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### Response of Judge Franklin B. Matheson

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## RESPONSE OF JUDGE FRANKLIN B. MATHESON

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Franklin B. Matheson, Judge

This is a very frightening experience. Normally I have you before me, now I'm before you. As I was preparing for this panel discussion today on confidentiality and privilege, I was reminded of the story in the recent issue of *Reader's Digest* of the individual penitent who worked for a lumber company. For years he had been pilfering supplies, enough to add on to his home, help one of his children build a home, and build a cabin in the mountains. Finally after all these years this was beginning to bother him, so he went to his priest and made a full confession of what he had been doing. The priest said, "Well, that's a very serious thing." He said, "We have got to think of an appropriate penance which would satisfy the ecclesiastical demands." So the priest thought for a minute and he said, "Have you ever done a retreat?" The individual likewise paused and then responded, "Well, no, but if you can get the plans, I can get the materials."

My assignment for this afternoon is to take about 20 minutes to lay the foundation or set the stage for the discussion of the problem, or at least outline to you what I understand to be the problem. I suppose I was asked to do this because I was in the legislature when the Child Abuse Reporting Act was passed, and when other types of protective services acts have been passed. I drafted and sponsored several of these intervention statutes and subsequently worked with them as an assistant attorney general. Also I have had quite an interest in and a concern for those things. As chairman of the State Child Abuse and Neglect Advisory Council, I guess I should know something about it.

I have passed out an outline to you and I am going to follow that for a few minutes. Having that in front of you might be helpful to you.

First of all, by way of statement of problem, I refer to the following recent newspaper clippings:

- Headline in the *Salt Lake Tribune*, May 8: “What Happens When Priests Hear Confessions on Child Abuse?”
- Headline in the *Deseret News*, May 19: “Is Clerical Privilege Shielding Molesters?”
- Headline in the *Deseret News*, August 15: “Ministers Oppose Law on Reporting Child Abuse Cases.”
- Headline in the *Ogden Standard Examiner*, September 21: “Minister Must Guard Secret Confession.”

I think those headlines illustrate the dimension of the problem we will discuss; that is, what are the responsibilities under law for a clergyman to report an instance of child abuse that comes to his attention, as opposed to the so-called privilege which protects that confidential communication?

I have set out for you, to begin with, the pertinent or the most significant portions of the Utah Child Abuse, Neglect and Reporting Act on the first page of the outline; let me point out the significant parts.

It begins, “Whenever any person, including but not limited to persons licensed under the medical practice act or the nurse practice act, has reason to believe that a child has been subjected to incest, molestation, sexual exploitation or sexual abuse, has been physically abused or neglected or observes a child being subjected to these conditions or circumstances which could reasonably result in sexual abuse, physical abuse or neglect, they shall immediately notify the nearest peace officer, law enforcement agency or office of the division.” Then the section goes on to indicate what would be done with these reports. An investigation is to be made by the Division of Family Services and a referral is to be made to the law enforcement office in the case of serious injury. That’s the basic statute adopted in 1978. It’s the law in the state of Utah. [See the introduction to this panel for a copy of the changes made by the 1986 General Session of the Forty-sixth Legislature of the state of Utah that are relevant to the panelist’s response.] The question and the problem is, is the clergyman excluded from that requirement to make the report. I suppose it might also be interesting to this group of social workers and psychologists as to whether you also have a privilege from this type of reporting.

The report is to be confidential; it is to preserve the anonymity of the person making the report (the bishop, priest, clergyman); it protects the person making the report from suit; it provides for the establishment of a statewide central register in which the names of both the abuser and the victim are to be retained, and it does specifically waive the physician/patient privilege. Then it prescribes a penalty for failure to report.

