ELEEMOSYNARY BOARD: Records are privileged, but if waived may be inspected by any interested party;

INSPECTION OF RECORDS: board may make reasonable rules respecting the same. If suit is pending, the court may order inspection; subpoena duces tecum will produce records in court.

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January 14, 1936

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Hon. W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your inquiry which is as follows:

> "At a meeting of our board on Monday, December 23rd, the question came up in regard to the privilege of inspecting the records of the insane persons in the several mental hospitals. It had particular reference to a letter addressed to Stephen K. Owen by D. W. Sherman, of the legal firm of Blackwell & Sherman, and upon motion of our board I was directed to obtain an opinion from your office as to the authority of the officials of these institutions with reference to the inspection of any of the records pertaining to insane people.
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> "Will you, therefore, kindly furnish this office with your opinion in regard to this matter, and oblige."

By Section 8574, R. S. Mo. 1929, it is provided that the eleemosynary board "shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions," and that the title to all such property then or thereafter acquired shall be vested in the board of managers for the use of the institution.

By Section 8580 the "person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager."

By Section 8592 it is provided that "the steward shall be the custodian of all the property of every kind and description belonging to the institution for which he has been appointed steward."

Section 8685 provides as follows:

> "The board of managers shall have power and authority to create the office of and to appoint examining physicians for this institution, whose duty when so appointed shall be to examine all applicants for admission, as is provided for in section 8686 of this article, in such counties, cities, points or localities as may be determined, ordered and directed by the board of managers. Reports of such examinations shall be made upon the blanks provided by the superintendent. Each examining physician appointed under the provisions of this section shall keep a proper book for the registry of all examinations made by him, and after the same are duly registered he shall forward the original examination without delay to the superintendent of the sanatorium. No fee shall be charged or collected from applicants furnishing the certificate entitling them to admission to the sanatorium as free patients as is provided in section 8686 of this article, but all other applicants for examination shall be charged a fee of five dollars."

Section 8565 empowers the board to "make all necessary rules, regulations and by-laws for the government, discipline and management of such institution not inconsistent with the laws of this state, and such rules, regulations and by-laws, when so made and adopted by the board, shall be binding upon all officers and employes of the institution, and shall remain in force and effect until changed or annulled by the board by an order entered upon the records of such institution."

The authority of the Legislature to delegate to commissions or boards the power to make reasonable rules and regulations has been sustained by the courts very generally.

State ex inf. Killam v. Colbert, 201 S. W. 52, 273 Mo. 198;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 204 S. W. 497, 275 Mo. 201;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 40 S. Ct. 342, 251 U. S. 547, 64 L. Ed. 408;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 799, 276 Mo. 309;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 805;
State v. Freeland, 300 S. W. 675, 318 Mo. 560;
Arnold v. Hanna, 290 S. W. 416, 315 Mo. 823, Judgment affirmed (1928), 48 S. Ct. 212, 276 U. S. 591, 72 L. Ed. 721;
State ex rel. v. Thompson, 60 S. W. 1077, 160 Mo. 333, 54 L. R. A. 950, 83 Am. St. Rep. 468.

You do not state whether your board has promulgated any rules with respect to the question you inquire about. However, it appears that they have such authority, provided the rules are reasonable and not in conflict with the statutory law.

The law with reference to the right of access to, inspection and use of public records at common law is stated in 55 C. J., page 624, as follows:

> "At common law a person may inspect public records in which he has an interest or make copies or memoranda thereof, when a necessity for such inspection is shown and the purpose does not seem to be improper, and where the disclosure would not be detrimental to the public interest; but the gratification of mere curiosity, or motives merely speculative, or the creation of scandal, will not entitle a person to inspection or to make copies or memoranda."

It will be noted that Section 8685, in part, provides as follows:

> "Every examining physician appointed under the provisions of this section shall keep a proper book for the registry of all

> examinations made by him, and after the same are duly registered he shall forward the original examination without delay to the superintendent of the sanitorium."

