STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CW 0316

[PARENTS OF MINOR CHILD]

VERSUS

GEORGE J. CHARLET, JR., DECEASED, CHARLET FUNERAL HOME, INC., [THE PRIEST], AND THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF BATON ROUGE[1]

Judgment rendered OCT 21 2013

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On Application for Writ of Certiorari to the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 580066
Honorable R. Michael Caldwell, Judge

* * * * * *

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KUHN, J CONCURS & ASSIGNS REASONS

* * * * * *

BEFORE: PARRO, KUHN, AND PETTIGREW, JJ.

[1] Because this matter deals with delicate subjects, and for the protection of the parties involved, the record was sealed both at the trial court and on appeal, except for this appeal opinion. To further protect the privacy of the parties involved, the names have been omitted herein, and the parties will be referred to as the parents of the minor child (plaintiffs), the minor child, and the priest (defendant).

PETTIGREW, J.

The defendants, the priest and the Roman Catholic Church of the Diocese of East Baton Rouge (the Church), seek supervisory review of a trial court's denial of their motion in limine, which had sought to prevent the plaintiffs in this matter from "mentioning, referencing, and/or introducing evidence at trial of any confessions that may or may not have taken place" between plaintiffs' minor child and the priest, while the priest was acting in his official capacity as a Diocesan priest and hearing confession from his parishioner (the minor child). We granted certiorari to address the significant and *res nova* issue underlying the determination of the propriety of allowing such evidence: whether the priest is a mandatory reporter under Louisiana's Children's Code provisions. In reviewing the issue, *vis a vis* the trial court's written judgment, for the following reasons, we find this matter compels us to exercise the authority vested in us, by La. C.C.P. art. 927B, to raise on our own motion the peremptory exception of no cause of action, and grant same, in effect, dismissing all of plaintiffs' claims against the priest and the Church.

FACTUAL BACKGROUND

On July 6, 2009, plaintiffs, the parents of a minor daughter, filed a petition for damages suffered by them and their daughter as a result of the alleged inappropriate and sexual acts perpetrated on the minor child. They named as defendants: the alleged perpetrator, then-deceased George J. Charlet, Jr. (a well-known, long-time parishioner and active member of the Church, who died on February 9, 2009, while a criminal investigation into those allegations was pending); Charlet Funeral Home, Inc. (of which Mr. Charlet was the alleged President); the priest, for allegedly being a mandatory reporter who failed to report the abuse allegations; and the Church, alleging vicarious liability for the alleged misconduct of the priest in failing to report the sexual abuse, as well as for the negligent training and supervision of the priest. (The plaintiffs later added a claim against the Church alleging additional liability for the acts of Mr. Charlet, under the theory that he, too, was an employee of the Church parish; however, these claims were later dismissed by summary judgment.)

The parents alleged that in 2000, their family moved from Baton Rouge to Clinton, in East Feliciana Parish, and began attending Our Lady of the Assumption Catholic Church, where they met and became friendly with a parishioner, Mr. Charlet, as well as the priest, the pastor of the church. According to the petition, from the young age of eight years, through her adolescent years, their minor daughter viewed Mr. Charlet as a second grandfather.

The petition alleged that during the summer of 2008, when the minor daughter was approximately twelve years old, there began an exchange of emails (1-2 per day) from Mr. Charlet to the minor child, involving "words of inspiration" and daily Bible verses. It is alleged that the emails soon increased in frequency (5-7 per day) and also began taking on a more personal tone, "while being laced with seductive nuances." Mr. Charlet allegedly told the minor child to keep the nature of their email correspondence private and to herself, because "no person, other than God, would understand their mutual feelings for one another." The petition contains various other paragraphs (none of which are directly relevant to the issue herein) detailing the continued wrongful acts of Mr. Charlet, which culminated with kissing and fondling the minor child.[2]

The petition alleged that the minor child became confused and scared over the evolving "relationship" with Mr. Charlet, and that on three separate occasions, she decided to seek spiritual guidance through the Sacrament of Reconciliation with the defendant priest. The petition alleges that on Tuesday, July 15, 2008, and Tuesday, July 29, 2008, prior to the 6:30 p.m. mass at the church, as well as on at least one other occasion after July 29, 2008, the minor child related to the priest during her confession

(the Sacrament of Reconciliation) that Mr. Charlet had inappropriately touched her, kissed her, and told her that "he wanted to make love to her." According to the petition, and consistent with the minor child's subsequent deposition testimony, the priest allegedly responded to her that she simply needed to handle the situation herself, because otherwise, "too many people would be hurt." The minor child testified that during one of those confessions, she told the priest what had happened and asked for advice on how to end it. According to her deposition testimony: "He just said, this is your problem. Sweep it under the floor and get rid of it."

