



STATE OF KANSAS

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January 5, 1981

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ATTORNEY GENERAL OPINION NO. 81- 3

John D. Randolph, Executive Director
Mental Health Center of East Central Kansas
705 South Commercial Street
Emporia, Kansas 66801

Re: Infants--Crimes Affecting Children--Reporting of Neglect
or Abuse

Synopsis: K.S.A. 1979 Supp. 38-717 imposes a duty on specified classes of persons involved in medical or health-related professions to report suspected cases of physical or mental abuse or neglect which involve children under the age of 18 whom they have examined, attended or treated. The statutory duty would not be imposed in the case where information regarding the suspected abuse was obtained from an indirect source (i.e. a parent or other individual), although the statute does make reporting in such situations discretionary. However, a failure to act, even in situations made discretionary by statute, could create the potential for liability in tort should further injury result. Cited herein: K.S.A. 1979 Supp. 38-716, 38-717.

* * *

Dear Mr. Randolph:

As Executive Director of the Mental Health Center of East Central Kansas, you request our opinion as to whether members of your staff are subject to the provisions of K.S.A. 1979 Supp. 38-717, which require the reporting of suspected cases of child abuse by specified groups of individuals. Included among these are all persons licensed to practice the healing arts and all certified psychologists, which classes include some of your personnel. You inquire whether the terms of the statute apply to these personnel when the information they

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obtain comes not from the child, but from counseling sessions involving a parent or other person.

The statute which must be construed with regard to your inquiry is K.S.A. 1979 Supp. 38-717, which in part states:

"Every person licensed to practice the healing arts or dentistry, persons licensed to practice optometry, persons engaged in postgraduate training programs approved by the state board of healing arts, certified psychologists, Christian Science practitioners, licensed social workers, every licensed professional nurse or licensed practical nurse, examining, attending or treating a child under the age eighteen (18), every teacher, school administrator or other employee of a school which such child is attending, the chief administrative officer of a medical care facility, every person licensed by the secretary of health and environment to provide child care services or employee of the person so licensed at the place where the child care services are being provided to the child, or any law enforcement officer having reason to suspect that a child has had injury or injuries inflicted upon him or her as a result of physical or mental abuse or neglect, shall report, and all other persons who have reason to suspect that a child has had injury or injuries inflicted upon him or her as a result of physical or mental abuse or neglect may report, the matter promptly to the district court of the county in which such examination or attendance is made, treatment is given, school is located or such abuse or neglect is extant or to the department of social and rehabilitation services." (Emphasis added.)

Originally adopted in 1965, the statute has been subsequently amended so as now to be prolix in the extreme. For example, it may be noted that the above quote consists of but a single sentence. As a result, it is necessary to break the statute down into its component parts in order to determine who is subject to its requirements. Once this is done, it is our opinion that the personnel in the situations you posit would not be required to report their suspicions to the district court or to SRS, although, as will also be noted, they might be wise to at least take some action.

As it now reads, the statute specifies 16 different groups or professions whose practitioners must comply with the reporting procedures if they have "reason to suspect that a child has had injury or injuries inflicted upon him or her as a result of physical or mental abuse or

neglect." Even the making of this preliminary conclusion, however, must ignore a strict reading of the statute, for the quoted material immediately above appears, on the face of the statute, to apply only to law enforcement officers. However, as this would make the prior portion of the statute unintelligible, such a construction should be avoided. See, e.g., Whitehead v. State of Kansas Labor Dept., 203 Kan. 159 (1969), Williams v. Bd. of Education of City of Wichita, 198 Kan. 115 (1967).

Of the groups named, nine are listed in the statute in such a way that the mandatory reporting requirements are applicable to them only when they are "examining, attending or treating a child under the age eighteen (18)." Included among these are those persons licensed to practice "the healing arts," as well as "certified psychologists." Accordingly, it would appear that if members of these professions obtain their information from sources other than a direct contact with the child, e.g., counseling with a parent, they would not be included under this portion of the statute, and we would so conclude.

However, a further problem arises due to the inclusion of the phrase "chief administrative officer of a medical care facility" with those professions which are listed after the "examine, attend or treat" language quoted above. Although an administrator of such a facility like yourself would presumably not perform such functions, it appears that persons in your position, along with teachers, law enforcement officers, persons licensed by the Department of Health and Environment, etc., are not required to have the kind of direct contact which is required of the professions listed initially in the statute. This gives the somewhat incongruous result that while your staff would not be subject to the statute (no direct contact), as chief administrator, you would be required to do so if your staff reported to you, as you would now have "reason to suspect" that abuse was occurring, even though your information, like theirs, was indirect. While such contradictory results are to be avoided, in our opinion the statute is so worded as to require this result.

While it is our opinion that under K.S.A. 1979 Supp. 38-717 your counseling staff would not be required to report suspected cases of abuse, we feel constrained to advise you that case law does exist which may impose a duty to disclose apart from any statutory requirement. While the leading cases in this area are from states other than Kansas, the concept is a developing one of which you should be aware, in that a failure to disclose may leave the counselor liable in tort for injuries which may subsequently occur. A concise statement of this common law duty appears at Tarasoff v. Regents of Univ. of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1978), where it is stated:

"When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." 131 Cal.Rptr. at 20.

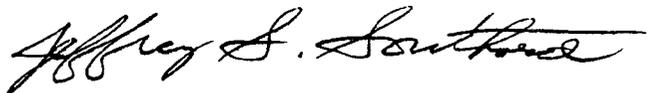
Additionally, the existence of the doctor-patient privilege does not obviate the duty to warn of impending danger. Tarasoff, 131 Cal.Rptr. at 27, McIntosh v. Milano, 131 N.J. Super. 466, 403 A.2d 500 (1979). Finally, while your counselors would not necessarily have to contact the district court or SRS (the entities prescribed by K.S.A. 1979 Supp. 38-717) where their information of abuse was acquired indirectly, they would be responsible to take "steps reasonably necessary under the circumstances."

In conclusion, K.S.A. 1979 Supp. 38-717 imposes a duty on specified classes of persons involved in medical or health-related professions to report suspected cases of physical or mental abuse or neglect which involve children under the age of 18 whom they have examined, attended or treated. The statutory duty would not be imposed in the case where information regarding the suspected abuse was obtained from an indirect source (i.e. a parent or other individual), although the statute does make reporting in such situations discretionary. However, a failure to act, even in situations made discretionary by statute, could create the potential for liability in tort should further injury result.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General