HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1321 Child Abuse and Abuse of Vulnerable Adults
SPONSOR(S): Gannon
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Children's Services (Sub)	1 Y, 5 N	Preston	Liem
2) Future of Florida's Families			
3) Judiciary			
4) Public Safety & Crime Prevention			
5)			

SUMMARY ANALYSIS

The bill makes a number of changes to Florida statutes related to members of the clergy. Specifically, the bill:

- Clarifies that "any person" is required to report known or suspected child abuse, abandonment, or neglect; clarifies that individuals in specified occupations are required to provide their names when reporting; and adds members of the clergy as defined in §90.505, Florida Statutes, to those specified professionals.
- Removes the exception to the abrogation of privileged communication between clergy and an individual seeking advice or counsel granted under §90.505, Florida Statutes, when the communication involves a perpetrator or alleged perpetrator of child abuse, abandonment, or neglect.
- Provides that there is no privileged communication pursuant to §90.505, Florida Statutes, for any communication involving a perpetrator or alleged perpetrator of child abuse, abandonment, or neglect.
- Differentiates between abuse of a vulnerable adult, abuse of a child, and childhood sexual abuse; provides a definition of the term "childhood sexual abuse"; amends the certain statute of limitations related to childhood sexual abuse to provide liability for a third party; and provides for a two year window for victims to bring an action against a third party under certain circumstances when the claim would otherwise be barred solely because the statute of limitations has or had expired.
- Adds an additional circumstance under which a person who commits sexual battery upon a child under the age of 12 is guilty of a felony of the first degree: when the offender is a person who has responsibility for the welfare, guidance, direction, supervision, education or spiritual well-being of the child.
- Creates a duty to report lewd and lascivious offenses defined in §800.04, Florida Statutes, if certain specified conditions are met.

The bill is anticipated to have a negligible fiscal impact on state government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[X]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[X	No[]	N/A[]
4. Increase personal responsibility?	Yes[X]	No[]	N/A[]
5. Empower families?	Yes[X]	No[]	N/A[]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Mandatory Reporting

Florida law requires **any person** who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare **to report** such knowledge or suspicion to the Department of Children and Family Services' hotline as prescribed by law.[1]

Florida law also provides that **reporters in the following occupation categories** are required to **provide their names** to the hotline staff when reporting:

- Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons.
- Health or mental health professional other than one listed above.
- Practitioner who relies solely on spiritual means for healing.
- School teacher or other school official or personnel.
- Social worker, day care center worker, or other professional child care, foster care, residential, or institutional worker.
- Law enforcement officer.
- Judge.[2]

The bill adds members of the clergy, as defined in §90.505, Florida Statutes, to the list of reporters in specified occupational categories that are required to provide their names to the hotline staff when making a report.

Privileged Communication

Florida law defines the term "members of the clergy" as a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed so to be by the person consulting him or her.

A communication between a member of the clergy and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course

[1] See §39.201, Florida Statutes
[2] See §39.201, Florida Statutes

of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.[3]

Florida law also provides that the privileged quality of shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by §39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect. There are two exceptions to the abrogation: privileged communication between attorney and client and the privilege provided in §90.505. Florida Statutes, relating to members of the clergy.[4]

The bill amends §39.204, Florida Statutes, to remove the exception to the abrogation of privileged communication relating to members of the clergy. The bill also amends §90.505, Florida Statutes, to provide that there is no privilege pursuant to the section for any communication that involves a perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect.

Statute of Limitations

Florida law provides time limitations on actions other than for the recovery of real property, including for intentional torts based on abuse:

> An action founded on alleged abuse, as defined in s. 39.01, s. 415.102, or s. 984.03, or incest, as defined in s. 826.04, may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.[5]

In addition to the statutory extensions, Florida has a "delayed discovery" doctrine which generally provides that the statute of limitations does not begin to run until the victim either knows or reasonably should know of the wrongful act giving rise to the cause of action. The Florida Supreme Court has held that the delayed discovery doctrine is applicable to repressed memory or 'traumatic amnesia' cases, stating that the statute of limitations does not begin to run (accrue) until the victim is aware that the abuse occurred.

