

## ACCESS TO MEDICAL RECORDS OF A DECEASED PATIENT

This letter is in response to your inquiry regarding when the relatives of a deceased patient can gain access to the deceased patient's medical records. Except as noted below, this letter assumes that relatives of a deceased patient are not attempting to file a wrongful death claim against you due to alleged medical negligence. If that is the case consult your professional liability insurance carrier, however, you *cannot automatically assume* that all relatives of deceased patients who request medical records are contemplating a lawsuit against you. The following information is provided.

Before proceeding we must inform you that we cannot provide legal advice to individual TMA members because Texas prohibits the "corporate practice of law" (*Texas Government Code Ann. §81.101*). In addition, the State Bar of Texas has ruled that corporate-employed attorneys may not provide legal services to customers of the corporation if a corporation receives fees that are, to any extent, compensation to the corporation for the attorney's legal services to the customers. To do so is a prohibited form of "fee-splitting" (*Ethics Opinion 498, January 1995*). The fact that TMA is a *non-profit* corporation does not seem to change the conclusion. However, we can provide general legal information about this topic. Because your facts may vary, you should contact your own retained counsel for true legal advice and representation.

### **Reasons and Confidentiality**

Various persons may appear in a physician's office requesting the medical records of a deceased patient. There are a number of possible reasons for this. Survivors may need to prove the cause of death in order to collect on a life insurance policy. Feuding family members may be attempting to contest the will. Relatives may be investigating a potential wrongful death claim against a third party. An insurance company might be contesting a claim against a life insurance (or other types of) policy. However, while all other privacy interests die with a person, the legislature has chosen to maintain the confidential and privileged nature of medical records intact.

### **Consent for Release of Medical Records**

As a general rule, no matter who wants the records or why, the Medical Practice Act of Texas requires a valid consent for release of medical records. The Act provides as follows:

Consent for the release of confidential information must be in writing and signed by the patient, or parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (citation omitted); the Persons with

Mental Retardation Act of 1977 (citation omitted); Chapter 13, Texas Probate Code; and Chapter 107, Family Code; *or a personal representative if the patient is deceased*, provided that the written consent specifies the following:

the information or medical records to be covered by the release;

the reasons or purposes for the release; and

the person to whom the information is to be released. (V.T.C.A., Occupations Code §159.005, emphasis supplied).

This provision applies to release of medical records in situations other than court or administrative proceedings, where the Medical Practice Act does not otherwise provide for an exception to confidentiality. There is no exception to confidentiality, outside of a court or administrative proceeding, where a patient is deceased. Thus, the deceased patient's spouse or any other family member may consent to the release of the deceased patient's medical records only if they are a "personal representative" of the deceased.

### **Personal Representative**

A "personal representative" is someone specifically named by the Texas Probate Code as having the authority, when appointed as such by the probate court, to transact business on the part of the estate. For example, the person named as executor in the deceased's will has first preference. If no qualified executor is named in the will, the surviving spouse has preference in administering the estate. A person who will receive money or property from the estate has next priority. Next of kin have next priority. Creditors of the deceased may even become personal representatives in certain rare instances. On the other hand, minors, incompetents, convicted felons and nonresidents are generally disqualified to administer estates. Note that the Probate Code does not identify a mother, father, spouse, sibling, child or other next of kin as constituting a "personal representative" although it is possible that any of these persons *would* be designated as a personal representative of a deceased person by a court.

In order to be a personal representative, a person must apply to the probate court. If a will is to be probated, the court may issue "letters testamentary." If no will is found to exist, the court may issue "letters of administration." In any event, letters testamentary or of administration, or a certificate by clerk of the court that letters testamentary or of administration have been issued are sufficient evidence of the appointment and qualification of a personal representative and the date of qualification. (Texas Probate Code §186).

To whom should a physician release the medical records of a deceased patient? To his parents? To his brother? To his wife? To all three? To anyone? These are the types of questions that the legislature intended the courts to resolve through the probate process and the issuance of letters testamentary or letters of administration. A physician is often not in any position to know or determine the nature of a patient's relationship with family or friends, although this was once more true than now. But a determination of a personal representative by the courts does delve into the nuances and sensitive aspects of the relationships between persons, and this is one reason, we believe, that the legislature did not remove the confidential nature of a patient's medical records upon the patient's death.

## **Attorney General Opinion ORD-632**

In 1994, the Texas Attorney General was asked whether certain persons had legal authority to consent to the release of emergency medical services (EMS) records of a deceased person. The laws pertaining to EMS records are almost identical to those in the Medical Practice Act.

In Attorney General Opinion ORD-632 (March 10-, 1995), the Attorney General opined that the term "personal representative," when used in the context of EMS records release, has the same meaning as that in the Probate Code (see discussion above). The noted, though, that the Legislature has enacted provisions for "informal probate" and "collection of small estates" which do not require that the probate court issue either letters testamentary or letters of administration. Accordingly the Attorney General ruled that a city may not require a person seeking EMS records (of deceased patients) to produce either letters testamentary or letters of administration *when such letters have not been offered*, and *must accept other evidence* establishing a person's personal representative status.

Although the Attorney General did not say so, these would logically include evidence showing that someone is involved in "informal probate" or "small estates" such as affidavits of heirship. The Attorney General opinion only applies to EMS records of deceased patients with are in the hands of a city, not records of deceased patient in the hands of a private physician's office. The Attorney General opinion regards release of records under the Open Records Act, which applies to cities, not private parties. Thus, one cannot regard ORD-632 as prohibiting private physicians from asking for letters testamentary or letters of administration *when such letters have not been offered*. Their point about alternative probate methods is well taken, though, and is commonly encountered when patients of modest means die.

