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

2 Christina Luini, JD, 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.
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.

New Jersey 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**

New Jersey 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 New Jersey, and recommend that psychologists use this template, too.

---

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).


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.
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 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 State Board of Psychological Examiners has adopted its own rules of ethical conduct for New Jersey psychologists, which set forth several obligations related to record keeping. In addition, New Jersey psychologists are subject to a number of provisions that are part of the Health Insurance Portability and

---

6 Please use the most recent version of WORD to access the full capabilities of the EHR templates.
8 *Id.* at p. 45.
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

Relevant Annotations: N.J. STAT. ANN. § 45:14B-28 (Confidential relations and communications)

- New Jersey law protecting disclosure of mental health records was more stringent than the provisions in the Health Insurance Portability and Accountability Act (HIPAA) regarding such disclosure, and thus, New Jersey law controlled such disclosure; under New Jersey law a mental health care provider had a higher duty similar to the attorney-client privilege which offered a more comprehensive privacy protection of an individual's innermost thoughts and feelings.\(^{12}\)

- Wife did not establish prima facie case for piercing psychologist-patient privilege so to allow disclosure of husband's therapy records, including his alleged admission to psychologist that he had beaten wife, for purposes of wife's marital tort claim, since evidence for proving wife's allegations of spousal abuse could be secured from less intrusive source, such as by wife's medical records and testimony, and testimony of other fact witnesses and of psychologists or psychiatrists retained or appointed to conduct appropriate investigations in case. Piercing psychologist-patient privilege, based on claim that party put records “in issue” by pleading extreme cruelty as ground for divorce, should be permitted only very rarely in order to enable party to defend that cause of action; due to subjective and liberal standard for proving extreme cruelty, plaintiff is usually not required to allege facts requiring testing by reference to information likely to be contained in psychologist's treatment records, and, when both parties seek divorce, there will be no genuine need for such evidence to defend other party's claims.\(^{13}\)


---


• The Supreme Court of New Jersey has interpreted the duty to warn/protect statute twice. In Runyon v. Smith, the Court held that the statute did not shield the clinician from a suit for breach of confidentiality when the client had never made serious threats, and when the psychologist testified 6 months after her last session with the client. Even if the threats had been serious, after 6 months they were no longer “imminent” as required by the statute.14

• In Marshall v. Klebanov (2006), a case in which a seriously depressed client committed suicide after the clinician failed to provide adequate monitoring and treatment. The clinician had argued that because the patient made no imminent threats of suicide, the statute shielded him from any malpractice claim. The Court clarified that the statute does not “immunize a mental health practitioner…when the practitioner abandons a seriously depressed patient and fails to treat the patient in accordance with accepted standards of care in the field.”15

• Department of Corrections regulation imposing duty on mental health practitioners to disclose certain inmate communications to prison officials in situations which present a clear and imminent danger to the inmate or others did not violate confidentiality rules governing inmate-therapist communications or interfere with inmates' right to medical treatment in violation of the Eighth Amendment.16 An ex-husband's statement while incarcerated to a psychologist that he was going to kill his ex-wife and that it would be worth it was properly admitted despite invocation of psychologist-patient privilege. The psychologist had reported the threat to officials at the county jail because she believed the ex-husband posed a danger to his ex-wife. The psychologist-patient privilege did not protect disclosure of confidential communications when disclosure was necessary to avoid imminent and clear danger to an identifiable third party. N.J.S.A. 45:14B-28; N.J.R.E. 505; N.J.A.C. 10A:16-4.4.17

• Plaintiffs argue that Marshall “involved virtually the same central legal issue presented here,” and is dispositive here. In Marshall, plaintiff alleged that the defendant psychiatrist refused to see the decedent because she did not have a check for payment. 188 N.J. at 30-31, 902 A.2d 873. The psychiatrist claimed

