The Duty to Record: Ethical, Legal, and Professional Considerations for New Mexico 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.
Guidelines do not substitute for laws of each state and provincial jurisdiction. 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 Mexico 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 Mexico 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 warn a reasonably identifiable victim if a patient makes a serious threat of physical violence, and recommend that psychologists use this template, too.5

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

---

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.
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 New Mexico State Board of Psychologist Examiners has promulgated its own Code of Conduct, and has mandated that psychologists “shall cooperate in …requirements of this code, the ethical principles of psychologists and code of conduct of the American psychologist association (“APA Code of Ethics”).

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


8 Id. at p. 45.


Common Law

New Mexico courts have never decided a case in which a clinician warned or failed to warn of a client’s threats against a specific, identifiable victim. However, in Wilschinsky v. Medina, a case in which a third party was injured by a person who drove while taking drowsiness-inducing prescription medications, the Supreme Court of New Mexico discussed Tarasoff favorably, but distinguished it from the situation in Wilschinsky and held that the physician did owe a duty to the “driving public.”11 In Weitz v. Lovelace Health System, Inc., a Federal appeals court applying New Mexico law declined to impose a duty to warn where the victim was already aware of the client’s threats.12

Annotations to N.M. R. EVID. 11-504 (…Psychotherapist Patient Privilege)

• Ordering personal injury plaintiff to execute a blanket release for her medical records was error; blanket release did not adequately protect privileged portions of records, as it did not address the applicability of privilege on a communication-by-communication basis, and plaintiff did not necessarily put her entire medical history in issue by filing a lawsuit which sought damages for pain and suffering or loss of enjoyment of life.  NMRA, Rule 11-504, subds. B, D(3).13

• City personnel board's discovery order requiring former city employee, who was protesting his discharge for failing to report for a drug test ordered by his therapist as part of a self-referral treatment program, to consent to release of confidential treatment records infringed on material protected by psychotherapist-patient privilege; requested documents included information concerning frequency or type of employee's drug use, use on the job, and effects on family and work, which information was confidential communication made for purposes of diagnosis or treatment.  NMRA, Rule 11-504, subd. B. 14

• Clear language of applicable rule and statutes permitted disclosure, in proceedings under Abuse and Neglect Act, of records of counseling sessions involving child's mother, where counselor was statutorily required to report abuse or neglect to appropriate authority, and any applicable privilege with respect to information so disclosed was expressly waived. NMRA, Rule 11-504;

12 214 F.3d 1175 (10th Cir. 2000).
Contents of the record are mandated by law

The psychologist rendering professional services to a client or patient shall maintain professional records that include:

(a) the presenting problem(s) or the reason the client(s) or patient(s) sought the psychologist's services;
(b) diagnosis and/or clinical formulation;
(c) the fee arrangement;
(d) the date and substance of each billed contact or service;
(e) any test results or other evaluative results obtained and any basic test data from which they were derived;
(f) notation and results of formal consultations with other providers;
(g) a copy of all test or other evaluative reports prepared as part of the professional relationship;
(h) the date of termination of services.

New Mexico laws provide for the following elements to the informed consent process:

Informed consent for therapy and evaluation

(1) The psychologist shall appropriately document and obtain appropriate informed consent for therapy or related procedures or evaluation. Informed consent means that the person:

(a) has the capacity to consent;
(b) has been informed of significant information concerning the therapy or evaluation in language that is understandable; and
(c) has freely and without undue influence expressed consent.

(2) When persons are legally incapable of giving informed consent, the psychologist shall obtain informed consent from a legally authorized person, if such substitute consent is permitted by law.

---

16 N.M. CODE R. § 16.22.2.8(G). Additional disclosures may need to occur about fees. See N.M. CODE R. §16.22.2.14
17 N.M. CODE R. § 16.22.2.10(A); see also § 16.22.2.10(B) (limits of confidentiality in forensic, court-ordered, or child custody evaluations require additional disclosures).
(3) In addition, the psychologist shall:
   (a) inform those persons who are legally incapable of giving informed consent about the proposed interventions or evaluations in a manner commensurate with the persons' psychological capacities;
   (b) seek or obtain their assent to those interventions or evaluations; and
   (c) consider such person's preferences and best interests.

