

Testimony
North Dakota Department of Human Services
Legislative Management Interim Human Services Committee
Representative Kathy Hogan, Chairman
July 26, 2016

Chairman Hogan, members of the Interim Human Services Committee, I am Dr. Andy McLean, Medical Director of the Department of Human Services. Pursuant to Section 1 of 2015 Senate Bill 2049, I am here to report interim study of statutory references to mental health professionals to determine whether changes in the law may help to more fully utilize these professionals within their scope of practice, as it relates to the responsibilities of the Department of Human Services to provide services or license facilities.

In addition to the Department of Health and Department of Human Services, stakeholders included numerous professional boards and associations, including Counseling, Addiction Counseling, Licensed Marriage and Family Therapists, Medicine, Nursing, Psychology, Hospitals, Long Term Care, Health Insurance, Advocacy, and Higher Education. It should be noted, that there was significant cross-discipline licensure and training and majority approval of recommendations among participants.

We met frequently by teleconference, reviewed each Administrative and Century Code reference to qualified mental health professional, mental health professional and mental health personnel. We categorized those areas and assigned stakeholder workgroups to review and give feedback and recommendations to the group at large.

The specific statutes and language reviewed are listed, but for the purposes of brevity, I will simply highlight main areas, review points of discussion and recommended changes.

One of the challenges in defining mental health professionals is determining core elements as function and delivering that service within scope of practice. Definition of the term is necessary, but not sufficient in specifying roles pertaining to each statutory function.

Advanced Degrees (and, at times, certifications), clinical experience, the above scope, and independent clinical decision-making are all important elements. As such, there was debate among the stakeholders as to whether the primary focus should be on training, education as per a matrix (attached), or whether the focus should be on scope of practice and responsibility regarding impact on the individual, in the form of a tier description of the roles of mental health professionals:

Tier 1 –Ultimate responsibility: greatest degree of broad-based, comprehensive training in multiple (all biopsychosocial) dimensions of psychiatric illness, with associated capacity to practice autonomously across those dimensions. Tier 1 manages highest level of responsibility and risk, though there are delineations specific to behavioral health (a+b)

Tier 2 – Ability to direct care independently. Delineation between broad-based, comprehensive training in diagnosis and modalities of treatment for behavioral health conditions (a) vs. specific area of expertise (b). Breadth of training allows for oversight of care delivery within those fields.

Tier 3 – Behavioral health therapy: clinical direction under supervision, or; enacting treatment plan with comprehensive training in specific dimensions of behavioral health. Within traditional non-mental health disciplines, certain behavioral health training allows for independent practice of care delivery in those dimensions, as well as execution of treatment plan.

Tier 4 – Supporting clinical services: paraprofessional (direct care) service workers with some level of behavioral health training, but without formal licensing. Tier 4 to carry out treatment under the guidance of licensed professionals.

**Tier 1-3 behavioral health professionals have independent licensing boards that identify and direct scope of work, ethics, discipline, etc.

Clearly there are limits to a tier type model, as by design it is hierarchical. However, by utilizing such a model, all professionals who provide mental health services can be recognized as such within statute (a frequent concern of many groups.) Yet, at the same time a tier description allows for clarity of role and function.

Despite the concerns of some stakeholders regarding the perception of a tier definition as “rank of importance,” the majority felt that within statute, the greater the risk to the individual (whether it be infringement on rights, clinical risk, etc.) the greater the scrutiny of scope and expertise of the mental health professional, particular to the statutory function. The following is a model:

- Tier 1) 1a: Psychiatrists/Psychologist (MD/DO, LP)
 1b: Primary Care Providers (MD/DO/APRN/PA)
- Tier 2) Independent Clinicians
 a.) LICSW/LPCC
 b.) LMFT, LAC, RN,
- Tier 3) LAPC, LCSW, LPC, LAMFT, OT, VRC, School
 Psychologists, Human Relation Counselors
- Tier 4) Direct Care Associates/Technicians

