Using the Medical Diagnosis and Statements to Confrontation in Child Abuse Cases

After Crawford v. Washington

Part One: The Physician’s Role

By Tom Harbinson

Although a doctor may freely choose to belong to a multidisciplinary child abuse team that does not mean the doctor has established an agency relationship with police. Merely being a member of an interdisciplinary team does not result in the doctor operating under the control of law enforcement. Likewise, the doctor has no agreement with police that because police bring a patient to the hospital the doctor will act as an agent of police. An agency relationship requires more.

A doctor’s obligation is always to the best interests of the patient. “A physician shall, while caring for a patient, regard responsibility to the patient as paramount.” From the time of Hippocrates physicians have taken a solemn oath to act on behalf of the best interests of the patient. Even in the modern era, the ethics of the Hippocratic oath are considered binding. “To the Hippocratic physician, nothing and no one was more important than the patient; this has always been a guiding principle of clinical medicine. Other patients, future patients, and the rest of mankind have been secondary considerations when a doctor is making decisions at the bedside of the sick.” Physicians who fail in their duty to always act in the patient’s best interests are subject to disciplinary actions and can even lose their license to practice medicine.

The doctor’s primary duty to always act on behalf of his patient prevents a doctor from acting as an agent of law enforcement. Agency requires a contract between the parties and there is no agreement between doctors and law enforcement for doctors to act as agents of law enforcement. The doctor is bound both ethically and legally to act in the patient’s best interests not law enforcement’s. The doctor cannot release matters considered part of the doctor-patient privilege without the patient’s consent. The doctor patient-privilege along with medical ethics does not allow a doctor to act as an agent of law enforcement or the government. The doctor’s primary duty to always act on behalf of his patient prevents a doctor from acting as an agent of law enforcement. Agency requires a contract between the parties and there is no agreement between doctors and law enforcement for doctors to act as agents of law enforcement. The doctor is bound both ethically and legally to act in the patient’s best interests not law enforcement’s. The doctor cannot release matters considered part of the doctor-patient privilege without the patient’s consent. The doctor patient-privilege along with medical ethics does not allow a doctor to act as an agent of law enforcement.
doctors are usually not trained in forensic interviewing. In a large number of cases doctors do not diagnose child sexual abuse but have “undetermined” findings. The use of objective guidelines for diagnosing whether a child has been sexually abused and the fact doctors often opine the cause of the child’s condition is “undetermined” show doctors are not acting to assist law enforcement but are attempting to make a diagnosis and provide medical care.

Mandated reporting laws do not change the doctor’s relationship into one of agency with law enforcement. An agency relationship requires more than a communication about the existence of possible abuse. The mandated reporter statute does not relieve the doctor of his ethical obligations to the patient. A physician has a duty to make sure that an abused child does not go back into a situation where the child’s life or health may be endangered. Doctors report because it is in the patient’s best interests to do so.

The agency relationship requires that the principle have the ability to control the actions of the agent; however, doctors are not under the control of law enforcement. Since doctors are not agents of law enforcement, and are not members of law enforcement, the Crawford v. Washington requirement that the statements be made to law enforcement has not been met.

1 Senior Attorney, National Child Protection Training Center (at Winona State University, Winona, MN). The author thanks Winona State University Professor of Nursing Jacqueline Hatlevig for her suggestions and comments.


3 "Id. at 51-53, 69.

4 See White v. Illinois, 562 U.S. 346, 356 (1992) [hereinafter now the words “medical exception” will be used in lieu of the longer title: “statements for purposes of medical diagnosis and statements to a treating physician”].


6 See John E.B. Myers, 1 MYERS ON EVIDENCE IN CHILD DOMESTIC AND ELDER ABUSE CASES § 3.01, § 3.05 (at 181-185 (2005).


8 See, e.g. United States v. Ureta (Colo. 2006).

9 See White v. Illinois, 562 U.S. 346, 356 (1992) [hereinafter now the words “medical exception” will be used in lieu of the longer title: “statements for purposes of medical diagnosis and statements to a treating physician”].


12 See Reuschlein & Gregory, supra note 10, at 10-11.

13 See Reuschlein & Gregory, supra note 10, at 3.

14 See Reuschlein & Gregory, supra note 10, at 3.

15 See, e.g., People v. Pupil, 127 P.3d 916 (Colo. 2006) (revealing that a doctor’s membership in a child protection team absent direct and controlling police presence does not make a physician an agent of police).

16 Doing an act that benefits someone, in this case, arguably, the doctor recording what the patient tells him or her benefits law enforcement, does not, by itself, establish an agency relationship. See Reuschlein & Gregory, supra note 10, at 23. Arguments the doctor possibly might believe the statements could be used in court and the statements might benefit law enforcement, even if true, do not show that the doctor’s actions are being controlled or directed by law enforcement. A doctor will document what the patient tells the physician whether the doctor is a member of an interdisciplinary team or not, and regardless of whom brings the child to the doctor. Physicians are trained to always document whenever they take patient history.


18 Sherman B. Nuland, M.D., DOCTORS 26 (1995) (quoting the Hippocratic oath) “I will follow that system of regimen which according to my ability and judgment, I consider for the benefit of my patients, and from whatever is deleterious and mischievous”.

19 Nuland, supra note 18, at 487.


21 Only two exceptions exist to doctor-patient privilege: mandated reporter laws and court orders. In these cases the information is not released to the public but is released for a limited basis only.


23 One commonly used text to teach health care providers about taking patient history and examination is only one page and half out of a total of 862 pages, specifically describing how to talk with children.


25 For example, data from two medical organization shows that no diagnosis or opinion of undetermined is made in approximately fifty percent of all cases. Statistics from Midwest Regional Children’s Advocacy Center, Children’s Hospital and Clinics in Minnesota, 345 N. Smith Ave., St. Paul, MN 55102 (one year report, March 2006), available at http://www.childrensminnm.org/MCRC/index.asp.


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29 Id. at 1579. (arguing that physicians have a legal duty to prevent abuse reoccurrence).

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31 See United States v. Renville, 779 P.3d 430, 438 (8th Cir. 1985) (indicating physicians have a legal duty to prevent abuse reoccurrence); see also State v. Robinson, 735 P.2d 801, 810 (Ariz. 1987) (revealing effective treatment and diagnosis require that the victim avoid contact with the abuser to avoid future abuse and recovery from past abuse); see also Marilyn J. Maog, A Child’s Statements: An Abuse Admissible Under the Medical Diagnosis or Treatment Exception to the Hearsay Rule, 53 U. CIN. L. REV. 1155, 1168 (1984).


34 517 U.S. at 62, 67-68. See also People v. Geno, 683 N.W.2d 867 (Mich. App. 2004), cert. denied, 688 N.W.2d 829 (Mich. 2004) (holding that children’s responses to non-governmental interviewer are not testimonial); See generally John E.B. Myers, supra note 6, at vol. 57 2:22 (B) 26 (1995).