The APA Code of Ethics also would be applied with the Health Insurance Portability and Accountability Act (HIPAA):18

3.10 Informed Consent

(a) When psychologists …provide assessment, therapy, counseling or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons… (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission,

---


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.
and assent. (See also Standards 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

A number of confidentiality standards under New Mexico law will require disclosure about the limitations in protecting certain types of confidences in order to satisfy the informed consent process:19

**A. Safeguarding confidential information**
The psychologist shall safeguard confidential information obtained in the course of practice, teaching, research, or other professional services. The psychologist shall disclose confidential information to others only with the written informed consent of the patient or client in accordance with the Public Health Act, Section 24-1-20 NMSA 1978, except as provided in these regulations.

**B. Discussing the limits of confidentiality**
(1) The psychologist shall discuss with persons and organizations with whom the psychologist establishes a professional or scientific relationship (including, to the extent feasible, minors and their legal representatives):
   - the relevant limitations on confidentiality, including limitations where applicable in group, marital, and family therapy or in organizational consulting; and
   - the foreseeable uses of the information generated through his services.

(2) Unless it is not feasible or is contraindicated, the psychologist shall discuss confidentiality at the outset of the relationship and thereafter as new circumstances warrant.

Along with the limitations of protecting confidences under New Mexico law, a HIPAA notice of privacy practices20 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. The possibility of mandatory disclosures could occur and should be identified to the patient as part of the informed consent process:21

**Reporting of abuse of children and vulnerable adults**

The psychologist shall be familiar with the Child Abuse and Neglect Act (CANA), Sections 32A-4-1 thru 32A-4-34 NMSA 1978, Resident Abuse and Neglect Act (RANA), Sections 30-47-1 thru 30-47-10 NMSA 1978, and any other relevant law concerning the reporting of abuse of children and vulnerable adults, and shall comply with the mandatory requirements of such laws.

In light of the New Mexico privilege standard, psychologists also should informed their patients that confidential information must be released if any of the four exceptions to the psychotherapist-patient rule applies:

**Psychotherapist Patient Privilege**22

A. Definitions.

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

 ...(3) A “psychotherapist” is

 ...(b) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

 (4) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the …psychotherapist, including members of the patient's family.

B. General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's …psychotherapist, or persons who are

---

21 N.M. CODE R. § 16.22.2.12(H); see also N.M. STAT. ANN. § 27-7-30(A) – (B) (laws about vulnerable adults).

22 N.M. R. EVID. 11-504 (Physician-Patient and Psychotherapist Patient Privilege).
participating in the diagnosis or treatment under the direction of the …psychotherapist, including members of the patient's family.

C. Who May Claim the Privilege. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the …psychotherapist may claim the privilege but only on behalf of the patient. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

D. Exceptions.

(1) Proceedings for Hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by Order of Court. If the court orders an examination of the physical, mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an Element of Claim or Defense. There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Required Report. There is no privilege under this rule for communications relevant to any information that the physician, psychotherapist or patient is required by statute to report to a public employee or state agency.

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

4.04 Minimizing Intrusions on Privacy

\[23\] APA CODE OF ETHICS, supra note 10.

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

6.06 Accuracy in Reports to Payors and Funding Sources

In their reports to payors for services …psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided …the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

9.01 Bases for Assessments

(a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements, …on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

9.02 Use of Assessments

(a) Psychologists administer, adapt, score, interpret or use assessment techniques, interviews, tests or instruments in a manner and for purposes that

---

24 Id.
25 Id.
26 Id.
are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques…

9.10 Explaining Assessment Results27
Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative…

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

Maintenance and Security of Records28
New Mexico psychologists “shall store and dispose of written, electronic, and other records in a manner that protects confidentiality.”29

Under APA Code of Ethics Standard 4.01 - Maintaining Confidentiality,30 “[p]sychologists have a primary obligation and take reasonable precautions to protect

