



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

September 23, 1996

Ms. Rebecca E. Forkner
Executive Director
Texas State Board of Examiners
of Psychologists
333 Guadalupe, Suite 2-450
Austin, Texas 78701

Letter Opinion No. 96-102

Re: Effect of provision of chapter 611,
Health and Safety Code, authorizing
mental health professional to disclose
confidential information about a patient in
response to a subpoena (ID# 38823)

Dear Ms. Forkner:

On behalf of the Texas State Board of Examiners of Psychologists ("the board"), you inquire about a recent amendment to chapter 611 of the Health and Safety Code, which establishes the confidentiality of the mental health records of a patient that are created or maintained by a psychologist¹ and sets out exceptions to the confidentiality provision. Senate Bill 667 of the 74th Legislature addressed the disclosure of health and mental health care information by hospitals, physicians, and mental health professionals.² Among other provisions, it adopted section 611.006 of the Health and Safety Code, which provides for disclosure of mental health information in judicial and administrative proceedings. Section 611.006 states as follows:

(a) A professional may disclose confidential information in:

(1) a judicial or administrative proceeding brought by the patient or the patient's legally authorized representative against a professional, including malpractice proceedings;

(2) a license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

¹Chapter 611 defines "professional" to include a licensed physician, "a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder," or "a person the patient reasonably believes" to hold the required license or certificate. Health & Safety Code § 611.001(2).

²Act of May 29, 1995, 74th Leg., R.S., ch. 856, 1995 Tex. Gen. Laws 4290.

(3) a judicial or administrative proceeding in which the patient waives the patient's right in writing to the privilege of confidentiality of information or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(4) a judicial or administrative proceeding to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(5) a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, . . . [exception omitted];

(6) a judicial proceeding affecting the parent-child relationship;

(7) any criminal proceeding, as otherwise provided by law;

(8) a judicial or administrative proceeding regarding the abuse or neglect, or the cause of abuse or neglect, of a resident of an institution, as that term is defined by Chapter 242;

(9) a judicial proceeding relating to a will if the patient's physical or mental condition is relevant to the execution of the will;

(10) an involuntary commitment proceeding for court-ordered treatment or for a probable cause hearing . . . ;

(11) *a judicial or administrative proceeding where the court or agency has issued an order or subpoena.*

(b) On granting an order under Subsection (a)(5), the court, in determining the extent to which disclosure of all or any part of a communication is necessary, shall impose appropriate safeguards against unauthorized disclosure. [Emphasis added.]

You state that psychologists typically receive numerous subpoena duces tecum³ for psychological records of present and former patients, and you ask how a psychologist should respond to receiving such a subpoena. You believe that subsection 611.006(a)(11)

³A subpoena duces tecum issued pursuant to rule 177a of the Texas Rules of Civil Procedure requires a witness to produce documentary evidence.

conflicts with a board rule governing the release of patient records, 465.22(d)(3), which provides as follows:

An individual licensed and/or certified by this Board shall release information about a patient or client only upon written authorization by the patient, client, or appropriate legal guardian; pursuant to a proper court order, or as required by applicable state or federal law.

22 T.A.C. § 465.22(d)(3). The board interprets the quoted rule as requiring a psychologist to refuse to honor a subpoena unless it is accompanied by an authorization for release signed by the client or his or her legal guardian.

Because the rules for issuing subpoenas in civil cases⁴ are relevant to your question about the effect of subsection 611.006(a)(11) on the board's rule, we will review them before answering it. The Texas Rules of Civil Procedure authorize various forms of discovery, including requests and motions for production, examination, and copying of documents.⁵ Rule 176 provides for issuing subpoenas to witnesses in civil suits:

The clerk of the district or county court, or justice of the peace,⁶ as the case may be, at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred miles of the courthouse of the county in which the suit is pending

⁴We will not review rules for issuing subpoenas in administrative proceedings under the Administrative Procedure Act, Gov't Code ch. 2001, because discovery in a contested case under that act is governed by the Rules of Civil Procedure. Gov't Code § 2001.091; Attorney General Opinion JM-1075 (1989) at 2. See also Gov't Code § 2001.089 (state agency authorized to issue subpoenas for witnesses and records in contested case).