In reaching its conclusion, the Florida Supreme Court made a distinction between "accrual" (a statute of limitations beginning to run) and "tolling" (a statute of limitations being suspended). Applying the concept of accrual in Herndon, the Court was able to avoid the 7-year statute of repose (final deadline in which suit can be filed) provided in Florida's tolling statute, Fla. Stat. §95.051.[6]

The bill makes a number of changes to §95.11, Florida Statutes, relating to limitations on actions, including:

> ● Creating a new subsection relating to the abuse of a vulnerable adult that removes the “within 7 years after the age of majority” timeframe which would be inapplicable in cases of abuse involving adults and that adds that the discovery of both the injury and the causal relationship between the injury and abuse may be made by either the injured party or by a person who is in a position of trust and confidence;
>
> ● Creating a new subsection relating to the abuse of a child which provides timeframes for an action and specifies that the term “abuse” does not include sexual abuse;

[3] See §90.505, Florida Statutes
[4] See §39.204, Florida Statutes
[5] See §95.11(7), Florida Statutes
[6] Herndon v. Graham, 767 So. 2d 1179 (Fla. 2000)

● Creating a new subsection relating to childhood sexual abuse, that provides a definition for the term “childhood sexual abuse”; provides timeframes within which an action may be commenced; provides that the timeframes apply to an action, not only against the actual perpetrator of the injury, but also against a third party who owed a duty of care to the injured person;

● Providing victims of childhood sexual abuse a two year window, beginning on January 1, 2004, to bring an action against a third party under certain circumstances when the claim would otherwise be barred solely because the statute of limitations has or had expired.

Sexual Battery

Florida law provides that a person who commits sexual battery upon a person 12 years of age or older without that person’s consent commits a felony of the first degree under the following specified circumstances:

● When the victim is physically helpless to resist.

● When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.

● When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future.

● When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

● When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

● When the victim is physically incapacitated.

● When the offender is a law enforcement officer, correctional officer, or correctional probation officer as defined by s. 943.10(1), (2), (3), (6), (7), (8), or (9), who is certified under the provisions of s. 943.1395 or is an elected official exempt from such certification by virtue of s. 943.253, or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government. [7]

The bill adds another circumstance under which sexual battery upon a person 12 years of age or older without that person’s consent commits is a felony of the first degree: when the offender is a person who has responsibility for the welfare, guidance, direction, supervision, education, or spiritual well-being of the child.

Lewd and Lascivious Offenses

Florida law defines “lewd or lascivious battery”, “lewd or lascivious molestation”, “lewd or lascivious conduct”, and “lewd or lascivious exhibition". Penalties for these offenses range from a felony of the

[7] See §794.011, Florida Statutes

third degree to a felony of the first degree depending upon the age of the offender, the age of the victim, and the severity of the action.[8]

The bill creates a duty to report lewd and lascivious offenses as defined in § 800.04, Florida Statutes, to law enforcement under certain specified circumstances.

