Introduction

Social workers are informed occasionally of the death of a client or former client. In addition to feelings of sadness, this occurrence may generate a number of responses, including legal questions and concerns. The focus of inquiries to NASW’s legal office is generally on the topic of how to handle requests for access to information about the deceased client. The proper response will vary depending on the source of the request and elements of the client’s clinical case. This LDF Legal Issue of the Month article reviews the basic issues social workers may need to consider in handling the confidential records of deceased clients and identifies other resources that may be appropriate to access in specific situations.

Applicable Standards for Release of Information

The NASW Code of Ethics requires that the confidential records and information of deceased clients be protected according to the same standards that apply to living clients (NASW, 2008, Standard 1.07(r)). The Code permits the release of information upon consent of the client or “a person legally authorized to consent on behalf of the client” (NASW, 2008, Standard 1.07(b)). This may include, for example, parents of a minor child, the legal guardian of a vulnerable adult, or the executor or administrator of the estate for a deceased individual.

The Code of Ethics further states that when releasing information to the client, information in the record should be withheld only for compelling professional reasons (NASW, 2008, Standard 1.08). The Code does not address access to records by representatives in this section; however, in Standard 1.07 it clearly states that an authorized representative may consent to the release of confidential information. This could encompass a release of information to the representative as well as to an authorized third party.

Most states require disclosure to clients of their own records (and by extension, to their representatives) and the medical privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) identify access to records by clients as one of the mandatory patient rights (45 CFR § 164.524(a)). HIPAA further specifies that a “personal representative” may make privacy decisions on behalf of a client or deceased client (45 CFR § 164.502(g); see also U.S. Department of Health and Human Services, 2003)).

Thus, social work ethical standards, state and federal law, all offer support for the concept that the executor or administrator of the estate of a deceased client has a right to obtain a copy of the client’s clinical record upon offering documentation of their authority to act on behalf of the deceased and providing written authorization to release the records.

HIPAA also gives permission for health care entities (including clinical social workers) to release information about deceased clients without consent or authorization in the following circumstances:

- to notify law enforcement of a death that the health care entity believes may have been caused by criminal conduct (45 C.F.R. § 164.512(f)(4))
- to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law (45 C.F.R. § 164.512(g)(1))
- to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent 45 C.F.R. § 164.512(g)(2).

Disclosing confidential information about a deceased client under the above circumstances is not mandatory; therefore, seeking written consent from the legal representative of the deceased client is a valid and ethical approach, even if the information is requested by police, a coroner or funeral director.

Options for Responding to Request for Records of Deceased Clients

While social workers may recognize that the executor of a client’s will or the administrator of their estate has the authority to request and access confidential client records, several options for responding to such requests may be valuable to consider, such as the following:
• **Determine whether disclosing the record is likely to endanger someone**—Both HIPAA (45 C.F.R. § 164.524) and the *NASW Code of Ethics* permit withholding information when it is necessary to prevent harm to the client; however, when a client has died this consideration is no longer a factor. The HIPAA medical privacy regulations extend this limitation to situations where the disclosure of information may harm the authorized representative or another person (45 C.F.R. § 164.524 (a)(3)(iii)). The procedures for denying information include notifying the individual of the right to a review of the denial decision. The *Code of Ethics* states that only that portion of the record that would cause harm is appropriate to withhold (NASW, 2008) and HIPAA requires that access be provided to any other portions of the record beyond that which is legitimately denied (45 CFR § 164.524 (d)(1)).

• **Offer a treatment summary**—HIPAA permits health care providers to offer a summary of treatment in lieu of the entire file (45 C.F.R. § 164.524(c)(2)(ii)). If the social worker or agency is going to charge an additional fee for creating the summary this should be clearly stated and the requesting individual has the right to accept or reject the offer of a summary. The individual may still request the entire file; however, depending on the circumstances, the requesting party may find a summary to be sufficient.

• **Provide the “medical record,” but withhold separate psychotherapy notes**—HIPAA permits mental health practitioners to withhold access to detailed psychotherapy notes that are maintained separately from the primary clinical record (45 C.F.R. § 164.524(a)). The primary record (or “medical record” in HIPAA terminology) must contain sufficient documentation to meet regulatory standards. The LDF article, *Social Workers and Psychotherapy Notes*, provides detailed information on this topic (Morgan and Polowy, 2006). To meet ethical standards, information in psychotherapy notes should only be withheld for compelling professional reasons, such as preventing suicide or homicide (Reamer, 2006, p. 78).

• **Offer to release the records to the survivor’s mental health practitioner**—If the emotional stability of the requesting survivor is a credible concern, a responsible course of conduct may be to release the record to the treating clinician for the surviving family member, with their written authorization.

• **Release a complete copy of the client’s record**—The executor/administrator of the deceased client’s estate has the right to a copy of the record unless the information would endanger someone. The concern about danger has to be more serious than the social worker’s vague feelings of discomfort about the personal nature of the information. Requests from the attorney for the estate that are accompanied by a written authorization from the executor or administrator of the estate generally require mandatory disclosure.

### What Records are Required?
Additional concerns that may arise for social workers when records of deceased clients are requested are whether the social worker has met professional treatment standards and whether their clinical records sufficiently document the treatment. The purposes of clinical recordkeeping are multiple and may vary depending on a number of factors such as the treatment setting and the requirements of third-party payers (Morgan and Polowy, 2001). The *NASW Code of Ethics* requires that records accurately reflect the treatment provided, are timely and sufficient to facilitate the delivery of services, include only relevant information, maintain privacy and allow for appropriate access (NASW, 2008, Standard 3.04). Generally, a summary progress note dated for each clinical session is a minimum expectation; however, other appropriate material may include an assessment, treatment plan and collateral contacts (Reamer, 2006, p. 159-60). A well-documented record is an important element to support the legal defense of a social worker in the event that they become the target of a legal complaint.

Social workers may also create an addendum to a record to supplement the existing documentation or draft a closing treatment summary to highlight important aspects of the client’s case. In both situations the additional material should be dated contemporaneously with the date the report was completed. Altering a clinical record may incur severe penalties and should be avoided; however, supplementing the record with an addendum or summary may be beneficial for the clinician as well as the requestor of the record. Any additions should be dated with the actual date of the new entry.

### Analysis and Conclusions
A straightforward request for clinical records may be made for many purposes unrelated to possible action against the social worker. Social workers who are concerned about the consequences of releasing confidential information about a deceased client also need to be concerned about the consequences of not releasing information when the request is made with legitimate authorization from a legal representative for the estate. From a legal perspective, a request from the executor or administrator of a deceased’s estate has a similar legal status to requests made by the client. The executor or administrator may be said to “stand in the shoes” of the deceased for purposes of carrying out any legal activities.

HIPAA offers social workers with credible concerns about possible danger to the requesting person or another individual some options to prevent harm that may result from accessing confidential information. This may include withholding specific portions of a client’s record or obtaining the requestor’s consent to release the information to a responsible and appropriate third party such as a treating clinician or legal counsel.

If a social worker has additional clinical material to contribute or wishes to provide an overview of significant elements of the treatment process, creating an addendum or closing summary may ease some of the concerns as to whether the file will be sufficiently understood by the requestor. In any situation where there is notice of legal action against the social worker, the professional liability insurer should be immediately contacted.

Protecting the privacy interests of clients does not end with the client’s death. The social worker needs to be aware of the continuing ethical limitations and legal exceptions to be considered in any request for a deceased client’s records.

References


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