



Chapter 10

Confidentiality Issues

In this chapter, you will find information on...

- *Good Record Keeping*
- *Confidentiality Policies and Procedures*
- *Handling Subpoenas*

Your program's ability to protect client confidentiality is extremely important to every sexual assault survivor. The foundation of rape crisis programs rests on the ability to provide a safe space for the survivor to speak confidentially. New York State Civil Practice Law § 4510 (*See Appendix P*) states that a rape crisis program counselor shall not be required to disclose a communication or records made or signed by his or her client during the course of service unless:

- 1) the release is authorized by the client; or
- 2) the information revealed to the rape crisis program counselor reveals the intent to commit a crime or harmful act.

Due to the efforts of NYSCASA and other advocates, New York State extended confidentiality protection to communications between survivors and rape crisis program advocates in 1993. Most rape crisis programs have been certified by the New York

State Department of Health so that the program advocates are eligible for this confidentiality privilege. This means that the communications between survivors and rape crisis program staff and volunteers who have completed the required training are extensively protected from defense attorney subpoenas in a court case.

If your program's records are subpoenaed to give information about a client, the program should immediately contact your district attorney for assistance in having the subpoena quashed on the grounds that it violates rape crisis counselor -- client confidentiality. If the Rape Crisis Program has its own attorney, it is wise to consult this lawyer immediately as well.

Your program should have every staff member, paid and unpaid sign a confidentiality statement of confidential information or agreement which states that all personal knowledge employees have about clients is confidential and not to be shared with anyone other than co-workers, and even then information should be shared with them on a need to know basis and privately.

Laws protect certain communications from being disclosed. These types of protected communications are referred to as "privileged" communications. The law says there is a positive value to society to justify not releasing this information. The relationship between advocate and client must be protected to ensure trust so that the survivor will feel free to disclose important information to the counselor. If the survivor you are working with authorizes you to provide the information and records to the party who is requesting it, warn her about the legal implications, i.e. losing counselor-client privilege, of providing this information to a third party.

Good Record Keeping

The best way to protect confidentiality is to adopt sound record keeping policies and practices. Even if your program is protected under a law of privilege, a court may order the release of records at some point during legal proceedings. It is important to take security precautions in terms of physical location and staff practices. Records should be kept in secure locations, and access should be restricted to authorized individuals. Limit access to program records and files by researchers, auditors, funders or government oversight agencies. However, a sexual assault survivor should have reasonable access to any program files or records about her.

Electronic communication poses some hazards in terms of confidentiality.

Communication with survivors should be limited, if not avoided, over non-secure media. Advocates should not communicate with survivors on analog cell phones or cordless phones. Confidentiality cannot be guaranteed on these devices, and conversations held on these kinds of phones may be intercepted or unwittingly broadcast to third parties. Advocates who make or return calls from home need to be aware of the possibility their number is being displayed and stored in a Caller ID system. Programs often recommend advocates have call blockers for their home lines, use pay phones for clients with All Call Restrict on, or establish alternative methods of communication for Caller ID should be avoided for the same reasons. For information on telephone security, see your local phone directory.

Computer communications can also incur security breaches; maintain physical integrity of your equipment by not keeping computers in publicly accessible areas, locking unoccupied premises, and by securing laptops when not in use. Install firewalls (software protection systems) to prevent attempts at hacking, have individual passwords for staff, use varying levels of access to client data files, perform system backups

regularly, and make sure computers are shut off at the end of the workday. Mobile data equipment, including Palm Pilots and laptops, should use encryption to protect data in the event that the device is lost or stolen. Electronic mail (e-mail) is also vulnerable to interception and loss of privacy, and be used only to communicate with survivors in limited instances.

In order to protect client communications, your written records should contain very few or only skeletal details so that any information released will not be harmful to the client. Rape crisis programs must balance the need for record keeping against the need to maintain confidentiality and to provide safety for clients and employees. While some programs need a certain amount of information in records, seemingly innocent information can possibly be used against an individual client or the program. In particular, narrative and counseling notes can be harmful to the client when taken out of context when used in a court of law.

As standard practice, records kept about a survivor should contain only information relevant to the purpose for which the survivor came to the program. These records include: originals of any signed statement from the survivor indicating that she has been informed of the program's confidentiality policy, authorizations for release of information, withdrawal of release of information, and survivors' requests to review records.