C. SECTION DIRECTORY:

Section 1. Amends §39.201 Florida Statutes, relating to mandatory reports of child abuse, abandonment, or neglect, to clarify that "any person" is required to report child abuse, abandonment, or neglect pursuant to chapter 39, Florida Statutes, to clarify that reporters in specified professions are required to provide their names to hotline staff when reporting, and to add "members of the clergy" as defined in §90.505, Florida Statutes, to that list of professionals.
Section 2. Amends §39.204, Florida Statutes, relating to abrogation of privileged communications involving child abuse, abandonment, or neglect, to remove the exception to the abrogation of privileged communication between clergy and an individual seeking advice or counsel granted under §90.505, Florida Statutes, when the communication involves a perpetrator or alleged perpetrator of child abuse, abandonment, or neglect.
Section 3. Amends §90.505, Florida Statutes, relating to privilege with respect to communications to clergy, to provide that there is no privileged communication pursuant to §90.505, Florida Statutes, for any communication involving a perpetrator or alleged perpetrator of child abuse, abandonment, or neglect.
Section 4. Amends §95.11, Florida Statutes, relating to statute of limitations, to provide a definition of the term "childhood sexual abuse"; to amend certain statute of limitations related to such abuse to provide liability for an employer or supervisor of an alleged abuser; to differentiate between abuse of a vulnerable adult, abuse of a child, and childhood sexual abuse; and to provide for a two year window for a victim to bring an action against a third party under certain circumstances when the claim would otherwise be barred solely because the statute of limitations has or had expired.
Section 5. Amends §794.011, Florida Statutes, relating to sexual battery, to add an additional circumstance under which a person who commits sexual battery upon a child under the age of 12 is guilty of a felony of the first degree: when the offender is a person who has responsibility for the welfare, guidance, direction, supervision, education or spiritual well-being of the child.
Section 6. Amends §800.05, Florida Statutes, relating to duty to report lewd and lascivious offenses, to create a duty to report lewd and lascivious offenses defined in §800.04, Florida Statutes, if certain specified conditions are met.
Section 7. Provides for an effective date of October 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of Children and Family Services does not anticipate additional costs as a result of the provisions of the bill.

[8] See §800.04, Florida Statutes

The bill will likely result in an increase in the number of criminal prosecutions related to sexual abuse of a child and lewd and lascivious offenses which could have a fiscal impact on the criminal justice system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Creating a cause of action against third parties in cases involving childhood sexual abuse under certain circumstances and providing a two-year time period during which time a victim can bring an action against a third party under certain circumstances when the claim would otherwise be barred solely because the statute of limitations has or had expired, will have the potential for increasing law suits and awards of damages against individuals and entities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable.

2. Other:

First Amendment Concerns – Privileged Communication

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”. The free exercise clause of the First Amendment guarantees the right to practice one's religion free of government interference. The establishment clause requires the separation of church and state.

- The Free Exercise Clause prohibits the government from regulating one's "right to believe and profess" one's religious convictions, or specifically targeting and regulating one's right to engage in religious activity. Conversely, "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice" do not violate the Free Exercise Clause. As the duty to testify is a generally applicable, religion-neutral law, it does not violate the Free Exercise Clause.

- The Establishment Clause prohibits legislation which either favors religion over nonreligion, or which favors one particular denomination over another. If a privilege or accommodation is overly broad and protects religious communications generally, it would be contrary to the Establishment Clause's

mandate that the religious not be elevated to a preferred position over the secular; if the privilege or accommodation is overly narrow and serves to protect only those communications made to clergy of certain denominations, it would violate the Establishment Clause's mandate that no particular denomination be elevated to a preferred position over other denominations.[9]

Since the Establishment Clause prohibits the government from preferencing religion over nonreligion, the guiding principle in Establishment Clause analysis of the clergy-penitent privilege is that privilege's similarity with other recognized privileges, such as those protecting attorney-client or physician-patient communications. That is, if the clergy-penitent privilege merely offers religious adherents protections similarly afforded to nonreligious individuals engaged in analogous activity, the privilege should withstand constitutional scrutiny. Conversely, if the privilege's protections are out of line with those protections offered by other evidentiary privileges, the privilege can be expected to be held unconstitutional.

With the above guidelines in mind, a constitutional clergy-penitent privilege statute would:

- define "clergy" as those religious functionaries who are obliged by their religion to maintain the secrecy of confidential communications made to them;
- be available to all penitents, regardless of whether the penitent is under an obligation to engage in such communication;
- extend protection only to confidential communication between a penitent and a member of the clergy made under a reasonable expectation of privacy; and
- grant the possession of the privilege to the penitent.

