

1 MARICOPA COUNTY
2 OFFICE OF GENERAL LITIGATION SERVICES

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11 Attorney for Maricopa County

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF ARIZONA

14 Brian A. Wilkins

15 Plaintiff,

16 v.

17 Maricopa County, et. al.,

18 Defendants.

NO. CV09-01380-PHX-LOA

**MARICOPA COUNTY'S
SUPPLEMENTAL MEMORANDUM
OF LAW IN SUPPORT OF MOTION
TO COMPEL MEDICAL RECORD
AUTHORIZATIONS**

Honorable Lawrence O. Anderson

19 Pursuant to the Court's Order, Document #109, Defendant Maricopa County
20 hereby submits its Supplemental Memorandum of Law in support of its Motion to
21 Compel Medical Record Authorizations.

22 **1. Defendant cannot obtain Plaintiff's medical records pursuant to subpoena**
23 **without a signed authorization or Court Order.** A.R.S. § 12-2292 provides:

1 A. Unless otherwise provided by law, all medical records and payment
2 records, and the information contained in medical records and payment
3 records, are privileged and confidential. **A health care provider may only
4 disclose that part or all of a patient's medical records and payment
5 records as authorized by state or federal law or written authorization
6 signed by the patient or the patient's health care decision maker.**
(Emphasis added)

7 A.R.S. § 12-2294 (A),(B) and (C) permit a health care provider to release medical
8 records to a third party if the patient signs an authorization; if the production is pursuant
9 to a court order; or the production is authorized by another provision of state or federal
10 law, including HIPAA. Finally, A.R.S. § 12-2294.01 provides that a health care provider
11 shall not produce medical records pursuant to a subpoena unless the subpoena is
12 accompanied by an authorization or a court order.

13 The entities from which the County seeks records, i.e., Walgreens; Medco Health¹;
14 Banner Desert Hospital and its Emergency Department doctor, Dr. Walsh²; and ASU
15 Student Health Services, are “health care providers” as that term is defined in A.R.S. §
16 12-2291 and other applicable statutes.³ Thus, unless Plaintiff signs an authorization for
17 the release of his medical records, the County may only obtain the records by a subpoena
18 *accompanied by an order from this Court* compelling the health care providers to release
19 Plaintiff’s records to the County.

20 ¹ Plaintiff has identified Medco Health as an insurance company or mail order pharmacy
21 which provided him with medications and the County wishes to receive their records.

22 ² Banner Health requires Dr. Walsh’s name to appear on a release or Court Order before
23 Banner will make Dr. Walsh available for a deposition.

24 ³ A.R.S. § 12-2291 defines “Health care provider” as: (a) A person who is licensed
25 pursuant to title 32 and who maintains medical records; (b) A health care institution as
26 defined in §36-401; (c) An ambulance service as defined in § 36-2201; (d) A health care
27 services organization licensed pursuant to title 20, chapter 4, article 9. A.R.S. §36-401
28 defines a “health care institution” as “every place, institution, building or agency,
whether organized for profit or not, that provides facilities with medical services, nursing
services, health screening services, other health-related services, supervisory care
services, personal care services or directed care services and includes home health
agencies as defined in § 36-151, outdoor behavioral health care programs and hospice
service agencies.”

1 As indicated above, A.R.S. § 12-2294(C) permits the disclosure of a patient's
2 medical records without a signed authorization if the disclosure is permitted by the
3 provisions of the HIPAA law. In this regard, 45 C.F.R. § 164.512 sets forth the
4 circumstances under which a "covered entity" may disclose protected health information
5 without the patient's written authorization. A specific designation is made for judicial
6 proceedings. 45 C.F.R. § 164.512 (e)(1)(i) permits a covered entity to disclose protected
7 health information in the course of any judicial or administrative proceeding in response
8 to an order of a court or administrative tribunal.

9 Thus, whether under state or federal law, the County may obtain the Plaintiff's
10 medical records without his signed authorization as long as the Court provides the
11 County with appropriate orders directed to Banner Desert Hospital, and Dr. Wash;
12 Walgreens Pharmacy; Medco Health; and ASU Student Health Services directing these
13 entities to disclose the records. To that end, the County has prepared proposed orders
14 and attaches them as exhibits to this Supplemental Memorandum.

15
16 **2. The citations of authority upon which Plaintiff relies are inapposite.** In
17 support of his position, Plaintiff relies on *45 CFR §§ 164.502(b) & 164.514(d)*; which
18 state in part, "a covered entity may not use, disclose or request an entire medical record,
19 except when the entire medical record is specifically justified as the amount that is
20 reasonably necessary to accomplish the purpose of the use, disclosure, or request."
21 Maricopa County is not a "covered entity" in this context and the CFR is not controlling
22 upon Maricopa County. 45 C.F.R. § 160.103 defines a covered entity as: (1) A health
23 plan; (2) A health care clearinghouse; or (3) A health care provider who transmits any
24 health information in electronic form in connection with a transaction covered by this
25 subchapter. Thus, the "covered entity" refers to Banner Desert Hospital and Dr. Walsh;
26 Walgreens; Medco Health; and ASU Student Health Services.

