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MEMORANDUM

To: Interested Persons

From: Daniel Brzovic, Associate Managing Attorney

Re: Prosecutors' access to records of minors in juvenile hall

Date: August 6, 2004

In at least one county, prosecutors in juvenile court actions are obtaining access to medical records of wards in juvenile hall by obtaining authorizations for release of information from the wards' parents. This is a violation of HIPAA privacy regulations as well as Welfare & Institutions Code section 5328.

A parent is not entitled to inspect or obtain copies of a minor patient's records if the minor patient is authorized by law to consent to medical treatment. H&SC §123115(a)(1). See, Cal. Family Code §§6920-6929. These sections apply to all minors who can consent to medical treatment whether or not the minor has been emancipated. There is a question about whether these sections apply only to minors who receive health services without parental consent. Since the parent is probably not required to authorize medical treatment in juvenile hall, the parent's consent to disclose records is probably invalid.

Also, a parent is not entitled to access to a minor's patient records if the provider determines that access to the records requested by the parent would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well being. H&SC §123115(a)(2). This restriction of access is specifically allowed under the federal HIPAA privacy regulations. 45 C.F.R. § 164.502(g)(3)(ii)(B).

A problem arises because W&IC ' 5328(d) specifically authorizes disclosure of mental health treatment records to a parent, guardian or guardian ad litem. ' 5328(d) is not preempted by the HIPAA privacy regulations and is therefore valid. 45 C.F.R. ' 164.512(a)(1). On the other hand, W&IC § 5328(f) limits disclosure of mental health information and records to the courts "as necessary to the

administration of justice." That provision has always been interpreted to allow subpoenas of mental health records in a judicial proceeding only if the records are produced directly to the court. Authorization for release by the parent of a minor would represent an end run around that section if it were permitted. Also, if the parent releases information over the objection of the minor, there is clearly a conflict of interest that would cause the right of the minor to override the wishes of the parent. *Cf., Parham v. J. R.*, 442 U.S. 584 (1979).

The HIPAA regulations also support an argument that blanket releases should not be made to law enforcement. 45 C.F.R. ' 164.512 provides:

> (f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.
> (1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:
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> (ii) In compliance with and as limited by the relevant requirements of:
> (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
> (B) A grand jury subpoena; or
> (C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:
> (1) The information sought is relevant and material to a legitimate law enforcement inquiry;
> (2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
> (3) De-identified information could not reasonably be used.

The underlined portion of the regulations preempts state law to the extent that state law provides less stringent standards for release of information to law enforcement. Blanket releases frustrate the purpose of the regulatory requirement that the information be relevant, material, specific, and the only alternative. In order to comply with the HIPAA privacy regulations, the court should require that records be released only to the court in accordance with ' 5328(f), and then allow access to law enforcement only in accordance with the underlined standards in the HIPAA privacy regulations.

If the records contain evidence that the minor has committed an offense, for example, if the minor confesses to something, it will be difficult to withhold the

records. These records can be subpoenaed for production to the court. The court can release the information to law enforcement if relevant and material. People should always be careful what they say even in confidence. On the other hand, if the prosecutors are getting mountains of daily notes solely for the purpose of arguing that kids should stay locked up without regard to any offense, then there is a question of relevance. The best way to proceed might be for the minors' attorneys to obtain court orders blocking the release unless the prosecutors can show that the records are relevant. It should be possible to prevent prosecutors from getting blanket releases from the parents, but it will be difficult to prevent them from getting all records under all circumstances. In other words, there is no clear or easy answer, but blanket authorizations for release of records by parents of minor children are invalid.