There is increasing controversy surrounding the issue of mandatory reporting by members of the clergy of physical or sexual abuse of children and the issue of privileged communication within the pastoral role. There are members of the clergy who perceive the expectation of mandatory reporting of child abuse by helping professionals to be in direct conflict with their clerical role. When state law requires clergy (along with all other helping professionals) to report suspected child abuse, some members of the clergy believe they are faced with a dilemma. Two legitimate concerns expressed by some members of the clergy are:

- an unwillingness to have the state determine their role and function as a religious professional; and
- an effort to protect their relationship with a congregant from incursion by the state.

Both of these issues are raised in the context of the separation of church and state provided for in the United States Constitution and must be taken into consideration.

In those states where members of the clergy are exempt from a statutory responsibility to report, some appear to believe that the conflict is resolved. Members of the clergy are unlikely to report even though they have the right to do so as does every citizen. Nonetheless, the hesitancy or unwillingness by many members of the clergy to utilize the reporting mechanism provided in their state to protect children from further abuse and their desire to be exempt from that which is required of other professionals suggests that the conflict is not just with the mandatory nature of the reporting requirements. The problem may best be stated in terms of a perceived conflict of the ethics of confidentiality and the ethics of reporting certain harmful behavior in order to protect children.[10]

[9] Employment Division, Department of Human Resources v. Smith, 494 U.S. 872,877 (1990)

[10] Fortune, M., Clergy Should be Required to Report Child Abuse. The Seattle Times. April 24, 2002.

The purpose of confidentiality has been to provide a safe place for a member of a religious community or a client in a professional relationship to share concerns, questions, or burdens without fear of disclosure. It provides a context of respect and trust within which help can hopefully be provided for an individual. It has meant that some people have come forward seeking help who might not otherwise have done so out of fear of punishment or embarrassment. Confidentiality has traditionally been the ethical responsibility of the professional within a professional relationship and is generally assumed to be operative even if a specific request has not been made by the individual seeking help or advice.

For a member of the clergy, unlike secular helping professionals, confidentiality rests in the context of spiritual issues and expectations as well. In Christian denominations, the expectations of confidentiality lie most specifically within the experience of confession. The responsibility of the pastor or priest ranges from a strict understanding to a more flexible one, i.e. from the letter to the spirit of the law. For example:

- For Anglican and Roman Catholic priests, the confessional occasion with a penitent is sacramental, i.e. whatever information is revealed is held in confidence by the seal of confession with no exceptions.

- The United Methodist Book of Discipline does not view confession as sacramental but states: "Ministers… are charged to maintain all confidences inviolate, including confessional confidences."

- The Lutheran Church in America protects the confidence of the parishioner and allows for the discretion of the pastor: "… no minister shall divulge any confidential disclosure given to him [sic] in the course of his [sic] care of souls or otherwise in his [sic] professional capacity, except with the express permission of the person who has confided in him [sic] or in order to prevent a crime."[11]

- Christian Science practitioners are governed by by-laws which provide that "members of this Church shall hold in sacred confidence all private communications made to them by their patients; also such information as may come to them by reason of their relation of practitioner to patient. A failure to do this shall subject the offender to Church discipline."[12]

Privileged communication is a legal concept that defines a right owned by the source. It is a conversation that takes place within the context of a protected relationship, such as that between an attorney and client, a husband and wife, a priest and penitent, and a doctor and patient. Privileges are exceptions to the general duty of witnesses to testify, reflecting society's belief that some values are sufficiently important to outweigh the need for probative evidence. Unlike other evidentiary rules, privileges do not facilitate fact-finding, but rather pose an obstacle to the fact-finding process, justified on public policy grounds. For this reason, experts generally agree that privileges should be cautiously promulgated and narrowly construed, in order to minimize the burdens they impose upon the adjudicatory process. However, the law recognizes that there are certain special relationships which are viewed by our society as being so important that they deserve protection from such intrusion. Those special relationships are granted "privileged communication" status and are therefore exempt from compulsory disclosure. Currently, the privilege is recognized in the United States via statutory enactment by all fifty states and the federal government.[13]

However, there are exceptions that can invalidate a privileged communication, and there are various circumstances where it can be waived, either purposefully or unintentionally. The law has traditionally respected privileged communication, including that between a member of the clergy and penitent, if four fundamental conditions are met:

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[11] Fortune, M., Confidentiality and Mandatory Reporting: a Clergy Dilemma? Working Together, Vol. 6, No 1., Fall 1985.
[12] Manual of the First Church of Christ, Scientist, By-Law Article VIII, Section 22.
[13] Trammel v. United States, 445 U.S. 40, 51 (1980).