27 Plaintiff's reference to A.R.S. § 36-509 ("A health care entity must keep records
28 and information contained in records confidential and not as public records, except as

1 provided in this section.”) is similarly inapposite because A.R.S. § 36-501(18) defines
2 “health care entity” as “a health care provider, the department, the Arizona health care
3 cost containment system or a regional behavioral health authority under contract with the
4 department.” Thus, Plaintiff has failed to cite any authority which prohibits Maricopa
5 County from obtaining his medical records in order to investigate the medical claims
6 alleged by Plaintiff in this lawsuit. Moreover, although Plaintiff argues that the release of
7 10 years of medical records is extreme, he fails to cite any support for this proposition.

8 **3. Plaintiff has put his medical condition at issue and must therefore provide**
9 **Defendant with access to his medical history.** Plaintiff’s medical history is relevant to
10 his claims in this lawsuit. For example, Plaintiff has claimed that he was taking Benicar,
11 an anti-hypertension medication, before he came to jail. Walgreens reported to
12 Correctional Health Services that it had no record of providing Plaintiff with Benicar.
13 The County is entitled to review Plaintiff’s prescription records to determine whether and
14 how often he was actually filling Benicar prescriptions. The County is entitled to know
15 for how long Plaintiff had been taking this medication, by whom it was prescribed, and
16 where the prescriptions were being filled. Federal Rules of Civil Procedure 26(b)(1)
17 states that a party may discover any relevant, unprivileged information that is admissible
18 at trial or reasonably calculated to lead to admissible evidence. Surely Plaintiff’s medical
19 records fall within these parameters. Arizona law supports this principle. In *Bain v.*
20 *Superior Court In and For Maricopa County*, 148 Ariz. 331, 334, 714 P.2d 824,
21 827 (1986) the Arizona Supreme Court stated that when a plaintiff “places a particular
22 medical condition at issue by means of a claim or affirmative defense, then the privilege
23 will be deemed waived with respect to that particular medical condition.” (Internal
24 citation omitted.) Thus, Plaintiff has waived any issue of privilege by putting his
25 medical condition at issue. Defendants are entitled to receive medical records by court
26 order and subpoena as discussed above, subject to a later determination of whether some
27 portion of the records is inadmissible.
28

1 **4. Defendant is not seeking 35 years worth of medical records.** Contrary to
2 what Plaintiff has said in his Response brief, the County is not seeking Plaintiff's lifetime
3 of medical records. Plaintiff has only lived in Arizona since 2001 (*See* Exhibit A,
4 Plaintiff's blog posting dated April 2007, where Plaintiff states that he has lived in
5 Arizona for 6 years). Plaintiff obviously hasn't sought medical care from ASU Student
6 Health Services for 35 years. As to the other providers, the parties and Court discussed
7 this during the Scheduling Conference and agreed that medical records from 10 years
8 prior to the incident, through the present, were appropriate. However, given Plaintiff's
9 residence in Arizona since 2001, it is unclear why Plaintiff is being so obstreperous
10 regarding these requests. Nonetheless, the orders the County is submitting to the Court
11 with this Supplemental brief direct Walgreens Pharmacy; Medco Health; Banner Desert
12 Hospital and Dr. Walsh; and ASU Student Health Services to provide the County with
13 Plaintiff's medical records dated 1998 through the present.
14

15 **5. Additional medical records may be identified and will require court orders**
16 **for production.** Plaintiff has provided preliminary (i.e., unsigned and unverified)
17 answers to the County's interrogatories and has not yet been deposed by Defendants. It is
18 anticipated that there will be additional medical providers discovered during this case
19 whose records the County will wish to obtain. Inasmuch as it is anticipated that Plaintiff
20 will refuse to sign authorizations for any of his records, the County requests that the
21 Court ratify a procedure by which the County may present the Court with an application
22 for Court Order for Release of Medical Records so that additional records can be
23 obtained to assist the County in its defense of this lawsuit.
24

25 RESPECTFULLY SUBMITTED this 14th day of May 2010.

26 OFFICE OF GENERAL LITIGATION SERVICES

27 BY: /s/Sherle R. Flaggman
28 SHERLE R. FLAGGMAN
 Attorney for Maricopa County

1 ORIGINAL of the foregoing E-FILED
2 and COURTESY COPIES mailed this
3 14th day of May, 2010, to:

4 Honorable Lawrence O. Anderson
5 United States Magistrate Judge
6 UNITED STATES DISTRICT COURT
7 Sandra Day O'Connor U.S. Courthouse
8 401 W. Washington Street Ste. 322, SPC11
9 Phoenix, Arizona 85003

10 and COPIES mailed to:

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21 /s/ V. Carbajal

22 S:\Cases\2009\T\Wilkins, Brian T09-0061\Pleadings\Suppl Brief Ins Support of Motion to Compel Med Recs.docx