

LETTER OPINION
94-L-267

October 7, 1994

Henry C. "Bud" Wessman
Executive Director
North Dakota Department
of Human Services
600 East Boulevard
Bismarck, ND 58505-0250

Dear Mr. Wessman:

Thank you for your letter requesting clarification regarding the investigation to be made by a mental health professional pursuant to North Dakota Century Code (N.D.C.C.) ? 25-03.1-08 in connection with a petition for involuntary treatment.

As amended by the 1989 Legislative Assembly, N.D.C.C. ? 25-03.1-08 requires a state's attorney or a prospective petitioner's private attorney to assist in completing the petition. Before the 1989 amendment, a clerk of court was required to assist persons in completing a petition for involuntary treatment. 1989 N.D. Sess. Laws ch. 149, ? 7.

The 1989 Legislature further amended N.D.C.C. ? 25-03.1-08 to allow a state's attorney to direct a mental health professional to investigate and evaluate the facts alleged in connection with the prospective commitment. Compare Senate Bill 2389, ? 8 as introduced with 1989 N.D. Sess. Laws ch. 149, ? 7. According to the chairperson of the task force that proposed this amendment, "the qualified mental health professional would do the necessary investigation as to the underlying facts to assist the state's attorney before the petition is filed This would give a state's attorney the ability to analyze the case before any other process takes place and save everybody a lot of time." Hearing on S. 2389 Before the House Comm. on the Judiciary, 51st N.D. Leg.

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(March 8, 1989) (Statement of Sharon Gallagher).

In connection with the investigation under N.D.C.C. ? 25-03.1-08, you specifically inquire whether the mental health professional is permitted to interview other persons without the respondent's consent. A corollary question is whether the mental health professional would have access to the respondent's records at a treatment facility.

N.D.C.C. ? 25-03.1-08 provides that a state's attorney may direct a "mental health professional designated by the regional human service center to investigate and evaluate the specific facts alleged" in a petition for involuntary treatment. The statute does not specify the scope of the investigation to be made but it does require the investigation to be "completed as promptly as possible and include observations of and conversation with the respondent, unless the respondent cannot be found or refuses to meet with the mental health professional." N.D.C.C. ? 25-3.1-08. A written report of the investigation is to be delivered to the state's attorney and copies provided upon request to the respondent, the respondent's counsel and any expert examiner. Id. If information obtained by the investigation provides probable cause to believe that the subject of the petition is a person requiring treatment, the petition is to be filed with the court. Id.

The scope of the investigation must be defined when interpreting this statute. Statutes are construed to ascertain the intent of the Legislature; this intent must be sought first from the language of the statutory provision. Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585, 586 (N.D. 1986). "Investigate" is not defined in the Code. Words not defined in the Code are to be given their plain, ordinary, and commonly understood meaning. N.D.C.C. ?? 1-02-02, 1-02-03; Kim-Gogh v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). "Investigate" means "[t]o observe or inquire into in detail; examine systematically." The American

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Heritage Dictionary 675 (2d coll. ed. 1991).

In construing a statute, the entire enactment of which it is a part is considered together with the object sought to be obtained and the statute's connection to other related statutes and the consequences of a particular construction. Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 580 (N.D. 1993). Statutes are to be construed logically so as not to produce an absurd result and to be liberally interpreted to fulfill the intent and purpose of the entire act. N.D.C.C. ? 1-02-01; In Interest Of M.Z., 472 N.W.2d 222, 223 (N.D. 1991).

N.D.C.C. ? 25-03.1-08 does not require the respondent's consent before the mental health professional is allowed to interview others about the respondent. However, an investigation under N.D.C.C. ? 25-03.1-08 regarding a patient (past or present) of a treatment facility may implicate state or federal confidentiality laws. The question is whether a mental health professional may have access to patient information at a public or private treatment facility.

N.D.C.C. ? 25-03.1-43 provides that "[a]ll information and records obtained in the course of an investigation, evaluation, examination, or treatment under [N.D.C.C. ch. 25-03.1 pertaining to voluntary or involuntary treatment of persons who are mentally ill or chemically dependent] must be kept confidential and not as public records, except as the requirements of a hearing under this chapter may necessitate a different procedure. All information and records are available to the court" (Emphasis added.) In my opinion, this statute does not impede an investigation by a mental health professional under N.D.C.C. ? 25-03.1-08. Rather, the state scheme for involuntary treatment of mentally ill or chemically dependent persons necessitates access by a mental health professional to information in a patient's record at a treatment facility in connection with the investigation and report under N.D.C.C. ? 25-03.1-08.

The definition of "person requiring treatment" was also amended in 1989 to include an additional type of "serious risk of harm" which would justify involuntary treatment. 1989 N.D. Sess. Laws ch. 149, ? 3. The potential harm that must exist includes, as a result of the amendment, a

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[s]ubstantial deterioration in mental health which would predictably result in dangerousness to that person, others, or property, based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors.

N.D.C.C. ? 25-03.1-02(11)(d).

As explained in the legislative history of the 1989 amendment, this additional commitment criteria was "viewed by the mental health professionals as necessary to allow earlier intervention without the need for the person to totally deteriorate before treatment can be ordered." Hearing on S. 2389 Before the House Comm. on the Judiciary (March 8, 1989) (Written statement of Sharon Gallagher). A determination about whether a person's mental health has deteriorated based upon "the person's treatment history, current condition, and other relevant factors" cannot be made in a vacuum, but must be based on knowledge of and reference to the information contained in a patient's record.