The case of Robison v. Fishback, 93 N. E. 666, 669, 175 Ind. 132, holds that a "public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done."

In the case of Galli v. Wells, 209 Mo. App. 460, l. c. 473, the court, in speaking of city hospital records and the right to inspection by the public, says:

> " * * * and although kept by public officials they are not for the benefit of the public, as the public has no interest in them, and therefore they are not such public records as come within the exception to the rule. Ordinarily such records are not open to the public because of the privilege statute, but where that statute is waived, as in the present case, the records of the City Hospital, a public institution, kept under requirement of the law, are like other public records and are open to the public."

In the case of Kirkpatrick v. Wells, 319 Mo. 1040, l. c. 1045, the court says:

> "Plaintiffs contend the court should not have admitted in evidence the record of St. John's Hospital purporting to show the disease with which Kirkpatrick was afflicted when confined therein, for the reason that said hospital is not a public institution, there is no rule of law requiring records to be kept by private hospitals, and they were not kept by officers under the law.
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> "It is not objected that the record is privileged. Plaintiffs admit if the record offered in evidence was the record of a public hospital, it should have been admitted.

> (Galli v. Wells, 209 Mo. App. 460, 239 S. W. 984.) Under the general rule all records required by law to be kept are admissible if properly identified. (St. Louis v. Arnot, 94 Mo. 275, 7 S. W. 15; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055; St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495; Levels v. St. Louis & H. Railroad Co., 196 Mo. 606, 94 S. W. 275.) Section 5812, Revised Statutes 1919, requires public and private hospitals to keep a record of the diseases of all patients. Therefore, a record kept by St. John's Hospital in compliance with the law is of equal dignity with a record kept by a public hospital. If a record of a public hospital is admissible, there can be no sound reason why a record of St. John's Hospital is not admissible. The person or persons making the record are performing a public duty under the law. The court ruled correctly, and the contention is overruled."

In the case of State v. Keller, 143 Ore. 589, in considering the right of the public to inspect the records of the corporation commissioner, where the statute required him to keep such records and empowered him to decline to disclose same when not required for public welfare, the court says, l. c. 601:

> "The public must always have access to all public records required to be kept or made by a public official unless the statute specially provides otherwise."

Section 1731, R. S. Mo. 1929, provides:

> "The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; * * * Fifth, a physician or surgeon concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon."

In the case of Ex parte Gfeller, 178 Mo. 248, l. c. 267, the court said:

> "Our statute places attorneys and physicians upon substantially the same grounds with respect to privileged communications, and it was held in Thompson v. Ish, 99 Mo. 160, that the protection afforded by the statute against calling a physician to give evidence of the information acquired in a professional character from his patient, may be waived by the latter or those representing him after his death, for the purpose of protecting rights acquired under him. The court said:
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> "'Notwithstanding our statute provides for no exception, still it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient; and we have held that it may be waived by the representative, and, in this, our ruling accords with that of the Supreme Court of Michigan under a like statute. If the patient may waive this right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be done by those who represent him after his death, for the purpose of protecting rights acquired under him.'"

In the case of Smart v. Kansas City, 208 Mo. 162, l. c. 197, speaking on the question of privileged communications and the records of the city hospital, the court said:

> "The defendant's next contention is that the court erred in excluding the evidence of Dr. Frederick. He was one of the attending physicians at the City Hospital, and was the keeper of and had charge of the records of the institution, which were required to be kept by the ordinances of the city. The defendant offered to prove by him the diagnosis of plaintiff's case, as shown by said official record, when she was in the hospital in the years 1895,

1896 and 1898, the latter when her leg was amputated. The plaintiff objected to the evidence offered because the entries made were privileged communications, first made to the attending physicians in order that they might correctly diagnose her case and to properly treat her. The diagnosis of the case was made by an examination of the patient and by interrogating her regarding the complaint. This is necessary to be known by the physician in order that he may prescribe the proper treatment, and when he once acquires that information the law declares it to be confidential communications, and disqualifies the physician from divulging the same upon the witness stand.

