

August 24, 1998

OPINION NO. 98-031

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
120 Market Street
Youngstown, Ohio 44503-1726

Dear Prosecutor Gains:

You have requested an opinion regarding the subpoena powers of the county coroner. Specifically, you wish to know the following:

1. May a county coroner during an investigation to determine the cause of death of a person issue a subpoena for the person's medical records to a private, nonprofit corporation that provides drug counseling?
2. Is a private, nonprofit corporation that provides drug counseling required to provide the medical records of a deceased person to the county coroner when the coroner issues a subpoena for such records?
3. If a private, nonprofit corporation that provides drug counseling fails to turn a deceased person's medical records over to the county coroner when the coroner has issued a subpoena for such records, may the coroner prepare a judgment entry requiring the corporation to turn over the requested records to the coroner, submit the entry to a judge for his signature, and serve the entry on the corporation?

A county coroner is a creature of statute, and, as such, he may exercise only the authority explicitly granted to him by statute, or necessarily implied therefrom. 1988 Op. Att'y Gen. No. 88-035 at 2-156 and 2-157. *See generally State ex rel. Harrison v. Perry*, 113 Ohio St. 641, 644, 150 N.E. 78, 78 (1925) (concerning origin of county coroner's authority). The powers and duties of the county coroner are set forth in R.C. Chapter 313.

One of the primary responsibilities of a county coroner is to determine the cause, manner, and mode of unexplained deaths in the county. R.C. 313.19; *see* R.C. 313.17. In order to discharge this responsibility, the county coroner has broad authority to gather information at the scene of an unexplained death and beyond, and to interview and subpoena witnesses when necessary. *See* R.C. 313.11; R.C. 313.13; R.C. 313.17; *see also* R.C. 313.09 (a county coroner

may request law enforcement officers to investigate unexplained deaths). With respect to the issuance of subpoenas by a county coroner, R.C. 313.17 states, in relevant part:

The coroner or deputy coroner may issue subpoenas for such witnesses as are necessary, administer to such witnesses the usual oath, and proceed to inquire how the deceased came to his death, whether by violence to self or from any other persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto.

R.C. 313.17 therefore authorizes a county coroner to subpoena witnesses when determining the cause, manner, and mode of unexplained deaths in the county. Although R.C. 313.17 does not expressly authorize a county coroner to subpoena the production of records by witnesses, it is reasonable to infer that the express authority to subpoena witnesses includes the authority to command such witnesses to produce records that the coroner believes are germane to determining the cause, manner, or mode of an individual's death. Let us now review the reasons for this conclusion.

Pursuant to R.C. 313.19, a county coroner must determine the cause, manner, and mode of unexplained deaths. To make this determination, a county coroner is authorized by R.C. 313.17 to gather pertinent information from personal observation of the corpse, from witnesses, and "from such other sources of information as are available, or from the autopsy." *See also* R.C. 313.13 (authorizing a county coroner to "go to the dead body and take charge of it"); R.C. 313.131 (authorizing a county coroner to conduct autopsies). R.C. 313.17 thus expressly permits a county coroner to determine the cause, manner, and mode of an unexplained death from any source of information that is available.

With the exception of R.C. 313.13 and R.C. 313.131, governing, respectively, a county coroner's duties at the scene of a dead body and the conducting of autopsies, and R.C. 313.17, pertaining to the subpoenaing of witnesses, no other statute indicates the method or manner by which a county coroner is to obtain available information concerning an unexplained death. It is, however, well established that where a public officer is authorized to perform a task, but is not given direction as to the manner of performing the task, the officer has the "implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties. *State ex rel. Hunt. v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *see also Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (where a statute authorizes performance of a particular act, but does not specify how the act is to be performed, the implication is that it is to be carried out in a reasonable manner). Because a county coroner is authorized to determine the cause, manner, and mode of an unexplained death from any source of information that is available, a coroner is permitted to select an appropriate method by which to obtain such information.

