

## **New Mexico Sexual Assault Service Providers Core Standards – Confidentiality Policy**

### **I. Policy Statement**

Confidentiality is critical to the services and advocacy that New Mexico Sexual Assault Service Providers/Sexual Assault Coordinators (hereafter also referred to as “the agency”) provide to clients. It is the policy of New Mexico Sexual Assault Service Providers/Sexual Assault Coordinators to hold confidential all information disclosed (“confidential communications” and information which might identify a client) by clients to staff members (herein to include all agency employees, including contract employees), volunteers, or other clients, as permitted under New Mexico and federal law, unless otherwise instructed by the client. At initial intake, or as soon as possible, clients should be provided with an oral and written description of their rights to confidentiality in the context of their receiving services at these agencies, including limitations on that confidentiality imposed by mandatory reporting laws, concerns related to self-harm or imminent serious harm to others, and relevant parental notification issues for minor clients under age 14, as well as any audio or video recording devices used during any time the client has contact with agency employees, contract employees, or facility in which the agency is housed.

**“Confidential communications”** are protected from unauthorized disclosure by state and federal law and include all client records, including, but not limited to, client statements, telephone logs, audio and video tapes containing client images and/or voices or information about clients, and other agency work product related to recipients of our services. Confidential communications may be made by clients who are adults or children, may be made in public or in the presence of a third party, and may be made to staff, volunteers, student interns, or board members. “Confidential communications” may not be disclosed except as described below.

As a matter of policy, **“confidential information”** will also be protected. Confidential information includes internal agency procedures, and information learned as a result of association with the agency, which has been identified as confidential program information by the Executive Director or her/his designee. In addition, all persons associated in any way with the agency agree to treat as confidential any information in their possession which might identify a client, including otherwise neutral demographic data, or offense description, which is so specific as to identify a client in a particular region. In addition, all persons associated with the agency agree to protect client information which has been gathered in the course of services to clients, even if that information was gained from public sources or was discussed in front of third parties. Although this information may not always be protected from disclosure by law, it is the aim of this policy to create practices within the agency such that agency personnel take precautions to protect client confidentiality wherever possible.

All staff, volunteers, student interns, board members, clients, including visitors to the agency from entities such as funders, auditors, service providers, maintenance contractors, etc. will be informed of the confidential nature of our services and the importance of

maintaining the confidentiality. Staff, board members, student interns and volunteers agree to be bound by these policies prior to beginning service. They will signify their agreement by signing below. Staff and all volunteers (including board members) agree to be bound by these policies both during and after association with the agency, whether separation from the agency is voluntary or involuntary.

Clients will be asked not to disclose any information regarding other clients both during service and after termination of services. Under certain circumstances, such as group therapy or support groups, clients may be required to sign a confidentiality agreement to participate in a client service program.

Confidential communications are protected under the Victim Counselor Confidentiality Act, § 31-25-1 et.seq.. NMSA 1978, HIPAA, and **Privacy Rights** under the Constitution. Confidential communications may only be released in accordance with the guidelines set forth below or as otherwise required by New Mexico or Federal law.

When client confidential information is related to an active legal claim by an employee, client, intern, volunteer, or board member against a New Mexico Sexual Assault Service Provider, a volunteer or staff member of a New Mexico Sexual Assault Service Provider in an official capacity, a Sexual Assault Coordinator in an official capacity, or the employing agency of the Sexual Assault Coordinator, client and program confidential information may be disclosed. Such disclosures should be fashioned to protect current and former clients' privacy so that confidential matters immaterial to the legal claim are not disclosed.

## II. Definitions

**A. "Confidential Communications"** – *Confidential communications* in the Victim Counselor Confidentiality Act means:

- any information exchanged between a client and a counselor in private or in the presence of a third party who is necessary to facilitate communications or further the counseling process and
- which is disclosed in the course of the counselor's treatment of the client
- for any emotional or psychological condition.

Confidential communications can be written or spoken and include any and all the client records. Communications are confidential even when shared by the client in the presence of the counselor and a third party. Documents received from other agencies for which client executed a written release are also to be treated as confidential.