15 902 A.2d 873, 875 (N.J. 2006).
that, even though the decedent did not have payment or clearance from her insurance company, he would have seen her but she declined to wait. Id. at 31, 902 A.2d 873. The Supreme Court affirmed the grant of summary judgment applying statutory immunity to the claim that the defendant had a duty to warn that the decedent was in imminent danger of committing suicide, because both the decedent's husband and mother testified that nothing in the weeks preceding the decedent's suicide indicated that she was in imminent danger. Id. at 40, 902 A.2d 873. Nevertheless, the Court held “that the statutory immunity provisions of N.J.S.A. 2A:62A-16 do not immunize a mental health practitioner from potential liability if the practitioner abandons a seriously depressed patient and fails to treat the patient in accordance with accepted standards of care in the field.” Id. at 38, 902 A.2d 873. The Court remanded the matter for further proceedings on the disputed facts as to whether the psychiatrist “abandoned” the decedent two days prior to her suicide. Id. at 39, 902 A.2d 873. This case is substantially different from Marshall. Here, there is no evidence to indicate that any of the defendants abandoned Garry. The evidence is undisputed that Garry did not see any of the mental health practitioners for several months before he shot his wife and killed himself on October 12, 2002, and there is no evidence whatsoever that they abandoned him. Indeed, on August 29, 2002-two months before the suicide—Dr. Yosry wrote to Garry, urging him to return to treatment. Dr. Grill, Garry's internist, saw Garry one month before the suicide and noted that Garry's medication had been changed. Nothing in the record indicates that Dr. Grill abandoned Garry or was otherwise negligent in his treatment.18


- Count V alleges that respondent's failure to maintain accurate and contemporaneous records violated the requirements of N.J.A.C. 13:42-8.1. Kleinman's recordkeeping practice violated N.J.A.C. 13:42-8.1(a), because she failed to maintain a record accurately reflecting contact with S.R. Video recordings demonstrate that Kleinman's records provided an inaccurate depiction of her contact with S.R. Kleinman's recordkeeping similarly violated N.J.A.C. 13:42-8.1(c), because those records failed to include “material pertinent to the nature and extent of the professional interaction,” such as “7. [f]indings on appropriate examination; ... 11. [c]ontemporaneous and dated

---


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.
progress or session notes including specific components of treatment, evaluation or consultation; ... [and] 15. [t]he client identity on each page”; N.J.A.C. 13:42-8.1(d), because the records lacked any reports from other professionals such as S.R.'s pediatrician or DYFS; and N.J.A.C. 13:42-8.1(b), because not all records were made contemporaneously. Respondent asserts in her brief that because some sessions “contain both a video and audio component, notes could not better capture what transpired during these sessions than the actual videotapes.” (Respondent's Post-Hearing Submission dated July 15, 2011, at 26.) However, that argument is not persuasive, because the rule provides that a psychologist must “make entries in the client record contemporaneously with the services provided[, but] may dictate an entry for later transcription, provided the transcription is dated and identified as ‘preliminary’ until the licensee reviews the transcription and finalizes the entry in the client record.” N.J.A.C. 13:42-8.1(b). Although the rule does not discuss video recordings, such material is analogous to dictations and transcriptions, and the prohibition on dictations and transcriptions in the client record suggests that the record must be in written form. None of Kleinman's notes for which a corresponding video was recorded indicated that they were preliminary, and respondent was therefore required to “make entries into the client record” at the same time the services were provided. As such, at least Kleinman's entry on November 5, 2003, was not made contemporaneously with the services provided, and the existence of the video recording does not cure that defect.19

- Petitioners and their experts point out that Mr. Vitaletti shredded his notes and thus they cannot trace the course of therapy he provided. The absence of notes is a cause for concern. Mr. Vitaletti and Dr. Goralsky testified that it was Calais policy to destroy clinical notes at the end of each year either because of space limitations or privacy issues. Yet, maintaining accurate and ongoing treatment notes is basic to both of their professions. See N.J.A.C. 13:44G-12.1 regarding social workers and N.J.A.C. 13:42-8.1 governing psychologists. If indeed this is the policy at Calais then it is a matter in need of structural reform. For our purposes, however, this failure does not undo the results obtained from April

