



Will Confidentiality Survive Death?

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Mr. Blanford, a 70-year-old married Caucasian man, is about to retire from his job as regional manager of a large company. In his initial session, he reports that, during the last five years, he has developed a relationship with a woman who lives in a city where he traveled regularly as part of his business activities. Now that he will no longer be traveling for work, opportunities to see this woman will be severely hampered and more likely nonexistent. He says that his wife has been suspicious that he may be having a relationship with another woman, but he believes she doesn't know for certain that he has been engaged in an extramarital affair. He comes for treatment because he is conflicted about what to do: stay in his long term marriage with a wife whom he feels affection for but is no longer in love with, or leave the marriage to be with the other woman whom he calls his "soul mate," knowing that he will likely experience rejection from his adult children because of their strong allegiance to their mother.

Working with Mr. Blanford in therapy presents some particularly sensitive considerations around confidentiality that are wisely addressed at the beginning of treatment, including what will happen to the authority over record release after Mr. Blanford's death. This question, while seemingly morbid, is important to consider with all clients at the outset of treatment. Psychologists regularly describe various exceptions to confidentiality as part of the informed consent process. The passing of privilege at a person's death should be included in that conversation. Addressing this potential exception to confidentiality is especially important when working with clients dealing with end-of-life issues but reasonably should be extended to all clients.

Background

A highly publicized case that brought this sensitive and challenging issue to the forefront for mental health professionals occurred in 1991. Anne Sexton, a Pulitzer Prize winning poet, committed suicide in 1974. She had seen a psychiatrist, Martin Orne, from 1956-1964. He made over 300 audiotapes of those sessions available to her daughter who was her literary executor. In this case, Ms. Sexton had given permission to Dr. Orne to use them as he saw fit to help others, as well as to release the tapes to her daughter after her death. Her daughter then authorized release of the tapes to Ms. Sexton's biographer, and in the fall of 1991, a biography was published. The tapes included information about Sexton's struggle with alcoholism, extramarital affairs (including one with a different psychiatrist), and her alleged sexual abuse of her daughter. Professionals and members of the public criticized the release of this information, and the idea that a client's right

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to confidentiality should survive death began to be addressed (Bradley, Hendricks, & Douglas, 2011; Burke, 1995).

At the Federal level, the United States Supreme Court addressed the question of patient-therapist privilege. In *Jaffe v. Redmond*, the Court affirmed that the assurance of privacy is necessary to the effective development of a therapeutic relationship. In *Swidler & Berlin v. United States*, the Supreme Court further addressed the issue of privilege, finding that it survives death. While the Court also stated that situations might occur where privilege would not predominate (i.e. situations in which the benefits of disclosure outweigh the benefits of maintaining privilege) affirmation of the right to privacy prevailed (Behnke, 1998).

In California, the issue of privilege is addressed in the Civil Code, the Health and Safety Code, and the Evidence Code. The law asserts that after death, the privilege passes to the legal representative of the decedent named in the will, i.e., the executor of the estate. Obeying these laws, however, can at times conflict with psychologists' ethical standards regarding confidentiality. For example, consider the situation if Mr. Blanford died during or soon after treatment ended, and his wife contacted the psychologist expressing her wish to review the treatment records. Another example would be a deceased mother who had come to treatment to address feelings of alienation toward her child. Releasing the records in either of these cases could cause harm to both the survivors and the reputation of the deceased clients.

Ethical Considerations

The psychologist is faced with making a decision in alignment with the American Psychological Association's (APA) Ethical Principles of Psychologists and Code of Conduct Principle A and Standard 3.04 in striving to do no harm and Principle E in showing respect for the former clients' dignity albeit postmortem (2002, 2010). Choosing a course of action that upholds the letter and the spirit of the law whenever possible is paramount. Psychologists must consider how to "respond ethically to legally imposed disclosure situations" (Fisher, 2008, p. 7). Situations such as the two discussed above can present dilemmas

whereby the psychologist is faced with potential conflicts between upholding ethical standards and complying with legal mandates. An ethics consultation from a colleague, and a risk management consultation from an attorney, can be invaluable in such situations.

Psychologists are given some guidelines when faced with a conflict between ethics and the law in APA Standard 1.02:

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights (2002, 2010).

We are further encouraged to address conflicts between our legal obligations and ethical concerns "...in a responsible fashion that avoids or minimizes harm" (2002, 2010).

APA Standard 4.01 directs psychologists to maintain confidentiality. Additionally, according to APA Standard 4.05(a): Privacy and Confidentiality, we are within ethical guidelines when we disclose confidential information if we have the consent of a "...legally authorized person on behalf of the client/patient unless prohibited by law" (2002, 2010). As such, Dr. Orne's actions would not be technically unethical for a psychologist. However, while he was in compliance with the letter of the law and Standard 4.05 (as well as the American Psychiatric Association's ethical code), many felt that he had violated the spirit of

the law and ethical guidelines. Could the release of this information have harmed Ms. Sexton's reputation after her death? On a larger scale, could it have harmed the public's trust in the profession, by violating the therapist's commitment to confidentiality, which is fundamental to the therapeutic relationship?

Beyond individual client considerations, concern has been expressed for how the public might view the profession if it feared that psychologists would routinely release client records after death, whether for personal gain (as some believed was the case with Ms. Sexton's records) or simply to comply with a request from the deceased client's personal representative.

This potential for disclosure of confidential information after a client's death, as noted above, is best addressed at the beginning of treatment during the process of obtaining informed consent. Including in that process some discussion with potential clients about what happens to their records after death allows them the opportunity to think through what that might mean for their participation in therapy. Additionally, APA's Recordkeeping Guidelines offer an opportunity to discuss the level of detail that might be kept in the record (2007). These Guidelines note that some clients may "express a desire for the psychologist to keep a minimal record in order to provide maximum protection and privacy" (2007, p. 995). Furthermore, clients might consider the possibility of including in the record a written statement or directive regarding their wishes with respect to postmortem disclosure. If a client chooses to do so, he or she should be directed to an attorney for guidance regarding this document.

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The American Medical Association (2000) provides guidelines to physicians for postmortem disclosure of information that psychologists can refer to for an additional perspective. The guidelines assert that the "information should be kept confidential to the greatest possible degree" and list factors to consider in determining whether or not to disclose information (AMA, 2000, para. 1). Included in these factors are considerations of the client's wishes expressed before death and the potential impact on his or her reputation.

Back to Mr. Blanford. At the initial session, as part of the informed consent process, the psychologist would be advised to:

1. Inform Mr. Blanford about the laws regarding privilege after death.
2. Discuss the level of detail generally included in the clinical notes and respectfully consider a request he might make regarding limited recordkeeping.
3. Offer Mr. Blanford the opportunity to assert his wishes in writing regarding the use of information contained in his records after his death. This statement can be kept in the clinical record and updated by Mr. Blanford as he wishes.

Psychologists' responsibility to clients and to the profession includes understanding clients' rights, the laws that govern professional practice, and ethical responsibilities related to those laws and rights. Through this knowledge, psychologists can more effectively help clients make informed decisions about their participation in therapy, enhance the development of the therapeutic relationship, uphold the

client's wishes with respect to confidentiality after death, and maintain the public's trust in the profession. 

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1 Name and details have been changed to protect confidentiality.

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