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# Postmortem Confidentiality: An Ethical Issue

Loretta J. Bradley<sup>1</sup>, Bret Hendricks<sup>1</sup>, and Douglas R. Kabell<sup>1</sup>

## Abstract

In an era of increased need and expectation for confidentiality, the counseling record of the deceased client challenges confidentiality. Using ethical codes and legal mandates, the authors explore whether the counseling record of a deceased client should be released when the client's will and the client's counseling records are silent on this issue.

## Keywords

confidentiality, ethical dilemma, informed consent, postmortem confidentiality, record release

Ideally, any person seeking counseling can expect confidentiality. Despite the counselor's attempt to maintain confidentiality, there are exceptions to confidentiality such as, although not limited to, abuse and court subpoenas, and in some instances counseling records. In recent years, counseling records have been questioned not only for the living client but for the deceased client (Werth, Burke, & Bardash, 2002). Specifically, issues have focused on policies and/or usual procedures concerning the release of counseling records of deceased clients. The Case of Jane and Clarence will illustrate some of the dilemmas and concerns. Please note the case is fictional and does not represent anyone living or dead.

## Case of Jane and Clarence

Jane Smith was born on January 5, 1931, and died on May 10, 2011, thus dying at the age of 80. Her husband Clarence was diagnosed with cancer 6 years ago. Jane and Clarence were referred to the counselor by the local hospice agency soon after Clarence was placed in hospice care. Clarence died 1 year ago. For the past 5 years, Jane had been seen for counseling by Dr. Jones. Throughout most of Jane and Clarence's lives, they presented themselves as bright, energetic, organized, and caring people. However, following Clarence's diagnosis and subsequent treatment, both Jane and Clarence gradually became anxious, worried, and despondent. After Clarence's death, Jane continued counseling to deal with grief issues. In counseling, Jane was motivated to work on her issues. Further, she diligently kept her appointments and always arrived on time. Then about 3 months ago, Jane died from natural causes. Jane left all of her money, real estate, jewelry, and so on, to her only child, Brenda.

About 1 month ago, Brenda came to see Dr. Jones. At that meeting, Brenda presented her parents' wills. Brenda said that since she was her mother's and father's heir and executor, she would like to have her parents' counseling records. Brenda stated that although neither her mother's nor her father's

wills mentioned their respective counseling records, she was confident that both would want her to have the records. Dr. Jones said that he was not sure if he could release the records, especially since neither of the wills nor his counseling notes gave any directions from her parents about the release of their counseling records. Dr. Jones said he would contact Brenda after he had consulted about her request.

After considering Brenda's request, Dr. Jones had the following questions:

- How does confidentiality impact my decision?
- How does informed consent impact my decision?
- What is my ethical responsibility?
- What is my legal responsibility?
- Given the above, what should I do?

Although the context of loss is prevalent in the counseling literature (Anderson, 2005; Bemby, Poe, & Rogers, 2009; Hunt & Rosenthal, 2000; Rubel, 2004; Scofield, 2005), the literature is sparse on postmortem confidentiality. Using the Case of Jane and Clarence, this manuscript will address the above questions and make recommendations for solving the dilemma.

## Confidentiality

Confidentiality is the cornerstone upon which counseling is based. Despite the need for confidentiality (Corey, Corey, &

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Callanan, 2007; Gilliland, James, & Bowman, 2002; Thompson & Henderson, 2007), absolute confidentiality cannot be guaranteed. Among the exceptions to confidentiality are abuse, intent to harm self or others, subpoenas, and court hearings (Bradley, Whiting, Hendricks, & Wheat, 2011). Despite the exceptions to confidentiality, clients should be assured that the counselor will exert every effort to maintain confidentiality.

## Confidentiality and Death

In counseling, it is assumed that the client should feel safe in disclosing his or her innermost feelings to their counselor. That is, counseling is a safe place where the client can “pour out” their struggles, and through counseling can work to solve some of their most private issues. In counseling, it is expected that verbal disclosure as well as the written counseling record (counselor’s notes) will be kept confidential. However, does this always occur? That is, after the client’s death, would the counseling record ever be released? While our literature search revealed sparse information in this area, the authors believe that confidentiality should not be breached unless there is imminent danger to self or others, and unless there are compelling ethical or legal mandates involved.