---


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.
• Plaintiff brings this suit against several defendants, including Dr. Allen, claiming that Dr. Allen and three other non-professional defendants were negligent in failing to report child abuse under a New Jersey statute requiring any person, with reasonable cause to believe a child is being abused, to report it immediately to Division of Youth and Family Services. N.J.S.A. 9:6–8.10. According to Plaintiff, Defendant is a licensed psychologist who treated Plaintiff when Plaintiff was a youth. Third Amended Complaint. Plaintiff alleges that during that time Dr. Allen became aware that George Baldwin Lewis, whose estate is a named defendant in this case, had sexually abused Plaintiff, but Dr. Allen allegedly failed to report the abuse to a state or local authority. …As noted above, in determining whether the Affidavit of Merit Statute applies to a claim, the New Jersey Supreme Court has looked to whether “the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession.” Couri, 173 N.J. at 340, 801 A.2d 1134. The factual allegations underlying Plaintiff's claim against Dr. Allen do not require a showing that Dr. Allen deviated from the professional standard of care for licensed psychologists. Under the New Jersey Reporting Statute, professional persons, including psychologists, are not held to a higher reporting standard in reporting child abuse. State v. Hill at 356, 556 A.2d 1325. The statute applies the same reporting standards to all persons. N.J.S.A. 9:6–8.10. Thus, in order to succeed on his claim, Plaintiff does not need to prove a deviation from the professional standard of care of a licensed psychologist. Therefore, an affidavit of merit is not required.21

Annotations and relevant citing reference re: psychologist to N.J. STAT. ANN. § 9:6-8.10 (re: Reports of child abuse)

• Communications and statements made by court-appointed psychologist to State Division of Youth and Family Services (DYFS), regarding psychologist's belief that child involved in custody proceedings had been sexually abused by father, could not be source of liability for psychologist; statements were made pursuant to statute requiring the reporting of suspected abuse of children, and

---

there was no evidence that psychologist did anything with respect to reporting to DYFS beyond that which she justifiably believed was required of her.\textsuperscript{22}

- General provisions of psychologist-patient privilege must yield to statute requiring persons to report evidence of child abuse to Division of Youth and Family Services (DYFS); statute requires only report to DYFS in order to protect the child in danger, and otherwise, privilege remains intact.\textsuperscript{23}

- Statute requiring any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse to report the same immediately to the Division of Child Protection and Permanency requires the reporting of injuries resulting from conduct that is reckless, or grossly or wantonly negligent, but not conduct that is merely negligent. Genuine issue of material fact as to whether condition of child, who was admitted to emergency room when she was only a few months past her second birthday, having consumed sufficient alcohol allegedly from drinking cologne to cause vomiting and to impair her ability to walk, was result of “reckless” or “grossly or wantonly negligent” conduct or inaction on part of her parent or guardian, and whether doctor breached standard of care by failing to report matter to Division of Youth and Family Services (DYFS) for further investigation, precluded summary judgment in medical malpractice action. Triggering of the obligation to report under statute requiring any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse to report the same immediately to the Division of Child Protection and Permanency, especially in the context of civil litigation involving professional malpractice, does not require the potential reporter to possess the quantum of proof necessary for an administrative or judicial finding of abuse or neglect; all that is required by statute is “reasonable cause to believe.”\textsuperscript{24}

- Release, to defense counsel seeking discovery, of report of psychological examination of child witness to sexual assault by juvenile, which had been furnished to prosecutor by Division of Youth and Family Services (DYFS), was not authorized under statute providing that DYFS “upon written request, [is to] release the records and reports...to [a] police or other law enforcement agency investigating a report of child abuse or neglect”; statute permitted DYFS to


release such reports to authorized recipients such as county prosecutor, but further release to third parties could not occur unless court found, after in camera review of documents, that the information was necessary to determine an issue before it.25

Contents of the record that are mandated by law

The Health Insurance Portability and Accountability Act (HIPAA)26 requires a notice of privacy practices27 that delineates the psychologist’s scope of and limitations of confidentiality. New Jersey’s law has set a very high bar for maintaining psychologist-patient confidences.28 In addition, under the statutes regulating psychological practice in New Jersey, disclosures must be provided in advance of psychological services, and the following must be displayed:29

Every licensee shall prominently display in every place of conducting independent practice his or her current renewal certificate, or current duplicate renewal certificate, and the following notice: (Name of Individual) is licensed by the Board of Psychological Examiners, an agency of the Division of Consumer Affairs. Any member of the consuming public may notify the Board of any complaint relative to the practice conducted under this license at the Division of Consumer Affairs, Board of Psychological Examiners, Post Office Box 45017, 124 Halsey Street, Newark, New Jersey 07101.