MD=Medical Doctor, DO=Osteopathic physician, LP= Doctoral level Licensed Psychologist, APRN=Advanced Practice Registered Nurse, PA=Physician Assistant, LICSW=Licensed Independent Clinical Social Worker, LPCC=Licensed Professional Clinical Counselor, LMFT=Licensed Marriage and Family Counselor, LAC=Licensed Addiction Counselor, RN=Registered Nurse, LACP=Licensed Associate Professional Counselor, LCSW= Licensed Certified Social Worker, LPC=Licensed Professional Counselor, LAMFT= Licensed Associate Marriage and Family Therapist, OT=Occupational Therapist, VRC=Vocational Rehabilitation Counselor

Mental Health Professional statute language is noted throughout in italicized **bold**

The Chapters/Codes Reviewed:

Stakeholder workgroup 1 focused on Mental Health Professional Definition related to Psychiatric Residential Treatment Centers for Children:

CHAPTER 25-03.2 RESIDENTIAL TREATMENT CENTERS FOR CHILDREN Senate Bill No. 2047 eliminated the term "Qualified Mental Health Professional" from this chapter. Within, there is no longer a definition of Mental Health Professional. It held forth AN ACT to amend and reenact sections 25-03.2-01, 25-03.2-03, 25-03.2-07, and 25-03.2-10 of the North Dakota Century Code, relating to psychiatric residential treatment facilities for children and rulemaking authority of the department of human services.

The last legislative session required the Department of Human Services to adopt rules defining which professions may provide clinical supervision and review, and may develop, update, and sign an individual treatment plan within a psychiatric residential treatment facility for children.

NDCC § 25-03.2-01. Definitions.

In this chapter, unless the context otherwise requires:

"Individual treatment plan" means a written plan of intervention, treatment, and services for a mentally ill person that is developed under the clinical supervision of a **mental health professional** on the basis of a diagnostic assessment.

NDCC § 25-03.2-07. Method of providing service.

A psychiatric residential treatment facility for children shall provide for the development of an individual treatment plan, based upon a comprehensive interdisciplinary diagnostic assessment, which includes the role of the family, identifies the goals and objectives of the therapeutic activities and treatment, provides a schedule for accomplishing the therapeutic activities and treatment goals and objectives, and identifies the individuals responsible for providing services, consistent with the individual treatment plan, to children. Clinical supervision of the individual treatment plan must be **accomplished as set forth by the department in rules.**

Clinical supervision must be documented in individual treatment plans and by entries in the child's record regarding supervisory activity.

NDCC § 25-03.2-10. Department may adopt rules.

The department may adopt rules for the conduct of psychiatric residential treatment facilities for children and shall ***adopt rules defining which professionals may provide clinical supervision and review, and may develop, update, and sign an individual treatment plan within a psychiatric residential treatment facility for children.***

PSYCHIATRIC RESIDENTIAL TREATMENT FACILITIES FOR CHILDREN

NDAC CHAPTER 75-03-17

"Mental Health Professional" has been removed, and the rule now reads "Clinical supervision of the individual person-centered treatment plan must be accompanied by full time or part-time employment of or contracts with a licensed physician who is a psychiatrist, a licensed psychologist, a licensed independent clinical social worker, or a nurse who holds advanced licensure in psychiatric nursing."

This chapter had significant debate, with some individuals relating that LMFTs should be included in being allowed to direct treatment planning due to their broad individual and family systems training. Others countered that the training is more specific to treatment of couples and families within those systems, and not individual children and adolescents.

As noted, our system places them in Tier 2 (b).

Workgroup 2 focused on the mental health professional definition within commitment rules:

CHAPTER 25-03.1 COMMITMENT PROCEDURES

NDCC § 25-03.1-02. Definitions.

Mental health professional" means:

a. A psychologist with at least a master's degree who has been either licensed or approved for exemption by the North Dakota board of psychology examiners.

b. A social worker with a master's degree in social work from an accredited program.

c. An advanced practice registered nurse.

d. A registered nurse with a minimum of two years of psychiatric clinical experience under the supervision of an expert examiner.

e. A licensed addiction counselor.

f. A licensed professional counselor with a master's degree in counseling from an accredited program who has either successfully completed the advanced training

beyond the master's degree as required by the national academy of mental health counselors or a minimum of two years of clinical experience in a mental health agency or setting under the supervision of a psychiatrist or psychologist.

g. A physician assistant.