In regard to your specific inquiry, it is our opinion that the issuance of a subpoena that commands a person to produce records that could be useful in determining the cause, manner, and mode of an unexplained death is an appropriate method by which a county coroner may obtain information relevant to that death. Under both the Ohio Rules of Civil Procedure and the Ohio Rules of Criminal Procedure, subpoenas may be issued by a court in order to require a person to produce records or documents in his possession, custody, or control. Ohio R. Civ. P. 45; Ohio R. Crim. P. 17; *see also* R.C. 2937.19 (“[t]he magistrate or judge or clerk of the court in which proceedings are being had may issue subpoenas or other process to bring witnesses or documents before the magistrate or court in hearings pending before him either under Chapter 2937. or 2938. of the Revised Code”). These rules indicate that the issuance of a subpoena to compel the production of records or documents is an acceptable way by which a court or a party in a civil or criminal case may obtain records or documents that are in the possession, custody, or control of a witness.

Moreover, the Ohio Supreme Court has found that R.C. 313.19, which requires a county coroner to determine the cause, manner, and mode of an unexplained death, “recognizes the quasi-judicial character of the coroner’s statutorily mandated duty to ascertain, in certain cases, a person’s cause of death.” *Vargo v. Travelers Ins. Co.*, 34 Ohio St. 3d 27, 30, 516 N.E.2d 226, 229 (1987); *accord State ex rel. Harrison v. Perry*, 113 Ohio St. at 644-45, 150 N.E. at 79. In other words, a county coroner engages in quasi-judicial activity when inquiring into the cause, manner, and mode of a person’s death. *Vargo v. Travelers Ins. Co.*, 34 Ohio St. 3d at 30, 516 N.E.2d at 229; *State ex rel. Harrison v. Perry*, 113 Ohio St. at 644-45, 150 N.E. at 79. In light of the quasi-judicial character of county coroners when acting to determine the cause, manner, and mode of unexplained deaths, the General Assembly specifically authorized coroners to subpoena witnesses and gather information from all available sources. R.C. 313.17; *see* R.C. 313.13; R.C. 313.131. By granting such authority to county coroners, the General Assembly intends coroners to obtain and examine any available information when discharging their duty to determine the cause, manner, and mode of an unexplained death.

An interpretation of R.C. 313.17 that permits a county coroner to issue a subpoena that compels a person to disclose records pertaining to the cause, manner, or mode of an unexplained death comports with the intent of the General Assembly to have a county coroner examine any relevant information pertaining to that death. It thus is reasonable to infer that R.C. 313.17 authorizes a county coroner to issue a subpoena for that purpose. *See generally* 1975 Op. Att’y Gen. No. 75-011 at 2-42 (R.C. 313.17 “gives the coroner power to collect data pertaining to the cause of death through means other than by formal inquest. Such an informal inquiry can take place by questioning of anyone who may be in possession of information (medical history or otherwise) that would aid the coroner in the disposition of his duty”). Accordingly, pursuant to R.C. 313.17, a county coroner during an investigation to determine the cause of death of a person

may issue a subpoena that directs a private, nonprofit corporation that provides drug counseling to produce the person's medical records that are in the custody or possession of the corporation.¹

Your second question asks whether a private, nonprofit corporation that provides drug counseling is required to provide a person's medical records to the county coroner when the coroner issues a subpoena for such records. Although no statute directly addresses the responsibilities of a witness subpoenaed by the county coroner, R.C. 313.17 provides the manner in which a county coroner obtains compliance with a subpoena issued under the authority of that section. In this regard, R.C. 313.17 states, in part:

In case of the failure of any person to comply with such subpoena, or on the refusal of a witness to testify to any matter regarding which he may lawfully be interrogated, the probate judge, or a judge of the court of common pleas, on application of the coroner, shall compel obedience to such subpoena by attachment proceedings as for contempt.

Cf. R.C. 2317.21 (setting forth the procedure whereby a court may, by attachment proceedings, compel obedience to a subpoena issued by the court). *See generally Ohio Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St. 3d 26, 457 N.E.2d 309 (1983) (syllabus) (“[t]he court of common pleas must fulfill the mandatory duty imposed upon it by R.C. 119.09 to compel obedience by attachment proceedings when a witness refuses to testify to matters relevant in an R.C. 119.09 administrative hearing”).