28 N.J. STAT. ANN. § 45:14B-28: “The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person…”
29 N.J. ADMIN. CODE § 13:42-10.1

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.
Disclosure by health care provider of clear and imminent danger

A licensee shall preserve the confidentiality of information obtained from a client in the course of the licensee's practice or investigation. However, the licensee shall reveal the information to appropriate professional workers, public authorities and the threatened individual(s) or their representatives only, if in the licensee's judgment, exercised in accordance with the standards of the profession, any one of the following circumstances occur:

1) There is a clear and imminent danger to the individual or the public;
2) There is probable cause to believe that an identifiable potential victim of a client is likely to be in danger; or
3) Release of such information is otherwise mandated by law, such as, but not limited to, N.J.S.A. 2A:62A-17.

Mandatory Duty to Report Child Abuse, Abandonment or Neglect

Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise. Such reports, where possible, shall contain the names and addresses of the child and his parent, guardian, or other person having custody and control of the child and, if known, the child's age, the nature and possible extent of the child's injuries, abuse or maltreatment, including any evidence of previous injuries, abuse or maltreatment, and any other information that the person believes may be helpful with respect to the child abuse and the identity of the perpetrator.

---

30 N.J. ADMIN. CODE § 13:42-8.5(a); See, N.J. Stat. Ann. § 2A:62A-16 “...c. A licensed practitioner of psychology ...shall discharge the duty to warn and protect ...by doing any one or more of the following;(1) Arranging for the patient to be admitted voluntarily to a psychiatric unit of a general hospital, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c. 116 (C.30:4-27.1 et seq.); (2) Initiating procedures for involuntary commitment to treatment of the patient to an outpatient treatment provider, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c. 116 (C.30:4-27.1 et seq.); (3) Advising a local law enforcement authority of the patient's threat and the identity of the intended victim; (4) Warning the intended victim of the threat, or, in the case of an intended victim who is under the age of 18, warning the parent or guardian of the intended victim; or (5) If the patient is under the age of 18 and threatens to commit suicide or bodily injury upon himself, warning the parent or guardian of the patient.”

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.

**Notification to division of impairment of health care professional.**  
A health care professional shall promptly notify the division if that health care professional is in possession of information which reasonably indicates that another health care professional has demonstrated an impairment, gross incompetence or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare. A health care professional who fails to so notify the division is subject to disciplinary action and civil penalties pursuant to sections 8, 9 and 12 of P.L.1978, c.73 (C.45:1-21, 45:1-22 and 45:1-25).

The regulations promulgated by New Jersey’s Examining Board of Psychology set forth the following requirements for the content of records maintained by licensed psychologists:

- a) A licensee shall prepare and maintain separately for each client a permanent client record which accurately reflects the client contact with the licensee whether in an office, hospital or other treatment, evaluation or consultation setting.
- b) A licensee shall make entries in the client record contemporaneously with the services provided. A licensee may dictate an entry for later transcription, provided the transcription is dated and identified as "preliminary" until the licensee reviews the transcription and finalizes the entry in the client record.
- c) The licensee shall include in the client record material pertinent to the nature and extent of the professional interaction, for example:
  1) The location of treatment, evaluation or consultation;
  2) The client name, address and telephone number;
  3) The client complaint on intake;
  4) Medical history recognized as of potential significance;
  5) Past and current medications;
  6) Significant social history;
  7) Findings on appropriate examination;
  8) Raw data and interpretation of tests administered;

---

9) Current functional impairments and rating levels thereof;
10) A diagnostic impression;
11) Contemporaneous and dated progress or session notes including specific components of treatment, evaluation or consultation;
12) Dates of all treatment, evaluation or consultation sessions;
13) An evaluation of progress (if applicable);
14) A prognosis;
15) The client identity on each page;
16) Fees charged and paid;\(^{34}\)
17) The identity of each provider of treatment, evaluation or consultation (and supervisor, if any); and
18) If services are rendered by a permit holder, the written disclosure form signed by the client as required by N.J.A.C. 13:42-4.4(f).

\(^{d)}\) The client record shall contain information regarding referrals to other professionals together with reports and records provided by other professionals and integrated into the client’s treatment, evaluation or consultation report.