According to the allegations in the petition and the deposition testimony in the record, subsequent "meetings" were had -- one between the priest and Mr. and Mrs. Charlet, and another between the Charlets and the minor child's parents (the plaintiffs) -- concerning the "obsessive number of emails and phone calls" between Mr. Charlet and the minor child, and the seeming inappropriate closeness between the two that had been observed by various parishioners. Again, according to the allegations in the petition, after these meetings, Mr. Charlet contacted the minor child to let her know about the meetings. He informed her that he told them their relationship was mutual and appropriate; that he did not know if they believed him, but he assured her he would take care of making sure everyone believed their relationship was appropriate and mutual, and that she just "needed to play the game."

However, shortly thereafter, the parents confronted their minor daughter about the emails and phone calls, at which time, she confessed to the true nature of the relationship with Mr. Charlet, including details of the inappropriate sexual contacts. The plaintiffs immediately contacted Mr. Charlet, ordering him to cease contact with their daughter. According to the petition, however, on a subsequent Sunday, the plaintiffs witnessed Mr. Charlet approach their daughter after church and hug her openly against her will. They then filed a formal complaint against Mr. Charlet with the East Feliciana Parish Sheriff's Department. According to the petition, the investigation was ongoing when, on February 9, 2009, Mr. Charlet died unexpectedly, after suffering a massive heart attack while in post-operative recovery, following knee-replacement surgery.

APPLICABLE LAW

In order to facilitate an understanding of the subsequent procedural history and a discussion and analysis of the issues presented, the law applicable to the parties' arguments and resolution of the issues is provided at this juncture.

Louisiana Children's Code article 603 provides definitions applicable throughout the Title VI of the Code. In relevant part, it provides, as follows (with emphasis added):

> As used in this Title:
>
> (1) "Abuse" means any one of the following acts which seriously endanger the physical, mental, or emotional health and safety of the child:
>
> ***
>
> (c) The involvement of the child in any sexual act with a parent or any other person, or the aiding or toleration by the parent or the caretaker of the child's sexual involvement with any other person or of the child's involvement in pornographic displays, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.
>
> ***
>
> (15) "**Mandatory reporter**" is any of the following individuals....:
>
> ***
>
> (c) "Member of the clergy" is **any priest**, rabbi, duly ordained clerical deacon or minister, Christian Science practitioner, or other similarly situated functionary of a religious organization, ***except that he is not required to report a confidential communication, as defined in Code of Evidence Article 511,*** from a person to a member of the clergy who, in the course of the discipline or practice of that church,

> denomination, or organization, is authorized or accustomed to hearing confidential communications, *and under the discipline or tenets of the church,* denomination, or organization *has a duty to keep such communications confidential.* In that instance, he shall encourage that person to report the allegations to the appropriate authorities in accordance with Article 610.

Louisiana Code of Evidence article 511, entitled communications to clergymen, which is referenced in the foregoing Children's Code definitions provision, provides:

> **A. Definitions.** As used in this Article:
>
> (1) A "**clergyman**" is a minister, **priest,** rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
>
> (2) A **communication is "confidential"** if it is *made privately and not intended for further disclosure* except to other persons present in furtherance of the purpose of the communication.
>
> **B. General rule of privilege.** *A **person** has a privilege* to *refuse to disclose and to prevent another person from disclosing a confidential communication **by the person to a clergyman*** in his professional character as spiritual adviser.
>
> **C. Who may claim the privilege.** The ***privilege may be claimed by the person*** or by his legal representative. The clergyman is presumed to have authority to claim the privilege on behalf of the person or deceased person.

Louisiana Children's Code article 609, addressees mandatory, as well as permitted, reporting and provides, in pertinent part (with emphasis added):

> A. With respect to mandatory reporters:
>
> (1) ***Notwithstanding any claim of privileged communication, any mandatory reporter*** who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect or that abuse or neglect was a contributing factor in a child's death *shall report* in accordance with Article 610.
>
> (2) *Violation* of the duties imposed upon a mandatory reporter *subjects the offender to criminal prosecution* authorized by R.S. 14:403(A)(1).