Within this same commitment rule,

NDCC § 25-03.1-08 Application to state's attorney or retained attorney - Petition for involuntary treatment - Investigation by **qualified mental health professional.**

Recommendation: drop "qualified" throughout Chapter 25.

2. "... petition may be accompanied by any of the following:

a. A written statement supporting the petition from **a psychiatrist, physician, physician assistant, psychologist, advanced practice registered nurse, or addiction counselor** who is practicing within the professional scope of practice and who has personally examined the respondent within forty-five days of the date of the petition."

NDCC § 25-03.1-11. Involuntary treatment - Examination - Report

For purposes of any examination conducted pursuant to this section:

- a. An evaluation of a respondent's physical condition may be made only by a ***licensed physician, physician assistant, psychiatrist, or advanced practice registered nurse.***

Consider: ("Tier 1 medical providers")

- b. An evaluation of a respondent's mental status may be made only by a ***licensed physician, physician assistant, psychiatrist, advanced practice registered nurse, or psychologist trained in a clinical program.***

Consider: ("Tier 1 providers")

- c. An evaluation of whether the respondent is chemically dependent may be made only by ***a licensed physician, physician assistant, psychiatrist, advanced practice registered nurse, licensed addiction counselor, or licensed psychologist trained in a clinical program***

Consider: ("Tier 1 and LACs")

NDCC § 25-03.1-18.1. Court-authorized involuntary treatment with prescribed medication.

1. a. Upon notice and hearing, a ***treating psychiatrist request authorization from the court to treat an individual under a mental health treatment order with prescribed medication. The request may be considered by the court in an involuntary treatment hearing. As a part of the request, the treating psychiatrist and another licensed physician, physician assistant, psychiatrist, or advanced practice registered nurse not involved in the current diagnosis or treatment of the patient*** shall certify:
 - (1) That the proposed prescribed medication is clinically appropriate and necessary to effectively treat the patient and that the patient is a person requiring treatment;
 - (2) That the patient was offered that treatment and refused it or that the patient lacks the capacity to make or communicate a responsible decision about that treatment;

(3) That prescribed medication is the least restrictive form of intervention necessary to meet the treatment needs of the patient; and

(4) That the benefits of the treatment outweigh the known risks to the patient.

4. If a patient has requested an examination by an independent expert examiner under this chapter, and if the treating psychiatrist has requested authorization for involuntary treatment with prescribed medication, **only a psychiatrist** may independently examine the patient as to the issue of involuntary treatment with prescribed medication.

In 1.a and 4., Recommend: "treating psychiatrist" be changed to "psychiatric treatment provider." If the requesting psychiatric treatment provider is not a psychiatrist, the second certifier or expert shall be a psychiatrist or final year psychiatric resident physician.

Also in 1.a, consider the group listed after "treating psychiatrist", i.e., "another licensed physician, etc..." as "Tier 1 medical providers."

Workgroup 3 reviewed:

CHAPTER 25-03.3 COMMITMENT OF SEXUALLY DANGEROUS INDIVIDUALS

NDCC § 25-03.3-01. Definitions.

In this chapter, unless the context otherwise requires:

"Qualified expert" means an individual who has an expertise in sexual offender evaluations and who is a psychiatrist or psychologist trained in a clinical program and

licensed pursuant to this state's law or a psychologist approved for exemption by the North Dakota board of psychologist examiners. For purposes of evaluating an individual with an intellectual disability, the qualified expert must have specialized knowledge in sexual offender evaluations of individuals with an intellectual disability

NDCC § 25-03.3-05. Abrogation of confidentiality statutes and privileges.

For purposes of this chapter, the disclosure of individually identifiable health information by a treating facility **or mental health professional** to the state hospital or a mental health professional, including an expert examiner, is a disclosure for treatment.

Recommendation: No change

Workgroup 4 reviewed:

Title 5 ALCOHOLIC BEVERAGES:

NDCC § 5-01-05.1. Public intoxication - Assistance - Medical care.

A peace officer has authority to take any apparently intoxicated person to the person's

home, to a local hospital, to a detoxification center, or, whenever that person constitutes a danger to that person or others, to a jail for purposes of detoxification. A **duly licensed physician of a local hospital or a licensed addiction counselor of a detoxification center has authority** to hold that person for treatment up to seventy-two hours.