27 Id.
28 For psychologists in public mental health contexts see N.M. CODE R. § 7.20.3.24 (Requirements for Community Mental Health Centers).
29 N.M. CODE R. § 16.22.2.8(G)(3); See also, N.M. STAT. ANN. § 14-6-1 (Health information; confidentiality; immunity from liability for furnishing). For supervising psychologists see, N.M. CODE R. § 16.22.3(C)(1)(d): “The supervisor …shall be available to patients …and shall be responsible for proper record-keeping and proper documentation in the patient's …record.” & N.M. CODE R. § 16.22.12.8(A)(5)(5): “The supervisor shall keep records of supervision …separately from the client's records and shall include dates of supervision, without reference to the client's name. Such records shall be submitted to the board on an annual basis as a condition of the renewal process.” For prescribing psychologists see, N.M. STAT. ANN. § 61-9-17.2(D)-(E) (Prescribing Practices).
30 APA CODE OF ETHICS, supra note 10; For psychologists providing services in employment contexts see N.M. STAT. ANN. § 61-9-18: “A licensed psychologist or psychologist associate shall not be examined without the consent of his client as to any communication made by the client to him or his advice given in the course of professional employment; nor shall a licensed psychologist's or psychologist associate's secretary, stenographer, clerk or any person supervised by the psychologist or psychologist associate be examined without the consent of his employer concerning any fact the knowledge of which he has acquired in such capacity.”

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.
confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)” This standard supports the record keeping standards:

6. Record Keeping and Fees

6.01 Documentation of Professional …Maintenance of Records
Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

Under New Mexico’s laws permits disclosure without informed written consent under some circumstances:

C… Except as otherwise permitted under the provisions of the MHDDC, Section 43-1-19 NMSA, 1978, and the CMHDDA, Sections 32A-6-1 thru 32A-6-22 NMSA 1978 and as amended, a psychologist may disclose confidential information without the informed written consent of the patient/client when the psychologist judges that disclosure is necessary to protect against a substantial and imminent risk of serious harm being inflicted by the patient on the patient or another person. In such case, the psychologist shall limit disclosure of the otherwise confidential information to only those persons and only that content necessary to address the imminent risk of harm. 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.

…I. Discussion of client information among professionals. When rendering professional services as part of a team or when interacting with other

31 Id.
32 N.M. CODE R. § 16.22.2.12.
appropriate professionals concerning the welfare of the client, the psychologist may share confidential information about the client provided the psychologist ensures that all persons receiving the information are informed about the confidential nature of the information and abide by the rules of confidentiality.

New Mexico has enacted laws about access to records, and fees for obtaining the records:

**Access to testing records**

A. Limits of reproduction and description of test materials. The psychologist shall not reproduce or describe in public or in publications subject to general distribution any psychological tests or other assessment devices, the value of which depends in whole or in part on the naiveté of the subject, in ways that might invalidate the techniques. The psychologist shall limit access to such tests or devices to persons with professional interests who will safeguard their use.

B. Safeguarding test materials. The psychologist shall safeguard testing materials in accordance with the necessity to maintain test security. The psychologist should take all reasonable measures to protect test manuals, testing stimuli, and raw test data from disclosure to those who are not qualified to properly appraise those materials. The psychologist is required to release such materials only to those licensed and qualified in the use and interpretation of psychological tests and testing materials. If test materials are sought by subpoena or discovery request, the psychologist shall seek a protective order from a court of competent jurisdiction in order to maintain test security. Thereafter, the psychologist shall comply with the court order.

**Access; charges**

Upon request by the client, patient, or legal representative of the client or patient, the psychologist shall release records under his control, except as otherwise provided in these rules and regulations or state law. Lack

![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.](image)
of payment for services does not constitute grounds for refusing to release client or patient records.

**Disclosure of information**

A. Except as otherwise provided in the code, no person shall, without the authorization of the client, disclose or transmit any confidential information from which a person well acquainted with the client might recognize the client as the described person, or any code, number or other means that can be used to match the client with confidential information regarding the client.

B. Authorization from the client shall not be required for the disclosure or transmission of confidential information in the following circumstances:

   1. when the request is from a mental health or developmental disability professional or from an employee or trainee working with a person with a mental disability or developmental disability, to the extent that the practice, employment or training on behalf of the client requires access to such information is necessary;

   2. when such disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the client on the client's self or another;

   3. when the disclosure of such information is to the primary caregiver of the client and the disclosure is only of information necessary for the continuity of the client's treatment in the judgment of the treating physician or certified psychologist who discloses the information; or

   4. when such disclosure is to an insurer contractually obligated to pay part or all of the expenses relating to the treatment of the client at the residential facility. The information disclosed shall be limited to data identifying the client, facility and treating or supervising physician and the dates and duration of the residential treatment. It shall not be a defense to an insurer’s obligation to pay that the information relating to the residential treatment of the client, apart from information disclosed pursuant to this section, has not been disclosed to the insurer.