**Responsibilities of supervisor**\(^{35}\)

…(f) Prior to a permit holder’s commencement of client treatment, the supervisor shall obtain a written disclosure form, which shall be signed by the client and retained as part of the client record, acknowledging that the client has been informed that:

1. Services are to be rendered by a permit holder who is not a licensed psychologist; and
2. Third party payors may not necessarily reimburse services rendered by a person not licensed by this Board, notwithstanding supervision by a licensed psychologist.

**Termination of services**\(^{36}\)

a) A licensee shall not abandon or neglect a client in need of professional care

---

\(^{34}\) See, N.J. ADMIN. CODE § 13:42-10.10 Financial Arrangements With Clients And Others.

\(^{35}\) N.J. ADMIN. CODE § 13:42-4.4; also see N.J. ADMIN. CODE § 13:42-4.5 (Supervision of individuals exempt from licensure) “The supervisor shall ensure that the exempt supervisee complies with all Board regulatory requirements (including preparation of client records) and with accepted standards of professional and ethical practice of the exempt agency or exempt health care professional.”

without making reasonable arrangements for the continuation of such care or offering to help the client find alternative sources of assistance.

b) A licensee shall not abandon or neglect professional employment by a group practice, hospital clinic or other health care facility without reasonable notice or under circumstances which would be expected to seriously impair the delivery of professional care to clients.

...e) A licensee shall terminate a clinical or consulting relationship when it is reasonably clear that the client is not benefiting from it. In such instances, the licensee shall offer to help the client find alternative sources of assistance...

**Maintenance and security of records**

A licensee shall establish policies and procedures with respect to licensed or exempt personnel who are employed by or under the supervision of the licensee. The policies and procedures shall include, but need not be limited, to the following:

1) Designation of a licensed practitioner responsible for:
   ...ii) The professional propriety of billing and of advertising or other representations;

2) Identification of the nature of the psychological services which shall be offered at the practice location;

3) Policies for maintenance, registration and inspection of professional equipment;

4) Standards for recordkeeping as to client records, billing records, and such other records as may be required by law or rule;

5) Policies for security, including confidentiality of client records; and

6) Procedures for periodic audit of client records and of professional services

---

37 For psychologists working in public practices see N.J. ADMIN. CODE §§ 10:37-6.73 – 10:37-6.79 (record-keeping obligations for patients receiving services under the Community Mental Health Services Act).

38 N.J. ADMIN. CODE § 13:42-7.7

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.
to assure quality professional care on the premises.

**Use of personal or other computer to prepare client record**\(^{39}\)

(a) A licensee who prepares a client record maintained solely on a personal or other computer shall use a write-protected program which:

1. Contains an internal permanently activated date and time recordation for all entries;
2. Automatically prepares a back-up copy of the file; and
3. Is designed in such manner that, after the licensee “signs” by means of a confidential personal code (“CPC”), the entry cannot be changed in any manner.

(b) Notwithstanding the permanent status of a prior entry, the licensee may make a new entry at any time and may indicate correction to a prior entry.

(c) The licensee shall include in the client record at least two forms of identification; for example, name and record number or any other specific identifying information.

(d) The licensee shall finalize or “sign” the entry by means of a CPC. Where more than one individual is authorized to make entries into the computer file of any client record, the licensee responsible for the practice shall assure that each such person obtains a CPC and uses the program in the same manner.

**Security safeguards**\(^{40}\)

…f) When records are to be maintained as confidential, the licensee shall establish and maintain a procedure to protect such records from access by unauthorized persons.

**Patient authorization of disclosure**\(^{41}\)

a) For purposes of this section, "authorized representative" means, but is not necessarily limited to, a person designated by the client or a court to exercise rights under this section. An authorized representative may be client’s attorney or an agent of a third party payor with whom the client has a contract which

---


\(^{41}\) N.J. ADMIN. CODE § 13:42-8.3.
provides that the third party payor be given access to records to assess a claim for monetary damages or reimbursement.

b) A licensee may require the record request to be in writing. No later than 30 days from receipt of a request from a client or duly authorized representative, the licensee shall provide a copy of the client record and/or billing records, including reports relating to the client. Limitations on this requirement are set forth in (e) below and N.J.A.C. 13:42-8.6(b) and in N.J.A.C. 13:42-11.

c) The licensee may elect to provide a summary of the record, as long as the summary adequately reflects the client's history and treatment, unless otherwise required by law.

d) A licensee may charge a reasonable fee for the preparation of a summary and reproduction of records, which shall be no greater than an amount reasonably calculated to recoup the costs of transcription or copying.

e) A licensee may withhold information contained in the client record from a client or the client's guardian if, in the reasonable exercise of his or her professional judgment, the licensee believes release of such information would adversely affect the client's health or welfare.

