

Legal Letters by Andrew Agatston – The Legal List (8.28.12)

Addressing the Law’s “Intimidation” Factor

Maybe it happened in your state too after Penn State. The mandated reporting statute in Georgia was amended this year, and as of July 1, 2012, Georgia’s mandated reporting law increased legal responsibilities on existing mandated reporters, and also added new categories of mandated reporters, including finally placing certain reporting requirements on clergy.

As with all statutes regardless of where you live, the amendment to the Georgia mandated reporting statute is written in language that ranges from understandable and coherent to ambiguous and vague.

As such, many Georgia religious organizations are understandably and appropriately embracing the new amendment, while also undergoing training and seeking legal counsel in order to fully understand the impact of the new rules.

Yet, as with all mandated reporters, the new mandated reporters within these religious organizations are going to have to (1) understand what the law requires of them and (2) decide whether they are going to comply with it.

Look at your state’s mandated reporting statute and see whether it applies to clergy. If so, it will likely define what “clergy” means. In Georgia, clergy means, “ministers, priests, rabbis, imams, or similar functionaries, by whatever name called, of a bone fide religious organization.”

The rule in Georgia is that clergy must report suspicions of child abuse unless the report comes “solely within the context of confession or other similar communication required to be kept confidential under church doctrine or practice.”

If the information comes from any situation outside of “the context of a confession or other similar communication required to be kept confidential under church doctrine or practice,” then the clergy reports! And according to Georgia’s new rules, clergy must report even when they receive the report in the context of a confession if they also hear it from another source outside of the confession context.

Yet some of the debate, which will certainly continue until news of the next child to be harmed is publicized, is whether this amendment applies to all religious organizations.

Wrong debate! Are there any Georgia clergy who want to argue that they are not the clergy of a “bone fide religious organization”?

I do not represent any religious organizations, but I imagine their legal counsel are suggesting that they assume that the mandated reporting amendment applies to their “bona fide” religious organization.

And then, the suggestion should be, embrace it! This is an example of a legal rule that absolutely fits into the overall mission of the religious organization.

But we have concerns, the attorney for the religious organization might hear.

Again, this is perfectly understandable and appropriate. Everyone has concerns when it comes to the various rules of law -- even you Legal Eagles, even prosecutors (including those on this listserv) and definitely me.

Concerns need to be acknowledged, discussed with legal counsel, and properly addressed.

So in the specific clergy-mandated reporter example, my response to their concerns would be two-fold. First, I would try to plug their concerns into the mandated reporting statute. Does it fit? Is it anywhere to be found?

And secondly, I would have a discussion around the theme of “Fear not, the law is on your side! It is perfectly consistent with what you do in your work! You and the law in this case are perfectly aligned!”

First prong: Plug the concerns into the statute:

“We don’t know if the mandated reporting statute applies to us?”

Answer after search of mandated reporting statute: No.

“We have always handled these matters in house.”

Answer after search of mandated reporting statute: No.

“We are concerned we will lose parishioners.”

Answer after search of mandated reporting statute: No.

The mandated reporting statute’s exclusive rationale for existing is simple: protect children. Anything that doesn’t relate to the protection of children in an outside concern.

Applying this to Legal Eagles

We have to first revisit the phrase “outside concern” as it relates to legal rules.

Every single statute (i.e. law passed by your General Assembly or Legislature) related to children that you encounter in your professional role in some way is for the safety of children: criminal statutes for the protection of children; privilege statutes used by healthcare professionals; statutes regarding children in custody or delinquency proceedings.

Thus, “safety” is not an “outside concern,” but a relevant concern. As it relates to these statutes, you can add as relevant concerns the twin concerns of responsibility and rule following.

And importantly, the relevant concerns need to be directed to the subject matter of the statute, i.e., the population that the statutes are design to keep safe. In your case, the target population is children.

In the clergy example above, the concerns were outside concerns directed toward the interest of the religious organization and how complying with the mandated reporting statute would affect it not the child.

Last point before we discuss how to overcome the law's intimidation factor in your own experience. And I think it is important.

For the statutes related to children that you encounter in your professional role, who is primary person who relies on you, your MDT members, and your associated healthcare providers to be bogged down with "outside concerns"?

That would be the defendant at trial or the perpetrator prior to arrest.

The validity of outside concerns

There is nothing wrong with a witness being concerned about how her involvement in a case might affect her, her colleagues, or her organization.

There is nothing wrong with a witness being concerned that he will not measure up with other similar professionals in the legal arena, or that he feels ill-prepared to not just for trial but in his day-to-day activities. up. You can see that in this appeal, everyone was tagging this as a "refreshing recollection" case, when it wasn't.

Best regards.

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