⁵Tex. R. Civ. P. 166b.

⁶Section 611.006(11) authorizes a professional to disclose confidential information in "a judicial or administrative proceeding where *the court or agency* has issued an order or subpoena." (Emphasis added.) You suggest that a "subpoena" within this provision means a subpoena issued only after a review by a court or agency as to whether the person requesting the records has a need for the information that overrides the patient's general right to confidentiality. It appears that you equate "court" with "judge" in reading this statute. Your argument is not consistent with procedures for issuing and contesting subpoenas established in the Rules of Civil Procedure. Moreover, the term "court" does not necessarily mean "judge." It has been defined more broadly, as "an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries." *Armadillo Bail Bonds v. State*, 772 S.W.2d 193, 195 (Tex. App.—Dallas 1989), *aff'd* 802 S.W.2d 237 (Tex. Crim. App. 1990). The phrase "court or agency" in section 611.006(a)(11) appears to refer to the legal entity that has jurisdiction of a matter, and not to the individual officers or employees who perform its functions.

A subpoena may also command a witness to produce books, papers, and documents.⁷

A witness summoned in any suit “shall attend the court . . . until discharged by the court or party summoning such witness.”⁸ If a witness fails to attend after being summoned, the witness “may be fined by the court as for contempt of court, and an attachment may issue against the body of such witness to compel the attendance of such witness.”⁹ “Any witness refusing to give evidence may be committed to jail, there to remain without bail until such witness shall consent to give evidence.”¹⁰ Thus, the rules provide for enforcing a subpoena. They also provide a way for the witness to raise a claim of privilege. Rule 177a allows a witness to move to quash or modify a subpoena that is “unreasonable and oppressive.” Rule 166b of the Rules of Civil Procedure authorizes a person from whom discovery is sought to seek a protective order limiting discovery.¹¹

Rules of civil procedure are promulgated by the Texas Supreme Court pursuant to article V, section 31(b) of the Texas Constitution, which states in part that “[t]he Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state. . . .” If a rule of civil procedure conflicts with a statute, the rule must yield.¹² However, we find no conflict between subsection 611.006(a)(11) and rules 176 and 177a. Subsection 611.006(a)(11) in fact makes it clear that a psychologist may comply with a subpoena.¹³

⁷Tex. R. Civ. P. 177a.

⁸Tex. R. Civ. P. 179.

⁹*Id.*

¹⁰Tex. R. Civ. P. 180.

¹¹Tex. R. Civ. P. 166b.

¹²Tex. Const. art. V, § 31(b); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex. 1971); *Drake v. Muse, Currie & Kohen*, 532 S.W.2d 369, 372 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *C. E. Duke's Wrecker Serv., Inc. v. Oakley*, 526 S.W.2d 228, 232 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); Attorney General Opinion DM-308 (1994) at 2. See Gov't Code § 22.004(c) (rule adopted by supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed).

¹³Subsection 611.006(a) states that a professional “may disclose confidential information” in various circumstances, and you suggest that the use of the word “may” means that the psychologist has discretion to comply or not comply with the subpoena, so that he may refuse compliance unless it is accompanied by a written release. We disagree with your argument. The bill analysis to Senate Bill 667 states that section 611.006 “[s]ets forth conditions under which a professional *is authorized* to disclose confidential information in a judicial or administrative proceeding.” House Public Health Committee, Bill Analysis, Tex. S.B. 667, 74th Leg., R.S. (1995) at 3 (emphasis added). Moreover, your suggested construction of section 611.006 ignores the mandatory nature of a subpoena.

Subsection 611.006(a)(11) does not expressly condition a psychologist's compliance with a subpoena upon a written release signed by the patient or guardian. To read subsection 611.006(a)(11) as requiring a written release would render it superfluous, because subsection 611.006(a)(3) authorizes a psychologist to disclose confidential information about a patient in a judicial or administrative proceeding if a written waiver is provided by the patient or the patient's representative. It is presumed that the legislature intended the entire statute to be effective.¹⁴ Moreover, the overall purpose of Senate Bill 667 was to "define the appropriate disclosure of patient health and mental health care information by hospitals, doctors, and mental health professionals."¹⁵ Its legislative history states that it adopted provisions authorizing "professionals" to disclose mental health records in judicial or administrative proceedings.¹⁶