Now, is that reporting section of the Child Abuse Act in opposition to the privileged communication statute in our judicial code. That statute is set out for you on the second page of the outline and reads, "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases." There are several privilege relationships specified in that code. I cite only number three, regarding the clergyman or priest. "He cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." Therein we have the apparent conflict . . . the duty to report under the Child Abuse Act versus the privileged communication protection under our judicial code. I wish to make the point, however (and I will probably make it several times this afternoon because I think it's critical and extremely important), that the privileged communication statute is found in the judicial code as a rule of evidence. You will note very carefully that it says, "The priest cannot be examined as to any confession made to him in his professional character," referring to an examination in a court of law. So, in my opinion, this privileged communication statute, although it's referred to as a protection or a shield for the clergyman in relation to the duty to report, is really irrelevant to such duty. The duty to report is not part of the evidentiary rules of this state regarding court testimony; it's a substantive piece of legislation that the legislature has mandated regarding the reporting of child abuse. I am sure that will be discussed further as we go on through the discussion.

Now, just for your information, I have set out the respective positions. There was a related attorney general's opinion February 17, 1983, which reads:

Members of the clergy have a legal responsibility to report incidents or knowledge of such child abuse or neglect to the proper authorities, but they cannot be forced to testify in trial as to the contents of the confidential communication.

So it was the attorney general's opinion that, unequivocally, clergymen had the duty to report, although they could not be compelled to testify in court as to the information that was conveyed to them.

Now as opposed to that or in distinction from that is the opinion issued from the General Counsel of the Church which reads: "Ecclesiastical leaders coming within the scope of the priest-penitent privilege are *not* required to report under the Utah Act." That sets the stage, I think, and that will be the

difference to which we will address ourselves, I assume, most of the afternoon.

I have attached to the outline pages 5 and 6 of a recent LDS church pamphlet entitled *Child Abuse*. I'm sure most of you have seen this booklet and the pages that refer to child abuse reporting duty [included at the end of this address]. I have also referred to the LDS church *Handbook of Instructions* [Section 8,8.3], although that is not attached. Some of you may be familiar with that information as well. I'm tempted to go into some of that information because quite frankly to me the situation is still somewhat uncertain. As I read those pronouncements from the Church, I am still a little bit in doubt as to just what should be done by the clergymen with relation to a confidential communication of child abuse. Apparently the bottom line is that if he is in doubt the bishop is to contact his stake president, who is to contact the area presidency, who may then contact the General Counsel of the Church. I suppose that's the ultimate solution if there is a concern or doubt in the mind of the local LDS clergyman as to what he should do.

As to the societal issue involved, it is presumptuous for me to comment because that is your field and not mine, but I have weighed the various considerations regarding a policy of reporting or nonreporting.

The paragraph at the conclusion of this address outlines some proposals for legislative compromise and cooperation which have been proposed. Note that in the attorney general's opinion it is suggested that ultimately the only resolution to any ambiguity or conflict will have to come from the legislature. In my opinion, the existing legislation is clear and the decision now, I think, rests with the court.

Let me just mention something that I perhaps passed over too quickly, and I'm sure Mr. Poelman will want to speak to it. When I make the point that we are dealing with a statutory directive and that the privilege is a rule of evidence, I don't mean to ignore and overlook that there is a very real argument that, irrespective of the privilege statute, there is still a constitutional protection as to the exposure of confidential communications. This rests not on the privilege statute, but rests on the first amendment and the fifth amendment and even perhaps the fourteenth amendment to the Constitution which protects inviolate the practice of religion. Within that framework, the confidential communication might be protected. I am not aware of a case that has met that issue yet, but I assume there will be in the near future.

Going quickly to some related matters that might be of interest to you, Paragraph VI of the outline refers to the "Confidential Communications for Sexual Assault Act."

- VI. Affect of "Confidential Communications for Sexual Assault Act" (Section 78-3c-1 et seq.)
- A. A True Confidential Communication Statute—not a "Privilege" Statute.
  - B. Shifts "Privilege" from Confessor to Confidante.
  - C. Application to Unlicensed or Noncertified Counsellors.
  - D. Impossible Hiatus by reference to 78-3b.

