



STATE OF NORTH DAKOTA
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LETTER OPINION
2022-L-06

Representative Karla Rose Hanson
District 44
1114 Fifth Street North
Fargo, ND 58102-3713

Representative Zachary Ista
District 43
3850 15th Avenue South
Grand Forks, ND 58201-3727

Dear Representatives Hanson and Ista:

Thank you for your letter requesting an opinion on several questions related to statutes governing abortion, specifically North Dakota Century Code (N.D.C.C.) § 12.1-31-12 and N.D.C.C. ch. 14-02.1¹. These statutes and similar statutes throughout the United States are currently the subject of litigation. Additionally, the answers to some of these questions would require a determination of factual issues. Therefore, I must respectfully decline to address questions 1 through 3 and 5 through 9 of your opinion request. Question 4 asks whether state or federal law would preclude a defendant from disclosing a patient's protected health information ("PHI") in order to assert an affirmative defense. In my opinion, state and federal law do not preclude a defendant from disclosing a patient's PHI in order to assert an affirmative defense so long as the applicable requirements are met.

ANALYSIS

Section 12.1-31-12(2), N.D.C.C., makes it a class C felony for "a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion." Subsection 3 then lists the following affirmative defenses to the felony:

- a. That the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female.
- b. That the abortion was to terminate a pregnancy that resulted from gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest, as those offenses are defined in chapter 12.1-20.

¹ N.D.C.C. ch. 14-02.1 is commonly referred to as the Abortion Control Act.

c. That the individual was acting within the scope of that individual's regulated profession and under the direction of or at the direction of a physician.

Question 4 of your request for an opinion asks whether a defendant would be prohibited from disclosing the PHI of a patient who received an abortion when asserting the affirmative defenses listed in N.D.C.C. § 12.1-31-12(3). Although the patient's PHI may not be required to prove an affirmative defense in all cases, it is reasonable to anticipate some defendants would need to disclose a patient's PHI to satisfy the elements of one or more affirmative defenses under the statute.

The principal laws related to the privacy and disclosure of PHI are the Health Insurance Portability and Accountability Act of 1996 (HIPAA)² and the Health Information Technology for Economic and Clinical Health Act (HITECH Act)³. The Secretary of the U.S. Dept. of Health and Human Services is required under HIPAA to promulgate privacy regulations governing individually identifiable health information.⁴ The HIPAA Privacy Rule (Privacy Rule) was published in the Code of Federal Regulations on December 28, 2000 and was later modified as necessary.⁵ The application of the Privacy Rule to any given situation is extremely fact-dependent and complex. However, I will address generally the interplay of the Privacy Rule and the assertion of the affirmative defenses noted above.

The Privacy Rule applies to covered entities, which include health plans, health care clearinghouses, and health care providers that transmit any health information in electronic form in connection with certain transactions.⁶ Assuming a defendant charged under N.D.C.C. § 12.1-31-12 or related laws is a "covered entity" or the information needed for an affirmative defense is held by a "covered entity," the defendant would be able to disclose the PHI only as allowed under the Privacy Rule.

The Privacy Rule delineates several authorized uses and disclosures of PHI including some that would allow a defendant to disclose a patient's PHI in furtherance of an affirmative defense.⁷ This opinion describes some of these applicable disclosure mechanisms but should not be considered an exhaustive list of options for a defendant.

² Health Ins. Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

³ Passed by Congress as a section in the American Recovery and Reinvestment Act of 2009 (ARRA).

⁴ Health Ins. Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936.

⁵ Codified at 45 C.F.R. pts. 160 and 164 (2013).

⁶ 45 C.F.R. § 160.103 (2014).

⁷ 45 C.F.R. § 164.502 (2013).

With or without an individual's consent, a covered entity that holds an individual's PHI may disclose the PHI to carry out the covered entity's health care operations.^{8,9} The Privacy Rule defines "health care operations" narrowly, but the term includes "conducting or arranging for . . . legal services" to the extent the activities are related to the covered entity's covered functions.¹⁰ In a guidance document, the U.S. Dept. of Health and Human Services applies the term "health care operations" in the context of legal proceedings as follows:

Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations.¹¹

As indicated in the guidance document, this type of disclosure generally occurs when a health care provider is sued for malpractice or sues for payment of an outstanding bill. This office found no cases analyzing a provider's disclosure of PHI under the "health care operations" exception when defending against a charge of performing an illegal abortion. Assuming the exception applies in such cases, the provider would have to comply with all elements of the exception to avoid violating the Privacy Rule.

Regardless of whether the "health care operations" exception applies, a provider may request an individual's legally valid authorization to disclose the individual's PHI.¹² The authorization would have to be voluntary because a health care provider generally is prohibited from conditioning treatment or care on a patient's execution of an authorization form.¹³ Additionally, a patient may revoke an authorization to use the patient's PHI at any time.¹⁴ For HIPAA purposes, "consent" and "authorization" are terms of art, and each has very specific requirements that must be met in order for the document to be legally valid.

⁸ 45 C.F.R. § 164.506(b) (2013).

⁹ A factual determination would need to be made as to which covered entity is, in fact, the holder of the PHI. For example, if a health care facility holds the records, an individual physician may not be able to disclose the PHI in the records. Any disclosure under this provision must be of the minimum amount of PHI necessary under the circumstances and must comply with other requirements of the Privacy Rule.

¹⁰ 45 C.F.R. § 164.501 (2013).

¹¹ U.S. Dept. of Health and Hum. Services, *HIPAA for Professionals: FAQ 705-May a covered entity in a legal proceeding use or disclose PHI for the litigation*, <https://www.hhs.gov/hipaa/for-professionals/faq/705/may-a-covered-entity-in-a-legal-proceeding-use-protected-health-information/index.html>.

¹² See generally 45 C.F.R. § 164.508 (2013).

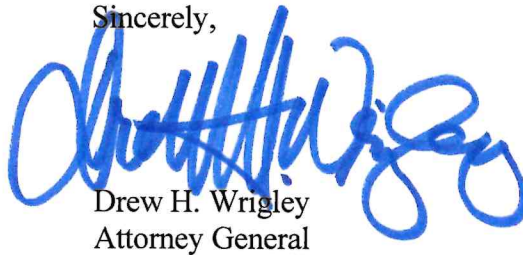
¹³ 45 C.F.R. § 164.508(b)(4) (2013).

¹⁴ 45 C.F.R. § 164.508 (b)(5) (2013).

A covered entity also may disclose PHI during the course of a judicial or administrative proceeding in response to an order of the court,¹⁵ subpoena, discovery request, or other lawful process, so long as certain specific requirements are met.¹⁶ Courts frequently issue protective orders preventing disclosure of the PHI to parties outside the legal proceeding.

It is my opinion that state and federal law do not preclude a defendant from disclosing a patient's PHI in order to assert an affirmative defense, so long as the applicable requirements are met.

Sincerely,



Drew H. Wrigley
Attorney General

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.¹⁷

¹⁵ 45 C.F.R. § 164.512(e)(1)(i) (2016).

¹⁶ *See* 45 C.F.R. § 164.512(e)(1)(ii) (2016). These requirements include the covered entity receiving assurances from the party seeking the information that “reasonable efforts have been made by such party to ensure that the individual who is the subject of the [PHI] that has been requested has been given notice of the request” and that “reasonable efforts have been made by such party to secure a qualified protective order . . .” Each of these requirements is further clarified in 45 C.F.R. § 164.512(e)(1)(iii) (2016).

¹⁷ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).