

OFFICIAL OPINION NO. 42

May 16, 1945.

Dr. W. D. Gatch, Dean,
Indiana University Medical School,
1040-1232 West Michigan Street,
Indianapolis 7, Indiana.

Dear Dr. Gatch:

Your letter of April 9, 1945, received requesting an opinion as to whether or not an indigent patient committed to the University Hospital by any agency, legally empowered to commit him thereto, is thereby deprived of his right of privileged communication. You further desire to know if the Indiana University Medical Center may refuse to furnish a committing agency a report on the medical history and various examinations made on the committed patient.

A number of statutes govern the admission to the various hospitals operated by the trustees of Indiana University, among them being the following:

Section 28-5416 and Section 28-5417, Burns' 1943 Supplement, same being Sections 1 and 2, respectively, of Chapter 6, Acts 1939; Section 28-5422, Burns' 1943 Supplement, same being Section 7, Chapter 6, Acts 1939; Sections 28-5404 *et seq.*, Burns' 1933, as amended by Chapter 305, Acts of 1945; Section 52-1256, being Section 9, Chapter 41, Acts 1937. Each of the above statutes contains substantially the same provision as contained in Section 28-5416 Burns' 1943 Supplement, *supra*, to wit:

"Any person * * *, may be admitted to any hospital operated by the trustees of Indiana University, treated therein, and discharged therefrom, under the terms of this act and such rules and regulations as may be adopted by the trustees of Indiana University:
* * *."

Each of the above statutes, after providing the procedure to be followed prior to the acceptance of such patient by a hospital operated by the trustees of Indiana University, has substantially the same provisions contained in Section 28-5417 Burns' 1943, *supra*, to-wit:

"* * * Such person shall be treated in said hospital by the medical and/or surgical staff thereof and the determination of all professional matters, such as the length of hospitalization, the type of treatment employed, the date of final discharge and the necessity of having the person return for re-examination, treatment or further hospitalization, shall be made solely by the hospital staff physicians responsible for the treatment of such person. Upon official notice of discharge by the hospital authorities, the county department of public welfare shall immediately remove the patient from said hospital. * * *

I do not find any statute in this state requiring the authorities in charge of any hospital operated by the trustees of Indiana University to furnish the committing agency with a report of the medical history or from the medical records of the hospital, of the committed patient.

A careful examination of the statutes of Indiana fails to reveal any authority given to any of the state or local agencies submitting indigent patients for treatment to any of the hospitals operated by the trustees of Indiana University, to require that a report be made to them by the hospital from the medical records of such patient. In the absence of specific authority therefor such agencies have no authority to require such records.

A statutory officer is not permitted to enlarge his powers and authorities merely because the exercise of such are not forbidden by the statutes. In order to exercise a power or authority it must be granted by the statute, and if the statute is silent on the subject, the courts will conclude no such authority or power has been granted.

Chicago & E. I. R. Co. v. Public Service Commission (1943), 221 Ind. 592, 594 to 596, 49 N. E. (2d) 341;

Doyle v. Lafayette Savings Bank (1924), 81 Ind. App. 177, 178, 179;

Bell v. Meeker (1906), 39 Ind. App. 224, 233, 234;

State, *ex rel.* v. Sloan (1926), 197 Ind. 556, 560.

Section 2-1714, Burns' 1933, same being Section 275, Chapter 38, Acts 1881 (Spec. Sess.), provides in part as follows:

"The following persons shall not be competent witnesses:

"* * *

"Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases."

In the case of Acme-Evans Co. v. Schnepf (1938), 214 Ind. 394, the Court in holding a patient does not waive the benefits of the above quoted statute as to physicians not called as witnesses, where he uses only one physician as a witness, quotes the above statute and then continues on pages 402 and 403 of the opinion as follows:

"* * * Attention is directed to The Masonic Mutual Benefit Association v. Peck (1881), 77 Ind. 203, 40 Am. Rep. 295. This was an action by the widow of the insured against the appellant upon a policy of insurance. The appellant offered the deposition of the attending physician of the deceased. Objection to its introduction was sustained. The appellant urged that it was admissible in evidence unless it appeared affirmatively that the information was *confided* to him, and that he was privileged to testify as to what he had learned by observation and examination of the patient. This court held that the statute was designed to have a broader scope; that (pp. 209, 210) :

"The relation of physician and patient, no matter what the supposed ailment, should be protected as strictly confidential, subject only to the right of the patient to waive the restriction. . .

"His admission to the bedside of the sick one may enable the experienced and skillful practitioner to discern more of the patient's condition and of the cause which brought it about, than the patient himself could tell, or would be willing to reveal. . . "A dumb patient and one whose vocal organs have been paralyzed, are equally protected by the statute with others. . . The statute seals the lips of the physician against

divulging in a court of justice the intelligence which he acquired while in the necessary discharge of his professional duty. It was enacted for the purpose of extending to the relation between a patient and his physician the same rule of public policy by means of which the common law protected the professional confidence necessarily existing between a client and his attorney."