## Postmortem Confidentiality

While little has been written on postmortem confidentiality, it is a topic that must not be ignored. There was a case about 20 years ago that created major debate, and while the case did not involve family counseling, it is pertinent to our inquiry. On July 15, 1991, the *New York Times* printed a front page article about the release of 300 hr of psychotherapy tapes by a psychiatrist (Burke, 1995). The psychiatrist, Martin Orne, had been counseling from 1956 to 1964, Anne Sexton, an accomplished poet who had received a Pulitzer Prize. Following Anne Sexton’s suicide in 1974, the psychiatrist released the tapes to the executor (Linda Sexton) who in turn released them to Diane Middleton, an author who was writing a biography about Anne Sexton. The author, Diane Middleton, quoted the tapes, sometimes verbatim, in the ensuing biography. Following the publication of the biography, public debate emerged because Dr. Orne released the client’s medical records, unpublished early poems, and more than 300 audiotapes of the sessions without the client’s permission. The public debate focused on the psychiatrist’s choice (“spirit of the law”) in releasing the tapes from psychiatrist to executor to author and finally to millions of readers. The debate also focused on a breach in confidentiality that occurred in the “spirit” of maintaining confidentiality (Werth et al., 2002).

Although Anne Sexton left no instructions as to whether her therapy tapes should be released, the psychiatrist (Dr. Orne) said he released the tapes to her executor, her daughter, Linda Sexton. Dr. Orne stated, “I have no question that she would have jumped at the opportunity to share what we did,” (Stanley, 1991). Accordingly, the public debate focused on the psychiatrist’s choice in releasing the tapes from psychiatrist to

executor to author and finally to millions of readers. Because the tapes detailed Sexton’s problems, alcoholism and sexual abuse of her daughter, along with her many extramarital affairs, with both women and men including an affair with the second of her many therapists, outrage ensued (Stanley, 1991). For example, Dr. Gaylin, psychiatry professor at Columbia University and an expert on medical ethics, concluded that Dr. Orne’s action was a betrayal of both his patient and profession. Dr. Jeremy Lazarus (chair of the Ethics Committee of APA) stated “A patient’s right to confidentiality survives death. Our view is that only the patient can give consent to the release of records. What the patient’s family wants does not matter a whit” (Stanley, 1991). Despite the various criticisms, Dr. Orne maintained that he acted with the permission of Anne Sexton’s executor.

Another case involving postmortem confidentiality involved the high profile case of Nicole Brown-Simpson and her therapist, Susan Forward. Dr. Forward, who at the time of Brown-Simpson’s death was a Clinical Social Worker, reported to media after Brown-Simpson’s murder that Brown-Simpson had seen her in psychotherapy and had told Dr. Forward during these sessions that she was being threatened and battered by her former husband, O. J. Simpson. In a 1994 article, the *Los Angeles Times* reported that Dr. Forward may face professional disciplinary charges based upon violation of client privacy (Roan & Dolan, 1994). In 1995, the *Orlando Sentinel* reported that Dr. Forward was barred from seeing patients for 3 months and that she had also agreed to 3 years’ probation for violating Nicole Brown-Simpson’s confidentiality (LaMee, 1995). Basically this case created some public outrage and brought forth many issues involving postmortem confidentiality. In the case of Brown-Simpson, the social worker was not given permission to release the tapes. Unless written permission is given to the counselor to release counseling records, the authors believe the counseling records should not be released unless the failure to release the records would cause harm to self or others, break codes of ethics, or be in violation of the law.

## Informed Consent

An informed consent is typically presented to the client at the initial counseling session. While the informed consent is presented in written format, it is also verbally described and discussed with the client. An informed consent usually discusses such topics as, although not limited to, an overview of counseling, counselor’s background and training, confidentiality, limits of confidentiality, counseling records, counseling fee structure, and counseling appointments. After the client has read and discussed the informed consent, the client is asked to sign and date the form.

The International Association of Marriage and Family Counselors (IAMFC) Code of Ethics (Hendricks, Bradley, Southern, Oliver, & Birdsall, 2011) in A.13 states:

Couple and family counselors maintain accurate and up-to-date records. They make all file information available to clients

unless there is compelling evidence that such access would be harmful to the client. In situations involving multiple clients, couples and family counselors provide individual clients with parts of records related directly to them, protecting confidential information related to other clients who have not authorized release. Couple and family counselors include sufficient and timely documentation in client records to facilitate delivery of services and referral to other professionals as needed.