To the extent that an administrative rule is inconsistent with a statute, the rule must yield.¹⁷ This well-established standard is incorporated into the provision defining the board's rule-making power: the board "may make all rules not inconsistent with the Constitution and laws of this state, which are reasonably necessary for the proper performance of its duties. . . ."¹⁸ Rule 465.22(d)(3), as interpreted by the board, is inconsistent with subsection 611.006(a)(11) and is invalid to the extent of the inconsistency. Accordingly, a psychologist's duty to comply with a subpoena for patient records is not contingent on receiving a written waiver from the patient or patient's representative.¹⁹

You also suggest that section 611.006(a)(11) conflicts with rule 510 of the Texas Rules of Civil Evidence, which establishes the confidentiality of communications between a patient and a mental health professional, subject to exceptions permitting disclosure of

¹⁴Gov't Code § 311.021(2).

¹⁵House Research Organization, Bill Analysis, Tex. S.B. 667, 74th Leg., R.S. (1995).

¹⁶*Id.*; see also House Public Health Committee, Bill Analysis, Tex. S.B. 667, 74th Leg., R.S. (1995) at 1 ("Background" statement cites expense and delay involved in obtaining medical records for a court case). Senate Bill 667 also added to the provisions of article 4495b, V.T.C.S. that authorize a physician to disclose medical records in court or administrative proceedings. See Act of May 29, 1995, 74th Leg., R.S., ch. 856, § 3, 1995 Tex. Gen. Laws 4290, 4293-94 (codified as V.T.C.S. art. 4495b, § 5.08 (g)(8), (9), (11), (12)).

¹⁷*Kelley v. Industrial Accident Board*, 358 S.W.2d 874 (Tex. Civ. App.—Austin 1962, writ ref'd); see also *Bexar Co. Bail Bond Bd. v. Deckard*, 604 S.W.2d 214 (Tex. Civ. App.—San Antonio 1980, no writ).

¹⁸V.T.C.S. art. 4512c, § 8(a).

¹⁹We do not consider whether a psychologist was authorized to disregard a subpoena for patient records in the absence of a written waiver prior to the effective date of section 611.006(a)(11), Health and Safety Code.

such communications in court proceedings.²⁰ Several of the exceptions in rule 510 are similar to exceptions in section 611.006. For example, disclosure is authorized if the proceedings are brought by the patient against a professional, if the patient or his or her representative signs a waiver, or if the purpose of the proceeding is to collect on a claim for mental or emotional health services rendered to the patient.²¹ Rule 510 also provides the following broad exception in court proceedings

as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense.²²

A psychologist may claim the rule 510 privilege on behalf of the patient, and the authority to do so is presumed in the absence of evidence to the contrary.²³ The Rules of Civil Procedure provide methods for a witness to claim that records are privileged and to have the question resolved by the court. If a psychologist believes that he or she has received a subpoena for records that are privileged and not within an exception to rule 510, he or she should avail himself of the protections found in the Rules of Civil Procedure.²⁴ Thus, section 611.006(a)(11) and rule 510 of the Texas Rules of Civil Evidence may be construed in harmony.²⁵

²⁰On November 23, 1982, the Texas Supreme Court entered an order adopting the Texas Rules of Civil Evidence. See Order, 641-642 S.W.2d at XXXV (Sept. 1, 1983). Under this order, former article 5561h, V.T.C.S. (1925), now codified as Health and Safety Code, chapter 611, was deemed repealed with respect to civil actions and replaced by rule 510 of the Texas Rules of Evidence. *Wimberly Resorts Property, Inc. v. Pfeuffer*, 691 S.W.2d 27, 29 (Tex. App.—Austin 1985, no writ); see List of Repealed Statutes and Enumeration, 641-642 S.W.2d at LXVIII (Sept. 1, 1983); Health & Safety Code § 611.001 historical note (Vernon 1992) [Act of May 7, 1979, 66th Leg., R.S., ch. 239, § 1, 1979 Tex. Gen. Laws 512, 513]. Section 611.006 of the Health and Safety Code relates to a psychologist's authority to disclose otherwise confidential information in an administrative or judicial proceeding and thus appears to reflect provisions of the Rules of Civil Evidence.

