

RECORDING OF
TELEPHONIC
COMMUNICATIONS:

Where authorities of State Hospital No. 1 obtain consent of relative or person authorized to give such consent for an operation or autopsy to be performed upon an inmate of State Hospital, having a state hospital employee "listen in" to the conversation would be permissible. Also permissible to have a recording machine attached to the telephone at the State Hospital, which machine would record the conversation giving consent. Such recording machine would be subject to regulations set forth in the order of the Missouri Public Service Commission.

FILED

June 28, 1957

Dr. A. K. Baur
Superintendent
State Hospital No. 1
Fulton, Missouri

Dear Dr. Baur:

Your recent request for an official opinion reads:

"A question has come up in connection with the obtaining of autopsy and operation permissions and we would appreciate a legal decision from you pertaining to this matter.

"The question is as follows: In obtaining permission from the responsible next of kin to perform an autopsy or an operation on one of our patients, to obtain such permission by telephone if (1) another hospital employee (telephone operator) listens in and witnesses the oral permission, or (2) if we obtain a recording device attached to the switchboard which will record the verbal permission given by the next of kin for an autopsy or operation.

"I may say that in the Veteran's Administration this method of obtaining permission was considered routine. Such a procedure would expedite matters considerably because at the present time we request the next of kin to verify the permission by sending a collect telegram to the Hospital which may delay matters several hours."

Your request raises the question of what consent to perform an operation and/or autopsy will be deemed legally sufficient to comply with the requirements of the law and to afford adequate protection to the authorities of the State Hospital against any actions which might be brought against them in connection with the above matters.

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There is a law regarding consent for autopsies. Section 194.115, Laws of Missouri, 1953, page 629, reads in part:

"1. It shall be unlawful for any licensed physician and surgeon to perform an autopsy or post-mortem examination upon the remains of any person without the consent of one of the following:

(1) The deceased, if in writing, and duly signed and acknowledged prior to his death; or

(2) The surviving spouse; or

(3) If the surviving spouse through injury, illness or mental capacity is incapable of giving his or her consent, or if the surviving spouse is unknown, or his or her address unknown or beyond the boundaries of the United States, or if he or she has been separated and living apart from the deceased, or if there is no surviving spouse, then any surviving child, parent, brother or sister, in the order named; or

(4) If no surviving child, parent, brother or sister can be contacted by telephone or telegraph, then any other relative, by blood or marriage; or"

It will be noted that subparagraph 4 above contemplates obtaining consent by telephone or telegraph. If such a method of obtaining consent is sufficient for an autopsy it would appear to us to be sufficient for obtaining consent for an operation.

In case consent is obtained by telephone, having, as you suggest, a state hospital employee "listen in" to the conversation would strengthen the position of the hospital if any question ever arose as to whether consent was obtained.

There is no Missouri law which would prohibit this, and we believe that such third person would be permitted to testify regarding the conversation which he had overheard. As we stated, there is no prohibition in the Missouri law against it.

Section 605 of Chapter 47 of the United States Code Annotated does state in part that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or

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meaning of such intercepted communication to any person * **." The above specifically relates to communications by telephone and telegraph. However, it would appear that the operation suggested by you above would not come within this prohibition. In the case of *Flanders v. United States*, 222 F. 2d 163, at l.c. 167, the United States Court of Appeals of the sixth district stated:

"(1) We are of the opinion that where, by means of an extension phone, or other device, a third party 'listens in' on a telephone conversation with the consent of one of the parties to the conversation, there is no interception of the communication, within the meaning of the statute. With respect for the high authorities that hold a contrary opinion, we are persuaded by the reasoning of those that adopt this view, and consider that the route we follow was pointed out by the Supreme Court in *Goldman v. United States*, supra."

We also note your question in regard to the use, by you, of a recording device to be attached to your telephone to be used to record conversations giving consent for autopsies and operations. There is no Missouri statutory law prohibiting or regulating this practice. However, on April 21, 1953, the Southwestern Bell Telephone Company issued a regulation which was filed with the Missouri Public Service Commission, which Commission, on May 21, 1953, promulgated the following regulation:

"D. CONNECTION WITH CUSTOMER-OWNED VOICE RECORDING EQUIPMENT

1. Regulations

a. General

Customer-owned voice recording equipment for the recording of telephone conversations may be used in connection with the facilities of the Telephone Company subject to the following conditions:

(1) Connection with Telephone Company Facilities

(a) Connection of customer-owned voice recording equipment with the facilities of the Telephone Company shall be made only through recorder connector equipment which contains a device automatically producing a dis-

tinctive recorder tone that is repeated at intervals of approximately fifteen seconds when the recording equipment is in use, except that in the case of a private line service which has no connection with the exchange or toll system of the Telephone Company recorder connector equipment which does not contain the automatic tone device may be used at the option of the customer.

(b) Permanent connection shall be made only through recorder connector equipment furnished, installed, and maintained by the Telephone Company.

(c) Connection may be made through portable recorder-connector equipment provided such equipment is obtained from and is maintained by the Telephone Company. The portable recorder-connector equipment shall be connected with the telephone line through jacks installed by the Telephone Company on each line or at each station used for recording purposes, except that where recording is done at a cord switchboard, a portable jack box supplied and maintained by the Telephone Company may be used.

(d) The customer-owned voice recording equipment shall be so arranged that at the will of the user it can be physically connected to and disconnected from the facilities of the telephone company or switched on and off.

(2) Responsibility of the Telephone Company

Telephone service furnished by the Telephone Company is not represented as adapted to the recording of telephone conversations by means of voice recording equipment. The use of customer-owned voice recording equipment in connection with the facilities of the Telephone Company is permitted only on the condition that the liability of the Telephone Company for damages arising out of mistakes, omissions, interruptions, delays, or errors or defects in transmission, or failures or defects in the recorder connector equipment occurring in the course of furnishing service or other facilities and not caused by the negligence of the customer, or of the Telephone Company

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in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay, or error or defect in transmission, or failures or defects in the recorder connector equipment occurs."

The above provision applies only to Southwestern Bell telephone lines. We have ascertained the fact to be that the telephone system at State Hospital No. 1 is owned and operated by Southwestern Bell. Therefore, State Hospital No. 1 would come within the compass of the Missouri Public Service Commission regulation.

CONCLUSION

It is the opinion of this Department that in instances where authorities of State Hospital No. 1 obtain consent from a relative or other person authorized to give such consent for an operation or autopsy to be performed upon an inmate of the State Hospital, that having a state hospital employee "listen in" to the conversation would be permissible and that it would also be permissible to have a recording machine attached to the telephone at the State Hospital, which machine would record the conversation giving consent, but that such recording machine is subject to the regulations set forth in the order of the Missouri Public Service Commission stated above.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/mw/bl