Based on R.C. 313.17, if a private, nonprofit corporation that provides drug counseling fails to provide the medical records of a deceased person that are in the corporation's custody or possession when the county coroner issues a subpoena for such records, the coroner may file an application with a probate judge or a judge of the court of common pleas requesting the judge to order the corporation to comply with the subpoena. After reviewing the application, a probate judge or a judge of the court of common pleas may order the corporation to produce the medical records for the county coroner.

When a private, nonprofit corporation that provides drug counseling is ordered by a probate judge or a judge of the court of common pleas to comply with a subpoena issued by a county coroner pursuant to R.C. 313.17, the corporation may (1) obey the order, (2) seek to have the order changed by the judge, or (3) disobey the order at its peril. *See* 1993 Op. Att'y Gen. No. 93-038 at 2-197; 1992 Op. Att'y Gen. No. 92-072 at 2-306; *see, e.g., State ex rel. Beil v. Dota*,

¹ A subpoena issued by a county coroner pursuant to R.C. 313.17 to a private, nonprofit corporation that provides drug counseling is served upon the agent appointed by the corporation to receive such service. R.C. 1702.06.

168 Ohio St. 315, 322, 154 N.E.2d 634, 639 (1958) (“[t]he interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril” (quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303 (1947))), *cert. denied*, 360 U.S. 912 (1959); *Board of Educ. v. Hamilton Classroom Teachers Assoc.*, 5 Ohio App. 3d 51, 53, 449 N.E.2d 26, 29 (Butler County 1982) (“[a]n order issued by a court with jurisdiction must be obeyed until it is reversed by orderly and proper proceedings”). A private, nonprofit corporation that provides drug counseling that disobeys or resists an order issued by a probate judge or a judge of the court of common pleas thus may be subject to a contempt proceeding. *See* R.C. 2705.02(A); 1992 Op. Att’y Gen. No. 92-072 at 2-306.

In light of the foregoing, it is our opinion that, pursuant to R.C. 313.17, a private, nonprofit corporation that provides drug counseling that fails to comply with a subpoena directing the corporation to produce for the county coroner a deceased person’s medical records may be held in contempt. It should be noted, however, that medical records in the custody or possession of a private, nonprofit corporation may constitute privileged communications that the corporation is not required to release to the county coroner. R.C. 2317.02(B), which sets forth the instances in which a physician is not required to testify concerning a patient’s communications, provides, in part, as follows:

The following persons shall not testify in certain respects:

....

(B)(1) A physician or a dentist concerning a communication² made [*sic*] the physician or dentist by a the [*sic*] physician’s or dentist’s patient in that relation or the physician’s or dentist’s advice to the a [*sic*] patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject. (Footnote added.)

² R.C. 2317.02(B)(4)(a) defines the term “communication,” for purposes of R.C. 2317.02(B)(1)-(3), as follows:

As used in divisions (B)(1) to (3) of this section, “communication” means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A “communication” may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

Accordingly, if the medical records constitute privileged communications for purposes of R.C. 2317.02(B)(1), a private, nonprofit corporation would not be required to produce such records for the county coroner, nor could such corporation be held in contempt for failing to produce the records. See 1975 Op. Att’y Gen. No. 75-011 at 2-44 (“a person who comes within the provisions of R.C. 2317.02 may refuse to provide a coroner with information under oath at an inquest on the grounds of privileged communication”). See generally *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947) (where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of the privilege, inadmissible in evidence by virtue of R.C. 2317.02(B)); *State ex rel. Buchman v. Stokes*, 36 Ohio App. 3d 109, 521 N.E.2d 515 (Hamilton County 1987) (if a court orders a physician to provide information and records that are shown not to be privileged, a contempt finding is appropriate; a court, however, may not order a physician to release all medical records bearing a patient’s name absent a showing that all the records are not privileged); *Pacheco v. Ortiz*, 11 Ohio Misc. 2d 1, 3, 463 N.E.2d 670, 673 (C.P. Cuyahoga County 1983) (“unless there was a waiver by the plaintiff himself, either actual or implied, of his privilege in regard to his hospital records, then they may not be released even though a subpoena has been properly served upon, in this case, the custodian of the hospital records, *i.e.*, Cleveland Clinic Foundation”).