Recommendation: add "advance practice registered nurse or physician assistant" after "physician." The question is also whether this should remain in the alcoholic beverages chapter, vs. Chapter 25.

Workgroup 5 reviewed the following:

CHAPTER 32-03 DAMAGES AND COMPENSATORY RELIEF-(pertaining to immunity during crises):

NDCC § 32-03-48. Definitions. **"Mental health personnel"**

means psychiatrists, licensed psychologists, licensed social workers, licensed mental health counselors, nurses, members of the clergy, and other individuals approved by the state department of health to function as members of a critical incident stress management team, who have completed appropriate training as approved by the department.

Recommendation: Consider changing the term "Mental health personnel" to "Disaster support personnel"

Workgroup 6 reviewed the following:

RULE 503. PHYSICIAN AND MENTAL HEALTH PROFESSIONAL-PATIENT PRIVILEGE N.D.R.Ev. (ND Supreme Court Rules)

(a) definitions.

"Mental health professional" means:

(A) a psychologist with at least a master's degree who has been either licensed or approved for exemption by a state board;

(B) a registered nurse with a master's degree in psychiatric and mental health nursing from an accredited program;

(C) a registered nurse with a minimum of two years of psychiatric clinical experience under the supervision of a psychiatrist, psychologist, or registered nurse as defined by Rule 503(a)(2)(C);

(D) a licensed addiction counselor;

(E) a licensed professional counselor with a master's degree in counseling from an accredited program who has either successfully completed the advanced training beyond the master's degree as required by the national academy of mental health counselors or a minimum of two years of clinical experience in a mental health agency or setting under the supervision of a psychiatrist or psychologist.

Recommendations: none, as this is a ND Supreme Court Rule, and under their jurisdiction.

Workgroup 7:

CHAPTER 12.1-04.1

CRIMINAL RESPONSIBILITY AND POST-TRIAL RESPONSIBILITY ACT

NDCC § 12.1-04.1-04. Notice regarding expert testimony on lack of state of mind as element of alleged offense.

1. If the defendant intends to introduce at trial evidence obtained from examination of the defendant **by a mental health professional** after the time

of the alleged offense to show that the defendant lacked the state of mind required for the alleged offense, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court.

NDCC § 12.1-04.1-05. Examination at request of prosecuting attorney.

1. If the defendant has given notice under section 12.1-04.1-03 or 12.1-04.1-04 of intent to introduce evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense, the court, upon application by the prosecuting attorney and after opportunity for response by the defendant, shall order

that the defendant be examined by one or more **mental health professionals** retained by the prosecuting attorney. The court shall include in the order provisions as to the time, place, and conditions of the examination.

2. If the parties agree to examination of the defendant by a mental health professional retained by the prosecuting attorney without order of the court, sections 12.1-04.1-06,

12.1-04.1-07, 12.1-04.1-08, 12.1-04.1-10, 12.1-04.1-11, 12.1-04.1-12, 12.1-04.1-13, 12.1-04.1-14, and 12.1-04.1-15 apply to that examination.

NDCC § 12.1-04.1-06. Explanation to defendant.

At the beginning of each examination conducted under section 12.1-04.1-05, **the mental health professional** shall inform the defendant that the examination is being made at the request

of the prosecuting attorney; the purpose of the examination is to obtain information about the defendant's mental condition at the time of the alleged offense; and information obtained from the examination may be used at trial and, if the defendant is found not guilty by reason of lack of criminal responsibility, in subsequent proceedings concerning commitment or other disposition.

NDCC § 12.1-04.1-07. Scope of examination.

An examination of the defendant conducted under section 12.1-04.1-05 may consist of such interviewing, clinical evaluation, and psychological testing as the

mental health professional considers appropriate, within the limits of nonexperimental, generally accepted medical, psychiatric, or psychological practices.

12.1-04.1-08. Recording of examination.

2. Within seven days after completion of an examination conducted under section 12.1-04.1-05, the **mental health professional conducting the examination** shall deliver a copy of the recording of the examination, under seal, to the court and a copy of the recording to the defendant. The recording may not be disclosed except in accordance with this chapter.