Therefore, it is logical to postulate that, when someone seeks the records of a deceased patient they can establish that they are a personal representative of the deceased by showing either letters testamentary or letters of administration, or evidence that they are involved in "informal probate" or "small estates" such as an affidavit of heirship.

### **Usual Release Rules Apply**

As long as the appropriate person is identified to consent to the released of medical records, the same rules apply to records of deceased patients as to the living. You have thirty days to respond to the release request or provide a written reason why not, and you may charge a fee for preparation and release of the records.

### **The "Billing Exception" to Confidentiality**

As alluded to above, the Medical Practice Act has a number of "exceptions" to confidentiality. One allows the release of confidential information - including medical records - to "individuals, corporations, or governmental agencies involved in the payment or collection of fees for medical services rendered by a physician." This is the exception that allows physicians to file insurance claims without the necessity of receiving a signed consent for release of records each and every time a claim is filed. This exception allows a physician to bill the patient's health insurance company for expenses related to the final illness.

## **Life Insurance Claims**

The above referenced exception does *not* allow life insurance companies to request medical records of their deceased insureds to process or contest claims, because they are obviously not involved in the payment of fees for the physician's services during final illness. We have encountered situations where attorneys for life insurance companies have requested records from physicians, been rebuffed, and have threatened suit against the recalcitrant physician. This typically only occurs where no will exists and there are no assets other than the life insurance policy. We are wholly unaware of what type of a cause of action that the insurance company would have at that point

If this happens you may want to suggest that the life insurance company contact the survivors and have someone produce evidence that they are involved in an alternative probate proceeding, such as "informal probate" or a "small estate" or otherwise execute an affidavit of heirship. That person may then sign the consent for release of medical records, which will specify that the life insurance company representative will be the person to whom the records are to be released. (The life insurance company *could* file suit for a declaratory judgment, asking the court to declare that certain persons are entitled to collect insurance proceeds, ad subpoena the medical records as part of that court action. However, the insurance company would probably not want to go to such lengths unless the policy is sizeable).

Contact your own retained attorney if threats continue. You may want to consult your professional liability carrier as well, though such situations would not typically be covered by a professional liability policy because they are not health care liability claims.

## **Litigation Unrelated to the Physician**

Suppose feuding heirs are contesting the deceased patient's will. Or suppose that relatives are litigating a wrongful death claim against a third party. How do they gain access to the medical records of the deceased as part of their lawsuit? First of all, a personal representative will probably request medical records prior to the litigation being commenced. In that case, the above-discussed rules apply. If the personal representative or the opposing party requests records during the discovery phase of litigation, the usual rules of subpoenas apply.

It is clear that the medical records of the deceased would be "admissible" in court under the Texas Rules of Evidence 509(e)(4) if they are arguably relevant to the patient's condition and either party to the suit "relies" on the condition in their claim or defense. Thus, in a will contest case, medical records would be relevant (and therefore admissible) if they disclosed the patient's medical or mental condition, and someone relies on that condition to show that the patient did not have the ability to execute the will. When something is admissible in court it is generally "discoverable," meaning subject to subpoena.

## **Professional Liability Litigation**

What if the relatives of a deceased patient *are* attempting to file a wrongful death claim against you due to alleged medical negligence? The usual rules, which require the plaintiff's attorney to send notice under the Medical Liability and Insurance Improvement Act, apply in these cases. With respect to the records of deceased (or incompetent) patients, the Legislature amended the Act in 1993 to provide as follows:

For the purposes of this section, and notwithstanding Section 5.08, Medical practice Act (*citation omitted*), or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization signed by a parent, spouse, or adult child of the deceased or incompetent person. (Article 4590i, §4.01(e), Vernon's Texas Civil Statute).

This means that, if a patient is deceased, and the relatives are, through an attorney, giving notice of their assertion of a possible claim against you due to alleged medical negligence, the attorney can gain access to the medical records of the deceased patient by sending an authorization signed by the parent, spouse, or adult child of the deceased (but only those persons; note that siblings are not included). *None of the "personal representative" discussion above applies to this limited situation.* Consult your professional liability carrier in this event.

## **Conclusions**

In the absence of litigation, when a patient is deceased, the person who is authorized to consent to release of medical records is that deceased patient's "personal representative" as that term is defined in the Texas Probate Code. That would include someone who can show either letters testamentary or letters of administration, or evidence that they are otherwise involved in "informal probate" or "small estates" such as affidavits of heirship.

If the relatives of a deceased patient are in some type of litigation, such as a will contest, medical records of the deceased patient can generally be subpoenaed through normal processes.

If the relatives of a deceased patient are attempting to file a wrongful death claim against you due to alleged medical negligence, an attorney can gain access the medical records of the deceased patient by sending an authorization signed by the parent, spouse, or adult child of the deceased. That authorization will typically be appended to the notice of health care liability claim under the Medical Liability and Insurance Improvement Act.

We hope this information is useful to you.

Prepared by:  
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**NOTICE:** *The Office of the General Counsel of the Texas Medical Association provides this information with the express understanding that 1) no attorney-client relationship exists, 2) neither TMA nor its attorneys are engaged in providing legal advice and 3) that the information is of a general character. You should not rely on this information when dealing with personal legal matters; rather legal advice from retained legal counsel should be sought.*