VOLUME NO. 42 OPINION NO. 7

ALCOHOLIC BEVERAGES - Chemical dependency centers receiving federal funds required to report child abuse;
CHILD ABUSE - Child abuse reporting act not preempted by 42 U.S.C.A. § 290dd-3;
CHILD ABUSE - Privileges of communication partially abrogated by child abuse reporting act;
MEDICINE - Physician-patient privilege partially abrogated by child abuse reporting act;
MENTAL HEALTH - Privileges of communication partially abrogated by child abuse reporting act;
MONTANA CODE ANNOTATED - Sections 41-3-201, 41-3-201(4);
UNITED STATES CODE ANNOTATED - 42 U.S.C.A. §§ 290dd-3, 290ee-3.

HELD: 1. The physician-patient and similar privileges of communication are abrogated by section 41-3-201(4), MCA, only when the professional obtains the information as a result of his treatment of the child.

2. The reporting requirements of section 41-3-201, MCA, are not preempted by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3.

13 February 1987

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Gentlemen:

Thank you for your letters requesting my opinion on the following questions:

1. Pursuant to section 41-3-201(4), MCA, are the physician-patient privilege and similar privileges of communication abrogated for purposes of reporting the abuse or neglect of a child only when the information is obtained as a result of the treatment of the child?

2. Do the reporting requirements of section 41-3-201, MCA, extend to a chemical dependency counselor who is covered by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3?

Your first question raises the significant issue of whether professionals who learn of child abuse or neglect as a result of their treatment of the offender are required by Montana law to report this information. In many states which have reporting statutes, this issue has been the subject of comment and controversy. See Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?, 22 San Diego L. Rev. 645 (1985); Annot., Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect, 44 A.L.R.4th 649. Resolution of this issue requires the delicate balancing of competing state interests. The state has a compelling interest in the prevention of child abuse and neglect. State v. Hall, 183 Mont. 511, 600 P.2d 1180 (1979). Yet, the state also has an interest in the preservation of the unity and welfare of the family through the encouragement of rehabilitative treatment of those who have abused or neglected children. § 41-3-101, MCA. Statutory privileges of communication between physicians or mental health professionals and their patients serve the purpose of encouraging persons in need of treatment to seek it. The task of weighing these competing interests and determining the point of equilibrium belongs to the Legislature.

Section 41-3-201, MCA, provides that certain enumerated professionals and officials must report to the appropriate authorities if they "know or have reasonable cause to suspect that a child known to them in their professional or official capacity is an abused or neglected child." With regard to the privileges of communication which may exist, the section provides:

> No person listed in subsection (2) may refuse to make a report as required in this section on the grounds of a physician-patient or similar privilege if the person came into

> possession of such information as a result of his treatment of the child.

§ 41-3-201(4), MCA. The plain language of the statute abrogates the privilege when the professional obtains the information as a result of his treatment of the child. Had the Legislature intended abrogation of the privilege in other situations, it would have specifically so stated. The statute is narrowly drawn and must be so construed. I cannot insert what has been omitted. The Legislature has balanced the competing interests and has drawn the line in favor of encouragement of treatment and rehabilitation.

Your second question concerns whether the state law requires disclosure of child abuse or neglect known or suspected by a chemical dependency counselor who is covered by the confidentiality provisions of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974, 42 U.S.C.A. § 290dd-3, and the regulations promulgated thereunder, 42 C.F.R. § 2.1-2.67 (1985). The act and regulations provide for confidentiality of records of the identity, diagnosis, prognosis, and treatment of any patient of alcohol treatment programs receiving federal funds.

On August 27, 1986, through the enactment of Public Law No. 99-401, Tit. I, § 106(a), 100 Stat. 907, Congress specifically addressed the interaction of the confidentiality provisions and state child abuse reporting laws as follows:

> The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

42 U.S.C.A. §§ 290dd-3(e), 290ee-3(e). As a practical matter, under Montana law, there will be few instances where a conflict could have arisen, since the chemical dependency programs will generally be treating the abusive parent or adult rather than the abused child.

THEREFORE, IT IS MY OPINION:

1. The physician-patient and similar privileges of communication are abrogated by section 41-3-201(4), MCA, only when the professional obtains the information as a result of his treatment of the child.

2. The reporting requirements of section 41-3-201, MCA, are not preempted by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3.

Very truly yours,

MIKE GREELY
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