OPINION NO. 80-022

Syllabus:

An individual examiner who performs a psychiatric evaluation of a criminal defendant pursuant to R.C. 2945.39 or R.C. 2945.371 has a duty to report to law enforcement authorities any information obtained during the evaluation concerning criminal offenses that are felonies. The duty to report also extends to the private organization employing the examiner and to any other employee of the organization who has knowledge of such information.

To: Anthony G. Pizza, Lucas County Pros. Atty., Toledo, Ohio
By: William J. Brown, Attorney General, May 7, 1980

I have before me your request for my opinion regarding the duty of a physician or psychologist to report information concerning felonies to law enforcement authorities. Yqu stated the issues as follows:

1. Does a private non-profit agency which performs psychiatric evaluations pursuant to Ohio Revised Code §2945.39 and §2945.371 under contract to a Common Pleas Court or its employees have any duty to report, to the proper authorities, information concerning criminal offenses, other than that which was the subject of the evaluation, which it obtains in the course of the evaluation?

2. If there is a duty to report with whom does the duty lie and what is its scope?

Ohio law provides for court-ordered psychiatric evaluations of an individual's mental condition in two situations. First, R.C. 2945.371 provides for an evaluation if there is doubt whether the defendant to a criminal action is mentally competent to stand trial. The pertinent part of R.C. 2945.371 reads:

> (A) If the issue of a defendant's competence to stand trial is raised under section 2945.37 of the Revised Code, the court may order one or more, but not more than three evaluations of the defendant's mental condition. An evaluation shall be conducted through examination of the defendant by a certified forensic center designated by the department of mental health and mental retardation to conduct such examinations and make such evaluations in an area in which the court is located or by any other program or facility that is certified or operated by the department to diagnose or treat mental illness or mental retardation and is designated by the department to conduct such examinations and make such evaluations, or the court may designate a center, program, or facility other than one designated by the department to conduct the examination, and in any case the court may designate examiners other than the personnel of the center, program, facility, or department to make the examination. (Emphasis added.)

Similarly, if a defendant to a legal action has entered a plea of not guilty by reason of insanity, an evaluation may be ordered. R.C. 2945.39 states in pertinent part:

> (A) If a defendant enters a plea of not guilty by reason of insanity, the court may order one or more, but not more than three evaluations of the defendant's mental condition at the time of the commission of the offense. An evaluation shall be conducted through examination of the defendant by a certified forensic center designated by the department of mental health and mental retardation to conduct such examinations and make such evaluations in an area in which the court is located or by any other program or facility that is certified or operated by the department to diagnose or treat mental illness or mental retardation and is designated by the department to conduct such examinations and make such evaluations, or the court may designate a center, program, or facility other than one designated by the department to conduct the examination, and in any case the court may designate examiners other than the personnel of the center, program, facility or department to make the examination. (Emphasis added.)

Both of the sections mentioned above require the examiner to submit a written report to the court detailing the findings and conclusions of the examiner. Thus, it is apparent that the examiner's sole function in evaluating the defendant is to inform the court of the relevant mental condition as requested by the court.

The question as to the duty of the examiner to divulge information to agencies other than the court arises because of a statutory prohibition regarding the withholding of knowledge of felonies. R.C. 2921.22 provides: "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." On the other hand, R.C. 2921.22(E) eliminates the disclosure requirement if certain privileged information is involved. That section provides, in pertinent part:

> (E) Division (A) or (D) of this section does not require disclosure of information, when any of the following applies:
> (1) The information is privileged by reason of the relationship between attorney and client, doctor and patient, licensed psychologist or licensed school psychologist and client, priest and penitent, or husband and wife.

The clear purpose of R.C. 2921.22(E)(1) is to excuse certain persons from the duty to

disclose knowledge of a felony which they have received in confidence through specific privileged relationships, such as a doctor-patient or licensed psychologist-client relationship. If one of the enumerated relationships does not exist, then R.C. 2921.22(E)(1) is not applicable and a physician or psychologist is obliged to report knowledge of a felony obtained during an evaluation. Whether the examiner can or must divulge any information to law enforcement authorities, other than the report to the court, therefore turns on whether the relationship between the examiner and defendant is such that the information passed is privileged. For the reasons discussed below, it is my opinion that a privileged relationship does not arise when a physician or psychologist examines a defendant pursuant to R.C. 2945.371 or R.C. 2945.39.

