STATE OF KANSAS

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September 19, 1987

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ATTORNEY GENERAL OPINION NO. 87-139

Gene Marks
Barton County Sheriff's Office
P.O. Box 87
Great Bend, Kansas 67530

Re: Procedure, Civil -- Rules of Evidence; Privileges -- Physician-Patient Privilege

Synopsis: When an inmate is given a medical examination upon arrival at a detention facility pursuant to intake procedures, the physician-patient privilege may be invoked to prevent disclosure of confidential communications in a civil action or misdemeanor criminal case, subject to statutory exceptions. Public policy supports the confidentiality of communications between the patient and physician beyond the witness stand. Such policy must give way, however, when the public's right to know about the patient's dangerous condition outweighs the individual's privacy interests. In that case, a physician would be justified in notifying sheriff's department personnel so that steps may be taken to protect the health interest of other inmates. Cited herein: K.S.A. 19-811; 45-221, as amended by L. 1987, ch. 176, § 4; 65-101; 65-118; 65-2837, as amended by L. 1987, ch. 176, § 6; 60-427; 75-5228; K.A.R. 28-1-1, 28-1-2.

Dear Sheriff Marks:

As Sheriff of Barton County, you have requested our opinion concerning communications between inmates and physicians. Specifically, you inquire whether a physician may disclose

medical findings to sheriff's department personnel. You explain that policies and procedures require an examination of an inmate within 14 days after arrival at the facility.

Initially, you ask whether the physician-patient privilege, K.S.A. 60-427, applies to inmates. The physician-patient privilege is an exclusionary rule of evidence, and applies only in civil actions and misdemeanor criminal cases. K.S.A. 60-427(b). In State v. George, 223 Kan. 507 (1978), the Court stated that the purpose of the privilege is "to encourage persons needing medical treatment to seek it." 223 Kan. at 510. For the privilege to exist, three elements must be present:

> "(1) There must be a 'patient' and a 'physician'; (2) there must be 'confidential communication between physician and patient'; and (3) either the physician or the patient must have 'reasonably believed the communication necessary or helpful to enable the physician' to treat or diagnose the patient's condition." State v. Pitchford, 10 Kan. App. 2d 293 (1985), Syl. ¶ 1.

A patient is defined as:

> "a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his or her physical or mental condition, consults a physician, or submits to an examination by a physician. . . ." K.S.A. 60-427(a)(1).

This definition indicates that the purpose of the examination is foremost in determining whether or not a person is a patient within the meaning of the statute. The privilege does not exist when the examining doctor is a disinterested physician who does not intend to offer treatment or advice. State v. Pitchford, 10 Kan. App. 2d at 297. We believe that the medical examinations pertinent to your inquiry are conducted for reasons not inconsistent with this definition. A medical evaluation is recommended for inmates within 14 days after their arrival to a facility. See Kansas Advisory Jail Standards and Procedures § 5.05

(October, 1985) (hereinafter, KAJSP), adopted pursuant to K.S.A. 75-5228. This policy was modeled after the American Correctional Association Standards § 2-5274 (2d Ed., 1981). That section is accompanied by a discussion which states in part:

> "A health appraisal should be completed for each inmate as soon after arrival at the facility as possible in order to determine any health problems which may need immediate attention and to determine if the individual needs any further health care. Information regarding the inmate's physical and mental status also may dictate housing and activity assignments." Id., at 73.

Explicit in the above-quoted comment is that the medical evaluation is performed for the benefit of the inmate's health and well-being. While those benefited by the examination may also include correctional personnel and other inmates, we do not believe that benefiting other persons renders the privilege inapplicable. The benefit to others is indirect. The direct purpose is to secure preventive, palliative, or curative treatment. Additionally, the fact that the examination is conducted pursuant to a policy guideline rather than subsequent to a request from the inmate is irrelevant, as the definition of a patient, cited above, includes those who consult a physician or submit to an examination. See State v. Pitchford, 10 Kan. App. 2d at 297-98 (dicta, privilege may apply even though person objects to treatment).

In summary, it is our opinion that if an inmate is examined by a physician pursuant to intake procedures, and the examination is for preventive, palliative, or curative treatment, then communications between the inmate and the physician are privileged. The holder of the privilege may prevent disclosure of confidential communications in a civil action or misdemeanor criminal case unless otherwise provided by law.

You have stated a particular interest in the disclosure of information regarding communicable diseases. Assuming that, based on the foregoing, the physician-patient relationship would lead to an otherwise privileged communication, one exception may allow a limited disclosure of information. If the physician or patient is required by another law to report or record the information, then no privilege exists unless the

statute requiring such report or record requires confidentiality of the report or record. K.S.A. 60-427(e). In short, if disclosure is required by law, then the disclosure may not be prevented by the holder of the privilege. Persons licensed to practice the healing arts who have information that a person is suffering from an infectious or contagious disease are required to report that information immediately to the county or joint board of health or the local health officer. K.S.A. 65-118(a). Such reported information is confidential unless an exception to the confidentiality requirement exists, such as when written consent is given by the patient, or when disclosure is necessary to protect the public health. K.S.A. 65-118(c).