The question whether a medical record is a privileged communication for purposes of R.C. 2317.02(B) requires the finding of three essential elements: physician, patient, and communication. *Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 229, 538 N.E.2d 419, 422 (Franklin County 1988). The extension of the physician-patient privilege to a medical record thus requires the resolution of certain specific factual issues in order to establish the existence of the three essential elements of the physician-patient privilege. For example, it must be determined whether, in a given instance, the physician-patient privilege extends to a private, nonprofit corporation that provides drug counseling. See, *e.g.*, *Weis v. Weis* (since the relationship of nurse and patient is not named in G.C. 11494 (now R.C. 2317.02), no privilege is extended to communications between a patient and his nurse); *Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (Montgomery County 1984) (an employee of a physician has no legal duty to refrain from divulging confidential medical information concerning a patient of the physician). In addition, a determination must be made whether the communication was made to the physician in the context of a physician-patient relationship for the purpose of diagnosing a medical condition and prescribing treatment therefor. See, *e.g.*, *Doe v. University of Cincinnati*, 42 Ohio App. 3d at 230, 538 N.E.2d at 423 (“[t]he evidence presented does not indicate that the blood donor sought any treatment for himself by subjecting himself to the procedures involved in drawing his blood. Therefore, based on the evidence presented, the trial court could not have found the donor to be a patient”); *State v. Dress*, 10 Ohio App. 3d 258, 261, 461 N.E.2d 1312, 1317 (Lucas County 1982) (“[t]he party seeking to invoke the privilege must establish that the communication was extended to the physician as a private confidence, or intended to be received in that manner. To be privileged, the communication must also facilitate, or be intended to facilitate, medical treatment, diagnosis or advice”). Further, before the physician-patient privilege may be invoked, it must be ascertained

whether the patient or guardian or other legal representative of the patient has waived the privilege or whether the privilege otherwise does not apply. *See* R.C. 2317.02(B) (authorizing the waiver of the physician-patient privilege and setting forth the instances in which the privilege does not apply).

Thus, whether a medical record is a privileged communication for purposes of R.C. 2317.02(B) presents questions of fact that can only be resolved on a case-by-case basis. An opinion of the Attorney General cannot resolve questions of fact or provide advice with respect to disputed factual matters. 1986 Op. Att’y Gen. No. 86-076 at 2-422. Therefore, we are unable by means of a formal opinion to make a final determination whether medical records in the custody or possession of a private, nonprofit corporation constitute privileged communications for purposes of the physician-patient privilege of R.C. 2317.02(B) that the corporation is not required to release to the county coroner.

Your final question asks, if a private, nonprofit corporation that provides drug counseling fails to turn the medical records over to the county coroner when the coroner has issued a subpoena for such records, may the coroner prepare a judgment entry requiring the corporation to turn over the requested records to the coroner, submit the entry to a judge for his signature, and serve the entry on the corporation. As stated above, pursuant to R.C. 313.17, a private, nonprofit corporation that fails to comply with a subpoena issued by the county coroner may be made a party to an attachment proceeding as for contempt before a probate judge or a judge of the court of common pleas. R.C. 313.17 thus prescribes the procedure by which a county coroner obtains compliance with a subpoena issued by him.

“It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner.” 1984 Op. Att’y Gen. No. 84-050 at 2-168; *accord Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951); 1979 Op. Att’y Gen. No. 79-048 at 2-153. Because R.C. 313.17 directs a county coroner to compel obedience to a subpoena by attachment proceedings for contempt before a probate judge or a judge of the court of common pleas when a private, nonprofit corporation fails to obey the subpoena, a coroner may not compel obedience to the subpoena in a different manner. *See generally Ohio Motor Vehicle Dealers Bd. v. Remlinger* 8 Ohio St. 3d 26, 457 N.E.2d 309 (1983) (an administrative agency compels obedience to a subpoena issued by the agency through attachment proceedings for contempt).

