destroyed. However, prior to destruction, care should be taken to notify active patients according to state law. In the case of facility closure, medical records must be properly maintained, but may be transferred to a different facility to do so.*



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