The reporting of infectious disease requirement is not a means to circumvent the physician-patient privilege regarding contagious diseases. By the terms of the statute, disclosure of reported incidents is limited to the purpose of disclosure. In other words, in the event that disclosure of information regarding an infectious disease is deemed necessary to protect the health of a named party, then the disclosure is to be made only to the extent necessary to protect the health or life of that named person. K.S.A. 65-118(c)(4). In addition, not every communicable disease may be disclosed. Pursuant to K.S.A. 65-101, the Department of Health and Environment has promulgated a list of reportable diseases. See generally, K.A.R. 28-1-2. This list is further limited to the presence of an actual disease, as opposed to the mere presence of the named virus itself which is not sufficient to require or allow reporting. The term "disease" is defined in K.A.R. 28-1-1(h) as a "definite morbid process having a characteristic train of symptoms." A healthy carrier of a virus who submits to an examination pursuant to the current procedures would therefore be able to prevent disclosure of the virus' presence, and the physician would not be required to report the incident.

Our opinion thus far has been limited to situations where the purpose for the physical examination is for preventive, palliative, or curative reasons, and to situations where the disclosure of information might occur in a civil action or misdemeanor criminal case. This is the scope of the physician-patient privilege.

However, even in situations not involving evidentiary rules, a trust relationship nevertheless exists between physicians and patients which may require that disclosure not be made to others. See generally, 61 Am Jur. 2d Physicians,

Surgeons, Etc. § 168, cited with approval in In Re Adoption of Irons, 235 Kan. 540, 548 (1984). Cf. Werner v. Kliewer, 238 Kan. 289, 293 (1985) (confidentiality of physician-patient communications matter of strong public policy). While the legislature has not created a privilege against disclosure beyond the witness stand, some reference is made to the general confidentiality of patients' communications. Unprofessional conduct of persons licensed by the Board of Healing Arts is defined as including willful betrayal of confidential information. K.S.A. 65-2837(b)(6), as amended by L. 1987, ch. 176, sec. 6. In addition, records which are privileged under the rules of evidence, which would include those arising out of a physician-patient relationship, are not required to be disclosed under the Kansas Open Records Act, K.S.A. 45-215 et seq. K.S.A. 45-221(a)(2), as amended by L. 1987, ch. 176, Sec. 4. Specific to your inquiry, additional reference to confidentiality is implicit in the KAJSP, § 5.11, which states:

> "Medical logs and other medical records are maintained separately from the confinement record and are controlled by the responsible health authority or health coordinator." Id., at 14.

The discussion following the parallel American Correctional Association Standards states:

> "The principle of confidentially protects the patient from disclosure of confidences entrusted to a physician during the course of treatment. Any information gathered and recorded about alcohol and drug abuse patients is confidential under federal regulations and cannot be disclosed without written consent of the patient or the patient's parent or guardian. The confidential relationship of doctor and patient extends to inmates/patients and their physician. Thus, it is necessary to maintain active health record files under security, completely separate from the patient's confinement record." American Correctional Association Standards § 2-5291 (2d E., 1981). (Emphasis added).

The general policy of confidentiality is strained by court decisions from various jurisdictions which have recognized a duty on the part of the physician to warn third persons who may be harmed by their patient's conditions. E.g., Tarasoff v. Regents of University of California; 551 P.2d 331 (Calif. 1976); Simonsen v. Swenson, 177 N.W. 831 (Neb. 1920); Freese v. Lemmon, 210 N.W.2d 576 (Iowa 1973). The Kansas courts have yet to formally recognize such a duty. In Durflinger v. Artiles, 234 Kan. 484 (1983), the Court declined the opportunity to impose a duty to warn, while reaching the same ultimate result by establishing a psychotherapist's duty toward third persons based on the negligent release of a dangerous patient. The following term, the Court decided Cansler v. State, 234 Kan. 554 (1984), holding that there was a duty on the part of the state to warn third persons about the escape of a dangerous inmate. The rule set forth in Restatement (Second) of Torts § 319 (1965) was specifically adopted, imposing a duty to third persons on the part of a person in charge of another having dangerous propensities. While it is unclear what direction our courts will take in the future, it is clear that there is the potential for liability on the part of the physician when facts present themselves which may place other persons in danger. We believe that if the facts present a danger to identifiable third persons, then a physician's decision to take protective action would be justified, if not required. Such action would not subject the physician to liability for invasion of the patient's privacy so long as the action reasonably appeared necessary to protect a legitimate public concern. Werner v. Kliewer, 238 Kan. 289, 295 (1985).

Based on the foregoing, physicians may find themselves in a position where they must balance the patient's interest of privacy against the health interests of the public. Should the public be exposed to a danger which is avoidable by a disclosure of the patient's condition, then the physician would be justified in disclosing such information as is necessary to avoid harm to others. Because of the limitations on inmates' freedom to move out of harm's way, as a practical matter the disclosure would only be effective if made to sheriff's department personnel. Cf., K.S.A. 19-811 (sheriff has custody and charge of prisoners).

In conclusion, it is our opinion that when an inmate is given a medical examination upon arrival at a detention facility, the physician-patient privilege may be applied to prevent disclosure in a civil action or misdemeanor criminal case, unless a statutory exception applies. Public policy supports

the confidentiality of communications between the patient and physician beyond the courtroom. Such policy must give way, however, when the public's right to know about the patient's dangerous condition outweighs the need for individual privacy. In that case, a physician would be justified in notifying sheriff's department personnel so that steps may be taken to protect the health interests of other inmates.

Very truly yours,

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