

5.50I FRAUDULENT CONCEALMENT OF MEDICAL RECORDS¹
(Approved 7/02)

Upon request, physicians have a duty to provide a patient or a patient's representative with a true, unaltered and complete copy of all treatment records for any treatment or services rendered.² Corrections or changes to entries may be made only where the change is clearly identified as such, dated and initialed by the person making the change.³ In fact, it is against the law in this State to alter medical records with the intent to deceive or mislead anyone.⁴

In this case you have heard evidence that Dr. [*insert the doctor's name*] concealed or altered his records in the following manner: [*here describe the actions*].

The elements that must be established by a plaintiff in a claim for Fraudulent Concealment of Medical Records are:

- (1) that the defendant had a legal obligation to disclose evidence in connection with an existing or pending litigation;
- (2) that the evidence was material to the litigation;

¹ See *Rosenblit v. Zimmerman*, 166 N.J. 391 (2001); *In re Jasclevich License Revocation*, 182 N.J. Super. 455, 471-472 (App. Div. 1982).

² N.J.A.C. 13:35-6.5(c).

³ N.J.A.C. 13:35-6.5(b)(2).

⁴ N.J.A.C. 2C:21-4.1. Purposeful destruction, alteration or falsification of record relating to care of medical or surgical or podiatric patient in order to deceive or mislead.

- (3) that the plaintiff could not reasonably have obtained access to the evidence from another source;
- (4) that the defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and
- (5) that the plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.⁵

NOTE TO JUDGE

This charge should be followed by damages charges appropriate to the case, which may include punitive damages. See footnote 5, below.

The *Rosenblit* Court explained,

In sum, where an adversary has intentionally hidden or destroyed (spoliated) evidence necessary to a party's cause of action and that misdeed is uncovered in time for trial, plaintiff is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrong-doer and may also amend his or her complaint to add a claim for fraudulent concealment. Where the hiding or destruction is not made known until after the underlying litigation, in which plaintiff's case has been lost or impaired due to the missing evidence, a separate tort action for fraudulent concealment will lie. *Id.* at 411.

⁵ *Id.* at 406-407. The *Rosenblit* Court added: “We are satisfied that those elements properly reflect the application of fraudulent concealment principles in a litigation setting. We hold that the tort of fraudulent concealment, as adopted, may be invoked as a remedy for spoliation where those elements exist. Such conduct cannot go undeterred and unpunished and those aggrieved by it should be made whole with compensatory damages and, if the elements of the Punitive Damages Act, *N.J.S.A.* 2A:15-5.12, are met, punitive damages for intentional wrongdoing.” *Id.*

The trial should be bifurcated in Fraudulent Concealment cases. The *Rosenblit* Court added:

[T]hose counts will require bifurcation because the fraudulent concealment remedy depends on the jury's assessment of the underlying cause of action. In that instance, after the jury has returned a verdict in the bifurcated underlying action, it will be required to determine whether the elements of the tort of fraudulent concealment have been established, and, if so, whether damages are warranted.

The Appellate Division stated in *In re Jasclevich License Revocation*, 182 N.J. Super. 455, 471-472 (App. Div. 1982):

We are persuaded that a physician's duty to a patient cannot but encompass his affirmative obligation to maintain the integrity, accuracy, truth and reliability of the patient's medical record. His obligation in this regard is no less compelling than his duties respecting diagnosis and treatment of the patient since the medical community must, of necessity, be able to rely on those records in the continuing and future care of that patient. Obviously, the rendering of that care is prejudiced by anything in those records which is false, misleading or inaccurate. We hold, therefore, that a deliberate falsification by a physician of his patient's medical record, particularly when the reason therefore is to protect his own interests at the expense of his patient's, must be regarded as gross malpractice endangering the health or life of his patient.