192.502(8) pt. privilege
192.495 records > 25 yrs old

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index - only summarize if included in dept

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February 7, 1994

Bruce Smith, Esquire
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Eugene, OR 97401-3156

Re: Petition for Public Records Disclosure Order; Mental Health and Developmental Disability Services Division Records

Dear Mr. Smith:

This letter is the Attorney General's order on your petition[1/] for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on January 26, 1994,[2/] asks the Attorney General to direct the Mental Health and Developmental Disability Services Division (division) to make available:

1. Medical records for those patients who died at Dammasch State Hospital (DSH) between July 1, 1992 and November 10, 1993 and

2. Reports that would provide monthly totals from July 1, 1989 to December 3, 1993 (the date of the records request) of:

- Number of Code 33 calls
- Number of all incidents
- Number of all incidents (excluding Ward F emergency restraint)
- Number of patients involved in all incidents
- Hours patients spent in restraint

[1/] The petition was filed on behalf of your client, Guard Publishing Company, dba The Register-Guard, based upon a records request by Brent Walth, an employee of The Register Guard.

[2/] We appreciate your agreeing to extend the time within which this office otherwise would have had to respond to the petition.

- Hours patients spent in restraint (excluding Ward F emergency restraint)
- Hours patients spent in ambulatory restraint
- Number of patients placed in ambulatory restraint
- Hours patients spent in programmed seclusion
- Number of patients placed in programmed seclusion
- Number of assaults/fights
- Number of patients assaulted
- Number of suicide attempts
- Number of other serious self-abuse incidents
- Number of patient injuries
- Number of patient injuries classified "minor"
- Number of patient injuries classified "moderate"
- Number of patient injuries classified "severe"

For the following reasons, your petition is denied.

1. Patient Medical Records

The medical records of patients at DSH cover the entire course of the patients' treatment at the hospital and the information received by the hospital staff in furtherance of that treatment. These records include summary documents concerning intake and then a series of assessment and evaluation documents developed for treatment planning. These may include social service histories, psychology, neuropsychology and neurology reports, physical exams, laboratory reports, rehabilitation/activity assessments, consultation reports from specialists outside the facility, X-rays, EKGs and other similar documents.

The records also contain a treatment plan(s) based on original evaluations and ongoing re-evaluations. Treatment plans may cover behavioral interventions, medication regimens, other medical treatments and therapies, nursing care plans and other indicated forms of treatment. The records also contain ongoing logs and summaries, including daily logs, where all staff observations are recorded, and weekly or other periodic summaries, such as summaries of ongoing consults and re-evaluations. If patients have been discharged, the records also contain discharge summaries, which reiterate the course of treatment in summary form.

A. ORS 192.502(8)

ORS 192.502(8) exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

ORS 40.230, the psychotherapist-patient privilege, and ORS 40.235, the physician-patient privilege, are incorporated in the public records law by ORS 192.502(8).[3/] The general rule of ORS 40.230 states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

ORS 40.230(2).

The general rule of ORS 40.235 states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

ORS 40.235(2).

There are three elements that must be met for these privileges to apply. First, the privilege applies only to "confidential communications," which are defined as communications "not intended to be disclosed to third persons," except, among others, persons who are participating in the diagnosis and treatment under the direction of the psychotherapist (or physician), including members of the patient's family. ORS 40.230(1) and 40.235(1). The communications written in the medical records by the DSH staff or received by the staff from other medical professionals were not intended to be disclosed to persons other than those participating in the diagnosis and treatment of the patient. Some of these written communications were based upon observations of the patient's verbal and nonverbal behavior. Even if the patient's communications were made originally in the

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[3/] Several other privileges relevant here are also incorporated by ORS 192.502(8), including ORS 40.240, the nurse-patient privilege, ORS 40.250, the clinical social worker-client privilege and ORS 40.262, the counselor-client privilege. Because in the case of DSH records these practitioners are operating under the direction and control of a physician who is also a psychotherapist, we do not discuss these privileges in detail. We note, however, that in some cases these privileges may afford additional confidentiality for the material contained in patient records.

presence of third persons, however, the notes made in the medical records by DSH staff describing those communciations are confidential because the staff's written account is not a verbatim record, but one filtered through the observation, interpretation and recording process.

Second, the communication must be made for purposes of diagnosis or treatment of the patient's mental or emotional condition (psychotherapist-patient privilege) or physical condition (physician-patient privilege). Each of the records or documents in the medical record were made for such purposes. That is the very reason the medical records are created and maintained.

Third, the communication must be among the patient, the patient's psychotherapist (or physician) or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist (or physician), including members of the patient's family. The term "psychotherapist" is defined to mean a person who is:

> Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition.

ORS 40.230(1)(c)(A). All of the physicians at DSH are psychotherapists. Many other members of the clinical treatment team, such as licensed psychologists or social workers who are involved in the diagnosis and treatment of patients in the institution, are also psychotherapists. However, the privilege is not limited to communications to or from psychotherapists (or physicians), but include communications among anyone who is "participating in the diagnosis and treatment under the direction of the psychotherapist" (or physician). The entire medical record consists solely of such communications.