C. No authorization given for the transmission or disclosure of confidential information shall be effective unless it:

---

35 N.M. STAT. ANN. § 43-1-19.
(1) is in writing and signed; and
(2) contains a statement of the client's right to examine and copy the
information to be disclosed, the name or title of the proposed recipient
of the information and a description of the use that may be made of the
information.

D. The client has a right of access to confidential information and has the right
to make copies of any information and to submit clarifying or correcting
statements and other documentation of reasonable length for inclusion with
the confidential information. The statements and other documentation shall be
kept with the relevant confidential information, shall accompany it in the event
of disclosure and shall be governed by the provisions of this section to the
extent they contain confidential information. Nothing in this subsection shall
prohibit the denial of access to such records when a physician or other mental
health or developmental disabilities professional believes and notes in the
client’s medical records that such disclosure would not be in the best interests
of the client. In any such case, the client has the right to petition the court for
an order granting such access.

E. Where there exists evidence that the client whose consent to disclosure of
confidential information is sought is incapable of giving or withholding valid
consent and the client does not have a guardian or treatment guardian
appointed by a court, the person seeking such authorization shall petition the
court for the appointment of a treatment guardian to make a substitute
decision for the client, except that if the client is less than fourteen years of age,
the client’s parent or guardian is authorized to consent to disclosure on behalf
of the client.

F. Information concerning a client disclosed under this section shall not be
released to any other person, agency or governmental entity or placed in files or
computerized data banks accessible to any persons not otherwise authorized to
obtain information under this section.

G. Nothing in the code shall limit the confidentiality rights afforded by federal
statute or regulation.

H. A person appointed as a treatment guardian in accordance with the Mental
Health and Developmental Disabilities Code may act as the client’s personal
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.

HIPAA enables the patient to inspect and obtain Protected Health Information (PHI) records, including the 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.

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

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer

36 45 CFR 164.524; HIPAA is more expansive of the patient’s rights so the more restrictive State law would not apply (TENN. CODE ANN. § 63-2-101).
37 45 CFR 164.526 (a).
38 45 CFR 164.528.
39 APA CODE OF ETHICS, supra note 10.

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.
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.)

Use and disclosure of electronic health care information

A. A provider shall not use or disclose health care information in an individual's electronic medical record to another person without the consent of the individual except as allowed by state or federal law.

B. A provider may disclose demographic information and information about the location of an individual's electronic medical records to a record locator service in accordance with state or federal law. A provider participating in a health information exchange using a record locator service shall not have access to demographic information, information about the location of the individual's electronic medical records or information in an individual's electronic medical record except in connection with the treatment of the individual or as permitted by the consent of the individual or as otherwise permitted by state or federal law.

C. A record locator service shall maintain an audit log of persons obtaining access to information in the record locator service, which audit log shall contain, at a minimum, information on:
   (1) the identity of the person obtaining access to the information;
   (2) the identity of the individual whose information was obtained;
   (3) the location from which the information was obtained;
   (4) the specific information obtained; and
   (5) the date that the information was obtained.

D. The audit log shall be made available by a health information exchange on the request of an individual whose health care information is the subject of the audit log; provided, however, that the audit log made available to the individual shall include only information related to that individual. The audit log shall be made available to the requesting individual annually for a fee not to exceed

---

40 N.M. STAT. ANN. § 24-14B-6; Electronic Medical Records Act, N.M. STAT. ANN. §§ 24-14B-1, et seq.
41 “Provider” means an individual who is licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession. N.M. STAT. ANN. § 24-14B-3(L).

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.
twenty-five cents ($0.25) per page as established by the department of health.

E. A record locator service shall provide a mechanism under which individuals may exclude their demographic information and information about the location of their electronic medical records from the record locator service. A person operating a record locator service or a health information exchange that receives an individual's request to exclude all of the individual's information from the record locator service is responsible for removing that information from the record locator service within thirty days. An individual's request for exclusion of information shall be in writing and shall include a waiver of liability for any harm caused by the exclusion of the individual's information.

F. When information in an individual's electronic medical record is requested using a record locator service or a health information exchange:

1. the requesting provider or health care institution shall warrant that the request is for the treatment of the individual, is permitted by the individual's written authorization or is otherwise permitted by state or federal law; and
2. the person disclosing the information may rely upon the warranty of the person making the request that the request is for the treatment of the individual, is permitted with the consent of the individual or is otherwise permitted by state or federal law.

