OPINION
77-47

June 20, 1977 (OPINION)

Mr. Thomas B. Jelliff
States Attorney
Grand Forks County
P. O. Box 607
Grand Forks, ND 58201

Dear Mr. Jelliff:

This opinion is given in response to a request by your office dated May 26, 1977, as follows:

> "I am requesting an opinion regarding the proper action of hospitals, the reporting to law enforcement agencies of traumatic injuries. Our research of the North Dakota Century Code has failed to disclose any specific statute which pertains to the reporting of hospitals. We would therefore like an opinion regarding:
>
> 1. Do hospitals have to report to law enforcement agencies incidents involving gunshot wounds, stabbings, rapes, attempted suicides.
>
> 2. Are the hospitals required to report such incidents evolving from auto accidents where injuries incur where no report has been made to a law enforcement agency.
>
> 3. Would this information obtained by the hospitals pertaining to suicides or attempted suicides, rapes, and other traumatic injuries fall under the category of privileged information between hospital and patient, or, physician and patient relationship."

Your conclusion that there is no statute specifically requiring this type of report from hospitals and/or health professionals is entirely correct. Please note, however, that the Forty-fifth Legislative Assembly in January of this year passed House Bill No. 1531 which requires physicians and other medical or mental health professionals who have under their charge or perform any professional services for a person suffering from a knife, gun or pistol wound to report such injury. The report is to be made to the sheriff or states attorney in the county where the treatment was given. The report is to be made whether the wound was self-inflicted or inflicted by the act of another. (Copy of House Bill 1531 enclosed.) The bill was signed by the Governor on April 21, 1977, and becomes effective July 1st of this year.

House Bill 1531 was introduced because of considerations similar to those raised in your request for opinion, i.e., potential tort liability of physicians for breach of the doctor-patient privilege in reporting this type of information.

Although it apparently has been the policy of most hospitals,

physicians and other health professionals to make these types of reports, it was felt that imposing the requirement would be a positive step toward negating any potential for lawsuits in this area and thus assuring that this type of information invariably reaches law enforcement authorities.

The doctor-patient privilege, although not a common law right, is recognized in North Dakota by means of a statute (N.D.C.C. 31-01-06). This statute deals specifically only with communications on the witness stand. It has been held that this type of statute does not change the common law lack of privilege as to communications to third persons in situations outside the courtroom but has to do merely with questions of whether or not certain testimony is admissible at trial proceedings, Quarles v. Sutherland, 389 S.W.2d. 249 (Tenn., 1965). But the general rule appears to be that statutes which prevent a doctor from testifying in court as to communications received from a patient, establish a public policy of recognizing a confidential relationship (20 A.L.R. 3d., 1121; Hague v. Williams, 181 At. 2d. 345 (N.J., 1962)).

The purpose of such a privilege is to inspire confidence in the patient, to encourage the ill or injured party to secure medical attention and then ensure full disclosure to the physician in order to facilitate effective treatment. (Booren v. McWilliams, 145 N.W. 410 (N.D., 1914); Sagmiller v. Carlsen, 219 N.W.2d.. 885 (N.D., 1974).)

The privilege extends to all information no matter how it was derived by the physician in the course of professional attendance. It includes the physician's observations and not only statements made by the patient (Auld v. Cathro, 128 N.W. 1025 (N.D., 1910).)

Therefore it would appear that the type of information under consideration here could conceivably be claimed to fall within the doctor-patient privilege. This privilege can only be waived by the patient.

Prior to the enactment of House Bill 1531, the physician might have had available at least two defenses relevant to a charge of breach of professional confidence in this regard. The first being that a physician may not be liable if he or she can show that the disclosure was made for certain overriding competing interests to which the law affords greater protection than to the interest of the patient in keeping information undisclosed such as the protection of public health, safety and general well-being (20 A.L.R. 3d. 1118; Berry v. Moench, 331 P. 2d. 814 (Utah, 1958)). The right of the physician to disclose this type of information is termed a "qualified privilege" in the area of libel and slander law and is applicable whether the physician is being charged with defamation or simply with breach of privileged communication. (73 A.L.R. 2d. 326, p. 328.) The privilege is limited, however, and the physician is protected only so long as the information is given only to a person who is reasonably and properly entitled to it in the ordinary course of a physician's professional business. (73 A.L.R. 2d., 326, p. 329.)

Under the current law this defense might also apply under the reasoning that the report to the authorities was necessary for the

protection of the physician since there is currently in effect a general statute, N.D.C.C. 29-05-02, which provides that:

> "Every person who has reason to believe that a crime or public offense has been committed by another person must make complaint against such person before some magistrate having authority to make inquiry of the same."

Although a formal complaint may not be filed by the physician this code section may be used as justification for relaying pertinent information to law enforcement officials.

After July 1, 1977, the physician will have a clear-cut defense to a tort action, i.e., that he or she was required by law to make such disclosure (61 Am. Jur.2d., Physicians and Surgeons, Sec. 104; 20 A.L.R. 3d. 1103, 1109, 1121, Section 7; Quarles v. Sutherland, supra).

You will note that the new law will not require the reporting of rape cases nor injuries sustained in automobile accidents. Therefore it will still be left to the discretion of the physician and/or the victim. The general defenses which apply in the absence of a statute requiring such reports would be applicable in such instances.

Sincerely,

ALLEN I. OLSON

Attorney General