● the communication must be made in confidence (the privilege is lost (waived) when all or part of the communication is disclosed to a third person);
● the element of confidentiality must be essential to the relationship;
● the relationship is one that should be fostered; and
● the injury of disclosing the communication must be greater than the benefit of its disclosure.

These privileges are held by the client (but not the lawyer), the patient (but not the doctor or psychotherapist), the speaking (but not the spoken-to) spouse and the penitent (but not the clergyperson). The lawyer, doctor, psychotherapist, spoken-to spouse, and clergyperson however, cannot reveal the communication without the other person's consent. The client, patient, speaking spouse, and penitent may waive the privilege (that is, testify about the conversation) and also may prevent the other person from disclosing the information.[14]

The United States Supreme Court has recognized that the clergy privilege is anchored in the

> human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts, and to receive priestly consolation and guidance in return.[15]

Communications made to nonordained or nonlicensed lay pastors, elders or deacons are generally not privileged. Even if the communication is made to an ordained minister, there is no privilege if the pastor is acting as a mere friend or family member, rather than as a spiritual adviser. Many states also require that the communication be made "in the course of discipline." Some courts have interpreted this language strictly, limiting the privilege to those confessions specifically authorized by particular church rites. In such states, the privilege is effectively limited to the Roman Catholic Church and the few Protestant denominations that recognize a formal sacrament of confession.[16]

The issues surrounding confidentiality and privileged communication are being examined with increasing frequency as they relate to the abuse of children, particularly in light of the recent increase in the number of cases in the Roman Catholic Church involving pedophile priests who were protected by their superiors and moved from diocese to diocese. The question which faces members of the clergy in their pastoral relationship to a congregant is, if that person has received information in the course of conversation with a congregant which reveals the probable abuse of a child and which indicates that the child is still in danger of being further abused, what is their obligation? This question arises regardless of legal requirements of mandatory reporting or exemption. And it is an issue that has resulted in a head-on collision between church and state.

Confidentiality must be understood in this context when faced with a conflict of two ethical norms; that of confidentiality vs. protection of a child from abuse. What should determine which norm should supersede the other? We are talking about two different sovereigns here," said Clifford Fishman, a law professor with the Catholic University of America. "The time will sometimes come when, if you can't reconcile the two, you have to decide which is to be master and which is to be subservient."[17]

Some states are attempting to craft carefully defined restrictions on the exemption of the confessional in the interest of protecting religious freedom. Nonetheless, the issue may well be more theoretical than practical in application, since none of the situations involving the abuse of children by members of the clergy have involved information gained in the confessional. Seldom does an offender against children come forward voluntarily and "confess". It is much more likely that a child or teenager who is being abused or a non-offending parent or other family member will come to a clergyperson seeking

[14] Privileged Communication. www.lectlaw.com
[15] Trammel v. United States, 445 U.S. 40, 51 (1980).
[16] Hall. T. Can You Keep a Secret? www.strang.com
[17] Herbst, M., States struggle with confession. The Concord Monitor, June 17, 2002.

assistance. Hence what is presented is not confessional on the part of an offender but a cry for help from a victim.

If a member of the clergy does not report known or suspected child abuse, the clergy member must be absolutely certain that the information was obtained during a confidential communication. If it was not, the member of the clergy is required to report child abuse. Learning of child abuse through a third party, hearing of child abuse by the abuser in the presence of outsiders, learning of the abuse from the abuser during casual conversation, or possibly even of the abuse from a family member other than the abuser during casual conversation will not qualify as a privileged communication, and therefore the member of the clergy must report the abuse.