The following suggestions about record-keeping are made by the National Center on Women and Family Law, Inc., in the booklet *Protecting Confidentiality of Victim-Counselor Communications*.¹ First, review what the goals are for keeping records, such as meeting funding source requirements; aiding in counseling or advocacy (to refresh memory); developing a statistical profile of the clients served; and protecting the

program from potential liability.

With regard to funding requirements, most funders allow records to be maintained without reference to the identities of the clients. Some may require a first name, while others permit some type of code. When a funding source mandates more specific information, your program may be able to negotiate that only minimal and non-identifying information be released. This means that you should know what the minimum amount of information is that the program must provide to each funding source. Programs may need to educate or remind funders on the importance of not divulging names or identifying information to funders.

One reason programs keep extensive records is to meet the client's safety and therapeutic needs by using the notes to develop goals for the client. However, it is essential to remember that these records that pose the largest dangers to the clients. Narrative notes used in court, such as notes saying that the client blames herself for the assault could be presented in a totally different light when offered by the defense to discredit her testimony. Although rape crisis program staff knows that most victims of sexual assault question their own actions or recollection of an incident, when this information is used in court it can be used with potentially devastating results to the case and the client.

The client's files could be used against her in several other ways. Any notations about the client's progress or therapy may be used to show that the client has a history of emotional instability. Editorial or personal observations on the part of a counselor may also be very damaging. For example, stating that a client seems to be unable to trust anyone could be used to embarrass or force the woman to defend herself. In addition,

statements about her state of mind or her feelings can be used to demonstrate emotional instability.

Even notations which are supposedly factual can be damaging in a court of law. For example, noting that the assault occurred at a certain time and place (according to the client) may be used to discredit her if this information is inconsistent with what the client said to the police or in her courtroom testimony. It is not unusual for victims to remember more details about the assault after some time, which means, what is in your records may allow the defense to impeach her credibility by finding her statements to be inconsistent.

Perhaps the worst statements to record are those including a diagnosis or diagnostic term unless you are also a mental health clinician. Any such terms will certainly be used to show that there is something wrong with the survivor. Some programs have found it helpful to tell a client at the beginning of the counseling relationship that, for her protection, very few notes will be taken. For that reason, she may need to repeat some answers from time to time. In addition, programs may need to tell a client that they are not equipped to document a case for her. If she is contemplating bringing a civil action as a result of the crime, she may need to take on the task of documenting exactly what happened by herself or with the assistance of an attorney.

Careful record keeping can allow you to collect statistics. These statistics can be important for data collection, provide back up to outcome based measure statements, fund-raising and for community education purposes. While it may be important to keep statistical data, there is no reason to ever keep statistics that can be traced to a particular individual. All statistical information should be kept anonymously.

The last reason for keeping records is to protect a program from liability. Such records are usually for maintenance of the program rather than for the safety and counseling needs of the client. It makes sense for a program to develop forms to meet the program's particular needs. Some examples include a form for releasing certain information for specified purposes. Program policy statements, such as statements explaining the program's confidentiality policy, should be posted and given to each client.

It is strongly advised that before programs write down any notes at all, the program consider the usefulness of those notes compared to the harm they may cause if released. The program should also consider if they would feel comfortable having the client see the notes. Because it is almost impossible to know what information from program records could be damaging to the client if disclosed, it is recommended that record keeping be limited to essential information only and that programs carefully examine what they consider essential and to whom it is essential.

Adopting Confidentiality Policies and Procedures

Each rape crisis program should already have in place or quickly adopt a confidentiality policy that explains what information is confidential, why this information is confidential, and the importance of maintaining that confidentiality. The policy should cover all communications, observations and information made between and by all staff, interns, volunteers and board members.

All individuals who work at or volunteer with the program — including students, and board members -- should be asked to sign a confidentiality statement in which they

agree to uphold the confidentiality requirement. When working with a non-English speaking client and using the services of an interpreter, make sure that your program receives written assurance from the interpreter that he or she understands and or adheres to New York State law regarding confidentiality. These agreements should be placed in each individual's personnel or case file. The confidentiality policy should be reviewed whenever a person leaves the program. One advantage of having such a confidentiality agreement is to be able to show the court what the policy is when attempting to quash a subpoena.

The confidentiality policy should also state the purposes for which the program maintains records. It is recommended that the individual files not include names but rather contain a code. Programs should develop policies to deal with record retention and destruction at the termination of services. If a client or former client wishes to see her records, such a request should always be honored. You may make copies of items for her personal records if she requests it. However, a client should not remove anything from the file.