1) That record or the summary, with an accompanying explanation of the reasons for the original refusal, shall nevertheless be provided upon request of and directly to:
   i) The client's attorney;
   ii) Another licensed health care professional; or
   iii) The client's health insurance carrier (except as maybe limited by N.J.A.C. 13:42-11).

f) Records maintained as confidential pursuant to N.J.A.C. 13:42-8.1(c) shall be released:

1) If requested or subpoenaed by the Board or the Office of the Attorney General in the course of any Board investigation;
2) Pursuant to an order of a court of competent jurisdiction;
3) Except as limited by N.J.A.C. 13:42-8.4, upon a waiver of the client or an authorized representative to release the client record to any person or entity, including to the Violent Crimes Compensation Board; or
4) In order to contribute appropriate client information to the client record maintained by a hospital, nursing home or similar licensed institution which is providing or has been asked to provide treatment to the client.

g) The licensee's obligation hereunder to release information shall include the obligation to complete forms or reports required for third party reimbursement of client treatment expenses. The licensee may charge reasonable fees for completion of reports other than health insurance claim forms, for which no fee may be charged pursuant to N.J.S.A. 45:1-12.

h) When a request is made for release of already completed reports to enable the client to receive ongoing care by another practitioner, the licensee shall not require prior payment for the professional services to which such reports relate as a condition for making such reports available. A licensee may, however, require advance payment for a report prepared for services as an expert witness.

Access by a managed health care plan to information in client record
(a) With regard to a client whose treatment cost is covered by a wholly insured health insurance plan, or a multiple employer welfare arrangement (MEWA), including a managed health care plan, a licensee shall make available, on request of the client or duly authorized representative with the client's consent, all information required, but only pursuant to N.J.A.C. 13:42-11.4.

(b) A psychologist whose client has explicitly waived the psychologist-client privilege established by N.J.S.A. 45:14B-28 may release requested information deemed professionally appropriate, not limited by the constraints of the Peer Review Law, N.J.S.A. 45:14B-31 et seq., to a third-party payor whose benefit plan is qualified under the Federal Employee Retirement Income Security Act (ERISA); that is: 1. The plan of a self-insured employer or an entity providing administrative services to that employer for the purposes of determining entitlement to benefits; or 2. An employer's “stop-loss” plan (i.e., a plan in which an employer self-insures up to a certain amount and then purchases excess insurance beyond that amount from an insurance company).

…(l) A supervisor shall be responsible for ensuring that a permit holder


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.
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.

Disclosures to third-party payors

A patient who is receiving or has received treatment from a licensed, practicing psychologist may be requested to authorize the psychologist to disclose certain confidential information to a third-party payor for the purpose of obtaining benefits from the third-party payor for psychological services, if the disclosure is pursuant to a valid authorization as described in section 6 of this act and the information is limited to:

a. Administrative information;
b. Diagnostic information;
c. The status of the patient (voluntary or involuntary; inpatient or outpatient);
d. The reason for continuing psychological services, limited to an assessment of the patient's current level of functioning and level of distress (both described by the terms mild, moderate, severe or extreme);
e. A prognosis, limited to the estimated minimal time during which treatment might continue.

Disclosure without patient's authorization

...c) A licensee may discuss the information obtained in clinical or consulting relationships, or in evaluating data concerning children, students, employees and others, only for professional purposes and only with persons clearly connected with the case.

d) A licensee may reveal, in writing, lectures or other public forums, personal information obtained during the course of professional work only as follows:
   1) With prior consent of the clients or persons involved; or
   2) Where the identity of the client or person involved is adequately disguised.

e) A licensee may share confidential communications with other parties interested therein, in a non-public forum, only where the original source and other persons involved have given their express permission to do so.