Louisiana Revised Statutes 14:403, referred to in the Children's Code as the penalty provision for violations of the mandatory reporter laws provides, in pertinent part (with emphasis added):

> 403. Abuse of children; reports; waiver of privilege
>
> A. (1)(a) *Any person* who, under *Children's Code Article 609(A), is required to report the abuse* or neglect or sexual abuse of a child and knowingly and willfully fails to so report shall be guilty of a misdemeanor and upon conviction may be fined not more than five hundred dollars or imprisoned for not more than six months, or both.
>
> ***
>
> B. In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, *evidence may not be excluded on any ground of privilege,* ***except in the case of communications between*** an attorney and his client or between ***a priest***, rabbi, duly ordained minister or Christian Science practitioner ***and his communicant.***

SPECIFIC FACTS, ALLEGATIONS, AND PROCEDURAL HISTORY RE: THE PRIEST AND THE CHURCH

Specifically, as to the priest, the petition alleges that he was negligent in advising the minor child during her confessions on three separate occasions that she needed to handle the abusive relationship with Mr. Charlet by herself because too many people would be hurt if they found out. The petition seeks damages for this alleged negligent advising. The petition further specifically alleged that the priest is a "mandatory reporter" pursuant to La. Children's Code art. 603(15)(c), with a resulting mandatory legal duty, pursuant to La. Children's Code art. 609, to report the abuse to the proper local authorities and to the minor's parents. Thus, the plaintiffs allege the priest is also liable to them for his failure to immediately report the abuse, and that the Church is liable for the negligence of the priest as its employee, as well as its own alleged negligence in failing to train and supervise him as a mandatory reporter of child abuse.

Motion In Limine At Issue Herein

In February 2013, the priest and the Church filed a motion in limine, seeking to exclude at trial *all evidence*, including testimony by the minor child herself, about the confessions. The denial of that motion is the subject of this supervisory review and grant of certiorari. However, the defendants had also filed a motion for summary judgment, which was heard and decided prior to the ruling on the motion in limine. Although no review has been sought of the denial of the motion for summary judgment, the issues raised and the defendants' arguments in support of that motion are similar to, and often

overlap those advanced in support of the motion in limine. Also, they are pertinent to a full understanding of the issue before us on the propriety of the denial of the motion in limine. Therefore, to that extent, both motions will be discussed.

Summary Judgment

First, defendants argued that any and all damages suffered by the minor child were at the hands of and due to acts of no one other than Mr. Charlet, not the priest. Moreover, they contended that the priest attained knowledge of these incidents of abuse through the Sacrament of Reconciliation, pursuant to which that communication was cloaked with a statutory confidentiality, as well as protected against disclosure by the Catholic Canon Law. They maintained that according to La. Children's Code art. 603(15)(c), a priest is classified as a mandatory reporter when the information is received while he is not performing his vocational ministry, but the statute specifically excludes the reporting of "confidential communications," as defined by Article 511 of the La. Code of Evidence. That codal article provides that a communication is confidential when relayed to a clergyman when it is made in private and not intended for further disclosure. See La. C.E. art. 511(A)(2). They further argued that the penal statute for failing to report, La. R.S. 14:403(B), also supports their claim of privilege, by providing:

> In any proceeding concerning the abuse or neglect or sexual abuse of a child, ... evidence may not be excluded on any ground of privilege, *except in the case of communications between* an attorney and his client or *between a priest ... and his communicant.*

Defendants also argued that the priest is bound by the mandates of the Roman Catholic Church Law -- known as the Code of Canon Law -- which also preclude him from divulging information acquired through the Sacrament of Reconciliation. They attached to their motion the affidavit of Fr. Paul Counce, Judicial Vicar and canon lawyer for the Diocese, which explained in detail and cited the law of the Catholic Church, and the obligation of confidentiality that a priest has in relation to anything heard in confessions/reconciliations, which is cloaked by the "Seal of Confession." The affidavit attests that the "Seal" is absolute. Moreover, a violation thereof results in the "*in stanter*" excommunication of the priest -- the most severe penalty known to the Church.

The defendants maintained that it is undisputed that the only communications had between the minor child and the priest concerning the sexual acts committed by Mr. Charlet occurred during the Sacrament of Reconciliation; therefore, to compel the priest to disclose such communications under threat of statutory penalties, whether civil or criminal, would be to place his duty to his faith and his duty to abide by statutory authority into direct conflict. They maintained that to compel the priest to disclose such communications would entangle the State in matters of church doctrine, implicating the constitutional right of the free exercise of religion, protected by the First Amendment.[3] They claimed that the Louisiana Legislature recognized as much by enacting a statutory scheme that exempts such communications from the mandatory reporting provisions in the Children's Code.

