

You're Being Investigated... Now What?

by Frank S. Perri, Attorney, CPA

There probably has never been a day care that has not had to deal with a child getting hurt. Perhaps the injury was minor and easily cured by basic first aid. However, what if a child gets hurt so badly that medical attention is required? What would happen if you, a day care provider, are investigated by a state agency like a department of children and family services? Medical professionals are usually required by law to notify such agencies if there is a possibility that a child was abused or neglected.

This article explains what providers can expect if they are formally investigated by a state agency for possible abuse and neglect of a child. Because of the attention that child abuse cases receive, a provider may also be subject to criminal prosecution. This article also describes providers' rights under a criminal investigation, since it is not uncommon for a state agency investigation and a criminal investigation to occur simultaneously. I will not focus on whether or not a provider abuses a child, but rather on how he or she should conduct herself during an investigation. For the purposes of this article, I will assume that an accident has occurred and that the state agency is investigating the cause of the child's injury because it's obligated to do so.

How a provider handles a state agency investigation sometimes determines whether there will be a criminal investigation at all. In fact, her behavior during a criminal investigation may contain far more severe consequences than a state investigation. Thus, it is very important that providers take note of my advice. There are inherent risks in running a day care business. Understanding these risks and my suggestions for managing them will help you get through an investigation with the least amount of stress.

State Agency Investigation

If you have to take a child to a hospital to receive medical care, you should prepare yourself for a formal investigation by the state agency, probably the one that issued you your day care license. In this article, I will try to address the major questions

that most providers would encounter, such as: Should I talk to anyone about the incident that led up to the injury? Do I have to speak to the state investigator concerning the incident? If I refuse to speak to the state investigator, what could happen? Should I talk to an attorney, and if so, what kind? Can I have an attorney with me if I decide to cooperate with the investigation?

Are providers required to participate in a state agency investigation? Most state child care laws require child care providers to participate in investigations of their business. If you refuse, the agency has the right to revoke your day care license—and, given that the agency cannot risk exposing other children to possible abuse and neglect, they probably will.

What should the provider do to prepare for the investigation? First of all, you should try to remember the events that led up to the child's injury. Try to remember who was present, what time it was, where it occurred and how the injury happened. Remember that the more accurately you can answer basic questions, the more confident and less stressed you will be under investigation. Assuming that the injury was an accident, don't worry that you will be labeled as a child abuser; accidents occur all the time. Unfortunately, some providers do not handle the state investigation properly, which leads to criminal charges.

For example, let's say you speak to the state investigator and tell inconsistent stories of how the accident occurred, or you tell those who were present during the accident to lie to the investigator. You will not only have your license revoked, but will have opened the door to criminal prosecution. It is extremely important not to lie to a state investigator about the facts of the case.

Yet when I represent providers, I often have to explain that even though the child's injury was an accident, lying during an investigation carries criminal penalties, including jail time. Lying during an investigation is called obstruction of justice and is usually classified as a felony for which you can be sent to prison. The fact that you did not know that lying during an investigation was a crime is not a defense. Your attorney cannot use your ignorance of the law to help your criminal case if you are arrested for obstruction of justice.

Many providers would never face criminal prosecution if they had properly

cooperated with the state investigation. Thousands of child care providers have to take children to the hospital because of accidental injuries. This is not an uncommon event, and providers do not need to fabricate facts to save face. State agencies are not blind to the fact that children get hurt. However, they are obligated to investigate injuries, and lying about what happened will not help your case.

Should you hire an attorney, and if so, what kind of an attorney? This is a tough question, and I would say it depends on how competent you are in explaining facts accurately, especially during a stressful period. If you are not good at communicating, then I would recommend that you hire a criminal defense attorney because of the possibility of criminal charges. If you are contacted by a state investigator, tell the investigator that you will have your attorney with you during the interview. There is nothing to stop you from having an attorney present, as long as you are cooperating with the investigation.

Moreover, you should be aware that the state investigator does not represent you, nor is the investigator required to look after your interests. On the contrary, it is the investigator's job to determine whether you did something wrong to a child. If you lie to the investigator, he or she will notify the local law enforcement authorities, and they'll begin a criminal investigation. This is often how police officers become involved in day care investigations.

One of the benefits of having an attorney is that he or she can interview you professionally, as an investigator would, so that you can resolve gaps in your testimony. All too often, the way we think about something is not how we communicate it. An attorney will help you get your facts straight and relay them clearly.