Now I think most people are unaware that recently the legislature passed a specific confidentiality act. Section 78-3c-1 of the Utah code is specifically a confidentiality statute and it provides that sexual assault counselors are not obligated to divulge, either in court or otherwise, a confidential communication that was relayed to them by the victim of the assault. It's a very difficult statute, and in my opinion a very poorly worded statute, because after it gets through saying that, it doesn't establish any criteria as to what a sexual assault counselor is, nor does it provide any parameters to that privilege. As a matter of fact, the act transfers what is normally the confessor's privilege (not the confessee) to the prerogative of the counselor to determine when the information will be disclosed and when it will not. Finally, it ends up by saying in the last section of the act that this provision is still subject to the provisions of the Child Abuse Reporting Act. So we are still with the same dilemma as to whether or not the Abuse Reporting Act, since it is specifically referred to in the Sexual Assault Counselor's Act, preserves the duty of the sexual abuse counselor to report.

It may be of interest to you that both the legislature and the courts have been chipping away at the problem of requiring juveniles to testify in sexual assault matters and being required to confront the abuser in those cases. I have indicated to you several acts that have been passed just recently allowing hearsay statements of the child, which I think reflect the legislative concern for that problem. Utah law used to state that a child under a certain age was incompetent to testify. That restriction has been removed, both by the rules of evidence and by the legislature. The assumption now is that an individual of any age is a competent witness unless there is some other impediment to his or her testimony.

We now have a law that admits out-of-court statements by the child victim, and the Juvenile Court Act permits those kinds of statements if they are made to a person in a trust relationship. In other words, the report made by the four-year-old to his mother or someone else in a trust relationship is admissible, even though, of course, traditionally that would be hearsay-type evidence. Perhaps the greatest stride that has been made in protecting the child victim or witness is an act

which is referred to as the *res ipsa* statute. This statute provides that if you establish the abuse and that only one person was in the presence of the abused in a position to commit the abuse, then you can presume that that person was responsible for the abuse without the testimony of the victim or a witness. The burden then shifts upon that individual to establish his own innocence. That particular statute, to my knowledge, has not been tested by specific reference in court yet. However, the philosophy of this statute has been tested in court—in two cases, the Tanner and the Watts cases, that went to our Supreme Court. Although these cases did not refer to that particular section of the code, they did say that if you have a circumstance where it is obvious the child has been battered (the Battered Child Syndrome), by expert testimony to that effect, and you can establish the likelihood of an individual's committing that act, that even without direct testimony, without observation, without witness, without accusation, you have sufficient evidence to convict a person of child abuse or sexual assault.

Well, those are some inroads that are being made, and perhaps the problem of proving the abuse without the presence of the child and without the direct confrontation of the accuser is being solved.

There are also some new registry laws that you should be familiar with. We passed an act just recently that an agency can't place a child in an alternate care or substitute care, unless they first check the state child abuse registry to make sure that the proposed placement is not in the home of an individual whose name is in that registry.

We now have a missing-children registry statewide. We are also requiring registration of sex offenders. That requires that a convicted sex offender, if he transfers his residence, must register the new residence with the law enforcement people.

Then we have a new reporting statute which requires an individual to report if he or she suspects that a newborn is born with a drug addiction. That report must be made to the Division of Family Services. The act doesn't say what happens after the report, but supposedly that provides some type of prevention and intervention.

Finally, a new provision in our state provides for Ex Parte Protective Orders in the juvenile court. Similar to procedures under the Spouse Abuse Act, we can now in the juvenile court (it isn't allowed yet in the adult courts) remove the abuser or the child from the home. As most of you are aware, it is usually quite a trauma to the youngster to be removed from the home. He or she often feels responsible, and thus feels guilty. So we now have a provision in our law that by the use of an Ex Parte Protective Order, we can remove the alleged abuser and leave the children in the home, thus separating the abuser and the abused.