Additionally, the defendants asserted that the Diocese cannot be held liable, because the church itself has no duty to report, *even if* the plaintiffs' misaligned claims that the priest is a mandatory reporter were to be upheld.

Finally, the defendants asserted that there is no private right of action against a mandatory reporter for the failure to report; the statutory remedy being limited to criminal prosecution pursuant to La. R.S. 14:403. Although there is no Louisiana jurisprudence, defendants cite several cases from other jurisdictions with similar mandatory reporting statutes that have held that there is no private cause of action for a violation of such a statute -- the remedy therefor being limited to criminal prosecution by the state. The underlying reasoning for such a finding in those cases is that the duty is owed to the general public -- for the protection of its minor children -- and not to any one person in particular.

Plaintiffs opposed the motion for summary judgment on several fronts; only those pertinent to the motion in limine are presented here. They argued -- without admitting --

that ***even if*** the priest were statutorily exempt from the definition and obligations of a mandatory reporter, the only thing excluded would be the knowledge acquired by the priest during the minor child's confession. They maintained the evidence derived from Ms. Charlet's deposition reveals that separate and apart from any information received directly from the minor child during her confessions, the priest himself had independently observed and discussed his concerns about the interaction between Mr. Charlet and the minor child, and that he expressed those concerns with them. During that meeting, according to Ms. Charlet's deposition, the priest advised the Charlets to speak with the minor child's mother and he advised Mr. Charlet to end his friendship with the minor child. Thus, to the extent that the priest independently observed and voiced concerns about seemingly inappropriate relations between Mr. Charlet and the minor child, plaintiffs argued that he indeed *did* have the statutory duty as a mandatory reporter, since this information was acquired outside the confidential communication, and is not cloaked with the privilege of a confidential communication. Thus, plaintiffs maintained, a genuine issue of material fact exists as to whether, to this extent, the priest was a mandatory reporter under La. Children's Code arts. 603 and 609, such that summary judgment is precluded.

Plaintiffs additionally maintained that any privilege attaching to the confessional communications had been waived by the minor child, the "holder" of the privilege, by and through her consent and disclosure of the communications. They also submitted an affidavit executed by them and the minor child, expressly "waiving" her privilege regarding her confession.

Finally, plaintiffs disputed the defendants' claim that reporting the information was against Catholic Canon Law, and even argued that pursuant to Catholic Canon Law, the priest had a duty to report the abuse, and the Church is vicariously liable for the priest's breach of that duty. In support of this position, plaintiffs submitted into evidence relevant portions of the Code of Ethics and Behavior for Adults who Minister with Minors in the Diocese of Baton Rouge ("Diocesan Code of Ethics") and guidelines regarding sexual abuse of children. However, as will be seen below, our ultimate issue obviates discussion of this argument, and no further explanation of plaintiffs' argument is necessary.

In denying the motion for summary judgment, as to the priest's duty to report, the trial court expressly found genuine issues of material fact as to what the priest knew, when he knew it, when he got that information, if that information was acquired somehow other than during the confession, and ultimately, what duty the priest may have had at that point. The trial court noted some of the factual issues indicated that there "may have been some sort of duty on the part of the priest for what he observed and upon which he commented outside of the confessional and outside of what [the minor child] may have told him in the confessional." However, the trial court also added:

> So I have made my position perfectly clear that while the law may give the plaintiffs the right to inquire as to what went on in that confessional, I'm not going to hold [the priest] to any standard of having to say what went on and to violate his vows to the Church. But I believe there are certain factual issues of things that he observed outside the confessional which could conceivably create a duty on his part to have taken more action than he took.

Thus, while the trial court *denied* the motion for summary judgment on the failure to report issue, it is clear that the ruling encompassed a finding that the confession itself was confidential and protected from disclosure.