Keep in mind that hiring an attorney does not mean you did anything wrong. Sometimes people incorrectly assume that consulting an attorney implies a guilty mind. An attorney will help you to think of facts that you may not have considered. As your delivery of the facts becomes easier, your confidence will improve and your nervousness will decrease. The attorney will probably say that they should be present during the investigation, and that advice should be followed. After all, your livelihood is at stake.

Should I talk to anyone about the incident? It is important that you not talk about the incident with anyone. The state investigator will talk to people with whom you may have discussed the incident. If what you told a third party is different from what you told the investigator, the investigator may assume that you are lying. Again, even if you are not lying, you are creating a perception of not telling the truth. Under no circumstance should you disclose facts to other people, even though you may be tempted to talk about them. It is natural for a provider to feel badly about what happened to a child. If you feel you need to talk, then speak to your lawyer; such conversations are protected by attorney-client privilege, and the investigator cannot get your lawyer to disclose what you said.

Will I have to pay for an attorney? Normally, if parents bring a civil lawsuit against your day care, your business liability insurance will cover any litigation costs. However, retaining a criminal defense attorney is different. More likely than not, you will have to pay for your own criminal defense attorney. If you are arrested and cannot afford an attorney, the court can appoint one to you free of charge. If you ask for a court appointed attorney, the court will ask you questions about your income and expenses in order to determine whether you qualify for a free attorney. If you have not been arrested and a welfare agency and/or the police want to talk to you, you are not entitled to a free attorney. (See also our article Finding a Lawyer.)

In conclusion, never lie to a state investigator about what happened to a child. If necessary, consult an attorney who can prepare you for the investigation.

Criminal Investigation

Although a provider is obligated under state child care laws to cooperate with investigators, if law enforcement conducts their own investigation, you have certain rights under the Constitution. Providers must have a general understanding of these rights in case the police decide to question you about a child's injury.

In general, if a police officer wants to talk to you, you are not obligated to speak to him or her. I am not talking about a situation in which you get a traffic ticket and the officer requests basic information, like your name; rather, I am talking about a situation where the police are conducting a formal investigation. By speaking to them, you are voluntarily answering their questions, and what you say can be used

against you in a court of law. Many people feel obligated to talk to the police because they believe they may be perceived as having something to hide if they refuse. Again, this is an incorrect assumption.

Be aware that the police do not represent you, nor are they obligated to represent your interests. The police collect facts about the case. If they believe that you have committed a crime, either they or the prosecuting attorney reviewing the case will have you arrested. If you want to talk to the police, that is a decision that you will have to make.

Some legal misconceptions must be clarified. Many providers believe that the statements they give to the police cannot be used against them if their Miranda Rights—basically, "You have a right to remain silent. Anything that you say can and will be used against you at trial. You have the right to the assistance of an attorney. If you cannot afford an attorney, one will be provided for you free of charge."—were not read to them. Sometimes people assume that the police are always required to read them their Miranda Rights. It is important to know that this is not always true.

Two conditions have to occur for Miranda Rights to be read to you. First, you must not be free to leave the presence of the police, e.g., you are arrested or under their custody. Second, the police must question you about the facts of the underlying case.

Assume that the police come to your house and want to talk to you about a child's injury. Are the police obligated to read you your Miranda Rights? No, because you can tell them you will not speak with them and ask them to leave. You are not under their custody—you are free to go about your business. At that point, the police must leave. You are not required to explain why you do not want to talk to them, even if they ask you why you are unwilling to answer any questions.

What if you decide to speak to the police at your house and you say things that are incriminating, such as telling inconsistent stories about how the child was injured? Can those statements be used against you? Yes. The police did not have to read you your Miranda Rights because you could have told them to leave your home without you making any statement. Again, in order for your Miranda Rights to apply, you have to be questioned by the police and be in a situation where you cannot remove yourself from their presence.

Let's assume that the police ask a provider to come to the police station so that they can find out what happened to the child. Is a provider legally obligated to go to the police station and answer their questions? No. Tell the police that you do not want to come to the police station. You do not have to explain why you refuse to go with them.

What if you do go to the police station but later decide that you don't want to talk to them? Because you voluntarily came to the police station, you can still tell the police that you have changed your mind and do not want to answer any questions. Again, you have the choice to either talk or not talk to the police.