"Mr. Elliott in his work on Evidence, in the discussion of such statutes says: 'It seems to be conceded in both opinions that hospital physicians, who attend such persons at the hospital, could not testify as to what they learned while so attending him.' (1 Elliott on Evidence, sec. 635; Grossman v. Supreme Lodge, 6 N. Y. Supp. 821.)

"This is undoubtedly the rule as announced by all the authorities, and that being so, it seems that it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit and the statute nullified by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner.

"The only intimation of any law to the contrary we have been able to find is in a foot note to section 635 of Elliott on Evidence, vol. I, which reads as follows: 'On the other hand, if one voluntarily goes to a public hospital where a record is required to be kept, is there not some reason for saying that there is no privilege, or that he waives his privilege, at least so far as the law requires a public record to be kept?' Mr. Elliott cites no authority whatever in support of the above suggestion, nor does he even dignify it by giving it a position in the text of his valuable work on evidence. But if that suggestion is sound law, what is the use of going through the empty form of writing the diagnosis into the record? Why not call the physician and let him testify direct as to those matters? Certainly the testimony of the physician would be more satisfactory than the record, because he would be under oath when giving his testimony and would be subject to cross-examination. In the case at bar Dr. Frederick testified that he did not know whether the entries made in the record were true or false; that the house surgeon writes the diagnosis in the record, and that he had no personal knowledge as to the truthfulness of the things written.

"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 <u>all patients</u> and their physicians, and it is wholly immaterial whether they are in or out of hospitals. The only case where the patient is denied the protection of this statute is where his or her case

> falls under the rule of necessity, heretofore mentioned and so ably discussed by Judge Burgess in the case of Cramer v. Hurt, 154 Mo. 112."

In the case of Cramer v. Hurt, 154 Mo. 112, the court held that in certain cases where justice would be prevented by declining to permit the physician to testify as to privileged communications, the physician could testify, announcing it as the doctrine of necessity, and states, l. c. 118:

> "'For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the matter of the subject presumes none better to be attainable.' (1 Greenleaf on Evid. (14 Ed.), sec. 348.)"

We have referred to or quoted all of the statutory law in Missouri that we find relevant to the question of inspection of records of a state eleemosynary institution in this state.

In the case of Excise Commission v. State, 179 Ala. 654, 60 So. 612 (1912), the court said:

> "With respect to records other than judicial, no statute to the contrary intervening, the public generally have no absolute right of access or inspection. Any one who demands the right can be properly required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose. But, for the public and for individuals showing such a right, the custodian of official documents is a trustee; and, while he may and should preserve them against impertinent intrusion he should allow ready access to those who have an interest in them, and who claim access for the purpose of promoting or protecting it."

In an opinion by this office dated July 3, 1934, on the question of who has the right of inspection of birth and death certificates filed in the Bureau of Vital Statistics, the following was stated:

> "The Supreme Court of Missouri seems to follow this general rule. In the case of State ex rel Thomas v. Hoblitzelle, 85 Mo. 620 (1885) there was involved the right of a candidate for office who had been defeated according to the announced election results to inspect the poll books used in his election, and the court in the course of an opinion holding that the relator had a right to such access, said:
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> "'While we regard the poll books as belonging to that class of public records, open to inspection when the applicant who desires to inspect them, shows that the purpose of the inspection is to vindicate some public or private right, the courts will by mandamus compel the inspection on condition that the inspection be made "under such reasonable rules and regulations as the court or officer having them in charge may impose." Whether mandamus will or will not lie to compel an inspection of poll books when it is sought simply for the gratification of curiosity without any purpose to vindicate either a private or public right, is not necessary to determine in this proceeding, as it does not present such a case.' (85 Mo. 624.)
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> "The language above quoted was quoted with approval in State ex rel. Conr n v. Williams, 96 Mo. 13, 8 S. W. 771 (1888). See also State ex rel Gay v. Reyburn, 158 Mo. App. 172, 138 S. W. 79 (1911); State ex rel Gay v. Jones, 158 Mo. App. 170, 138 S. W. 81 (1911).
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> "Sherwood, J., delivered a concurring opinion in the Hoblitzelle case in which he stated that he believed the true rule to be broader than that adopted by the majority of the court, and stated that in his opinion the plaintiff should have been granted the relief.

