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RESPONSE OF B. LLOYD POELMAN

B. Lloyd Poelman, JD

I share Judge Matheson's pleasure and consternation in appearing before you today. When I stand before a group of therapists, I always have the feeling I am being psychoanalyzed. I just want you to know that it's a two-way street because, as a lawyer, I have been looking you over and evaluating you as potential expert witnesses.

I don't come to you as an expert on child abuse. My closest current involvement is the perception of our nine children that they are abused when I ask one of them to do the dishes on a Friday night. I think the only instance from my own youth that I can vividly recall was once as a pre-teenager when I brought my school lunchbox home and left a little garter snake in it. As I laid the lunchbox on the kitchen table, my mother opened it. I later regretted that she bruised her arm in the course of administering the well-deserved punishment to my backside. I have long since forgiven her of that (I think before she ever forgave me), and I don't think the episode has adversely affected me—or at least I can't blame any of my present psychological condition on that event.

We are here to talk about a very serious concern. I would like to let you know the evolution of my recent thinking because I believe it has important bearing on what I would like you to see through my eyes today. Two years ago I would not have given serious consideration to child abuse matters. This issue wasn't part of my upbringing. As I read statistics about the prevalency of child abuse, I had trouble believing them. They didn't seem congruent with the milieu in which I was living. But as I started learning more of this issue, mostly through being a legal advisor for LDS Social Services and with the help of many organizations that are represented here today, my eyes were opened. I have evolved from a position of cautious suspicion to conviction in several areas.

First, I now realize the problem is much more prevalent than I had ever suspected, not just because reporting has increased, but because I believe the incidences of child abuse have significantly increased in recent years.

Second, the devastating impact on the victims of child abuse is far worse than I had suspected, sometimes even from what some may deem to be very minor or casual encounters.

Third, children usually are to be believed in these instances.

And fourth, it rarely, if ever, occurs (and I tend to suspect the "if ever") that one who is guilty of such abuse, especially in the sexual area, can ever truly reform without public disclosure and without professional assistance.

Having come to those conclusions myself, I found that I was constantly being asked, "Why doesn't the LDS church react differently than seems to be its posture?" I have participated in very close interaction with the leadership of the LDS church concerning the child abuse issue, and I believe the evolution of thought I just described for myself has, in fact, recently occurred rather uniformly among the General Authorities of the Church. One of the results has been development of a child abuse pamphlet entitled *Child Abuse Helps for Ecclesiastical Leaders*, which was distributed recently. Telling you that the final product is Draft Number 57 may help you understand that it was a very carefully considered document. The challenge we still face is bringing that information and that conversion of thought down to the level of local leaders, where it has the most important meaning and application.

The pamphlet is only a first step. A training procedure is also in process of development. Much more undoubtedly will be necessary, but I am convinced the LDS church is in the process of making an educational change that cannot happen with the snap of a finger. It takes some reasonable time, and I hope you will perceive yourselves as instruments of that change as well.

Now, let's move directly to the announced issue. I have great respect for Judge Matheson who, at the time the attorney general's opinion he referred to was issued, was employed by the Office of the Attorney General. One of the great challenges for lawyers is being able to disagree without being disagreeable. That is especially true with respect to a judge before whom one might still want to practice. I would like to point out the areas in which we concur and those in which we disagree, together with the reasons, from my perspective, for that disagreement.

If there is any conflict of purpose between child abuse reporting requirements and priest-penitent provisions of the law (and I am not

saying there is), it's not just an ecclesiastical difference; it is a social difference as well.

The purpose clause of the Reporting Child Abuse or Neglect Act says, "It is the purpose of this act to protect the best interests of children, offer protective services to prevent harm to the children, stabilize the home environment, preserve family life whenever possible, and encourage cooperation among the states in dealing with the problem of child abuse." I believe the posture I am going to describe for you is completely consistent with that.

Judge Matheson has pointed out to you the purpose clause relating to Utah's priest-penitent provision. It states, "There are particular relations in which it is the policy of the law to encourage confidence and to preserve inviolate; therefore, a person cannot be examined as a witness in the following cases . . ." and then it lists the traditional husband-and-wife exception; an attorney/client exception; a public officer, on account of his public duty; and physicians or surgeons with respect to patient care. But squeezed in as number three among those is a provision stating, "A clergyman or priest 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."

I don't appear before you today as an official spokesman for the LDS church or for LDS Social Services. But I can at least accurately reflect the kind of advice I give them when these matters come to me for opinion.