Assume that either the police came to your house and you agreed to speak to them or you went to the police station and agreed to speak to them. What if, after ten minutes of questioning, you no longer want to talk to them? You can stop answering questions at any time. Again, you have the right to refuse to speak with the police. You do not have to tell them anything that can be used against you. Simply say that you do not wish to answer any further questions. Again, you are not obligated to give reasons for your refusal to answer any more questions.

What if you were arrested and you voluntarily made statements that incriminate you? Does the fact that you were arrested require the police to read you your Miranda Rights? No. Even though you are not free to leave because you are under police custody, you spoke voluntarily. The police did not ask you any questions. Any incriminating statements that you made are admissible in a court of law.

The easiest way to stop any police questioning is to tell them that you want to consult an attorney. At that point, any questioning by the police must stop. This is true whether you are free to leave or not, whether the police came to your house or you were brought to the police station. If the police continue to ask questions, statements you make are not admissible in a court of law. The problem for a provider is that it is difficult to prove that you told the police you wanted to consult with an attorney.

If possible, have a witness with you when you ask for an attorney. Police officers usually have a partner with them so they have a witness to incriminating statements

that you make. If the police did not have a partner there to hear what a provider had to say, then it would be a scenario of who said what. Providers must be just as savvy as the police and should have a witness to back up their demand for an attorney so that questioning may stop.

If you decide to go to the police station, the police probably will not allow anyone but you into an interview room. Sometimes they isolate witnesses so that they have an upper hand in the interview. Keep in mind that if you are at home, the police cannot tell you who you can have around during questioning. The police may come to your home when you least expect it and try to catch you off guard. Again, you are under no obligation to talk to them. If they continue to ask you questions, tell them that you want to speak to an attorney.

Even if you do not have a witness available, you can tell the police that you want to consult an attorney. Some police officers, knowing that you do not have a witness to back up your request, will continue to question you in the hopes that you will break down and talk to them. Unethical officers will claim that you did not invoke your right to speak to an attorney.

Another method of handling this situation is to tell them that you are willing to speak to them, but they have to make an appointment for a future date. This will give you an opportunity to find a witness to be with you when they do come to your home. You can then still tell them that you do not want to speak to them and that you want to consult with an attorney. This method should protect you—the police may not be as tempted to keep questioning you. Under no conditions should you sign any documents that the police put before you. You could be signing a confession that you never gave.

When you are invoking your right to have an attorney, you must be clear. The law does not recognize questions like, "Do I need an attorney?" or "Should I call an attorney?" The police are under no obligation to provide you with legal help. Your demand must be clear: "I want to speak to an attorney."

Even if you do want to speak to the police, I advise that you first consult a criminal defense attorney. Providers often do not understand how their statements can hurt them, even when they believe they are truthful. What providers say is often

reviewed by other people, and there is much subjective interpretation of events. Do not assume that others will see the situation as you do. When it comes to injured children, the criminal justice system is more apt to consider you a guilty party. I suggest that you consult with an attorney before you speak to the police. Some people believe that by cooperating with the police they will not face criminal charges. That is a very dangerous and incorrect assumption that may help the police build a better criminal case against you.

If the police want to talk to a child in your day care who is a suspect for hurting another child, use caution, because now you have to deal with both the police and the parents' reactions. Providers should contact the child's parents as soon as possible and let them deal with the police. The parents of a suspect child may be upset with a provider if they did not know that the police were questioning him or her. In addition, there may be times when your child is the suspect and the police want to talk to him or her. As the child's provider and legal guardian or parent, you can decline to let the police speak to him or her—as long as the child hasn't been arrested.

Conclusion

Most providers entered the day care profession because they enjoy raising this country's next generation. Like any other business owners, providers face certain risks. It is important that you understand how to handle these risks. This article has tried to outline some areas that I have witnessed that impact a provider's livelihood and possible freedom. Remember, if you are investigated, be honest with the investigator, especially when a child has been accidentally injured. There is no reason to lie. Accidents happen all the time. If necessary, consult an attorney to go over the facts so that you convey the information to a state investigator professionally and with confidence.

If law enforcement becomes involved in the investigation, our Constitution affords us certain rights regarding whether we are required to speak to the police. Again, consult an attorney on this matter. Although there may be costs attached to the representation, you must consider that your years of hard work and reputation within the community you serve could be jeopardized.

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