The preparation and submission by the county coroner of a judgment entry to a judge requiring a private, nonprofit corporation to turn over medical records to the coroner in lieu of attachment proceedings for contempt is in a manner different than that set out in R.C. 313.17 and, therefore, not permissible. *See generally Green v. Western Reserve Psychiatric Habilitation Center*, 3 Ohio App. 3d 218, 444 N.E.2d 442 (Summit County 1981) (an administrative agency possesses no inherent judicial power to sanction contempt of its subpoenas, but is limited by statute as to the manner of compelling the attendance of subpoenaed witnesses or otherwise

punishing the contempt of witnesses). Rather, pursuant to R.C. 313.17, in case of the failure of a private, nonprofit corporation that provides drug counseling to comply with a subpoena requesting the medical records of a deceased person that are in the corporation's custody or possession, the county coroner must make application to the probate judge or a judge of the court of common pleas to compel obedience to such subpoena by attachment proceedings as for contempt. The law does not authorize a county coroner to prepare a judgment entry requiring the corporation to produce the medical records, submit the entry to a judge for his signature, and serve the entry on the corporation when the corporation fails to comply with a subpoena issued by the coroner commanding the corporation to produce such records, in lieu of complying with the procedures set forth in R.C. 313.17. However, when an application is filed in the manner directed by R.C. 313.17 and a hearing is held before the court in accordance with the terms of that section, a probate judge or a judge of the court of common pleas that finds in favor of the county coroner may direct the coroner to prepare a judgment entry for the judge's signature ordering the corporation to produce the medical records, and the judgment entry may then be served upon the corporation. *See generally* Ohio R. Civ. P. 58(A) (“[s]ubject to the provisions of Rule 54(B), ... upon a decision announced ... the court shall promptly cause the judgment to be prepared”).

In conclusion, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 313.17, a county coroner during an investigation to determine the cause of death of a person may issue a subpoena that directs a private, nonprofit corporation that provides drug counseling to produce the person's medical records that are in the custody or possession of the corporation.
2. Pursuant to R.C. 313.17, in case of the failure of a private, nonprofit corporation that provides drug counseling to comply with a subpoena requesting the medical records of a deceased person that are in the corporation's custody or possession, the county coroner may make application to the probate judge or a judge of the court of common pleas to compel obedience to such subpoena by attachment proceedings as for contempt.

3. The law does not authorize a county coroner to prepare a judgment entry requiring a private, nonprofit corporation that provides drug counseling to produce the medical records of a deceased person, submit the entry to a judge for his signature, and serve the entry on the corporation when the corporation fails to comply with a subpoena issued by the coroner commanding the corporation to produce such records, in lieu of complying with the procedures set forth in R.C. 313.17. However, when an application is filed in the manner directed by R.C. 313.17 and a hearing is held before the court in accordance with the terms of that section, a probate judge or a judge of the court of common pleas that finds in favor of the county coroner may direct the coroner to prepare a judgment entry for the judge's signature ordering the corporation to produce the medical records, and the judgment entry may then be served upon the corporation.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

August 24, 1998

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
120 Market Street
Youngstown, Ohio 44503-1726

SYLLABUS:

98-031

1. Pursuant to R.C. 313.17, a county coroner during an investigation to determine the cause of death of a person may issue a subpoena that directs a private, nonprofit corporation that provides drug counseling to produce the person's medical records that are in the custody or possession of the corporation.
2. Pursuant to R.C. 313.17, in case of the failure of a private, nonprofit corporation that provides drug counseling to comply with a subpoena requesting the medical records of a deceased person that are in the corporation's custody or possession, the county coroner may make application to the probate judge or a judge of the court of common pleas to compel obedience to such subpoena by attachment proceedings as for contempt.
3. The law does not authorize a county coroner to prepare a judgment entry requiring a private, nonprofit corporation that provides drug counseling to produce the medical records of a deceased person, submit the entry to a judge for his signature, and serve the entry on the corporation when the corporation fails to comply with a subpoena issued by the coroner commanding the corporation to produce such records, in lieu of complying with the procedures set forth in R.C. 313.17. However, when an application is filed in the manner directed by R.C. 313.17 and a hearing is held before the court in accordance with the terms of that section, a probate judge or a judge of the court of common pleas that finds in favor of the county coroner may direct the coroner to prepare a judgment entry for the judge's signature ordering the corporation to produce the medical records, and the judgment entry may then be served upon the corporation.