Denial of Motion in Limine

In denying the defendants' motion in limine, thereby allowing the plaintiffs to present evidence of the confession, the trial court noted the apparent inconsistency in the Children's Code articles: one provision stating that clergy is excepted from being a mandatory reporter for anything that is a confidential communication (Art. 603(15)(c)), and the other mandating reporting "notwithstanding any claim of privileged communication" (Art. 609). However, the court then noted that the privilege, granted by Code of Evidence Art. 511, clearly belongs to the communicant, such that it can be waived by the communicant. Thus, the trial court found the testimony of the minor child regarding the confessions was relevant and, certainly, as the holder of the privilege, she was entitled to waive it and testify. When pressed by the defendants' counsel as to whether that meant that the trial court was holding that the priest also had a duty to report, the trial court stated, "Yes, at this point, there may be some duty based on [Art.]

609." The trial court also noted that its earlier ruling also permitted questioning of the priest concerning any other information acquired by him about the abuse outside of the confessional. The trial court, although denying the motion, also commented that "I certainly recognize the conundrum with which [the priest] is presented, and I know his solution to that is going to be that he is not going to say anything about any confession." The motion in limine was denied by judgment dated February 22, 2013.

DISCUSSION/ANALYSIS

IS A PRIEST A MANDATORY REPORTER PURSUANT TO LOUISIANA'S CHILDREN'S CODE?

The parties maintain and argue that the pivotal issue underlying the dispute of whether the motion in limine was properly denied, allowing evidence to be submitted concerning the occurrence and/or contents of a confession between the minor daughter and the priest is whether a Catholic priest -- or any member of the clergy -- is exempt from Louisiana Children's Code art. 609's mandatory child abuse reporting requirements, pursuant to La. Child. Code art. 603(15)(c), when the facts allegedly giving rise to the duty to report were learned during the Sacrament of Reconciliation.

Defendants maintain that under the facts of this case, the priest is exempt from the mandatory reporter requirements. Thus, they assert that the priest is shielded from having to testify as to any facts learned during that confession. Moreover, they maintain that since the priest has no duty to report, there can be no breach of said duty, rendering *any and all* testimony or evidence regarding the Sacrament of Reconciliation and/or the contents revealed therein irrelevant to the purported cause of action by plaintiffs against the priest and the Church for the breach of said duty. For the following reasons, we agree, and find the trial court erred.

Rules of Statutory Construction/Interpretation

Very recently, the Louisiana Supreme Court reiterated the rules that apply when determining the true meaning of a statute:

> The fundamental question in all cases of statutory interpretation is legislative intent and the ascertainment of the reason or reasons that prompted the legislature to enact the law. *In re: Succession of Boyter*, 99-0761, p. 9 (La. 1/7/00), 756 So.2d 1122, 1128. The rules of statutory

Taken from
A Practical Guide to Rabbinic Counseling by Levitz & Twerski

In the past, members of the clergy did not consider themselves to be at risk for malpractice suits that were generally thought to be limited to professionals, such as physicians. However, in 1980, the case of *Nally v. Grace Community Church*[7] radically changed the legal status of the clergy. In light of that and other more recent cases such as *Lightman v. Flaum and Weinberger*,[8] it has become essential for rabbis to understand, consider, and plan for this particular risk when engaging in counseling.

For a negligence lawsuit against a rabbi to succeed, it must include the following components: First, there must be a duty on the part of the defendant (the rabbi) toward the plaintiff (the person counseled). In other words, by the nature of their relationship, there must be a finding that the rabbi has a certain responsibility toward the plaintiff. Second, there must be a breach of that duty. This means that either the rabbi failed to fulfill an obligation or did something he should not have done. Third, there must be a proximate (direct) connection between the action (or omission) of the rabbi and the harm that was caused. Finally, there must be a quantifiable amount the plaintiff seeks to be paid in compensation for his or her damages.

In the *Nally* case, the parents of a congregant sued four Protestant ministers and the congregation after their son, who had been counseled by the pastors, committed suicide. The son had been hospitalized for a suicide attempt during the counseling process. One of the pastors recommended that Mr. Nally seek psychological and medical help and that he be institutionalized, however, the parents rejected these recommendations. Mr. Nally continued to have further counseling sessions with a pastor, during which he discussed committing suicide. Subsequent to a family argument, he carried it out. His parents then sued the pastor, claiming clergy malpractice had been responsible for the wrongful death of their son. Part of their claim was

that there was negligence in the pastor's training and outrageous conduct on his part.

The California Supreme Court ruled that the burden of proof was on the parents to show that the pastor had a duty to prevent suicide, because the pastor was a non-therapist counselor and it would have been contrary to public policy to create such a duty. This was especially true since the California legislature had specifically excluded clergy from the licensing requirements that were imposed on professional counselors. The court added that secular courts did not have the authority or competence to determine the practice standards of religious counselors. The court also wanted to avoid imposing a duty, since it would have implicated the government in the many theological approaches of religions and sects. Such an involvement would also have involved constitutional issues, such as the government's control of religion.