First Amendment Concerns – General

In recent years, the Catholic Church's Boston Archdiocese has spent months in court, in the clergy abuse litigation, trying to avoid discovery but failing. The Church has recently raised a First Amendment defense - based on either the right to free exercise of religion, or the government's duty not to establish a state religion, or both. The argument, which is not new, is that the church deserves operational "autonomy," and thus may not be brought into the courts to defend its handling of its clergy.

The Florida Supreme Court has held that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner caused by the alleged sexual assault or battery by one of its clergy. The general issue presented in the case was whether in the name of the First Amendment, religious institutions could be shielded from otherwise cognizable tort claims caused by their agents and employees. In the context of the case, the specific question is whether the First Amendment bars a secular court's consideration of the parishioners' claims of negligent firing and supervision against the Church based upon the claim that Malicki fondled, molested, touched, abused, sexually assaulted or battered the minor and adult parishioners.

> In rendering its opinion, the court stated: In any event, we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics. We would draw the line at criminal conduct.
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> We recognize that the Free Exercise Clause and the Establishment Clause require constant vigilance to prevent the government from either stifling the free exercise of religion or excessively and impermissibly entangling itself with interpreting religious doctrine on matters solely within the purview of religious institutions. However, with regard to a third party tort claim against a religious institution, we conclude that the First Amendment does not provide a shield behind which a church may avoid liability for harm arising from an alleged sexual assault and battery by one of its clergy members. We thus join the majority of both state and federal jurisdictions that have found no First Amendment bar under similar circumstances.[18]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Mandatory Reporting

[18] Malicki v. Doe, 814 So.2d 347

The provision of the bill that adds members of the clergy to the list of specified occupations that are required to provide their names to hotline staff when reporting is the cause of any fiscal impact associated with the bill. Even though if does not create a classification of new mandated reporters, typically, whenever a new class of professionals is added to the list of individuals in occupations who are required to provide their name when reporting known or suspected child abuse, abandonment, or neglect, the number of calls to the hotline increases. It has been speculated that this occurs because the inclusion of a specifically identified profession to this list leads the individuals belonging to the profession being added to believe that they are now being required to report pursuant to chapter 39, Florida Statutes, for the first time.

In fact, since **"any person"** is currently required to report instances of child abuse, abandonment, or neglect, the increased number of reports would appear to be from a misinterpretation of the law by members of the newly added profession. The fiscal impact of any future additions to the list of those professionals required to provide their names when reporting could perhaps be mitigated by providing better education relating to reporting requirements to members of professions who routinely work with or around children.

Privileged Communication

A case has been presented that the clergy-penitent privilege is inadequate in the protection it provides for clergy's own religious duties. A case before a Massachusetts court illustrates the problem with this situation. In Kane, a Roman Catholic priest refused to testify to communications made to him by the defendant, who had waived his rights to the privilege. The defendant maintained that he had confessed nothing inculpatory, wanted the priest to corroborate this, and consented to the disclosure of the communications in question. The court held that the right to assert the privilege was defendant's only, and the priest was held in contempt for refusing to violate the dictates of his religion, which forbade him from revealing the confidences made to him.[19]

In offering a solution to the problem, Robert Colombo provided the following analysis:

> While the Kane court correctly construed the clergy-penitent privilege statute it was faced with, its decision makes clear the inadequacy of the privilege alone. The solution lies in accommodating clergy whose religions prevent them from testifying under certain circumstances, via a "clergy testimonial accommodation" that would permit clergy to refuse to testify to communications which their religions bind them to keep silent.
>
> While not constitutionally required, this recognition is constitutionally permissible, and essential if we wish to remain faithful to the principles underlying the First Amendment. Unlike the clergy-penitent privilege, a testimonial accommodation would permit clergy to refuse to testify if their religions prevented them from doing so, regardless of the intentions of their penitents… Therefore, unlike the clergy-penitent privilege, the clergy may invoke the testimonial accommodation, so long as clerics can show that testifying at trial would violate the dictates of their religion. Proper clergy testimonial accommodation would not violate the Establishment Clause because it removes a government imposed burden that has a disproportionate impact on the practice of particular religions. Accommodation of these religious obligations, therefore, is not a preference of the cleric's interests, but rather addresses the disproportionately burdensome application of the law upon his practice of religion.
>
> In sum, while the Constitution neither requires nor prohibits the protection of clergy-penitent communication, it does address the matter. Once protection is granted, it may be neither too generous nor too parsimonious, for legislation which either unduly preferences religion generally, or which picks and chooses

[19] Commonwealth v. Kane, 445 N.E. 2d 598 (Mass. 1983).

specific denominational practices for special favor, is unconstitutional. Furthermore, the framers of the Constitution intended for generous accommodation of religion, and therefore accommodation of clergy on the receiving end of penitential communication would serve to fulfill the intent of the Constitution.[20]

Statutes of Limitations

An increasing number of survivors of childhood sexual abuse are turning to civil suits as a means to obtain justice and accountability. The majority of the states now have some type of provision extending the statute of limitations or implementing a "tolling" doctrine for adult survivors of childhood sexual abuse, although the remedy varies depending upon state.

● A tolling doctrine postpones the date from which a statutory period is counted. Most states have general minority tolling doctrines which provide that statutes do not begin to accrue (start counting) until the injured party reaches the age of majority, usually 18. While minority tolling provisions are applicable to all claims, regardless of type of injury, some states also have extended minority tolling provisions for childhood sexual abuse victims. Some states like Oregon, Nevada, and Florida allow claims beyond the age limitation if the victim had a repressed memory, or the victim did not discover the connection between the abuse and the harm done until some time later. In such "repressed memory" or "delayed discovery" cases the statute of limitations is tolled until the memory is "recovered" or the "connection" is made between the childhood abuse and the harm done. In such cases the victim may have as much as three to ten years to pursue their claim from the date of "discovery" of the connection, or of the date of the "recovered memory".[21]

● A statute of limitations is a legislative provision defining the time periods within which criminal charges or civil claims must be brought. Statutes of limitations generally start running from the time a crime is discovered and if the injured person does not assert his or her right within the set time frame, a legal remedy cannot be obtained. Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They are intended to balance the public's need to prosecute with the defendant's need for peace of mind. [22]

California has perhaps the most comprehensive law related to childhood sexual abuse that has evolved over the past 13 years. Before 1990, claims of childhood sexual abuse were governed by a one-year statute of limitations and if the cause of action occurred while the injured person was a minor, the statute was tolled until he or she became an adult. Thus, any complaint had to be filed within one year of the injured person's 18th birthday.

In 1990, the California Legislature rewrote the statute of limitations for cases related to adult trauma that was caused by childhood sexual abuse. The law as amended then provided that the time for commencing an action based on injuries resulting from "childhood sexual abuse" shall be eight years after the plaintiff reaches majority or within three years of the date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by the abuse, whichever occurs later. As subsequently interpreted by the courts, the 1990 legislation changed the statute of limitations for actions against perpetrators, but did not change it for actions against other responsible third parties.

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[20] Colombo, R. The Inadequacies of the Clergy-Penitent Privilege, New York University Law Review (Vol. 73, No. 1).
[21] Aronson, B. Why Statutes of Limitations for Child Abuse Should be Extended. www.findlaw.com
[22] Bond, J. The Statute of Limitations in Pennsylvania and Repressed Memories of Childhood Sexual Abuse: Dalrymple v. Brown. 2001 Vill. Women's L.F. 041106.

In 1998, the California Legislature responded to those cases and enacted legislation to apply the extended statute of limitations in actions against third parties. However, any action against any person or entity other than the sexual abuser would have to be commenced before the plaintiff's 26th birthday.