²¹Tex. R. Civ. Evid. 510(d)(1), (2), (3).

²²Tex. R. Civ. Evid. 510(d)(5).

²³Tex. R. Civ. Evid. 510(c)(2).

²⁴Attorney General Opinion H-231 (1974).

²⁵You have asked us to consider the recent decision in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), in which the United States Supreme Court, exercising its authority under Federal Rule of Evidence 501 to define new evidentiary privileges, recognized the existence of a psychotherapist-patient privilege. *Jaffee v. Redmond* is not relevant to the question before us, because a privilege for psychotherapist-patient communications already exists in Texas, see Rule of Civil Evidence 510, and because Texas courts, unlike federal courts, lack authority to establish new privileges, see Tex. R. Civ. Evid. 501.

You also ask the following questions about the psychologist's obligation upon receiving a subpoena that is not accompanied by a signed release:

Must the psychologist contact the patient to give the patient the opportunity to file a motion to quash before releasing the records? If the psychologist fails to contact the patient or cannot locate the patient and it is later determined that the records were not subject to being subpoenaed, is the psychologist then liable under [chapter 611 of the] Health and Safety Code²⁶ . . . to the patient for releasing the records? Does the psychologist bear the responsibility of hiring an attorney to determine if the records are privileged from being subpoenaed? If the psychologist delays in producing the records while attempting to contact the patient, can the psychologist be sanctioned for the delay?

Section 611.006(11) authorizes a psychologist to provide confidential information in "a judicial or administrative proceeding where the court or agency has issued an order or subpoena." However, as we have already pointed out, a particular subpoena might seek records that are privileged and not within an exception to rule 510. You wish to know what the psychologist's responsibility would be in such a case. We are able to address these questions only in the most general way, by pointing out that courts of various states have found a mental health professional may be liable in tort to a patient for the unauthorized disclosure of confidential patient information,²⁷ but we have found no case addressing the psychologist's duty at the point of receiving a subpoena duces tecum for patient records that may or may not be privileged from disclosure in a judicial proceeding. Moreover, the question of liability must be decided on the basis of the relevant facts and circumstances of each case. Although it may be advisable for a psychologist to notify a patient that his records have been subpoenaed, we cannot determine that the action would be either necessary or sufficient to protect the psychologist from liability to the patient should privileged information from the patient's records be disclosed. We believe that the individual psychologist should consult a private attorney if such issues arise in connection with his or her practice.

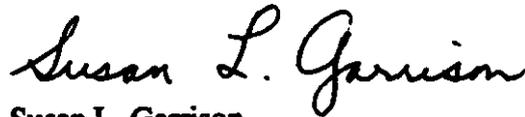
²⁶Section 611.005 of the Health and Safety Code provides that "[a] person aggrieved by the improper disclosure of or failure to disclose confidential . . . records in violation of this chapter may petition the district court of the county in which the person resides for appropriate relief, including injunctive relief."

²⁷See generally 24 AM. JUR. Proof of Facts 3d, 123, *Proof of Unauthorized Disclosure of Confidential Patient Information by a Psychotherapist* (1994); Judy E. Zelin, J.D., Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668 (1986). These authorities relate to disclosures of confidential information in a wide variety of circumstances, not limited to disclosures in judicial proceedings.

S U M M A R Y

A psychologist is authorized to disclose confidential information about a patient in a judicial or administrative proceeding where the court or agency has issued an order or subpoena without receiving a written waiver of confidentiality from the patient or patient's representative. A rule of the Board of Examiners of Psychologists interpreted by the board as requiring such a waiver is invalid to the extent of inconsistency with the exception to the confidentiality requirement found in section 611.006(a)(11) of the Health and Safety Code. If a psychologist has received a subpoena for patient mental health records he or she believes are privileged by rule 510 of the Rules of Evidence, he or she may raise the claim of privilege under applicable provisions of the Rules of Civil Procedure. Although it may be advisable for a psychologist to notify a patient that his records have been subpoenaed, we cannot determine that the action would be either necessary or sufficient to protect the psychologist from liability in tort in the event that the patient's privileged mental health information is disclosed in a judicial proceeding.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee