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Robert H. Corbin

January 18, 1982

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ARIZONA ATTORNEY GENERAL

Dr. Lewis Kurke
Division of Behavioral Health Services
Department of Health Services
2500 East Van Buren
Phoenix, Arizona 85008

Re: I82-008 (R81-040)

Dear Dr. Kurke:

Your letter of March 5, 1981 requests our opinion concerning the release, pursuant to a subpoena, of State Hospital patients' medical records.

There are three statutes which may be applicable to the release of these records. The primary one, A.R.S. § 36-509, specifies the conditions under which the records of patients evaluated, examined or treated pursuant to A.R.S., Title 36, Chap. 5 may be released. It states:

All information and records obtained in the course of evaluation, examination or treatment shall be kept confidential and not as public records, except as the requirements of a hearing pursuant to this chapter may necessitate a different procedure. Information and records may only be disclosed, pursuant to rules established by the department, to:

1. Physicians and providers of health, mental health or social and welfare services involved in caring, treatment or rehabilitating the patient.
2. Individuals to whom the patient has given consent to have information disclosed.
3. Persons legally representing the patient, and in such case, the department's rules shall not delay complete disclosure.

4. Persons authorized by court order.^{1/}

5. Persons doing research or maintaining health statistics, provided that the department establishes rules for the conduct of such research, as will insure the anonymity of the patient.

6. The department of corrections in cases where prisoners confined to the state prison are patients in the state hospital on authorized transfers either by voluntary admission or by order of the court.

7. Governmental or law enforcement agencies when necessary to secure the return of a patient who is on unauthorized absence from any agency where the patient was undergoing evaluation and treatment.

This section and an implementing regulation, A.C.R.R. R9-15-306.A.7, expressly prohibit disclosure of patient records except under the specified circumstances.

Undoubtedly, a substantial portion of your medical records are also within the restrictions of A.R.S. § 12-2235.^{2/} Since medical records contain privileged material, they are not generally susceptible in their entirety to subpoena or other discovery techniques. 16 A.R.S. Rules of Civil Procedure, Rules 26(b) and 34; Dean v. Superior Court, 84 Ariz. 104, 113, 324 P.2d 764, 73 ALR 2d 1 (1958); State Farm Insurance, supra, 173; Tucson Medical Center v. Rowles, 21 Ariz.App. 424, 430, 520 P.2d 518 (1974).

1. In Arizona, subpoenas are issued by the clerk of the court at the request of either party to a lawsuit (16 A.R.S., Rule 45); a court order is not involved in the issuance of a subpoena. State Farm Insurance v. Roberts, 97 Ariz. 169, 178, 398 P.2d 671 (1965).

2. A.R.S. § 12-2235 states:

In a civil action a physician or surgeon shall not, without the consent of his patient, be examined as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of the patient.

Finally, the provisions of A.R.S. Title 12, Chapter 13, Article 7,^{3/} Hospital Records, establish a procedure for making available patient records in response to a subpoena duces tecum. The article, enacted in 1969, applies to any proceeding in which testimony can be compelled.^{4/} The article's purpose is to provide a system for the use of hospital medical records in judicial proceedings without requiring the custodian of the records to personally appear and present them.^{5/} The article does not mention, however, the statutory physician-patient privilege or the previously-quoted

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3. A.R.S. §§ 12-2281 through 12-2286.
 4. A.R.S. § 12-2286.
 5. A.R.S. § 12-2282 states:

A. Except as provided in § 12-2285 [in which the subpoena requires the custodian's personal attendance], when a subpoena duces tecum is served upon the custodian of records or other qualified witness from a hospital in an action in which the hospital is not a party and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it is sufficient compliance therewith if the custodian or other officer of the hospital, within five days after the receipt of such subpoena, delivers by registered mail or in person a true and correct copy of all the records described in such subpoena to the clerk of the court or other tribunal or if there is no clerk then to the court or tribunal, together with the affidavit described in § 12-2283.

B. The copy of the records shall be separately enclosed in an inner envelope or wrapper and sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon. The sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed and directed to the clerk of the court or tribunal or if there is no clerk then to the court or tribunal.

(Continued on next page.)

A.R.S. § 36-509. There is nonetheless little doubt that the confidentiality protection afforded by those two statutes is unaffected by the article.

In Tucson Medical Center v. Rowles, *supra*, the Court, without any indication that it was aware of any of the several statutes in Article 7, held that evidence otherwise privileged under A.R.S. § 12-2235 (the physician-patient privilege) does not become non-privileged merely because it is contained in hospital records. The Court then stated that its decision:

. . . that hospital records are covered by the physician patient privileges mandates that the hospital assert this privilege when neither the patient nor his physician are parties to the proceedings. . . . Moreover, we feel obliged to carry this reasoning one step further and hold that when the holder of the physician patient privilege is absent from the proceedings with no opportunity to assert the privilege, it is incumbent upon the trial court to frame its discovery orders in a manner which will protect an absent patient. 21 Ariz.App. at 429.

Later in the opinion, after observing that our pretrial discovery rules effect a salutary purpose, that privileged matters are not discoverable, and that the trial court is vested with wide discretion in discovery matters, the Court said:

. . . the trial court could order the hospital to designate the portions believed to be privileged and turn the records over to the court for in camera inspection. After reviewing the records, the trial court should then make available to plaintiffs (the party requesting the records)

5. (Continued from previous page.)

C. Unless the parties to the proceeding otherwise agree [this could only occur if the patient were a party, because no one else is authorized to waive the privilege], the copy of the records shall remain sealed and shall be opened only at the direction of the judge or tribunal conducting the proceeding. (Emphasis added.)

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portions of the record which it finds to be non-privileged without infringing in any manner upon the absent person's statutory privilege. 21 Ariz.App. at 430.

We think that Tucson Medical Center requires the Arizona State Hospital to observe^m physician-patient privilege and, by analogy, to comply with A.R.S. § 36-509 when served with a subpoena. Thus, in all instances when its patient records are requested by subpoena or otherwise, the hospital must assert the physician-patient privilege as to all matters which appear to come within that privilege and protect the records from disclosure except as specified in A.R.S. § 36-509.6/

We suggest that you call the above-referenced statutes, regulations and cases to the attention of your medical records supervisor and suggest that the hospital's medical records disclosure policy be reviewed and revised as necessary to conform with them as outlined in this opinion.

Sincerely,



BOB CORBIN
Attorney General

BC:WJW:lm

cc: Dr. James E. Sarn, Director

6. We believe the patient's consent is not required for release of his information and records to persons in classes 1 and 3 through 7 of subsection 36-509.A. However, these persons have a status very similar to the hospital in Tucson Medical Center, supra; therefore, they should assert the physician-patient privilege if such information or record is requested of them for a purpose inconsistent with their reason for having it.