In 2001, the highest court in New York issued a ruling in the case of *Lightman v. Flaum and Weinberger,* which addressed several other liability/counseling/religious issues. Mrs. Lightman, who was in the process of obtaining a divorce, sued two rabbis for breach of confidentiality because they had issued separate affirmations about their independent encounters with her. In those affirmations, they said that she had told them she no longer observed ritual purification (*mikveh*). Rabbi Flaum's affirmation asserted that Mrs. Lightman told him that she was seeing a man in a social setting and admitted that, "I was doing the wrong things." She also brought a defamation claim against Rabbi Weinberger, whose affirmation contained a statement that she was no longer inclined, "to adhere to Jewish law despite the fact that she...was an Orthodox Jew and her children... were being raised Orthodox as well ... and that she engaged in bizarre behavior."

The rabbis believed that they had a religious duty to dis-

close these statements in order to prevent the husband from violating Jewish law by engaging in prohibited sexual relations with his wife. Furthermore, they believed that their disclosures were relevant to the matrimonial proceeding because they were relevant to the best interests of the children.

The wife claimed in her lawsuit that her communications with the rabbis were confidential, that the rabbis violated the New York clergy-penitent privilege law,[9] and that they had intentionally inflicted severe emotional distress upon her.

These cases raise the issue of the relationship between religious and secular law. Rabbinic counselors need to consider the following questions when they engage in counseling relationships:

- What secular laws apply to rabbinic practice?
- What happens if secular law contradicts Jewish law?
- What are the rules of confidentiality under secular and Jewish law?
- Is the rabbi who provides counseling serving as a rabbi or as a counselor?
- In a case such as *Lightman*, to whom does the rabbi have a duty, the person he is counseling, the children, the father, Jewish law, state law, to all or none of the above?
- What constitutes clergy malpractice under secular and religious law?
- In a litigious climate, what type of risk management should rabbis consider?
- Can a congregation be liable for the actions of its rabbi?

First, it is important to understand the basis for clergy liability. Rabbinic liability may arise from sources in both Jewish and secular law. By secular law, we mean American civil law, which is not necessarily uniform and may vary by jurisdiction.

guidance need not be a member of the rabbi's congregation and, in fact, need not be Jewish.

For the clergy privilege to apply, it must have religious content and must be received by the clergyman in his religious capacity.[28] In one well-known murder case,[29] a husband, who had stabbed his pregnant wife, went to speak with an Orthodox rabbi from New York. In court, the husband claimed that privilege should apply since he had consulted the rabbi for spiritual advice. The rabbi, on the other hand, testified that he had been contacted in a secular capacity, in order to help the man find an attorney and use his influence to negotiate a settlement. The court ruled that although New York recognizes the clergy-penitent privilege,[30] not every confession made to a clergyman is privileged, especially if it was not made for the purpose of religious counsel.[31]

The standard for breaching confidences is based on several factors:[32]

- There must be an intention to prevent harm.
- The person must be motivated by an urge to help and not by animosity.
- The least damaging form of revelation should be used.
- An instruction must be given not to repeat the information.
- The information should be limited to the minimum amount necessary to accomplish the goal. Broyde et al. also discuss exceptions to the mandated disclosure rules, such as when the rabbi may suffer harm as a result of his disclosure.[33]

In the *Lightman* case discussed above, the highest court in New York ruled in favor of the rabbis who made disclosures of confidences. The court ruled that although New York granted

a privilege to the rabbis, it did not provide for any penalties if the rabbis breached a confidence. The court said, "In this appeal, we must decide whether CPLR 4505 imposes a fiduciary duty of confidentiality upon members of the clergy that subjects them to civil liability for the disclosure of confidential communications. We hold that it does not." The court said that a violation of the privilege would not subject the clergymen to a legal action. The court also indicated that it was reluctant to determine whether the rabbis' disclosure followed religious law, since such involvement had "troubling constitutional implications."

