

Senate Bill 360 (Hill) — Definition of Clergy-Penitent Privilege Under the Child Abuse and Neglect Reporting Act Amended in Assembly July 2, 2019

IN BRIEF

SB 360 narrows the definition of clergy-penitent privilege under the Child Abuse and Neglect Reporting Act, and excludes clergy members and religious employees from the exemption.

BACKGROUND

There are 46 professions identified under the Child Abuse and Neglect Reporting Act as mandated reporters, including teachers, day care employees, social workers, peace officers, physicians, therapists, and athletic coaches. In 1997, the Act was amended to include clergy members with an exception for knowledge or a reasonable suspicion of child abuse learned during a “penitential communication.”

In 2005, the California 2nd District Court of Appeal held that for a communication to be penitential: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and (3) such member of the clergy must have a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.ⁱ In 2015, the 1st District Court of Appeals held that a communication is not “penitential” unless the communication is made in the presence of no third person so far as the penitent is aware.ⁱⁱ

Clergy-penitent privilege did not exist at common law but was rather the product of statutes enacted by state legislatures that were intended to be narrowly construed.ⁱⁱⁱ In 1973, Congress rejected a proposal to codify clergy-penitent privilege and left the matter for individual states to decide. Clergy members, however, are not mandated reporters under the federal statute governing child abuse and neglect reporting.^{iv}

The 2nd District also held that clergy-penitent privilege was inapplicable under the ministerial exemption and ecclesiastical abstention doctrines because the issues were criminal in nature—a grand jury investigation into allegations that children had been molested by priests—and did not involve either employment matters or an internal church dispute.ⁱ The 2nd District also held that disclosure of confidential information in a grand jury investigation regarding allegations that priests had molested children did not result in the government’s excessive entanglement with religion, because the core issues involved criminal conduct, which had no religious doctrine aspect.ⁱ

THE PROBLEM

The U.S. Supreme Court found that the purpose of clergy-penitent privilege is to fulfill “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.”^v This holding was reaffirmed in the California case of *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015).ⁱⁱ But many organizations conduct in-house investigations into violations of their own rules and doctrines, in order to administer church discipline.^{vi} The procedure is no different for inquiries of members accused of criminal conduct^{vi}, and the same sources have revealed that information gleaned from these judicial inquiries are also used to prepare for litigation, while claiming privilege to avoid both evidentiary and mandated reporter laws.^{vi} Other documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent privilege is improperly invoked.^{ii,vii} In other cases, priests have even admonished some victims to remain silent about abuse and “‘sweep it under the floor and get of rid it’ because ‘too many people would be hurt’ if the victim were to disclose the abuse to others.”^{viii} With some variation between religious denominations, most practice penitential communications allegedly in accord with the Catholic Catechism, in which “the act of confession is an intrinsically private communion between God and the sinner, with the priest as mediator.”^{ix} But as the aforementioned cases demonstrate, religious institutions persistently try to stretch clergy-penitent privilege beyond its original scope and legislative intent, deeming “confidential” communications which are, in fact, not penitential, and which are routinely relayed to third parties, thus breaking the confessional seal.

THE SOLUTION

If enacted, the current version of SB 360 would clarify the definition of clergy-penitent privilege for the purpose of exemption under the Child Abuse and Neglect Reporting Act. By narrowing the definition, religious institutions will no longer be able to make the overbroad claims that they have up until the present time. Additionally, by removing the exception for confessions made by or between clergy members and religious employees, SB 360 will ensure that clergy members and employees cannot hide behind the auspices of clergy-penitent privilege when the real purpose is to conceal criminal conduct, avoid mandatory reporting laws, or discuss and plan a legal strategy.

FOR MORE INFORMATION

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REFERENCES

- ⁱ *Roman Catholic Archbishop of Los Angeles v. Superior Court of Los Angeles* (2005) 131 Cal.App.4th 417
- ⁱⁱ *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214.
- ⁱⁱⁱ Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World* (2004) 98 N.W.U L. Rev. 703, 708.
- ^{iv} 34 U.S.C.A. § 20341.
- ^v *Trammel v. U.S.* (1980) 445 U.S. 40.
- ^{vi} Gledhill, Judge questions whether confession privilege should extend to Jehovah's Witnesses (Nov. 10, 2015) Christian Today.
- ^{vii} Recent Clergy Privilege Case Serves as a Tale of Caution (Nov. 16, 2016) TeliosLaw.)
- ^{viii} Jenkins, *Unholy Secrets: The legal loophole that allows clergy to hide child sexual abuse* (Aug. 8, 2016) ThinkProgress.)
- ^{ix} Deagon, *Religious freedom, the confessional and the Royal Commission* (Sep. 27, 2017) Asia & The Pacific Policy Society.