Well, that is briefly what I was told to do and I have kept within the twenty minutes. Thank you.

1. Editor's note: The complete outline is not included, but when Judge Matheson quotes an excerpt necessary to his thesis, that excerpt is included.

Report from the *Child Abuse* booklet distributed by the LDS church to all its ecclesiastical units (Summer 1985).

Before true repentance can occur, any serious transgression must be confessed to the bishop or other appropriate Church officer. (See Mosiah 26:29, D&C 58:43, D&C 59:12, 1 John 1:9.) Church officers have a duty to keep any information received in a member's confession strictly confidential. However, if the member indicates he has violated a civil or criminal law, try to persuade him to clear the matter with civil authorities as a condition of repentance and forgiveness.

Laws in most states in the United States and provinces in Canada require citizens to report suspected child abuse in order to protect children and help offenders, victims, and family members obtain needed assistance. Learn the reporting requirements for your area. LDS Social Services agencies can provide general information about local reporting requirements. (See note following for *information on referrals* to the Area Presidency.)

When any information regarding child abuse comes to you or another Church officer from other than the confidential confession of the offender (probably from a victim or a victim's parents), local law *may* require it be reported to civil authorities. If a disclosure intended to be confidential must be reported under local law, inform the person making the disclosure (in advance if possible) that confidentiality may not be protected because the law requires that you report certain matters to civil authorities.

Counsel Church members to comply with reporting laws; offer support and assistance in meeting reporting requirements. Try to keep a good relationship with the offender, the victim, and family members so you may provide continuing spiritual support. Any required reporting of child abuse should usually be done by the offender or by others having knowledge of the problem.

Reporting incidents of child abuse should be a protection to the child and perhaps to other potential victims. A person guilty of serious child abuse rarely changes his pattern of behavior without facing up to all consequences—criminal penalties, Church discipline, social ostracism, and others. Facing up to the consequences may need to include professional help in addition to spiritual counseling. Fines or imprisonment may not be involved if the offender (1) voluntarily reports the abuse to civil authorities, (2) agrees to temporary separation by leaving the home, if necessary, and (3) accepts a treatment plan from those trained to deal with child abuse problems.

Be guided by the spirit of your calling in these sensitive matters, as you strive to help protect children, reform offenders, and preserve family relationships.

### Exception to Legal Duty to Report

In the United States and some other countries, a Church officer's legal duty to report child abuse to public authorities may be superseded by the constitutional right to free exercise of religion. This right should protect the confidentiality of facts disclosed by a transgressor to a bishop or other designated Church officer in a confidential confession or in the course of Church court proceedings. (See *General Handbook of Instructions* [1983], section 8, p. 53.)

If this circumstance arises, the stake president or bishop (through his stake president) should consult with the Area Presidency if *both* of the following conditions exist:

1. The Church officer knows of a child abuse incident only from the confidential confession of a member who after careful counseling still refuses to report the incident or to allow it to be reported by others; and
2. Local law seems to require the Church officer to report the information to public authorities.

If necessary, the Area Presidency may seek legal advice from the office of the General Counsel at Church headquarters or from local counsel in countries outside the United States.

## V. Proposals for Legislative Compromise and Cooperation

### A. In Relation to Protection of Confidential Communication.

1. Restricting duty to report those circumstances where clear and present danger to child exists.
2. Requiring reporting of abuse but allowing concealment of identity of abuser.
3. Specifically excluding duty of clergyman to report.
4. Specifically mandating clergyman's duty to report.

### B. In Relation to Evidentiary Privilege

1. Defining and restricting privilege to "Disciplinary" and "Confessional" church proceedings.
2. Specifically waiving privilege in regards to priest-penitent communications regarding child abuse provided priest encourages penitent to report.
3. Specifically preserving priest-penitent privilege as a clarification of legislative intent.

*Frank B. Matheson is 2nd District Juvenile Court judge, state of Utah.*