"The quotation serves to illustrate the breadth of the statutory provision, and has been so held throughout the history of this court. *Excelsior Mutual Aid Assn. v. Riddle* (1883), 91 Ind. 84; *Penn Mutual Life Ins. Co. v. Wiler* (1885), 100 Ind. 92, 50 Am. Rep. 769; *Williams v. Johnson* (1887), 112 Ind. 273, 13 N. E. 872; *Heuston v. Simpson* (1888), 115 Ind. 62, 17 N. E. 261, 7 Am. St. 409; *Gurley v. Park* (1893), 135 Ind. 440, 35 N. E. 279; *Springer v. Byram* (1894), 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. 159; *Aspy v. Botkins* (1903), 160 Ind. 170, 66 N. E. 462; *Towles v. McCurdy* (1904), 163 Ind. 12, 71 N. E. 129; *Indianapolis, etc., Transit Co. v. Hall* (1905), 165 Ind. 557, 76 N. E. 242; *Cincinnati etc., R. Co. v. Gross* (1917), 186 Ind. 471, 114 N. E. 962; *Post v. State, ex rel. Hill* (1896), 14 Ind. App. 452, 42 N. E. 1120; *Warsaw v. Fisher* (1900), 24 Ind. App. 46, 55 N. E. 42; *Hays v. Hays* (1912), 49 Ind. App. 298, 97 N. E. 198.

"In many of the foregoing decisions this court has expressed, in the strongest terms, its disapproval of permitting a physician, over the objection of the patient, to testify to facts learned in the sick room, even where other physicians have testified for the patient."

In *Stalker v. Breeze* (1916), 186 Ind. 221, the Court was called upon to determine if a nurse called as a witness could, over the objection of the patient, read from a portion of the hospital clinical record. In holding such hospital clinical record was privileged, but that the privilege had been waived, by the patient, the Court on page 225 of the opinion said:

"* * * We are of the opinion that, although the clinical record itself may be incompetent as a privileged communication (*Smart v. Kansas City* (1907)

208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 578, 123 Am. St. 41) the error, if any, in permitting the clinical record to be read in evidence was rendered harmless by appellant's asking his own witness, one of the nurses, to testify as to part of the contents of the same record."

In Mathews v. Rex Health, etc., Ins. Co. (1927), 86 Ind. App. 335, the Court, in holding the results of an autopsy performed by an employee of the staff of a hospital in which a patient had died were not admissible over an objection made on the ground of confidential communication, even though the physician performing the autopsy was not the same doctor who had treated the patient in the hospital, in great detail reviews the decisions of this state and of foreign states as to the extent of the application of the rule regarding confidential communications between physicians and clients and its application to the relation between a hospital and a patient. After approving the case of Stalker v. Breeze, *supra*, the Court, on pages 344 to 346, said:

"In Smart v. Kansas City (1907), 208 Mo. 162, 105 S. W. 709, cited in Stalker v. Breeze, *supra*, it was held that assistant physicians or surgeons in a hospital to which a person had been taken for treatment were incompetent to testify, over objection, to anything connected with the treatment or as to the condition of such person while there; *that it made no difference whether the person was a poor or pay patient, in a private residence, or in a hospital, or whether the person was a charity patient in a public hospital;* that a patient in a hospital has the right to assume and rely upon the assumption that a physician apparently in charge of the hospital is rightfully there, and has authority to examine and prescribe for him, and that the physician will not afterwards be heard to say he was not connected with the institution and had no authority to treat the patient, for the purpose of allowing him to testify as to the condition of the patient while in the hospital. It was also held that the official record of a hospital into which had been copied the attending physician's diagnosis of a patient was privileged and not admissible in evidence over the patient's

objection. Referring to the assistant physicians and surgeons at the hospital, the court said: 'Under and by virtue of their appointment, contract, or by whatever arrangement they became assistant physicians in that hospital, they were constituted the physician and surgeon of each and every patient who entered that institution for treatment, and they had no legal or moral right or authority to view, treat or operate upon any of them, except by virtue of that appointment or contract. Even their very presence there is traceable to and authorized by that authority and none other: and the intrusion of a physician or surgeon into an institution of the character in question, and his assumption of authority to observe and examine patients without the permission of those in charge, and by the consent of the patients, would constitute him a trespasser. Such is not tolerated by the law, and would not and should not be permitted by those in charge. The relation of physician and patient is one of contract, either express or implied, and can be created in no other way. In cases of this character the physician or surgeon in accepting such a position impliedly, at least, agrees to treat such patients as are accepted into the institution, and when he assumes to examine them, either by their express agreement or by their implied or tacit consent, which may be inferred from the act of entrance into the institution, and which will be inferred in the absence of evidence indicating a contrary intention in either event, whenever the minds of the physician and patient meet by either express or implied contract, the statute places the seal of secrecy upon all information acquired by the physician in such professional capacity.' (Our emphasis.)