G. Notwithstanding any other provision of law, information in an individual's electronic medical record may be disclosed:

1. to a provider that has a need for information about the individual to treat a condition that poses an immediate threat to the life of any individual and that requires immediate medical attention; and
2. except as provided in the Electronic Medical Records Act, to a record locator service or a health information exchange for the development and operation of the record locator service and the health information exchange.

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

42 45 CFR 164.508.
Retention of Records

“The psychologist shall ensure that all data entries in the professional records are maintained for a period of not less than five (5) years after the last date that service was rendered.”

Retention of electronic medical records

A. If a law or rule requires that a medical record be retained, the requirement is satisfied by retaining an electronic record that:
   (1) accurately reflects the medical record; and
   (2) remains accessible and is capable of being accurately reproduced for later reference.

B. If a law or rule requires a medical record to be presented or retained in its original form or provides consequences if the medical record is not presented or retained in its original form, that law or rule is satisfied by an electronic medical record retained in accordance with Subsection A of this section.

C. A medical record retained as an electronic medical record in accordance with Subsection A of this section satisfies a law or rule requiring a person to retain a medical record for evidentiary, audit or other purposes.

Hospital records; retention

A. Unless provided otherwise in this section, a hospital shall retain and preserve all records directly relating to the care and treatment of a patient for a period of ten years following the last discharge of the patient. Retention and preservation of such records in microfilm or other photographically reproduced form shall be deemed compliance with this subsection and such reproduced and retained copies shall be deemed originals for the purposes of the rules of evidence promulgated by the supreme court of New Mexico.

Violations of the specific duty

43 N.M. CODE R. § 16.22.2.8(G)(2); see also 16.22.2.8(G)(4) (“For each person professionally supervised, the psychologist shall maintain for a period of not less than five (5) years after the last date of supervision a record of the supervisory session that shall include, among other information, the type, place, and general content of the session.”).

44 N.M. STAT. ANN. § 24-14B-5.

45 N.M. STAT. ANN. § 14-6-2(Hospital records; retention).

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.
The complaint procedures, adjudicatory proceedings, and consequences for violating the standards of psychologist conduct are delineated with some specificity.\textsuperscript{46}

\textbf{Denial, revocation or suspension of license}\textsuperscript{47}

A. The board, by an affirmative vote of at least five of its eight members, shall withhold, deny, revoke or suspend a psychologist or psychologist associate license issued or applied for in accordance with the provisions of the Professional Psychologist Act or otherwise discipline a licensed psychologist or psychologist associate upon proof that the applicant, licensed psychologist or psychologist associate:

(1) has been convicted of a felony or an offense involving moral turpitude, the record of conviction being conclusive evidence thereof;

…(3) has impersonated another person holding a psychologist or psychologist associate license or allowed another person to use the psychologist's or psychologist associate's license;

(4) has used fraud or deception in applying for a license or in taking an examination provided for in the Professional Psychologist Act;

(5) has accepted commissions or rebates or other forms of remuneration for referring clients to other professional persons;

(6) has allowed the psychologist's or psychologist associate's name or license issued under the Professional Psychologist Act to be used in connection with a person who performs psychological services outside of the area of that person's training, experience or competence;

…(8) has willfully or negligently violated the provisions of the Professional Psychologist Act;

(9) has violated any code of conduct adopted by the board;

(10) has been disciplined by another state for acts similar to acts described in this subsection, and a certified copy of the record of discipline of the state imposing the discipline is conclusive evidence;

\textsuperscript{46} N.M. CODE R. § 16.22.11.

\textsuperscript{47} N.M. STAT. ANN. § 61-9-13.
(11) is incompetent to practice psychology;

(12) has failed to furnish to the board or its representative information requested by the board;

(13) has abandoned patients or clients;

(14) has failed to report to the board adverse action taken against the licensee by:
   (a) another licensing jurisdiction;
   (b) a professional psychologist association of which the psychologist or psychologist associate is or has been a member;
   (c) a government agency; or
   (d) a court for actions or conduct similar to acts or conduct that would constitute grounds for action as described in this subsection;

(15) has failed to report to the board surrender of a license or other authorization to practice psychology in another jurisdiction or surrender of membership on a health care staff or in a professional association following, in lieu of or while under a disciplinary investigation by any of those authorities for acts or conduct that would constitute grounds for action as defined in this subsection;

(16) has failed to adequately supervise a psychologist associate;

(17) has employed abusive billing practices; or

(18) has aided or abetted the practice of psychology by a person not licensed by the board.