Furthermore, a mental health professional, as well as a peace officer, physician, psychiatrist, and psychologist, is authorized to make an emergency commitment for safety reasons under N.D.C.C. ?? 25-03.1-21(3) and 25-03.1-25. It would defeat the expressed intent of the Legislature to provide prompt evaluation, treatment, and continuity of care for persons with serious mental disorders or chemical dependency, N.D.C.C. ? 25-03.1-01, if a mental health professional could not use information obtained in the course of an investigation, evaluation, examination, or treatment under chapter 25-03.1 in connection with an application for emergency commitment. It would be equally inconsistent with legislative intent to conclude that a mental health professional may not use patient information to assess whether an individual is a "person requiring treatment" before filing a petition for involuntary treatment under N.D.C.C. ? 25-03.1-08 or ? 25-03.1-26. Prohibiting access by mental health professionals to patient records in either of these cases would completely stymie the process for obtaining involuntary treatment.

The exception to confidentiality recognized by N.D.C.C. ? 25-03.1-43 permits use of information

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obtained in the course of an investigation, evaluation, examination, or treatment "as the requirements of a hearing under [N.D.C.C. ch. 25-03.1] may necessitate." Because an investigation under N.D.C.C. ? 25-03-08 focuses on the allegations in the petition for involuntary treatment to determine whether there is probable cause that the respondent is a "person requiring treatment," N.D.C.C. ? 25-03.1-02(11), the investigation is an antecedent component of a hearing under N.D.C.C. ch. 25-03.1. Whether a petition for involuntary treatment must be filed may depend on the mental health professional's assessment of the risk of harm that would exist if the respondent does not receive treatment. Thus, the "requirements of a hearing" under N.D.C.C. ch. 25-03.1 "necessitate[s]" access to patient records by a mental health professional performing an investigation under N.D.C.C. ? 25-03.1-08.

In addition, other state confidentiality constraints regarding patient records do not apply to commitment proceedings. See N.D.C.C. ?? 31-01-06.6, 50-06-15; N.D.R.Ev. 503(d)(1). For example, the Department of Human Services ("Department") is required to administer "mental health programs, including . . . preventive, consultative, diagnostic, treatment, and rehabilitative services for persons with mental or emotional disorders and psychiatric conditions" and "alcohol and drug abuse programs, including . . . a system of prevention, intervention and treatment services." N.D.C.C. ?? 50-06-01.4(4),(6). The Department carries out these programs through the State Hospital and human service centers. N.D.C.C. ?? 25-02-01, 25-02-03, 50-06-05.2, 50-06-05.3. N.D.C.C. ? 50-06-15 generally prohibits disclosure of records or information pertaining to a client "under any program administered by or under the supervision and direction of the department . . . except that such records and information may be used in the administration of any program . . ." (Emphasis added.) See also N.D.D.H.S. Manual Section 110-01-09-01. In my opinion, access to patient information or records by a mental health professional directed and designated to make an investigation under N.D.C.C. ? 25-03.1-08 is an integral feature of mental health and alcohol and drug abuse programs administered through public treatment facilities. See also N.D.C.C. ? 50-06-06.5; ch. 54-38.

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Thus, state confidentiality statutes and rules do not impede an investigation under N.D.C.C. ? 25-03.1-08. However, that is not the case under federal law regarding a patient of a treatment facility who is or has been treated for alcohol or drug abuse. Patient information or records pertaining to alcohol or drug abuse treatment may not be resorted to in connection with an investigation directed under N.D.C.C. ? 25-03.1-08. 42 U.S.C. ? 290dd-2; 42 C.F.R. pt. 2 (1993). See also Jane H. v. Rothe, 488 N.W.2d 879 (N.D. 1992); Letter from Attorney General Nicholas J. Spaeth to Bruce Haskell (March 25, 1991). Information concerning a drug and alcohol abuse patient may only be disclosed under limited circumstances including pursuant to a release or pursuant to a specialized court order after a hearing requiring the court to balance the potential injury to the patient, the physician-patient relationship and treatment services against the interest in disclosure. 42 U.S.C. ? 290dd-2(b); Jane H. v. Rothe, 488 N.W.2d at 883.

In your letter you enclosed a copy of an order of a county court directing the mental health professional to investigate and evaluate specific facts alleged by the applicant in the petition for involuntary treatment under N.D.C.C. ? 25-03.1-08. The form of the order submitted tracks the language in the statute and would not, in my opinion, accomplish anything more than the direction by a state's attorney to a mental health professional. Except for the fact that the investigation is directed by the court rather than the state's attorney, the form of the court order is similar to the model North Dakota mental health commitment form GN-13, State's Attorney's Request For Investigation and Evaluation, prepared under N.D.C.C. ? 25-03.1-46. See also form GN-14, Report of Mental Health Professional.

In summary, a mental health professional may make a detailed investigation under N.D.C.C. ? 25-03.1-08 regarding a person alleged to be mentally ill, with access to patient information and records at a treatment facility. If the investigation under N.D.C.C. ? 25-03.1-08 concerns a person who is or has been an alcohol or drug abuse patient, the mental health professional may not obtain information from the patient's treatment records without a release or a specialized court order.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tam/jfl