"And in discussing the admissibility of the hospital records as evidence, the court said: 'The mere fact that the ordinance of the city requires such a record to be kept is no reason on earth why the statute regarding privileged communications should be violated. That record is required to be kept for the benefit of the institution and not for the benefit of outside litigants. It is not the object or purpose of the ordinance to repeal the statute in question, but even if it were, it

would be null and void, because in conflict with the statute. The object of the statute is to guarantee privileged communications between *all patients* and their physicians, and it is wholly immaterial whether they are in or out of hospitals."

On page 346 of the opinion in the case of Mathews v. Rex Health etc., Ins. Co., *supra*, the Court cites and approves the following cases holding hospital records are inadmissible under the confidential communication rule, when proper objection is made thereto, to wit: Price v. Standard Life and Accident Ins. Co. (1903), 90 Minn. 264, 95 N. W. 1118; Peave v. St. Louis Transit Co. (1908), 212 Mo. 331, 111 S. W. 52; and Sparer v. Travelers Ins. Co. (1919), 185 App. Div. 861, 173 N. Y. Supp. 673. In conclusion the Court on pages 347 and 348 of the opinion says:

"In the instant case, the boy, prior to and at the time of his death, was a patient in the hospital. After death, his body was placed on the table in the autopsical room by some one in authority, and Dr. Alburger performed the autopsy as a part of his duties as head of the pathological department of the hospital. The purpose of which was to discover the cause of death. *The fact that the boy was a patient at the hospital provided the opportunity for having the autopsical examination. It was the outgrowth of the relationship existing between the patient and the hospital, and it would not have been performed except for the fact of that relationship.* If it had been held by the physician who treated the boy before his death, such physician would have been an incompetent witness as to any information acquired by reason of such examination. Any physician or surgeon assisting him would also have been incompetent to testify, over objection, to any knowledge acquired thereby. Can a physician, after the death of his patient, through his consent or connivance, allow another physician to take the dead body of his patient, and, in the absence of friends and relatives, and without the consent of any one, hold a post mortem examination and thus give to the public the information which the physician in charge could

not? Can a hospital, immediately after the death of one of its patients, discharge the physician who had attended the patient up to the time of death, and thereafter rush the dead body to the morgue and direct the physician at the head of the pathological department to perform an autopsy, and thus evade the statute which sealed the lips of the first physician? We think these questions should be answered in the negative, and that a physician under such circumstances steps into the shoes of the attending physician, and must be treated as if he were the assistant of the attending physician, holding the autopsy at the direction of the latter, and that the information acquired by him through the autopsy is privileged. A physician should not be privileged to authorize or permit another physician to hold an autopsy on one of his patients and thus destroy the privileged character of the information thus acquired. *Neither should a hospital, after the death of one of its patients, authorize or permit a physician other than the attending physician to hold an autopsy and destroy the privileged character of the information thus acquired.* In order to protect those who are so unfortunate as to become patients in a public hospital, as in the instant case, from having their bodies violated after death in order to discover the cause of death and thus qualify a physician to appear in court as a witness and disclose the cause of death, we are constrained to hold the court erred in allowing Dr. Alburger to testify as to the information he acquired through the autopsy. The doctor had no more right to make this examination, and to disclose the information thus received, than he would have had if he had gone into the sick room prior to the boy's death and made an examination to ascertain the cause of the boy's illness and to then go into court and testify as to the information thus acquired. He should be treated as an assistant of the physician in charge prior to the boy's death." (Our emphasis.)

For other cases construing the above statute see Chicago etc. R. Co. v. Walas (1922), 192 Ind. 369, 374 to 376; Myers v. State (1922), 192 Ind. 592, 599 to 601.

Under the above authorities I am of the opinion an indigent patient in a hospital operated by the trustees of Indiana University does not thereby lose his privilege as to the confidential character of information contained in the hospital medical records, due to such person being an indigent patient; that such hospital authorities are not required to give such information from the medical records of such hospital to any committing agency; and that the same may not be furnished except with the consent of such patient.

OFFICIAL OPINION NO. 43

May 18, 1945.

State Highway Commission of Indiana,
State House Annex,
Indianapolis, Indiana.

Gentlemen:

I have your request for an opinion whether a construction contractor is entitled to payment of the final estimate as against a claim filed against a construction contract under the following state of facts.

The claim in question was filed on December 1, 1944, and notice of the filing was forwarded to the contractor on the same date; and on December 5, 1944, the contractor in writing notified the Commission of the rejection of the claim. On February 9, 1945, the claimant filed action on the claim, and a certificate of the clerk showing the filing thereof was filed with the Commission, in the Bartholomew Circuit Court, in which action there was a failure to name all the parties to the contracting firm that held the contract for construction. Certain procedure took place with reference to the naming of parties and subsequently thereto the defendants filed a motion to declare null and void the certificate filed with the Commission purporting to show that action was filed on the claim within the 90 day period required by statute. The Court, after hearing the motion, which was contested by the claimant, made and entered an order declaring the certificate prepared and certified by the clerk as null and void. The pertinent part of said order reads as follows: