

## Expanding Abuse Reporting Requirements Texas, South Carolina, Colorado and National Trends

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Attention Counselors in university, ministry and camping contexts

### ***Am I a mandatory reporter?***

***If an adult describes having been abused as a child, am I required to report? When?***

***How do expanding reporting requirements impact college and university counselors?***

***How do reporting requirements impact individuals providing spiritual guidance?***

Around the country, state legislatures are pursuing aggressive strategies to reduce the risk of child sexual abuse: strengthening criminal penalties, expanding civil statutes of limitations, and requiring deeper and more frequent criminal background checks. With the exception of new requirements for criminal background checks, these changes do not impact the day-to-day operation of churches, camps, colleges, and other organizations providing services to children.

Legislative changes to child abuse reporting statutes, on the other hand, can *significantly* impact daily operations of these organizations. Leadership must stay abreast of statutory changes in abuse reporting requirements, including:

- a broader scope of those listed as ‘mandatory reporters’;
- specific requirements concerning how a report must be made;
- explicit time limits within which a report must be made;
- narrowing privileges that limit the necessity of a report, particularly clergy privilege;
- broadening the types of behaviors to be reported; and
- heavier penalties for failure to report.

Failure to understand and properly execute these requirements can create serious consequences for child-serving organizations *and* individual employees or volunteers.

Reporting statutes often include criminal penalties when a mandatory reporter fails to timely or correctly report abuse or neglect. Generally these penalties are misdemeanor charges, although the Florida legislature recently upgraded the penalty to a felony (Protection of Vulnerable Persons Act of 2012).<sup>1</sup> Although every state has criminal penalties for ‘failure to report’, enforcement has dramatically increased *post-Penn State*.

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<sup>1</sup> Colleges and universities that “knowingly and willfully” fail to report suspected child abuse, abandonment or neglect—or prevent another person from doing so—now face fines of up to \$1 million for each incident. Individuals who fail to report abuse and neglect face felony prosecution and fines up to \$5,000.

*Adult* reports of sexual abuse—situations where an *adult* reveals sexual abuse or neglect as a *child*—comprise a significant modification in statutory reporting requirements. Imagine this scenario: ‘Adult One’ receives information from ‘Adult Two’ related to abuse or neglect that ‘Adult Two’ suffered as a child. In Texas, Colorado and South Carolina, this circumstance may give rise to a mandatory report, even though the victim is *not a minor* at the time of the report.

## **Requirement to Report Abuse or Neglect Related to Adult Disclosures of Past Childhood Abuse or Neglect**

### **Changes in the Law**

The most significant change in reporting requirements (seen in Texas, South Carolina and Colorado) requires a possible report if an adult learns that another adult was a victim of abuse or neglect as a child. Most adults serving in organizations providing services to children are familiar with reporting requirements related to abuse or neglect *of a child*. Reporting requirements related to *adult reports* of abuse or neglect (*occurring as a child*) creates new legal territory for many. In Texas, South Carolina and Colorado, a report is now required when *an adult* reports abuse or neglect *as a child*:

- when ‘disclosure of the abuse is necessary to protect another child’ (TX);
- if the alleged abuser holds a position of trust or authority related to children (CO); or
- ‘another child has been or may be abused’ (SC).

### **Texas**

Texas Family Code Section 261.101(b-1) provides: *A person must make a report to the authorities when a person has cause to believe that an adult was a victim of abuse or neglect as a child and the person believes that disclosure of the abuse is necessary to protect another child.*

Like most legislation designed to protect children, this code section is extremely broad. Two events seem to trigger a required report under this Texas code section:

- (1) *Adult One* comes to believe that *Adult Two* was a victim of abuse or neglect; **and**
- (2) *Adult One* believes that another child is at risk, and reporting is necessary to protect that child.

Though §261.101(b-1) creates the basis of a mandatory report, the construction of the new code is unclear concerning penalties associated with failure to report in this context.

### **Colorado**

In recent Colorado legislation, *Adult One* (in the above example) is required to report abuse communicated by *Adult Two*, but the statute contains some unusual draftsmanship.

Colorado Revised Statutes (C.R.S.) §19-3-304:

**(1) (a)** Except as otherwise provided by [other sections], **any person specified in subsection (2)** [list of mandatory reporters] **of this section who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect** or who has observed the child being subjected to circumstances or conditions that would reasonably result in abuse or neglect **shall immediately** upon receiving such information report or **cause a report to be made** of such fact to the county department, the local law enforcement agency, or through the child abuse reporting hotline system as set forth in section 26-5-111, C.R.S.

