

RULES RELATING TO CONFIDENTIALITY

Section 31-9-1 NMSA.

Forensic evaluations for the purpose of assessing a defendant's competency are confidential. A client is advised that when competency is raised pursuant to Section 31-9-1 NMSA, a defendant necessarily waives some confidence, as he must provide a copy of the evaluation to the Court and opposing counsel if he intends to introduce it when raising competency. The competency report is not made part of the court file; however, and the defendant in no way waives privilege entirely when competency is raised.

NMSA § 14-6-1. Health information; confidentiality

- A. All health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public even though the information is in the custody of or contained in the records of a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities.
- B. A custodian of information classified as confidential in Subsection A may furnish the information upon request to a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities, and the custodian furnishing the information shall not be liable for damages to any person for having furnished the information.
- C. Statistical studies and research reports based upon confidential information may be published or furnished to the public, but these studies and reports shall not in any way identify individual patients directly or indirectly nor in any way violate the privileged or confidential nature of the relationship and communications between practitioner and patient.
- D. This section does not affect the status of original medical records of individual patients and the rules of confidentiality and accessibility applicable to these records continue in force. This section does not affect the status of vital statistical records of the health and environment department.

New Mexico Administrative Code: NMAC 16.22.2.16

- 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.**

Rule 11-504 D(2) Privilege Btw Patient & Psychotherapist:

The Rules of Evidence in New Mexico address privilege and state: 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.

Rule 5 – 123A & C(5) NMRA Sealing Court Records

Court records subject to public access unless sealed by order of the court.

C(5) provides that all court records in competency proceedings are confidential and shall be automatically sealed without an order of the court.

Rule 16-308. Special responsibilities of a prosecutor.

- 1) Commentaries: [1] The prosecutor has the responsibility of a minister of justice and not simply that of an advocate.
- 2) Reliance on judicial decisions: the primary duty of a lawyer engaged in public prosecution was not to convict....Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965).

Rule 16-304. Fairness to opposing party and counsel.

A lawyer shall not....E. In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to...the credibility of a witness...”

Rule 16-404. Respect for rights of third persons.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 16-114. Client with Diminished Capacity.

- C. **Protected Information.** Information relating to the representation of a client with diminished capacity is protected by Rule 16-106 of the Rules of Professional Conduct.

Rule 16-106. Confidentiality of Information.

- A. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implied authorized in order to carry out the representation or the disclosure is permitted by Paragraph B of this rule.

Rule 16-203. Evaluation for use by third persons.

- B. **Client consent required.** When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- C. **Protected Information.** Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 16-106 of the Rules of Professional Conduct.

Rule 16-113. Organization as a Client.

- A. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Section 43-1-1 Evaluations of Criminal Defendants

- A. Whenever a district court finds it necessary to obtain an evaluation of the mental condition of a defendant in a criminal case, the court shall order an evaluation from a qualified professional available to the local facilities of the court or from a qualified professional at a local mental health center designated by the secretary of health

HIPAA (Health Insurance Portability and Accountability Act of 1996)

The HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.

45 C.F.R. 164.512 provides:

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.