Although the IAMFC Code of Ethics does not mention the records of a deceased client, there is information in the Code (A.13) indicating that the client should authorize the release of the counseling record. The authors of this manuscript likewise advocate that the client's signature is needed prior to the release of the counseling record. As stated earlier, laws may necessitate the release of the record with or without the client's consent. The authors also believe that the informed consent should be expanded to address the client's will. Specifically, the client should indicate that following death who or if anyone should have access to the counseling record. The authors believe that if the client's will is silent on this issue, it is possible that the court could mandate that the records be disclosed if requested by the executor.

### Ethical and Legal Responsibilities

Although ethical and legal responsibilities are often similar, they are not synonymous. When considering whether to release a client's record following death, the counselor must consider both ethical and legal mandates.

The ACA Code of Ethics (American Counseling Association, 2005) in Section B.3.f states:

Counselors protect the confidentiality of deceased clients consistent with legal requirements and agency or setting policies.

A fundamental principle underlying B.3.f is the belief that the welfare of the client (Section A.1.2) is paramount. Simply stated, the welfare of the client does not end with death. In the case of Jane and Clarence, it is imperative that the counselor consider that the couple's separate wills were silent about their counseling records. The ACA Code of Ethics (2005) speaks to the issue in that Jane and Clarence's confidentiality must be protected consistently, of course, with legal requirements and the agency's policies.

The IAMFC Code of Ethics (Hendricks et al., 2011) in Section B.5 states:

Couple and family counselors store records in a way that protects confidentiality. Written records should be kept in a locked file drawer or cabinet and computerized record systems should have appropriate passwords and safeguards to prevent unauthorized entry.

In the ACA Code of Ethics (2005), B.6.a states:

Counselors ensure that records are kept in a secure location and that only authorized persons have access to records.

While B.5 of the IAMFC ethics code focuses on confidentiality and security of client records and B.6.a of the ACA Code of Ethics (2005) focuses on security of records and authorized persons, both imply that records are safeguarded for all clients, living or deceased.

In addition to being familiar with ethical codes (Werth et al., 2002), the counselor must be cognizant of legal mandates (Barsky & Gould, 2002; Berg, 2001; Burke, 1995). Further, the counselor must recognize ethical and legal behaviors are not identical. In some instances, one can be unethical and still remain within the legal limits of the law.

With regard to Jane and Clarence and the release of their counseling records, the law does not fully prohibit the release of the counseling records of a deceased client (Kocher & Keith-Spiegel, 1998). Further, a court can require the counselor to provide the client's records. While our literature search did not reveal any legal cases filed against a counselor releasing the deceased client's records, there is some direction from other professions.

In a U.S. Supreme Court decision (*Swindler & Berlin and James Hamilton v. United States, 1998*), the court ruled the attorney-client privilege survives the client's death. The American Medical Association's Council on Ethical and Judicial Affairs (2000) provided a report titled "Confidentiality of Health Information Postmortem." The council concluded that protection of medical information should continue after the patient dies. In addition, the council concluded that all information recorded in the deceased patient's medical record should be kept confidential to the greatest extent possible. Berg (2001) reviewed postmortem confidentiality and concluded that while she would allow disclosure in regard to health, she would not allow disclosure involving "general interest," the category in which most mental health disclosures would be found. "General interest" includes all conditions, including mental health, which impact a person's functioning. Werth et al. (2002) concluded that releasing the deceased client's records should occur if breaking confidentiality would advance the client's wishes or enhance the need of individuals to protect themselves. Otherwise, the authors concluded that the records should not be released.

### Conclusions and Recommendations

Using a case study, this article highlighted issues involved in releasing a deceased client's counseling records. Specifically, this article focused on confidentiality, postmortem confidentiality, informed consent, ethical, and legal responsibilities. Although our literature review revealed a sparse amount of information, the published data do indicate the welfare of the deceased client is paramount. Thus, the counselor should not release the counseling records unless it is in the best interest of the client or unless the records need to be released because of a compelling reason dictated by legal mandates. Ethical and

legal problems could likely be reduced if the counseling record was addressed in the informed consent and in the client's personal will.

Since postmortem confidentiality is a sparse topic in the counseling literature, future research should be directed to how the deceased client's record should be or should not be released when executors request release. Research should also be directed toward how legal mandates influence the release of counseling data within and between states. In order to provide more concrete procedures, research should be directed toward the decision-making process by which counselors decide whether they will or will not release a deceased client's record.

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