The policy behind the legislative grant of a privilege between doctor and patient or psychologist and patient is, in general, to encourage freedom of disclosure by the patient so as to aid effective diagnosis and treatment. In the Matter of Winstead, No. 9388 (Ct. App. Summit County Jan. 9, 1980), notice of appeal filed (Ct. App. Summit County Feb. 8, 1980); Floyd v. Copas, 9 Ohio Op. 3d 298 (C.P. Montgomery County 1977). When the purpose of a mental examination is not treatment or diagnosis looking toward treatment, then there is no privileged relationship. Winstead; Suetta v. Carnegie-Illinois Steel Corp., 75 Ohio Law Abs. 487, 144 N.E. 2d 292 (Ct. App. Mahoning County 1955). In addition, the fact that the purpose of the examination is to provide information to someone other than the person being examined is evidence that the purpose of the examination is not treatment, diagnosis, or advice, and, therefore, that no privileged relationship was intended. For example, the results of a psychological test required in a job promotional examination are not privileged because the purpose of such a test is not treatment or advice. Ring v. Fox, 56 Ohio App. 2d 235, 247, 382 N.E. 2d 1159, 1166 (Ct. App. Montgomery County), writ of prohibition denied, 55 Ohio St. 2d 27, 377 N.E. 2d 794 (1978). Similarly, the examination of an employee by an employer's physicians to determine the validity of a workers' compensation claim does not create a doctor-patient relationship because the purpose of the examination is not treatment or advice. Suetta v. Carnegie-Illinois Steel Corp., 75 Ohio Law Abs. at 489, 144 N.E. 2d at 294. Finally, under the same rationale, it has been held that a physician's examination of a plaintiff solely for the purpose of trial preparation or testimony does not create a privileged relationship. McMillen v. Industrial Commission, 34 Ohio Law Abs. 435, 37 N.E. 2d 632 (Ct. App. Franklin County 1941). See also United States v. Alvarez, 519 F. 2d 1036, 1046 (3d Cir. 1975) (preparation of psychiatrist as expert witness).

Obviously, the purpose of a court-ordered psychiatric examination pursuant to R.C. 2945.39 or 2945.371 is not advice, treatment, or diagnosis for the purpose of treatment. Rather, the purpose is to determine whether a person was insane at the time of the crime or whether he is competent to stand trial. There is no evidence of a legislative intent to permit the privilege granted in R.C. 2921.22(E)(1) to attach to the persons involved in a court-ordered mental examination. Indeed, there is clear evidence to the contrary. R.C. 2317.02 creates various evidentiary privileges and bars a physician from testifying "concerning a communication made to him by his patient in that relation." The underscored words indicate that the privilege does not attach to persons who communicate with a physician for purposes other than treatment. That, of course, is wholly consistent with the purpose of the privilege which is to facilitate treatment by a full disclosure of all relevant facts.

Legal commentators have also discussed the attachment of the physician-patient privilege in the case of court-ordered examinations. One writer specifically denies that the privilege attaches; McCormick's Handbook of the Law of Evidence 214 (2d ed. Cleary 1972) states:

> Usually, however, when the doctor is employed by one other than the patient, treatment will not be the purpose and the privilege will not attach. Thus when. . .a doctor is appointed by the court or the prosecutor to make a physical or mental examination. . .the information secured is not within the privilege.