During the 2001-2002 legislative session, California enacted legislation that provided that the absolute age of 26 limitation (eight years after majority pursuant to statute) for actions against a third party does not apply, and the broader "within three years of discovery" statute of limitations applies, in claims against third parties if the third party "knew or had reason to know of complaints against an employee or agent for unlawful sexual conduct and failed to take reasonable steps to avoid similar acts of unlawful sexual conduct in the future by the employee or agent." The legislation also provided that those victims who discovered their adulthood trauma after age 26, whose action has been barred by the current statute of limitations, a one-year window to bring a case against a third party that otherwise would be time-barred. The sponsor of the California legislation stated:

> This bill is essential to ensure that victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible. While current law allows a lawsuit to be brought against the perpetrator within three years of discovery of the adulthood aftereffects of the childhood abuse, current law bars any action against a responsible third party entity (such as an employer, sponsoring organization or religious organization) after the victim's 26th birthday. Unfortunately, proponents assert, for many victims their adulthood trauma does not manifest itself until well after their 26th birthday, when some event in their current life triggers remembrance of the past abuse and brings on new trauma.
>
> For example, a 35-year old man with a 13-year old son involved in many community and sporting events, may begin to relive his nightmare of being molested by an older authoritarian figure when he was 13 years old and about to enter puberty. While a lawsuit against the perpetrator is possible, that person may be dead, may have moved away to places unknown, or may be judgment-proof. However, any lawsuit against a responsible third party is absolutely time-barred after the victim passes this 26th birthday. This arbitrary limitation unfairly deprives a victim from seeking redress, and unfairly and unjustifiably protects responsible third parties from being held accountable for their actions that caused injury to victims. [23]

As for a statute of limitations, the United States Supreme Court has long held that:

> if the lapse of time merely bars a personal claim for money or damages, there is no denial of due process in disappointing the hope of a complete defense . . . Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . They are by definition arbitrary, and their operation does not discriminate against the just and the unjust claim, or the voidable or unavoidable delay. . . Their shelter has never been regarded as what now is called a 'fundamental right' . . . the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.[24]

California courts subsequently affirmed the Legislature's power to revive civil common-law causes of action, even if the action was otherwise barred by the running of the statute of limitations. [25]

Proponents of the California legislation asserted that the emotional and psychological damage that results from childhood sexual abuse affects the public at large. Many victims will require state-funded therapy or other medical care. They contended that untreated victims often have problems with alcohol

[23] Bill analysis, SB 1779 (2001-2002), California Legislature
[24] Chase Securities Corp. v. Donaldson (1945) 325 U.S. 304
[25] Liebig v. Superior Court (1989) 209 Cal.App.3d 828; Lent v. Doe (1995) 40 Cal.App.4th1177; Hellinger v. Farmers Group, Inc. (2001) 91 Cal.App.4th 1049.

and drug abuse and low achievement and will require state-funded treatment programs and/or public assistance. Some victims will become perpetrators themselves. In short, it is the victims themselves, their families, and the public that now bear the financial and other burdens of this abuse while the responsible entities, which can prevent the harms, are free from potential liability.

General theories of negligence impose a duty of care where a third person or entity has assumed some responsibility, through a relationship or otherwise, for a person's conduct or a person's safety. An employer thus bears a duty of care to third parties for the conduct of an employee engaging in acts related to his employment, but not for acts unrelated to that employment. Similarly, a school district, church, or other organization engaging in the care and custody of a child owes a duty of care to that child to reasonably ensure its safety.

Reviving time-barred actions for one-year window period has precedent. While state legislatures have the authority to revive actions, the policy behind the statutes of limitation provides that they "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them." Yet, courts have acknowledged that "the need for repose is not so overarching that the Legislature cannot by express legislative provision allow certain actions to be brought at any time, and it has occasionally done so.[26]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The **Subcommittee on Children's Services** voted to lay the bill on the table on **April 9, 2003.**

[26] 3 Witkin, Calif. Procedure, Actions (4th ed. 1996) 408.