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.

---

...g) A licensee may release confidential documents, testimony or other information contained in the client record only in accordance with the provisions of N.J.A.C. 13:42-8.3 and this section.

Consent by others

a) Unless otherwise ordered by a court, if the client is a minor, a parent or legal guardian will be deemed to be an authorized representative, as defined at N.J.A.C. 13:42-8.3(a). When the patient is more than 14 years of age, but has not yet reached the age of majority, the authorization shall be signed by the patient and by the patient’s parent or legal guardian, pursuant to N.J.S.A. 45:14B-36(e).

b) This section shall not require a licensee to release to a minor's parent or guardian records or information relating to the minor's sexually transmitted disease, termination of pregnancy or substance abuse or any other information that in the reasonable exercise of the licensee's professional judgment may adversely affect the minor's health or welfare.

c) Unless otherwise ordered by a court, at least one parent or guardian shall consent to the treatment of a minor. If one parent consents, a licensee may treat a minor even over the objection of the other parent.

d) The provisions at N.J.A.C. 13:42-8.3, 8.4 and 8.5 shall apply to access to client records, access by a managed health care plan to information in client record and confidentiality of minors.

Representative of deceased patient

b) In the case of a client’s death:
1) Confidentiality survives the client's death and a licensee shall preserve the confidentiality of information obtained from the client in the course of the licensee's teaching, practice or investigation;
2) The disclosure of information in a deceased client's records is governed by the same provisions for living patients set forth in N.J.A.C. 13:42-8.3, 8.4 and 8.5; and


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.
3) A licensee shall retain a deceased client’s record for at least seven years from the date of last entry, unless otherwise provided by law.

**Correction or amendment of record**

...e) A licensee may make corrections or additions to an existing record provided that each change is clearly identified as such, dated and initialed by the licensee. Any other alteration of records shall be deemed professional misconduct.

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

Finally, patients may obtain an accounting as to who has accessed the PHI and the details about each disclosure.

**Retention of Records**

The regulations promulgated by New Jersey’s Examining Board of Psychology set forth the following requirements regarding the retention of records by psychologists:

...g) The licensee shall retain the permanent client record for at least seven years from the date of last entry, unless otherwise provided by law.

---

48 45 CFR 164.526 (a).
49 45 CFR 164.508.
50 45 CFR 164.508 (b)(4).
51 45 CFR 164.528.
h) The licensee shall establish procedures for maintaining the confidentiality of client records in the event of the licensee's relocation, retirement, death, or separation from a group practice, and shall establish reasonable procedures to assure the preservation of client records which shall include at a minimum:

1) Establishment of a procedure by which patients can obtain treatment records or acquiesce in the transfer of those records to another licensee or health care professional who is assuming the responsibilities of that practice;

2) Publication of a notice of the cessation and the established procedure for the retrieval of records in a newspaper of general circulation in the geographic location of the licensee's practice, at least once each month for the first three months after the cessation; and

3) Making reasonable efforts to directly notify any patient treated during the six months preceding the cessation, providing information concerning the established procedure for retrieval of records.

**Violations of the specific duties**

A board may refuse to admit a person to an examination or may refuse to issue or may suspend or revoke any certificate, registration or license issued by the board upon proof that the applicant or holder of such certificate, registration or license:

a. Has obtained a certificate, registration, license or authorization to sit for an examination, as the case may be, through fraud, deception, or misrepresentation;

b. Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense; New Jersey Uniform Enforcement Act NJSA 45:1.1 et seq.

c. Has engaged in gross negligence, gross malpractice or gross incompetence which damaged or endangered the life, health, welfare, safety or property of any person;

d. Has engaged in repeated acts of negligence, malpractice or incompetence;

---


---

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.
e. Has engaged in professional or occupational misconduct as may be determined by the board;

f. Has been convicted of, or engaged in acts constituting, any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board. For the purpose of this subsection a judgment of conviction or a plea of guilty, non vult, nolo contendere or any other such disposition of alleged criminal activity shall be deemed a conviction;

g. Has had his authority to engage in the activity regulated by the board revoked or suspended by any other state, agency or authority for reasons consistent with this section;

h. Has violated or failed to comply with the provisions of any act or regulation administered by the board;

...k. Has violated any provision of P.L.1983, c.320 (C.17:33A-1 et seq.) or any insurance fraud prevention law or act of another jurisdiction or has been adjudicated, in civil or administrative proceedings, of a violation of P.L.1983, c.320 (C.17:33A-1 et seq.) or has been subject to a final order, entered in civil or administrative proceedings, that imposed civil penalties under that act against the applicant or holder;

...o. Advertised fraudulently in any manner.