Several cases in other jurisdictions are in clear agreement. In State v. Jensen, 286 Minn. 65, 174 N.W. 2d 226 (1970), the court held that a psychiatrist's examination of a defendant to determine his mental competency to stand trial did not create a privileged relationship. The court reasoned that the psychiatrist had not attended the defendant for the purpose of diagnosis and treatment, and that the privilege was designed to protect only communications necessary for obtaining the benefits of the professional relation—that is, remedies and relief from the doctor. In People v. Lowe, 109 Ill. App. 2d 236, 248 N.E. 2d 530 (1969), the court held that a statutory psychiatrist-patient privilege did not exclude the testimony of a court appointed psychiatrist who examined a defendant to determine his competence to stand trial, because such an examination did not constitute consultation with the physician in his professional character. In State v. Steelman, 120 Ariz. 301, 316-17, 585 P. 2d 1213, 1228-29 (1978), the court relied on the "well established distinction between an examining and treating physician for purposes of applying the privilege," and held that there is no privileged relationship when the defendant is examined on the orders of the court or prosecutor in regard to issues for consideration at trial, such as sanity at the time of the crime. For similar holdings see People v. Perry, 7 Cal. 3d 756, 499 P. 2d 129, 103 Cal. Rptr. 161 (1972); In the Matter of Moser, 27 Or. App. 31, 554 P. 2d 1022 (1976); Simecek v. State, 243 Wis. 439, 10 N.E. 2d 161 (1943).

R.C. 2921.22(A) prohibits any "person" from knowingly failing to report information regarding a felony. Under Ohio law, it is settled that a statute imposing criminal liability may be applied to organizations as well as individuals. R.C. 2901.23 states in pertinent part:

> (A) An organization may be convicted of an offense under any of the following circumstances:
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> . . . .
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> (2) A purpose to impose organizational liability plainly appears in the section defining the offense, and the offense is committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment, except that if the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.
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> (3) The offense consists of an omission to discharge a specific duty imposed by law on the organization.
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> (4) If, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment.
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> (C) In a prosecution of an organization for an offense other than one for which strict liability is imposed, it is a defense that the high managerial officer, agent, or employee having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. This defense is not available if it plainly appears inconsistent with the purpose of the section defining the offense.
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> (D) As used in this section, "organization" means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity. "Organization" does not include an entity organized as or by a governmental agency for the execution of a governmental program.

The Legislative Service Commission[1] comments following this section read in part:

> This section adopts the principle that an organization can be held criminally liable for any offense.
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> Case law indicates that corporations have been held liable for some offenses, although there is confusion as to whether a corporation is capable of forming the requisite culpable mental state, and as to whether organizations other than corporations can be criminally liable for any offense. The section provides specific rules for holding not only corporations but various other types of organizations liable for violations.

In addition, R.C. 1.59 states that "person," as the term is used throughout the Revised Code, includes individuals, corporations, partnerships, and associations. Therefore, it is my opinion that "person," as used in R.C. 2921.22(A), includes individuals and private organizations. As such, an individual examiner who performs an evaluation pursuant to R.C. 2945.39 or R.C. 2945.371, and the private non-profit organization employing the examiner, are under a duty to disclose any information that a felony has been or is being committed. The duty to disclose also extends to any other employee of the private organization who has actual knowledge of such information. The duty imposed by R.C. 2921.22(A) does not apply to information concerning criminal offenses that are not felonies.

Please note that your request tangentially raises an important question, i.e., whether the information obtained by the examiner and divulged to law enforcement authorities would itself be admissible in a criminal prosecution in light of R.C. 2945.38(J) ("[n]o statement made by a defendant in an examination or hearing relating to his competence to stand trial shall be used in evidence against him on the issue of guilt in any criminal action") and the self-incrimination clause of the Fifth Amendment to the Constitution of the United States. Since these issues are beyond the scope of this opinion, I will not address them at this time.

In conclusion, it is my opinion, and you are advised, that an individual examiner who performs a psychiatric evaluation of a criminal defendant pursuant to R.C. 2945.39 or R.C. 2945.371 has a duty to report to law enforcement authorities any information obtained during the evaluation concerning criminal offenses that are felonies. The duty to report also extends to the private organization employing the examiner and to any other employee of the organization who has knowledge of such information.

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[1] See R.C. 103.11 through 103.22 for composition and duties of the Legislative Service Commission.