

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-21

Date issued: July 28, 1994
Requested by: Henry C. "Bud" Wessman, Executive Director
Department of Human Services

- QUESTION PRESENTED -

Whether otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there is probable cause to believe child abuse or neglect is indicated.

- ANALYSIS -

As a general rule a physician may not disclose medical information acquired in treating a patient. Tehven v. Job Service North Dakota, 488 N.W.2d 48, 51 (N.D. 1992). The patient's privilege against disclosure of medical information generally extends to hospital records. Id. This general rule, however, is abrogated by N.D.C.C. § 50-25.1-10. Section 50-25.1-10 provides:

Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.

The above language plainly abrogates any privilege of communication between a physician and the physician's patient. This abrogation necessarily includes any privileged information that a medical facility may also possess. Thus, a physician or medical facility

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cannot withhold otherwise privileged information to the extent it is to be used as evidence in any proceeding regarding child abuse or neglect resulting from a report made under N.D.C.C. ch. 50-25.1.

"Proceeding" as used in N.D.C.C. § 50-25.1-10 is not defined. When words used in a statute are not defined they are to be given their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-02; Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991); Kim-Go v. J.P. Furlong Enter., Inc., 460 N.W.2d 694 (N.D. 1990). Furthermore, a statute must be read as a whole when it is being interpreted and a remedial statute must be liberally construed with a view to effecting its objectives. N.D.C.C. § 1-02-01; Madler v. McKenzie Co., 496 N.W.2d 17 (N.D. 1993); In re C.J.A., 473 N.W.2d 439 (N.D. 1991).

As commonly understood "proceeding" means a "course of action; procedure." The American Heritage Dictionary 987 (2d. coll. ed. 1991). It is also commonly understood to mean legal action or litigation. Id. In order to understand what the Legislature intended by the term "proceeding" in N.D.C.C. § 50-25.1-10, it is necessary to examine the purpose of that section and the purposes of N.D.C.C. ch. 50-25.1.

N.D.C.C. ch. 50-25.1 was enacted to protect the health and welfare of children by encouraging the reporting of known or suspected child abuse or neglect and to protect the children from further harm. N.D.C.C. § 50-25.1-01. If N.D.C.C. § 50-25.1-10 is to effectuate the substantive goals of chapter 50-25.1, social service staff must have access to relevant information to determine whether probable cause exists to believe child abuse or neglect has occurred. Section 50-25.1-10's abrogation of privileged communication would be largely hollow if it were restricted to actual judicial proceedings which do not occur until after a finding of probable cause is made. As noted by former Attorney General Robert O. Wefald, "[t]he entire statutory scheme surrounding the reporting and investigation of child abuse or neglect reveals the legislative intent that notions of confidentiality or privacy should not be obstacles to the discovery of abuse and neglect, and to the protection of children." 1984 N.D. Op. Att'y Gen. 11, 12. Thus, as used in N.D.C.C. § 50-25.1-10, "proceeding" should be understood to mean a course of action or procedure and to include all actions which arise out of and are required by the provisions of the Child Abuse and Neglect Recording Act, i.e., the initial report, the required investigation, the determination of probable cause, the report to the court, the provision of protective and other services, and such other activities

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implicitly or explicitly required to discharge the Department of Human Service's responsibilities under the law.

That the Legislature intended "proceeding" as used in N.D.C.C. § 50-25.1-10 to apply to more than legal actions in a court of law is evidenced by other sections of N.D.C.C. ch. 50-25.1. For example, in N.D.C.C. §§ 50-25.1-02(5.1) and (8) the Legislature used the term "court proceeding," and in N.D.C.C. § 50-25.1-08, the term "judicial proceeding." Had the Legislature intended N.D.C.C. § 50-25.1-10's abrogation of privileged communication to be limited to court proceedings it could have limited the scope of the term "proceeding" by qualifying it with the word "court" or "judicial" as it did in the other sections. However, the Legislature did not do so, indicating it intended the term "proceeding" as used in section 50-25.1-10 to encompass more than just judicial or court proceedings.

That the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes investigations by the Department of Human Services is also supported by decisions of the North Dakota Supreme Court. For example, in In re J.Z., 190 N.W.2d 27 (N.D. 1971), the court addressed whether an initial interview with parents was a stage of a proceeding under the North Dakota Juvenile Court Act, N.D.C.C. ch. 27-20. The court noted that the juvenile supervisor had statutory authority to make an investigation to determine whether there would be court proceedings to terminate parental rights. Id. at 32. Despite the fact that no court proceeding had been initiated, the court concluded that the initial interview was a critical stage of the proceedings under N.D.C.C. ch. 27-20. Id. See also In re D.S., 263 N.W.2d 114 (N.D. 1978) (custodial interrogation of a juvenile is a stage of the proceedings under N.D.C.C. ch. 27-20); United States v. Browning, Inc., 572 F.2d 720 (10th Cir.) (the term "proceeding" is not limited to something in the nature of a trial), cert. denied, 439 U.S. 822 (1978); Banach v. State Comm'n on Human Relations, 356 A.2d 242, 247 (Md. 1976) (administrative investigations are commonly referred to as "proceedings"); cf. Emo v. Milbank Mutual Ins. Co., 183 N.W.2d 508, 514 (N.D. 1971) (the word "proceeding" includes some form of governmental process).

In conclusion, the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes the investigation required by N.D.C.C. § 50-25.1-05. Accordingly, a request made by an authorized social service staff person, in the conduct of an investigation pursuant to section 50-25.1-05, for information concerning the subject child's medical records cannot be denied by a physician, hospital, or medical facility on the basis that the information is privileged information.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

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