**B. Confidential Program Communications** – Access to confidential program communications shall be limited internally and external access shall be prohibited except as approved for disclosure by the Executive Director or by the agency Board of Directors in accordance with the entity's bylaws. The intent of this policy subsection is not to subvert transparency related to non-client information. Confidential program communications include any information related to the operation of New Mexico Sexual Assault Service Providers/Sexual Assault Coordinators' service provision, including but not limited to communications, video tapes, audio tapes, or writings made by staff, interns, volunteers, board members, related to the administrative, clinical, or personnel operations and board functions of New Mexico Sexual Assault

Service Providers or Sexual Assault Coordinators. All qualitative assessment and evaluation materials, in any format, for New Mexico Sexual Assault Service Providers or Sexual Assault Coordinators are confidential program communications.

1. Former staff or volunteers seeking references from the agency should execute a release to permit full disclosure of past performance.

2. Absent such a release, unfavorable reviews of past performance should be avoided; instead only dates of association with the agency should be provided. The exception to this policy is disclosure may be made if the staff or volunteer engaged in misconduct that put clients at risk.

**C. “Client”** - *Client* means a person who consults a New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator for assistance in overcoming emotional, social, or psychological problems, or someone seeking assistance from these entities for another person. This includes secondary victims such as family and friends of assault survivors.

**D. “Counselor”** - *Counselor* means an employee, volunteer, or contracted individual who has completed academic or other training to assist clients in overcoming their concerns and issues.

A supervised volunteer who has completed forty hours of formal training, or who has at least one year of experience counseling victims, and whose duties includes counseling victims, is also considered a counselor.

### **III. Access to Client Information**

New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators maintain client records for clinical, statistical, and informational purposes.

**A. Staff Access** – Staff access to client records is controlled and monitored by the Executive Director or the Director’s designee. Access to current and former client records is available only to staff who are:

1. Working with that particular client;
2. Supervising the employee working with client; or
3. Working as part of a team to provide client with the best services available.
4. Custodian of records for the entity.
5. Working with client files in capacity of compiling statistical (non-identifying client data) reports for the agency or to funders.
6. Preparing records for release pursuant to client authorization or preparing a response to court orders for the record.

**B. Client Access** - Requests by clients to view their own files are to be honored. (For client initiated release, see Section VI. A.)

Requests by any third party, including but not limited to the client’s attorney, will not be honored absent the client’s informed, written consent. The review of the client’s records must be done in the presence of the custodian of records or the Executive Director’s designee. The client, or any party authorized by client consent or court order, may make notes about the records and/or make written requests for

a copy of any records. The requestor may be required to bear the cost of copying and requested copies should be provided within seventy-two hours. Information received from confidential sources should be maintained separately from the client file and may not be reviewed or copied except by court order after a full hearing on the scope of the request. The agency should request this hearing. The client should be referred to the original source for those materials. A client's request for copies should be made part of the file in writing by the staff member assisting the client with the request.

The client is to be informed that if a copy of information in her or his file is released to a permitted third party it may not be kept confidential by that third party, is no longer covered by the Victim Confidentiality Act, and may be used against her or him.

New Mexico Sexual Assault Service Providers/ Sexual Assault Coordinators should not hold written documents or materials for safe keeping for the client except in unusual circumstances such as when such safekeeping is necessary as part of safety planning. These materials should not be made a part of the client's file and are to be released upon the client's request. Such materials are not subject to review by staff or persons who otherwise have access to client and administrative files. The client should be made aware that agency safekeeping of this type of material may cause the documents/information to be subject to subpoena if there is a pending legal action.

Client files may not be removed from New Mexico Sexual Assault Service Providers or agencies housing Sexual Assault Coordinators, without prior written permission from the agency custodian of records or the Executive Director's designee.

**C. Board Member Access** — Board members should not have access to individual client files, or to information that would identify a client, except as the Executive Director authorizes. Authorization should be limited to specific administrative situations, such as subpoenas or litigation against a New Mexico Rape Crisis Center, staff/volunteers of a New Mexico Rape Crisis Center in their official capacity, a Sexual Assault Coordinator, or an agency housing a Sexual Assault Coordinator. The entity's Executive Director will monitor such access.

**D. Public Access** - The general public is not entitled to client or New Mexico Rape Crisis Center or Sexual Assault Coordinator client records. Names and/or other case information that could identify a client should never be used in training or public speaking. Disclosure should only be made with the explicit informed written permission of the client or pursuant to court order after a full hearing on the scope of the disclosure. If the agency receives a court order, such as a subpoena, compelling the disclosure of client information the agency should seek legal representation to fight the disclosure unless the client has authorized the release. The lawyer for the agency should file the motion with the court requesting a hearing to challenge any disclosure ordered.