Rape crisis programs should have a policy in place as to the release of information when requested. At a minimum, the following conditions should be met:

- The client must understand what information is being released and their right to limit it to a specific incident or date if they have been a long term client or have more than one case in progress.
- The client must sign a written release outlining the information which she is consenting to have released, to whom and for what purpose.
- The consent form must have an expiration date.
- The client should have the right to revoke the consent and should be

notified of this right in writing. The revocation must be submitted in writing.

If the client no longer receives services and is calling or writing for a release, the program should have a policy detailing how such requests are handled including whether such requests must be notarized to assure that the request is being made by the individual.

Rape crisis program counsel should review the confidentiality policy with staff to discuss issues such as when a program may release a file without the permission of the client. This might occur when a client is legally incompetent, and the client's guardian has requested the files. Such situations should be included in the confidentiality policy as well as an explanation of whether the staff must inform an incompetent client that her records will be or have been released.

MINORS CONFIDENTIALITY

It is important to note that in New York State, sexual assault survivors who are minors can consent to all aspects of sexual assault care. Minors who are capable of giving informed consent can consent to services including sexual assault crisis counseling, forensic exam, emergency contraception, abortions, pregnancy care, STI testing and treatment, and HIV testing without parental involvement. Providers cannot require parental consent or disclosure for other parts of the sexual assault services, such as treatment of related injuries.²

As with adults, minor survivors of sexual assault should be informed upon first contact with your program about confidentiality, and about mandatory reporting exceptions. A suggested statement to minors might go something like this: "The information you

share with me is confidential and will not be shared without your permission. However, I want you to know that if you tell me that a child is or might be being abused, or if you plan to hurt yourself or anyone else, by law I have to report that to the proper authorities.” To report child abuse and neglect to the New York State Central Register (SCR), the general number is 1-800-342-3720 and for mandated reports 1-800-635-1522.

Subpoenas

There are two types of subpoenas that might be served on a rape crisis program. When an individual is named on a subpoena, it requires that person to attend a court proceeding and give testimony. A subpoena *duces tecum* requires that a person or program produce specified items such as documents, books or records. A subpoena can include one or both of these components.

If your rape crisis program is served a subpoena, you should immediately contact the district attorney and the program’s counsel to determine what course of action should be taken. It is imperative that a program understand that it is illegal to destroy any records once a subpoena has been served. The program should *not* have any conversation with the attorney or party issuing the subpoena, even if it is simply to inform them that there are no records, or that the advocate being sought for testimony no longer works there.

The district attorney and the attorney for your agency will know how to proceed based on the subpoena’s language. If the program does not choose to turn over its records or to produce a witness, the attorney will attempt to quash the subpoena, which means to get a court order that says the subpoena may not be enforced.

The most successful argument for quashing the subpoena is on the grounds that the information sought is confidential. If the attorney can do so, the motion to quash the subpoena will be based on the grounds that there is a statutory communications privilege or that there is a nondisclosure requirement. In New York, the argument will probably be based on the confidentiality privilege conferred to rape crisis program counselors by the Department of Health as stated in Civil Procedure Law §4510. (See *Appendix V for a Memorandum of Law*).

When the attorney files the motion to quash, the attorney may request a hearing before the court, or the judge may ask the attorney to present evidence and arguments. A crucial factor in the court's decision is to learn why the records are sought and what, if any, use is intended for them. The program's attorney will want to demand the attorney asking for the items put the reasons for this request on court record.

If the judge denies the motion to quash the subpoena, the program must decide whether to abide by the judge's decision or to contest the decision. A program director will want to talk to its legal counsel about the ramifications of either decision, including whether the order is appealable. These are issues which need to be thoroughly considered prior to the hearing.

It is easiest to prepare for the issuance of a subpoena by having wisely outlined record keeping policies within the program. This will allow the program's attorney to argue more effectively a motion to quash a subpoena. More importantly, it means that if records are turned over and a program counselor or advocate has to testify, the information which is disclosed will not be harmful to the client. Once the defense attorney community is aware that the program does not keep extensive narrative

records with information that could be used against a client, it is unlikely that the program's files will be subpoenaed in the future.

¹ National Center on Women and Family Law, Inc. (1992). *Protecting confidentiality of victim-counselor communications*.

² NY Public Health Law sections: 2504(30), 2780 (5), 2781 (1), 2783 and 2805(d) And NY Mental Health Law section: 33.21 [c]