First, with respect to LDS Social Services personnel, there is absolutely no privilege exempting them from reporting child abuse. As I have said to some of you in this group in another setting, you may get a phone call from a bishop who says, "I have just had a conversation with so and so" (and he specifically identifies that person). Then he adds, "Nearly two years ago he had a problem with fondling a child; he feels bad about it and has voluntarily confessed it to me. I want him to get some counseling to help clear it up, but I would rather that you not report this." You have to say, "I'm sorry, Bishop, that is reportable. I already have enough information; I must report it."

The bishop replies, "Oh, but you don't understand. This man is a pillar of the community, as you know."

"Yes, I know that," you answer. "I have to report it."

"But you know that his wife is not a member of the Church."

"I know that, but we have to report it."

"Do you know that she is suicidal and this will probably have disastrous results and consequences?"

I must say, as legal advisor, there is no exemption from reporting that. The reporting requirement is unqualified.

In another instance someone may come to a Mormon bishop and say, "Bishop, I have reason to believe there is something wrong going on in that home," and then maybe he or she discloses some facts. Those facts are not privileged. That is not a confession.

A close case arises if a wife comes in and says, "Bishop, I want to tell you something in confidence. I believe there may be something inappropriate going on between my husband and his stepdaughter (my daughter)." The question is raised, "Is that a confession?" Strictly speaking, no. That communication would probably require the bishop to report the matter. The only instance where it is clear that no reporting is required by a bishop or similar ecclesiastical officer is when the bishop learns of child abuse in a confessional setting from an offender who is a member of that bishop's congregation.

What is the bishop instructed to do in that limited situation? The *Child Abuse Pamphlet* says, "Before true repentance can occur, any serious transgression must be confessed to the bishop or other appropriate church officer." Then after citing various scriptural examples, it states, "Church officers have a duty to keep any information received from 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" (p. 5). So, even when disclosure of child abuse occurs in that confessional setting to a bishop, ecclesiastical officers are instructed to encourage the offender to make that disclosure voluntarily or to authorize the bishop to do so. In most instances I believe the bishop would urge the repentant member to receive some professional assistance, perhaps through LDS Social Services or a similar organization, which would then assist the offender in making the required report.

In every instance of this type that I am aware of, the bishop has been successful in persuading the person to permit that reporting to be done. The consequence is that the offender then presents himself before the law in a more favorable light. He has made a confession; he has consented to get professional help; he is receiving religious support from the Church and professional help from Social Services or some other organization; and he is in a posture where he can be aided.

The only circumstance in which I believe the bishop would not be permitted to make a disclosure would be when, after all of this has been explained and attempted, the confessor says, "Bishop, I appreciate what you are saying and I came here hoping to relieve myself of guilt. But I can't report the matter at this stage, and I can't give

you permission to report it.” In that instance, it is my opinion that both under present law and under the United States Constitution it would be improper for the bishop to make a report of that incident. That doesn’t mean the bishop, with that knowledge, would be excused from taking action to protect a child that may be in danger. But he cannot be compelled to report or to testify.

Judge Matheson makes an important point that our priest–penitent privilege is an evidentiary privilege and is not substantive legislation. I really hesitate resorting to a discussion of legal history, but let me briefly explain how the law evolved to its present state.

We are talking today only about Utah law. Most other states in the union have passed similar legislation, though almost none of them are of identical wording or scope. The Utah Division of Family Services first proposed legislation requiring that child abuse be reported. The proposed law went through several revised drafts. Draft Number 6, dated November 23, 1977, contained as Section 10 a provision which was later deleted. This provision, under the heading “Abrogation of Privilege Communications,” stated, “Any privilege between husband and wife, or between any professional person, except a lawyer and client, including but not limited to physicians, ministers, social workers, counselors, hospitals, clinics, day care centers, and schools, and their clients, shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or neglect of the child or the cause thereof.”

Now, that provision was originally part of the proposed law, but it was deleted before the bill was passed. The only remnant left in the law as enacted is the present provision that the physician/patient relationship is not grounds for failure to report. Traditional rules for interpreting legislative history compel the conclusion that by eliminating this proposed exclusion the legislature reaffirmed the existing priest–penitent privilege. The opinion of our office that a priest–penitent privilege exists with respect to child abuse reporting was based on this legislative history.