In order to protect and encourage the vital service of rabbinic counseling, rabbis need to feel safe and secure in their roles. In order to limit rabbis' exposure to liability, the following recommendations should be seriously considered:

- Skills necessary for the practice of religious counseling should become a component of rabbinic training. These skills would supplement the knowledge that rabbis already receive in Jewish law and philosophy.
- Rabbis should be trained to identify problem areas which may be beyond the scope of ordinary spiritual counseling, and which may require a referral to a mental health specialist. This training is especially important in the identification of potential dangers.
- Rabbis, synagogues, and religious organizations should develop protocols that deal with suicide risk, divorce, child abuse, minors, and other counseling situations.
- Rabbis and their employers should obtain liability insurance.
- Rabbis should be careful about the complexities inherent in dual relationships with those whom they counsel. When issues concerning potential conflicts of values or

Confidentiality and Rabbinic Counseling
- An Overview of Halakhic and Legal Issues

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I. The Current Secular Legal Landscape

II. The Halakhic Background

A. Repeating Harmful Information and Truth-telling

B. Jewish Law and the Obligation to Prevent Damage to Others

C. Professional Confidences and Halakha

This memorandum represents a joint effort by the Institute for Public Affairs of the Orthodox Union and the Beth Din of America to highlight some of the issues relating to communications which take place between a Rabbi and another party in the context of a counseling session. As we will illustrate, there are extensive halakhic rules as well as civil law regulations balancing the privileged and confidential nature of such communications with the requirement incumbent upon every Jew to take all necessary measures to prevent others from suffering harm. This memorandum also discusses factors to take into consideration from a halakhic perspective in the event that the secular law requirements conflict with a Rabbi's legitimate understanding of his halakhic obligations. It is our hope that this joint effort will serve to educate Rabbis about the requirements of the secular law as well as help clarify the various halakhic issues concerning this matter.

I. The Current Secular Legal Landscape*

The "clergyman-penitent privilege" was first introduced in the United States in the State of New York in the early 1800s. Since that time, it has been codified in New York as well as all fifty states and the District of Columbia in various forms which have, in turn, been updated and revised over the years.[1] The most notable revision was the expansion of this privilege from its original application to Catholic priests and their confessors to the clerics of other religions and theirs.[2] Perhaps due to the fact that these statutes grew from the Catholic model, the presumption underlying them is that a clergyman will be directed by his religion not to disclose any information

confided in him by a penitent. While, as outlined in the halakhic discussion below, this default position coincides with that of halakha, it does not account for the situations in which halakha calls upon a Rabbi to disclose confided information.

In assessing the various clergy-penitent privilege statutes, there are three basic questions relevant to the practice of a Rabbi:[3]

(1) Who holds the privilege?
(2) What communications are covered by the privilege?
(3) How is the privilege waived?

(1) The holder of a privilege has the power to invoke it or waive it. With regard to the famous attorney-client privilege, for example, it is the client that holds the privilege and thus, it is only the client who can permit the attorney to divulge information revealed to him in their confidential conversations. Among the fifty states, statutes may be found to resort to one of three models as to who holds the clergy-penitent privilege. In the majority of states, including New York, the privilege is held by the "penitent." [4] In some states, such as Illinois, it is the clergyman who holds the privilege and is thus empowered to waive it.[5] Finally, in some states, such as New Jersey, the privilege is held by both the clergyman and the penitent and both must waive it for disclosure to be permitted.[6]

(2) Although states vary with regard to who holds and may waive the privilege, there is general consensus with regard to what type of communication falls within the scope of the privilege. Not surprisingly, not everything said by a person to a Rabbi is protected by this privilege; rather, the communications must be made to the clergyman, in the words of New York's statute, "in his professional character as spiritual adviser." Thus, New York's highest court ruled over a decade ago, that a Rabbi had not breached the confidentiality statute in revealing an accused murderer's communications to him when the only purposes for which the accused contacted the Rabbi were for his help in finding him a lawyer and negotiating with the prosecutor's office. [7] This is not to say, however, that it is only matters that are "religious" which are privileged. Secular matters that arise in the context of a conversation with a Rabbi in which the Rabbi has been approached to provide spiritual guidance and counseling will be included under the privilege's umbrella. In some states, it has been held that the privilege only bars the clergyman from disclosing communications from the penitent, but that the clergyman may relate his "observations."

