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Inside this Issue

Another Reminder to Attorneys: You Don't Get Medical Records Just Because You Are an Attorney

Here at the *Firehouse Lawyer*, we work daily with public records officers (PRO) across Washington State, who deal with attorneys demanding the medical records of their client or some other person. This is the common scenario: (1) The attorney gets a written authorization from an individual permitting the attorney to obtain their medical records; (2) the attorney calls the PRO and demands the records, providing the PRO with the written authorization; and (3) the PRO informs the attorney that he or she needs to obtain identification from the patient in order to match the signature on the ID with the signature on the authorization. Otherwise, the PRO insists, the requested records will not be disclosed. The attorney then throws a tirade and accuses the PRO of violating the law. But respectfully, that attorney is wrong.

Under Washington law, a health care provider (HCP) must provide medical records to a patient that asks for his or her own medical records. RCW 70.02.030 (1). Of course, the preeminent law firm specializing in the field of emergency medical services, Page, Wolfberg and Wirth (PWW), recommends that HCPs not

just take the patient at their word. PWW recommends, and so does this firm, that the HCP require that *the patient* provide some form of valid identification proving that the patient *actually is the patient*.

After all—and at the risk of generalization—public entities enjoy what is called good faith immunity, whereby the entity is essentially absolved from wrongdoing for actions taken in good faith. For example, if an agency was provided what appeared to be a valid driver's license from a person claiming they are the patient, and match that signature to the authorization provided by that person, the agency may indeed have good faith immunity from liability if the person turns out not to be the patient.

But what if the entity does not even ask for ID and the person, who turns out not to be the patient, gets the records? Bingo: the entity would more than likely lose its good faith immunity. Therefore, the entity would could way more easily be liable for invasion of privacy, or may be sued under RCW 70.02—HIPAA does not provide for a private cause of action, but instead is enforced by the Office of Civil Rights.

Consequently, our standard advice to PROs is to respond to angry, uninformed attorneys in the following manner:

> "Washington law is generally more protective of patient privacy rights than HIPAA. Therefore, the [entity] must rely on the language in Washington statutes governing the release of medical records. Washington law states that a patient may authorize the release of their health care information to any person. But the [entity] cannot simply take an individual at their word. The [entity] needs some proof that the individual that signed the authorization is actually the patient. Otherwise, there is potential that the [entity] could be sued for wrongful disclosure of health care information. More importantly, there is potential that an absolute stranger may obtain the medical records of another individual. That is why we request ID: to protect the patient and to protect the [entity], not to indiscriminately deny access to medical records."

Furthermore, we recommend that your PRO simply inform the angry attorney to contact legal counsel for the entity, so that legal counsel can educate the attorney on this issue. We at the *Firehouse Lawyer* are aware that patients have a broad right of access to their own medical records, under HIPAA and Washington law. However, this right of access does not come into play, frankly, until the HCP is certain that the requestor is *actually the patient.* In other words, PROs should stand their ground with angry attorneys, and consult legal counsel when civility is not possible.

Of course, any attorney could get the medical records of their client or any person,

without that person's authorization, if the attorney follows the procedure set forth at RCW 70.02.060, which is a special rule for requests for medical records from attorneys. But so often, attorneys have no idea that this law exists.

To Law Enforcement: You Don't Get Medical Records Just Because You Are in Law Enforcement

Under HIPAA, there are various exceptions that **permit**—not require—disclosure of medical records to law enforcement, without patient authorization. This means that a HCP can just give medical records over to law enforcement just because law enforcement is investigating a crime, correct? Not so fast. Under Washington law, specifically RCW 70.02.020 (1), a HCP may not disclose the medical records of a patient without the patient's written authorization, except as provided **in RCW 70.02.** Of course, a HCP **shall** provide medical records to federal, state or local law enforcement authorities "as **required** by law." RCW 70.02.200 (2)(a) (emphasis added).