**F. Funders and Auditors Access.** Funders and auditors should not have access to individual client files or to information that would identify a client except

as the Executive Director authorizes. Aggregate data collection should be sufficient for most circumstances. Authorization to view individual client data should include a request by the agency for funder/auditor compliance with these policies and a request for a signature below to signify agreement to be bound by these policies.

**G. Multidisciplinary Team Access.** Client authorization is to be sought to share confidential client information with MDT members. In rare emergency circumstances the Executive Director may authorize release of client information to team members. This authorization should be done in consultation with agency legal counsel and the BOD.

#### **IV. Content of Client Files**

The client file may include but is not limited to: Intake, assessment, treatment plan, legal documents, progress notes, etc.

**A. Data Collection.** Only information that is either essential to provision of client services or data collection mandated by funders should be collected. Record keeping by staff and volunteers should be periodically reviewed by supervisory staff to assess if excessive confidential data is being collected. Limiting collection of confidential information about clients as much as is reasonably possible should be the goal. If an agency is being required or pressured by a funder, or other entity, to disclose confidential, identifying client information, please make the NMCSAP aware of the situation.

**B. Excluded From Client Files.** Files should NOT contain a staff or volunteer's assessment of the credibility of the client, a statement of the client's current immigration status, a narrative purporting to be the complete history of the traumatic event, or personal opinions of the staff or volunteer regarding the client, including judgments of the client in any manner such as the client's use of alcohol/substances, etc. other than clinician notes on diagnosis.

**C. Safety Issues.** In the course of safety planning with clients, client addresses or safehouse/shelter locations may be disclosed to agency staff. Full names and addresses of other witnesses, family members, addresses of safehouses, or locations of temporary client housing should not be recorded in the client's file for safety reasons.

**D. Immigration Issues.** Immigration status creates vulnerability to assault and ongoing safety issues for clients. Details on immigration status should not appear in client records. Clients should be referred to legal professionals for assistance in determining what legal avenues may be open to them.

#### **V. Maintenance and Destruction of Client Files**

**A.** All (open and closed) client files should be kept in locked file cabinets in a secured area or in a password protected location on agency computers. Use of a

“cloud” method of storage for electronic client records will require encryption. The custodian of records or the Executive Director’s designee is responsible for the secure maintenance of all client and administrative records and must actively plan for the avoidance of unauthorized accessing of protected records.

**B.** Destruction of client records will be done according to an established schedule authorized by the custodian of records in consultation with the Clinical Supervisor and the Executive Director. Destruction should be done in such a way that the records are no longer identifiable, such as cross-cut shredding, including any photographs or digital photographs of the client or client’s injuries. The custodian of records or the Executive Director’s designee should supervise the destruction of client files and program logs.

**C.** Clients who disclose childhood abuse should be offered the option of longer record retention by the agency, with that extended retention period determined by the local agency based on agency capacity for retention, in recognition of the enlarged statute of limitations in most jurisdictions to bring lawsuits for those harms.

**D.** The client should be informed in writing of the retention and destruction procedures of New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators.

**E.** Prior to disposal of any computer or electronic media or electronic equipment, including cell phones, all confidential files must be removed. The custodian of records or the Executive Director’s designee is responsible for verifying and documenting that this removal has occurred.

**F.** Destruction of records may not be done when a court order for the record is pending, or is reasonably anticipated as a result of notice that the record will be sought. Under no circumstances are records, files, or any part thereof to be destroyed to avoid a subpoena.

## **VI. Release of Records**

All clients who seek our services depend on our maintaining client confidentiality. This confidentiality is essential to a full and satisfactory relationship between the client and the service program. Therefore, any release of information to a third party must only be undertaken after verifying clear and informed consent with the client, the scope and limits of information the client wishes to have released, or in response to court order after a hearing requested by the agency.

**A. Client-Initiated Disclosure** - The client generally makes decisions regarding information disclosure. To ensure that the client is making an informed decision **the following conditions** must be met prior to disclosure:

1. The client may review any information requested for disclosure, prior to the

information being released. New Mexico Sexual Assault Service Providers or Sexual Assault Coordinators must ensure that the client understands the scope of the information to be disclosed, the purpose of releasing the information, who (agency or person) will receive the released information, and the reasonably foreseeable ramifications of the disclosure.