sought on the basis of the simple allegation that he was a citizen, without showing any special interest, and Judge Sherwood used the following language:

"'Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws.' (85 Mo. 625).

"However, the rule in Missouri does not seem to be as broad as that contended for by Judge Sherwood, and apparently it would be necessary for one seeking to inspect public records to show some public or private interest to be served by such inspection.

"It is our opinion that any citizen would have a right to inspect the records and certificates of birth and death filed in the Bureau of Vital Statistics upon a showing by him that he had some interest in the document which is sought, and that the inspection is for a legitimate purpose, and unless the public official who has custody of such documents reasonably feels that the request is an impertinent intrusion, or not in good faith, such official is under a duty to allow inspection and to certify copies of such records if a reasonable need therefor is shown, and compliance by such official could be compelled by mandamus."

We have not found a Missouri case deciding that the guardian for an insane person has or has not authority to waive on behalf of his ward the legal production of privileged communications, but on principle it would appear that the same right of waiver should exist in favor of a guardian of an insane person as the courts of this state have decided does exist with respect to the representatives of a deceased person.

The Legislature of this state has seen fit to provide a method of procuring information as to records where they properly pertain to the administration of justice, and by

following that course the records of the institution may be inspected and the facts as they speak them may be produced in the courts.

Section 924, R. S. Mo. 1929, provides:

> "Every court or judge thereof shall have power to compel any party to a suit pending therein to produce any books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein."

Section 925 provides the course to be followed by the party seeking such information.

Section 927 provides the penalty for refusal to obey the order of the court for the production of such information.

Section 928 provides for an order of court permitting the adverse party to inspect and copy or photograph such papers, and provides the penalty for refusal to comply with the order.

Likewise, if such suit is pending, the party seeking such information has the right to have the records of the institution brought into court under a subpoena duces tecum for use in the trial of the case.

CONCLUSION

The records of the state eleemosynary institution that are kept by that institution and are the recording of a physician's professional diagnosis or conclusion, or the history of the case, or of any fact which was revealed to him in such examination on account of its being appropriate or necessary in order for him to properly professionally diagnose or treat such case, are privileged communications, notwithstanding such records are kept as a result of compliance by him with a statute requiring such, and they may not be used nor exhibited to the public without the consent of the person so examined or treated, nor may they be used in a suit, unless the privileged character be waived by said patient, absent the rule of necessity. If said patient has a duly appointed guardian, such guardian has the authority to waive the privilege. If said insane patient has no guardian, then

there can be no waiver of the privileged communication. If the privilege is waived, the record is a public record and any person having an interest in such record, or whose rights are or reasonably may be thought to be affected by such record, has the right to inspect such record; that such right of inspection includes the right to make memoranda therefrom and photograph thereof; that if the board of managers of such institution declines to so permit such interested party the information as set forth in this conclusion, such interested party has the legal right to enforce the same by mandamus proceedings; that the board of managers of the state eleemosynary institution has authority to make any reasonable rules governing such inspection, including the time, place and manner thereof, and may reasonably determine who are interested parties entitled to such record information.

If a suit is pending between such person desiring an inspection of the hospital records and said eleemosynary institution, the party to such suit who seeks such record information and procures an order of the court in which the cause is pending directing such eleemosynary institution to permit an inspection and photographing of such records is entitled to such inspection and such information as said records may show. He is likewise entitled to have such records produced in court on a subpoena duces tecum at the trial of the case.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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