In other words, similar to asking a patient for ID prior to blindly disclosing medical records, make law enforcement prove it. Our counsel is to always ask law enforcement to provide the HCP with a law that actually *requires* disclosure. For example, under RCW 26.44.030 (14)(a), law enforcement and DSHS "**[S]hall** have access to all relevant records of the child in the possession of mandated reporters and their employees," when investigating potential child abuse or neglect. This is a classic example of when disclosure is "required by law"—EMS providers are mandatory reporters.[1] Another example would be what we call the "gunshot exception" under RCW 70.02.200 (2)(b), whereby the patient was the victim of a gunshot wound or a wound from some other blunt instrument. And even then, disclosure is limited by statute.

Our point is this: If the law enforcement agency is not able to provide the PRO with a law *requiring*—not merely permitting—disclosure of medical records, then the answer is no. If law enforcement is *not* able to provide a law requiring disclosure, our counsel is that the HCP inform law enforcement that it should obtain a court order mandating disclosure. That way, disclosure would be "required by law." But again, if no law requires disclosure and there is no court order, the answer is no. Of course, no client of ours, or frankly any HCP, should act with the intent to impede a criminal investigation. But patient privacy takes precedence, especially in Washington State. Be wary of blindly providing medical records, if your agency wishes to keep your good faith immunity.

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[1] http://www.firehouselawyer.com/Newsletters/v08n03mar2008.pdf

Mandatory Sick Leave Law Comes Into Effect, Soon

On January 1, 2018, all Washington employees, public and private, will begin to accrue one hour of sick leave for every 40 hours worked. The voters asked for it and got it. Initiative 1433 will become law very soon.[2] This mandatory sick leave law applies to full-time, part-time, casual, seasonal or temporary employees.

Essentially, an employee will begin accruing paid sick leave on January 1, 2018. Furthermore, sick leave is not capped. This means that the employee can accrue sick leave in any amount in one year. Accrued leave carries over. Therefore, the employee need not "use it or lose it." Of course, the employer can set a cap on the amount of sick leave that may carry over, up to 40 hours. We understand the headaches that this new law may cause, with respect to non-contract employees or those with a professional services contract that does not address Initiative 1433.

We may consider preparing a model policy to address Initiative 1433.[3]

[2] http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/1443.asp

[3] See the text of Initiative 1433 here: https://sos.wa.gov/_assets/elections/initiatives/FinalText_954.pdf

Trying for a Lid Lift? Check Your Ballot Title Language, Thoroughly

Under RCW 84.55.050, a fire department, or any taxing district, may lift the 101% "lid" applicable to regular property taxes. However, the dollar amount of such a levy lid lift may not be used as the base amount for computing "subsequent levies" unless the proposition "expressly" states that the dollar amount will be used for this purpose. *See* RCW 84.55.050(3); *See Also* RCW 84.55.050(4)(a). Otherwise, the lid lift is null: "Except as otherwise expressly stated in an approved ballot measure," subsequent levies are calculated as if the levy lid lift proposition "had not been approved." RCW 84.55.050(5)(a).

Recently, the Washington Court of Appeals, Division Two, found that a ballot title did not "expressly state" that the dollar amount established in the final year of the lid lift would be used to calculate future levies. *End Prison Industrial Complex v. King County,* No. 49453-1-II (2017). Therefore, Division Two found that the (criminal justice) levy should have been collected as though the lid lift had never passed.

Division Two effectively nullified the following ballot title language—proposed in 2012—for failure to satisfy RCW 84.55.050(3):

"The King County council passed Ordinance No. 17304 concerning a

replacement facility for juvenile justice and family law services. This proposition would authorize King County to levy an additional property tax for nine years to fund capital costs to replace the Children and Family Justice Center, which serves the justice needs of children and families. It would authorize King County to levy an additional regular property tax of $0.07 per $1,000 of assessed valuation for collection in 2013. *Increases in the following eight years would be subject to the limitations in chapter 84.55 RCW*, all as provided in Ordinance No. 17304. Should this proposition be: () Approved () Rejected"

(emphasis added).