2. The client's consent to disclose must be in writing and must specify the information to be released, the dates the consent to disclose is effective, and the purpose of releasing the information. Blank release forms should never be given to clients for signature.

3. Clients should be told that agency services will continue to be available to them whether they choose to release their records or decline to release their records.

4. Information that is released by written client consent should be limited to the information which is essential to respond to the request and should be time-limited. For state court litigation a period of two years should be sufficient, for a federal claim, such as a civil rights lawsuit, a period of four years may be needed.

5. A release of information from another agency may be substituted for a signed release form from a New Mexico Sexual Assault Service Providers or a Sexual Assault Coordinator only if it conforms to the requirements of HIPAA and contains the following provisions and these conditions are met:

- a. an explanation of the possible uses of the information
- b. an opportunity for client review of the material to be released
- c. a statement of the continuing availability of services regardless of the decision regarding disclosure
- d. a reasonable time limitation on the release, usually not exceeding one year for litigation
- e. a statement of the name of the party requesting/demanding the records and the purpose of the release
- f. an offer to provide the client with a copy of the documents to be released.

6. In cases involving minors aged 14 and over, the child shall have full authority to consent to treatment and to determine if records shall be released, unless the child suffers from a cognitive disability which renders them incompetent to make treatment decisions (in which case a legal guardian/treatment guardian shall make these decisions for the child). Unless the parents have signed a written agreement to allow the minor this authority, the minor's non-abusive parent or legal guardian must execute the release, or decline the release, on behalf of a minor client. In cases involving minors under age 14, a non-abusive parent or guardian has the authority to execute a release, or decline a release, for a minor client. When a parent or guardian seeking the release of a minor patient's records is the subject of an abuse or neglect investigation, records should not be released and that parent should be referred to the Children's Court attorney or Assistant District Attorney handling the case. The agency should seek legal counsel if there

is no criminal matter pending.

7. When more than one client is affected by the information to be released, the informed, written consent of all clients affected must be secured before the information is released. If consent is not secured from all clients, any information relating to the non-consenting client(s) must be redacted from the record so that it is not identifiable.

8. Telephonic release is not adequate.

9. Clients wishing to execute a consent to disclose confidential information should be advised of the right to seek a Qualified Protective Order to limit access to the released record and to direct future destruction or return of the original record and any copies. Clients who desire a Qualified Protective Order should be referred to legal counsel such as the Victim Rights Project.

**B. Legally Mandated Disclosure** — New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators are committed to safeguarding client privacy. Exceptions are as necessary to further the interests of justice, or to protect clients and third parties from harm. If a subpoena is served upon a New Mexico Sexual Assault Service Providers or Sexual Assault Coordinator, requesting disclosure of client records, the following steps should be followed:

**Subpoenas for Records:**

1. Each agency shall designate a custodian of records. Persons seeking to serve the agency with a court order for records are to be directed to the custodian of records. Other staff should not accept service on behalf of the custodian of records.

2. All subpoenas for records received by mail or through posting on an agency building door should be delivered immediately to the custodian of records or the Executive Director's designee as soon as they are served.

3. The custodian of records or the Executive Director's designee shall promptly examine the court order for facial validity (i.e. the document appears to be a real court order) and any deadlines to comply which are noted on the face of the order. Such factors as the signature of a judge, a court name, a current date, and a standardized format document shall be evidence of the facial validity of the order. Documents signed by attorneys are valid, but should be challenged unless the client consents to the disclosure after an explanation of the client's legal rights.

4. If the document appears to be invalid, or was served by fax, it may be challenged for those reasons if the client does not wish the documents released.

5. If the order appears to be a facially valid subpoena for **client records**, the custodian of records or the Executive Director's designee should contact the client to evaluate whether the New Mexico Sexual Assault Service Providers or Sexual Assault Coordinator should resist or cooperate with the subpoena. As a general

rule, under §31-25-3 NMSA 1978, the client and the client's counselor shall not to be compelled to produce records regarding confidential communications, unless the client consents. Clients with pending court cases should be advised to discuss the subpoena with their civil attorney and/or the assigned Assistant District Attorney in order to evaluate the importance of the subpoenaed records to legal outcomes the client may be seeking, such as a criminal conviction of the perpetrator of the assault, or a civil remedy.