**(b) The reporting requirement described in paragraph (a) of this subsection (1) shall not apply if the person who is otherwise required to report does not:**

**(I) Learn of the suspected abuse or neglect until after the alleged victim of the suspected abuse or neglect is eighteen years of age or older; and**

**(II) Have reasonable cause to know or suspect that the perpetrator of the suspected abuse or neglect:**

**(A) Has subjected any other child currently under eighteen years of age to abuse or neglect** or to circumstances or conditions that would likely result in abuse or neglect; or

**(B) Is currently in a position of trust, as defined in section 18-3-401 (3.5), C.R.S., with regard to any child currently under eighteen years of age.**

Like Texas, two events trigger a required report in the Colorado statute:

(1) *Adult One* learns that *Adult Two* was a victim of abuse or neglect as a child; and  
(2) *Adult One* knows or reasonably suspects that another child is at risk of abuse/neglect, **or** the suspected perpetrator is currently in a position of trust related to children.

In Texas, *Adult One* must believe that another child is at risk. In Colorado, it is enough that the suspected abuser is in a position of trust related to children (i.e. coach, youth minister, scout leader).

This code section formed the basis for four arrests of church leaders at Vinelife Church in Longmont, Colorado. In this case, an adult woman who alleged she was victimized as a child by Vinelife's youth pastor returned to the church to report the circumstances of the alleged sexual abuse to Vinelife church leadership. Because her abuser was still the youth pastor, serving in a 'position of trust ... with regard to a child under eighteen years of age', Vinelife church leaders should have reported the allegation. Instead, they failed to report to criminal authorities, ostensibly believing they had no legal obligation to do so, as the report related to an adult woman, even though the abuse occurred when she was a minor. In October 2013, the youth pastor was charged with sexual abuse, and two pastors and two elders were charged with failure to report under C.R.S. §19-3-304(b). The youth pastor later plead 'no contest' to criminal charges related to sexual abuse of a minor.

Prior to media coverage and criminal prosecution of Coach Sandusky at Penn State, criminal prosecutions for 'failure to report' abuse or neglect were rare. Post Penn State, prosecutors seem willing (and even eager) to investigate and prosecute organizational leaders for failing to report suspicions of abuse and neglect. Given the Vinelife scenario sketched above, organizational leaders must become conversant with abuse and neglect reporting requirements, as well as enforcement provisions and penalties.

### **South Carolina**

In South Carolina, the reporting statute is unclear as to whether a report is required by *Adult One* of abuse or neglect communicated by *Adult Two*. Clarity is provided through an Attorney General's Opinion letter, which confirms this reporting requirement ([click here for June 30, 2014 South Carolina Attorney General's Opinion](#)).

South Carolina Code § 63-7-310: (A) Mandatory Reporters [list omitted] *must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20.*

*(B) If a person required to report pursuant to subsection (A) has received information in the person's professional capacity which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect.*

Applying this code section alone, it is unclear whether the South Carolina legislature intended that *Adult One* report abuse or neglect communicated by *Adult Two* occurring when *Adult Two* was a child. When there is uncertainty concerning the scope or intent of a piece of legislation, and no legislative debate or instruction provides guidance, the clearest instruction is provided by an Attorney General's Opinion. Each state has procedural rules for the request of an Attorney General's Opinion Letter, indicating who may request such an opinion and circumstances that may give rise to such a request.

In March of 2014, a senator from South Carolina requested clarification of South Carolina's reporting requirements from the South Carolina Attorney General. The Attorney General's response outlined a reporting obligation similar to that codified in Texas, but expressed in the negative:

As stated above, this Office believes a court will conclude the statutory intent of South Carolina Code § 63-7-310 of the Children's Code is to protect children. As such, this Office believes a court will conclude that a mandatory reporter would not have to report pursuant to South Carolina Code §63-7-3 10 when an adult discloses being abused in the past as a child, ... as long as there is no information that another child (who is, at the time of the disclosure, under the age of eighteen as defined in 63-3-20(3)) has been or may be abused or neglected as defined in S.C. Code § 63-7-20(4), ... .

Put differently, if *Adult One* is a mandatory reporter in South Carolina and learns from *Adult Two* that *Adult Two* was abused or neglected as a child, and another child (a child at the time of the disclosure) has been or may be abused or neglected, *Adult One* must report the abuse of *Adult Two*.

It should be noted that this Attorney General's Opinion Letter includes the disclaimers and caveats characteristic of any AG Opinion Letter: that an AG's opinion is not law, rather an attempt to provide analysis of South Carolina law pending further clarification from the South Carolina courts or legislature. This Opinion Letter, however, is consistent with Texas and Colorado law, and the expanding legislative trend.

### **Ramifications—Who is Impacted, and How**

It is clear that state legislatures have prioritized the health and welfare of children: children *currently* in harm's way, and children whose abuse may be prevented by the report by *Adult One*. The effect of this expanded reporting requirement, however, will impact organizations in Texas, Colorado and South Carolina not accustomed to reporting abuse.