12.1-04.1-10. Reports **by mental health professionals and expert witnesses.** A **mental health professional** retained by the prosecuting attorney and a mental health professional whom the defendant intends to call to testify at trial shall prepare a written report concerning any examination of the defendant and other pretrial inquiry by or under the supervision of the **mental health professional.** Any other individual whom either party intends to call at trial as an **expert witness** on any aspect of the defendant's mental condition shall prepare a written report. A report under this section must contain:

1. The specific issues addressed.
2. The identity of individuals interviewed and records or other information used.
3. The procedures, tests, and techniques used.

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4. The date and time of examination of the defendant, the explanation concerning the examination given to the defendant, and the identity of each individual present during an examination.

5. The relevant information obtained and findings made.

6. Matters concerning which the **mental health professional** was unable to obtain relevant information and the reasons therefor.

7. The conclusions reached and the reasoning on which the conclusions were based.

Recommendations: Within Title 12, all references to “mental health professional” should be preceded by “Tier 1.a.”

CHAPTER 12.1-04

JUVENILES - INTOXICATION – DEFENSES

12.1-04-06. Examination- Temporary commitment. Whenever there is reason to doubt the defendant's fitness to proceed, the court may order the detention of the defendant for the purpose of an examination by a **psychiatrist or a licensed psychologist**. The detention must be in the least restrictive appropriate setting, including the state hospital, the life skills and transition center, or other suitable facility for a reasonable period, not to exceed thirty days, for such examination.

Consideration: use term “Tier 1.a”

The following were reviewed by Stakeholder Workgroups 8+9:

CHAPTER 50-25.1 CHILD ABUSE AND NEGLECT

50-25.1-03. Persons required and permitted to report - To whom reported.

1. Any physician, nurse, dentist, optometrist, dental hygienist, medical examiner or coroner, or any other medical **or mental health professional**, religious practitioner of the healing arts, schoolteacher or administrator, school counselor, addiction counselor, social worker, child care worker, foster parent, police or law enforcement officer, juvenile court personnel, probation officer, division of juvenile services employee, or member of the clergy having knowledge of or reasonable cause to suspect that a child is abused or neglected, or has died as a result of abuse or neglect, shall report the circumstances to the department if the knowledge or suspicion is derived from information received by that person in that person's official or professional capacity. A member of the clergy, however, is not required to report such circumstances if the knowledge or

suspicion is derived from information received in the capacity of spiritual adviser.

CHAPTER 50-25.2 Vulnerable Adult Protective Services:

50-25.2-03. Reporting of abuse or neglect - Method of reporting.

1. **Any medical or mental health professional or personnel**, law enforcement officer, firefighter, member of the clergy, or caregiver having knowledge that a vulnerable adult has been subjected to abuse or neglect, or who observes a vulnerable adult being subjected to conditions or circumstances that reasonably would result in abuse or neglect, shall report the information to the department or the department's designee or to an appropriate law enforcement agency if the knowledge is derived from information received by that person in that person's official or professional capacity. A member of the clergy, however, is not required to report the information if the knowledge is derived from information received in the capacity of spiritual adviser.

For purposes of this subsection, "medical or mental health professional or personnel" means a professional or personnel providing health care or services to a vulnerable adult, on a full-time or part-time basis, on an individual basis or at the request of a caregiver, and includes a physician, nurse, medical examiner, coroner, dentist, dental hygienist, optometrist, pharmacist, chiropractor, podiatrist, physical therapist, occupational therapist, ~~addiction counselor, counselor, marriage and family therapist,~~ social worker, mental health professional*, emergency medical services personnel, hospital personnel, nursing home personnel, congregate care personnel, or any other person providing medical and mental health services to a vulnerable adult.

***Recommend: "Tier 1-4 mental health professionals"**

There was also a group 10 which is monitoring language on telemedicine- there are no current concerns.

Again, the mission of our task was specific to how evaluating the term “mental health professional” might assist the Department of Human Services in its utilization of such professionals within service and licensure. We hope that with our stakeholder partners, we have accomplished this.

Thank you, and I am available for any questions.