6. Upon receipt of any facially valid subpoena for **agency records** (i.e. records pertaining to agency policies or procedures, as differentiated from client records which refer to client identity/treatment/diagnosis/etc.), the custodian of records shall notify the Executive Director, who shall contact the Board of Directors, to evaluate whether the agency should resist or comply with the subpoena.

7. New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators should not disclose any information without the explicit, informed, written consent of the client. While New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators are under no obligation to seek out a former client, it may be useful to the client to make reasonable efforts to do so. Under no circumstances should a New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator pressure a current client to provide consent to release confidential information. Without client consent, a New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator should resist disclosure and file a Motion to Quash the subpoena or a Motion for a Protective Order in the case of subpoena "duces tecum."

8. If the Motion to Quash or the Motion for a Protective Order has an unfavorable result, the Executive Director and the BOD shall analyze the agency's ability to take further legal steps to protect client confidentiality. In any event, the agency shall make reasonable effort to consult with the client and notify her/him of the agency's position.

#### Subpoena for Staff/Volunteer to Testify:

9. If a New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator is served with a subpoena commanding staff or a volunteer to testify, the Executive Director should be notified and make reasonable efforts to contact the client to evaluate whether the agency should resist or comply with the subpoena. In the absence of client consent to comply, the agency should resist the subpoena by filing a Motion to Quash. If the Motion outcome is unfavorable, the agency should proceed as described in #7 above.

10. If law enforcement comes to a New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator's office with a search warrant, the person answering the door should immediately notify the agency Executive Director, the Director's designee, and the agency's attorney. If these persons are not available, the Board chair should be notified.

11. The search warrant should be scrutinized for validity by ascertaining if the

area to be searched is described, if there is a current date, and a judge's signature appears on the document. If any defects appear on the warrant, the New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator should call the issuing judge's office/issuing authority and ask that it be quashed due to the defect, and also ask that the official quashing the warrant speak directly to the supervising officer at the scene of the search to advise him/her of the decision to quash the warrant.

12. If the search warrant is for a particular individual, the warrant should state where that individual will be searched for, recognizing that others in a joint living/working space have a right to privacy. In such a situation, the Executive Director should respectfully request that law enforcement wait while s/he talks with the individual sought. The Executive Director may advise the individual sought that the New Mexico Sexual Assault Service Provider or Sexual Assault Coordinator prefers that she/he cooperate with the warrant rather than expose other clients and staff to the disclosure necessitated by execution of the warrant. If the warrant is for anything other than an individual, or if the individual refuses to cooperate with the officer, the officer should be asked to wait until non-essential staff and clients may be asked to temporarily exit while the search takes place.

13. A search warrant would only be issued if the police or prosecutor believes that a client committed a crime. The Director should advise that client to immediately contact her/his attorney. The attorney may wish to attempt to quash or terminate the warrant.

14. If a warrant is not terminated, it must be honored. Efforts to assess the validity and to limit the scope of the warrant should be documented to include the name and agency affiliation of the officer executing the warrant.

15. If an officer presents an arrest warrant at a New Mexico Sexual Assault Service Provider or at the office of the Sexual Assault Coordinator, personnel must comply with the warrant. Compliance does not require identification of clients, nor does it require permitting law enforcement entry absent a lawful search warrant for the premises. If the staff learn of an arrest warrant before it is effected, they should encourage the staff/volunteer/client who is the subject of the warrant to contact counsel and turn themselves in to the issuing authority or police department. New Mexico Sexual Assault Service Providers and Sexual Assault Coordinators are not obligated to assist law enforcement in effecting an arrest. However, in the case of agency staff or a volunteer who has committed a criminal offense, it may be in the best interest of the agency and the administration of justice to assist law enforcement.

### Subpoenas for Clients

16. Agency staff are under no obligation to serve subpoenas. Local protocols may provide for passive service such as mailing or posting, but staff are not to agree to personally serve a client unless the client has specifically authorized staff to do so.

**I have read, understand, and agree to follow the above confidentiality guidelines. I understand it is my responsibility to ask for clarification when needed.**

\_\_\_\_\_  
**Employee/Volunteer/BOD/Contractor Signature**

\_\_\_\_\_  
**Date**

Form as approved March 2011.