Because each of the documents in the DSH medical records meet the elements of the psychotherapist-patient privilege, ORS 40.230, or the physician-patient privilege, ORS 40.235, these records are privileged under Oregon law.

However, the medical records sought by the petition are the records of deceased patients. Therefore, we must consider whether these privileges survive death.

The privilege created by ORS 40.230 and ORS 40.235 may be claimed by the patient or "[t]he personal representative of a deceased patient." ORS 40.230(3)(c) and 40.235(3)(c).[4/] By including the personal representative as one of the individuals able to

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[4/] In addition to the patient and a personal representative, ORS 40.230 and 40.235 permit the privilege to be claimed by a guardian or conservator of the patient and by the person who was the psychotherapist, on behalf of the patient.

claim the privilege on behalf of the patient, the legislature made clear that it intended these privileges to survive the death of the patient. Unless the privileges contained in ORS 40.230 and 40.235 are waived by a personal representative, they remain in effect after a patient's death.[5/] See State ex rel Calley v. Olsen, 271 Or 369, 376, 532 P2d 230 (1975) (noting that doctor-patient privilege is not terminated upon patient's death); see also Legislative Commentary to ORS 40.230 ("physician (psychiatrist) patient privilege is not terminated by death of patient").

We conclude that because the documents in the medical records of the deceased DSH patients are comprised of "confidential communications" that are "privileged under Oregon law," those these records are exempt from disclosure under ORS 192.502(8).[6/]

[5/]Your petition notes that in a September 23, 1976 letter opinion to Dr. Bray, then administrator of the Mental Health Division, the Attorney General concluded that ORS 179.505 did not apply to the records of deceased patients and did not preclude the release of deceased patients' records. ORS 179.505 is silent on deceased patient records, neither expressly permitting nor prohibiting their release. For purposes of this order we need not decide whether the 1976 opinion correctly analyzed ORS 179.505, because that opinion did not consider the privileges on which this order is based. ORS 40.320 and 40.235 expressly indicate that the privileges for confidential communications described in those statutes survive the death of the patient. On this point, they are more specific than the silence of ORS 179.505, and therefore are controlling.

[6/]The psychotherapist-patient privilege is an evidentiary privilege limiting the admissibility of evidence in any criminal or civil judicial proceedings, with a few enumerated exceptions not relevant here. The physician-patient privilege is limited to civil proceedings. We note that for a privilege to have meaning in any judicial setting, the prohibitions it contains must be observed outside of that setting as well. For example, if a psychotherapist were free to disclose patient communications considered confidential under the privilege outside of court, the purpose of the privilege, the protection of the patient's confidentiality, would be negated.

ORS 192.502(8) does not require an analysis of the scope or effect of an evidentiary privilege outside of the judicial context, however. Instead, it exempts from disclosure "information the disclosure of which is * * * otherwise * * * privileged under Oregon law." Simply stated, if information is otherwise privileged under Oregon law, it is exempt from disclosure under ORS 192.502(8). Therefore, the difference in scope between the psychotherapist-patient privilege and the physician-patient privilege as they operate outside the context of the Public Records Law is not relevant for this analysis.

B. ORS 192.495

ORS 192.495 addresses public records more than twenty-five years old. It states:

> Notwithstanding ORS 192.501 to 192.505 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection.

The exemption from disclosure for patient records is based on the incorporation of the psychotherapist/patient and the physician/patient privileges into the Public Records Law by ORS 192.502(8). Because ORS 192.495 operates "notwithstanding ORS 192.501 to 192.505," and therefore notwithstanding ORS 192.502(8), that exemption is no longer applicable after twenty-five years. When a patient's medical record contains records older than twenty-five years, as well as more recent records, we conclude that ORS 192.495 requires releasing the older material and exempting the more recent information. See ORS 192.505.

We are informed by Marcia Bell, Medical Records Custodian at DSH, that the medical records of two patients that are the subject of the petition contain records created more than twenty-five years before the date of the records request to the state agency. The division advises us that it is willing to release these portions of the medical records. If your client is interested in inspecting or receiving copies of these portions of the medical records, your client may make arrangements to do so by contacting Marcia Bell at (503) 682-4607.

2. Reports Showing Monthly Statistical Data

The division denied the request for reports showing the monthly statistical data described in the petition on the grounds that such information was privileged under ORS 41.675 and, therefore, exempt under ORS 192.502(8). The division now informs us that despite this possible exemption, the division will release that information. The division will be sending a copy of those records directly to Mr. Walth.

For the reasons discussed above, with respect to the deceased patient records that are less than 25 years old, your petition is denied because those records are exempt from disclosure under ORS 192.502(8). With respect to those deceased patient records that are more than 25 years old and those reports showing the requested monthly statistical data, your petition is denied as moot.

Sincerely,

Elizabeth S. Harchenko

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c: Richard Lippincott
Marcia Bell