Additional, alternative penalties

In addition or as an alternative, as the case may be, to revoking, suspending (Suspension of a license can occur under 45:1-21.2) or refusing to renew any license, registration or certificate issued by it, a board may, after affording an opportunity to be heard:

a. Issue a letter of warning, reprimand, or censure with regard to any act, conduct or practice which in the judgment of the board upon consideration of all relevant facts and circumstances does not warrant the initiation of formal action;

---


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.
b. Assess civil penalties in accordance with this act;

c. Order that any person violating any provision of an act or regulation administered by such board to cease and desist from future violations thereof or to take such affirmative corrective action as may be necessary with regard to any act or practice found unlawful by the board;

d. Order any person found to have violated any provision of an act or regulation administered by such board to restore to any person aggrieved by an unlawful act or practice, any moneys or property, real or personal, acquired by means of such act or practice; provided, however, no board shall order restoration in a dollar amount greater than those moneys received by a licensee or his agent or any other person violating the act or regulation administered by the board;

e. Order any person, as a condition for continued, reinstated or renewed licensure, to secure medical or such other professional treatment as may be necessary to properly discharge licensee functions;

f. Order any person, as a condition for continued, reinstated or renewed licensure, to submit to any medical or diagnostic testing and monitoring or psychological evaluation which may be required to evaluate whether continued practice may jeopardize the safety and welfare of the public;

g. Order any person, as a condition for continued, reinstated or renewed licensure, to submit to an assessment of skills to determine whether the licensee can continue to practice with reasonable skill and safety, and to take and successfully complete educational training determined by the board to be necessary;

h. Order any person, as a condition for continued, reinstated or renewed licensure, to submit to an assessment of skills to determine whether the licensee can continue to practice with reasonable skill and safety, and to submit to any supervision, monitoring or limitation on practice determined by the board to be necessary.
Violations, penalties

a. Any person who engages in any conduct in violation of any provision of an act or regulation administered by a board shall, in addition to any other sanctions provided herein, be liable to a civil penalty of not more than $10,000 for the first violation and not more than $20,000 for the second and each subsequent violation. For the purpose of construing this section, each act in violation of any provision of an act or regulation administered by a board shall constitute a separate violation and shall be deemed a second or subsequent violation under the following circumstances:

(1) an administrative or court order has been entered in a prior, separate and independent proceeding;
(2) the person is found within a single proceeding to have committed more than one violation of any provision of an act or regulation administered by a board; or
(3) the person is found within a single proceeding to have committed separate violations of any provision of more than one act or regulation administered by a board.

b. In lieu of an administrative proceeding or an action in the Superior Court, the Attorney General may bring an action in the name of any board for the collection or enforcement of civil penalties for the violation of any provision of an act or regulation administered by such board. Such action may be brought in summary manner pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.) and the rules of court governing actions for the collection of civil penalties in the municipal court where the offense occurred. Process in such action may be by summons or warrant and in the event that the defendant in such action fails to answer such action, the court shall, upon finding an unlawful act or practice to have been committed by the defendant, issue a warrant for the defendant's arrest in order to bring such person before the court to satisfy the civil penalties imposed. In any action commenced pursuant to this section, the court may order restored to any person in interest any moneys or property acquired by means of an unlawful act or practice.

55 N.J. STAT. ANN. § 45:1-25

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.
c. Any action alleging the unlicensed practice of a profession or occupation shall be brought pursuant to this section or, where injunctive relief is sought, by an action commenced in the Superior Court.

d. In any action brought pursuant to this act, a board or the court may order the payment of costs for the use of the State, including, but not limited to, costs of investigation, expert witness fees and costs, attorney fees and costs, and transcript costs.