Division Two found that the italicized language above was not sufficient to establish that the dollar amount collected in the first year of the levy would be used to calculate subsequent levies. Therefore, Division Two ruled that the property tax would be levied as though the lid lift "had not occurred."

The moral of the story: be specific. For a lid lift election in 2018, use the following ballot title language: "The maximum allowable levy in 2018 shall serve as the base for computing subsequent levy limitations as provided by chapter 84.55 RCW."[4] This is much more specific than "Increases in the following eight years would be subject to the limitations in chapter 84.55 RCW." That language was found insufficient by Division Two. And we agree. Ultimately, under RCW 84.55.050 (3), "[A]fter a [levy lid lift is authorized], the dollar amount of such levy may not be used for the purpose of computing the limitations for subsequent levies provided for in this chapter, *unless the ballot proposition expressly states* that the levy made under this section will be used for this purpose." (emphasis added).[5]

Case Note Regarding Unemployment Benefits

Recently, in *Cuesta v. Employment Security Department*, No. 75405-0-1 (2017), the Washington State Court of Appeals, Division One, reminded us that just because an employee is terminated does not mean that the employee is disqualified from receiving unemployment benefits.

[4] In the case of a multi-year lid lift, **always** specify that the dollar amount of the final year shall be used to calculate the levies in future years.

[5] The *Firehouse Lawyer* has written extensively on RCW 84.55.050 over the years:

http://www.firehouselawyer.com/Newsletters/v07n05may2007.pdf

http://www.firehouselawyer.com/Newsletters/v01n08dec1997.pdf

http://www.firehouselawyer.com/Newsletters/v09n05may2009.pdf

Under Washington law, "[A]n individual shall be disqualified from [receiving unemployment benefits] beginning with the first day of the calendar week in which he or she has been discharged or suspended for *misconduct* connected with his or her work." RCW 50.20.066 (emphasis added). The unemployment-benefit laws are "to be used for the benefit of persons unemployed through no fault of their own." RCW 50.01.010. But the *Cuesta* court found that "the question of discharge is different than the question of misconduct," and therefore "the fact that Cuesta's acts were sufficient grounds to justify discharge from employment does not necessarily mean that they are sufficient grounds to constitute statutory misconduct that disqualifies him from unemployment benefits."

Of course, according to the *Cuesta* court, "the statute does not require a showing of 'willfulness' and 'wantonness,' meaning the employee's actions need not be done intentionally, or with the intent to cause the employer harm." Ultimately, "misconduct" can be "[c]arelessness or negligence of such a degree or recurrence as to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294 (1)(d).

The *Cuesta* case reminds us that an employee may be disqualified from obtaining unemployment benefits by a showing of repeated work violations which, albeit are not intentional, still demonstrate a substantial disregard for one's job duties. But discharge alone does not disqualify the employee from unemployment benefits, under *Cuesta.*

SAFETY BILL

Washington law provides that body armor used by a fire department "shall not be used beyond the manufacturer's warranty." *See* WAC 296-305-02012 (4). Period. There is no exception.

Furthermore, if your agency decides to purchase body armor for your employees, your agency must comply with national standards on the maintenance, care and use of this body armor. *Id.*[6] Otherwise, you face liability under the Washington State Industrial Safety and Health Act (WISHA).

DO NOT rely on the DOSH guidance referenced in the above law. That DOSH guidance states that a warranty "should not" be used to establish the "shelf life" of body armor. IGNORE THIS. The Department of Labor and Industries will tell you to follow what the WAC says. This author recently faced this issue and advised the client to follow what the law says, not what DOSH guidance suggests.

DISCLAIMER

The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.

[6] *See Also* NIJ Standard 0101.06, an application guide for ballistic body armor: https://www.ncjrs.gov/pdffiles1/nij/247281.pdf