Fact patterns giving rise to a report by *Adult One* related to abuse or neglect communicated by *Adult Two* (experienced while a child) are widespread and commonplace. When a child is abused by a trusted adult (teacher, youth minister, coach, pediatrician), subsequently reaches adulthood, and the abuser continues to hold a position of trust and authority related to children, a report is made in order to protect *other children* still exposed to the abuser. The underlying goal of this new reporting requirement, protection of children, is valid—even valiant—but the breadth of the requirement makes it difficult to determine circumstance where a report is *not* required.

### **Impact on Colleges and Universities**

Imagine this fact pattern: a nineteen-year-old college freshman (*Adult Two*) seeks counseling for an alcohol or pornography issue, and his counselor (*Adult One*) learns through the counseling process that the student was sexually abused as a child. Is the counselor a mandatory reporter? To trigger the reporting requirement, is the counselor required to *ask* whether there is another child presently at risk, or simply report if the student volunteers this information? Is the counselor required to *ask* whether the alleged abuser is presently in a position of trust and authority related to children? No current reporting requirement creates an affirmative duty to investigate, so these issues remain unanswered by the legislature at present.

Complicating the matter further, what if the college freshman referenced above (*Adult Two*) attends a Texas university but resides in a state other than Texas, Colorado or South Carolina?

## Spiritual Leaders, Counselors, Medical Professionals

Pastors, spiritual leaders, counselors, and medical professionals face similar questions. The purpose of abuse reporting requirements is to protect children, but will these changes create a 'chill' in actual instances of reports of abuse or neglect to counseling or medical professionals, or a barrier to individuals seeking help, if confidentiality is not assured?

### **The clash of compelling interests – protecting children v. care for victims**

Protecting children from abuse and neglect is a 'compelling state interest' in every state. As a result, governing officials have determined that the priority of protecting children justifies laws that may impact or impinge upon other rights previously enjoyed. A prime example is the expansion of requirements to report information that may have once been protected by clergy, counseling or attorney-client privileges.

The expansion of reporting code sections to require reports by *Adult One* of abuse or neglect experienced by *Adult Two* could seriously chill *Adult Two's* willingness to communicate the abuse, which might risk unwanted exposure or consequent investigation. As a result, it is possible that fewer adult victims will seek counseling, spiritual guidance, or medical help associated with past abuse if they believe their communication may not be kept confidential.

These two important interests are potentially at odds: expanding the scope of reporting requirements and creating an environment that encourages victims to get care and counseling. Texas, South Carolina and Colorado legislatures have acted in favor of protecting children and preventing future victims rather than serving existing abuse survivors desiring confidentiality.

### **Is there a penalty for Adult One's failure to report in Texas?**

Texas Family Code Section 261.109 contains the penalty provisions related to abuse reporting requirements in the state of Texas. Under Section 261.101(a), criminal penalties exist for failure to report, including criminal penalties for 'professionals' who fail to report suspected abuse or neglect, including teachers, nurses, day care employees and others under Section 261.101(b). The new law articulates no specific criminal penalties for failure to report adults abused as children, when another child is at risk, under Section 261.101(b-1).

Is this failure to articulate a specified penalty a 'grace period' or simple oversight?

Will Section 261.109 be interpreted in a manner to extend penalties for failure to report under Section 261.101(a) to Section 261.101(b-1)? As of this writing, the penalty for failure to report *adult disclosures*, if any, is unclear.

## Summary

Given the current flood of reports of sexual abuse, legislative change is appropriate. In an environment of increased risk and legislative change, it is critically important that leaders of child serving organizations clearly understand applicable reporting requirements and closely follow legislative change. For states beyond Texas, Colorado and South Carolina, *change is coming*.

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### **Love & Norris, Attorneys at Law**

Gregory Love and Kimberlee Norris have a nationwide sexual abuse litigation practice representing victims of sexual abuse throughout the country. In addition, Love & Norris provide consulting services to secular and ministry organizations providing services to children. Representative clients include the United States Olympic Committee, Awana International, Church of the Nazarene, the North Texas Conference of the United Methodist Church, Gladney Center for Adoption, and many church and para-church schools, camps and ministries.

### **MinistrySafe Institute**

MinistrySafe Institute was created by legal professionals who are sexual abuse experts. After decades of litigating cases and providing counsel related to sexual abuse issues, Gregory Love and Kimberlee Norris founded MinistrySafe Institute to equip ministry leaders with an understanding of the issues and how to best navigate through them.

Love and Norris are sexual abuse lawyers who have been providing guidance to ministry leaders since 1998, offering counsel, crisis response and seminary instruction. MinistrySafe Institute provides instruction that ministry leaders desperately need.