There is also a question of the constitutionality of requiring a bishop, under the limited circumstances I defined for you, to make that disclosure. That has an interesting history as well. You are aware that one of the sources of our law is what we call the common law. It is the judge-made law that we inherited mostly from England and western Europe. The Catholic church’s position on confession is exceptionally strong. As you know, if a Catholic priest discloses anything he hears in the confessional, he is automatically excommunicated unless excused by the Pope himself. That’s how strongly the Catholics feel about confidentiality of confessions. Until the Reformation, while the Catholic

church was dominant in England, this priest-penitent privilege was part of the common law. After the Reformation, although it was not strictly a part of the common law, the priest-penitent privilege tended to be observed in tradition and administration of the law.

When the United States Constitution was adopted, including the Bill of Rights, the First Amendment declared that Congress shall make no law respecting the establishment of religion or abridging the free exercise thereof. The question then became, "Does this priest-penitent privilege have constitutional basis?" The first test of that question in the courts occurred in a New York case in the early 1800s when a Catholic priest refused to disclose information he had received in a confessional setting. The court held that his refusal was a free exercise of religion under the First Amendment of the Federal Constitution and he should not be compelled to testify. Four years later another New York court, considering similar refusal by a Protestant minister, reached an opposite conclusion and the minister was cited for contempt of court. Before the sentence could be implemented, the New York legislature met and adopted the first priest-penitent privilege statute in the United States. Thereafter, each of the other 49 states adopted similar legislation in one form or another.

As a result, the question of whether the priest-penitent privilege is a constitutional right has never reached the United States Supreme Court. There are cases where that court and lower courts have spoken favorably concerning the existence of that as a constitutionally protected privilege, but that issue itself has never been directly presented. However, in recent years as child abuse reporting statutes have been enacted by the various states, there has been a tendency to carve out of the priest-penitent privilege an exclusion for child abuse reporting, thereby raising the constitutional issue.

Last year in Florida there arose a case which I thought was going to be determinative and result in a U.S. Supreme Court pronouncement. In the case of *Mellish v. State of Florida*, a Nazarene minister in a child abuse case was called as a witness and claimed the privilege because the accused asserted it. Incidentally, this privilege does not belong to the priest; it belongs to the penitent. The priest cannot waive it unless the penitent does. The penitent did not waive the privilege in the *Mellish* case, and the court held the minister in contempt for failure to disclose what had been said in a confessional setting. The contempt situation was appealed in the state court system. The Archdiocese of the Catholic church filed a "Friend of the Court" brief in that matter raising exactly the constitutional issues I have described. But in January 1985 the Florida legislature amended the state's child

abuse reporting act and made a specific statutory exception for confessions to clergymen.

That explains why we believe that, in the limited circumstances I have defined, the Utah statute must be read as including a priest-penitent exception to child abuse reporting.

Let me conclude with a final comment on why I believe these two legislative policies are not as sharply in conflict as they may first appear. I believe that if a bishop were required to disclose a confidential confession, the result would be a substantial erosion of the doctrine and practice of confession in the Church. There is no question but that the requirement of confession as a condition of forgiveness is scriptural and fundamental. LDS doctrine clearly defines confession of serious transgression as the necessary route to laying claim upon the atonement of the Savior.

If the practice of confessional confidentiality is to be changed, then with 150 years of history of bishops giving assurance that anything said in that confessional setting is strictly confidential, the bishop, I believe, would come under duty to give a forewarning: "If you are going to confess something related to child abuse, you should know that anything you tell me I must immediately report to the nearest police officer so that you can be charged and prosecuted."

I believe such a step would undermine the whole practice of confession, not only in the area of child abuse but in many other areas. There would not only be a chilling effect, but a freezing effect. If that were to occur, I believe we would deny our ecclesiastical leaders many opportunities they now have to provide assistance. By allowing this reporting exception, the door is opened for bishops to counsel with offenders, to help them seek necessary aid in reforming their lives, and most importantly, to become aware of children who need protection and help.

Such is my personal conviction. I respect the fact that others may see it differently. I believe that constitutionally, legislatively, and also on social policy grounds, the priest-penitent exception to child abuse reporting should be maintained and preserved.

Nothing deserves our greater concern than the abuse of children. The Savior reserved his harshest judgment and condemnation for those who would inflict that evil. In preserving the priest-penitent privilege in its constitutional setting, the desire is not to limit any assistance to children but is in full harmony with the declared purposes of the reporting statute, which purposes include stabilizing the home environment and preserving family life whenever possible. This can best be done by maintaining inviolate the confidentiality of

all confessions, thereby permitting compliance with a fundamental doctrine of salvation.

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