(3) Like other privileges, the clergy-penitent privilege is statutorily constructed to prevent a clergyman from being compelled to testify in a legal proceeding about the matters confided in him by the penitent. If the privilege is found not to have "attached" in the first place, or is explicitly waived, the Rabbi may then disclose the

confidential communication. As mentioned above, the privilege will not arise when the communication was not made to the Rabbi in the context of his professional capacity for the purpose of spiritual guidance. Also, like other privileges, this privilege will not attach when the circumstances of the communication are not entirely confidential in the first place; for example, if a third person who is not a member of the clergy is in the room. [8] Under current law, in states such as New York where the penitent holds a properly created privilege, that person must explicitly waive it to permit the Rabbi to disclose the confidential communication. In states such as Illinois, where the clergyman holds the privilege, it falls to the clergyman to waive it. In states where both hold it, generally, both must waive. It is, however, important to note the newly amended provision of New Jersey's law which may be adopted up by other states in the future. As mentioned above, New Jersey bestows the privilege upon both the clergyman and the penitent and thus, in general, both must waive it. The law now provides that when "the privileged communication pertains to a future criminal act...the cleric alone may, but is not required to, waive the privilege."

Two points are important to note in concluding this brief discussion. First, rabbis may be aware that the federal and state constitutions protect the "free exercise of religion." Thus, one might be led to assume that such a constitutional protection will protect the Rabbi in a case where he discloses otherwise confidential information when he does so pursuant to a religious imperative. While one would hope this position would be clearly and widely recognized, it is not as of yet. [9] Moreover, there are precedents in American law which could very well suggest that a secular judge might not recognize a free exercise exception to these statutes. [10] This, as well as the entire foregoing outline, leads to the second point: rabbis would be well advised to consult with their personal attorneys [11] in dealing with any situation in which the issues of confidentiality and privilege arise.

II. The Halakhic Background

A. Repeating Harmful Information and Truth-telling

Rabbis, like all Jews, are prohibited from speaking derogatorily about people without just cause, even if the derogatory information is true, and thus harmful information given over in confidence to a Rabbi may not be repeated to anybody at anytime absent proper cause. In this sense, Jewish law is much stricter than this country's secular law, which imposes virtually no restrictions on repeating derogatory information when the information is true, or on repeating defamatory statements in private "dinner conversation" type situations.

Three distinctly different things are forbidden to repeat: making unflattering, but true, remarks about a person for no reason; recounting to a person gossip heard about him; and knowingly communicating false, negative statements about another.[12] In addition, it is forbidden as a general proposition to reveal information which is

disclosed in confidence.[13] Rabbis, for whom giving advice is a central part of their professional life, must know when it is permissible or prohibited or even mandatory to repeat negative information to another. The details of when this type of conduct is prohibited and when it is mandated have been addressed numerous times and are beyond the scope of this memorandum. However, as a general proposition, it is prohibited to repeat truthful but harmful information about another unless a multi-part test is satisfied. The chief components of such test are:

1) First and foremost, the information must be "*Le'Toelet*"- for the purpose of preventing a real harm to another person (see *infra* for further elaboration);
2) The person must not exaggerate the truth;
3) The person must be motivated by a desire to help another, and not by personal animosity;
4) The least damaging means must be employed when revealing the information (indeed, if the information can be conveyed without speaking evil of the other person, it should be conveyed in such manner);
5) The revealer of the information must instruct the recipient not to repeat this information to others;
6) The person must only recount information that truly needs to be repeated.[14]

B. Jewish Law and the Obligation to Prevent Damage to Others

Halakha requires one to inform a Jew of harm that might befall him and which could be avoided; this is based on the verse "Do not stand by while your brother's blood is being shed." [15] As has been noted by many, [16] this obligation applies not only to saving lives or preventing physical harm, but also to preventing improper monetary losses. Thus, in the absence of any other halakhically significant factor, a person who learned that another was planning to cause either a monetary loss through impropriety or a physical harm to a Jew would be halakhically obligated to inform the potential victim or the authorities, and thus prevent the loss.[17] This is, obviously, even more so true when the whole community is the victim of a wrong (such as a butcher selling non-kosher meat as kosher).

C. Professional Confidences and Halakha

This section will address a simple question: What should a Rabbi do when halakha requires that he reveal information to help another, and secular law states that one may not reveal that information. Does it matter if secular law states that if one reveals that information one will go to jail? Be fined? Pay damages? This issue is relevant to a host of professions, including the rabbinate.

In such a situation a Rabbi should be exceedingly careful. The halakhic obligation to rescue a fellow Jew from harm is a very serious one. However, there are some halakhic authorities who rule that is no obligation to rescue one from harm if the

rescuer himself will suffer significant harm. Three different cases need to be explained:

1. Through a confidence told to him, a Rabbi is aware of the fact that physical harm will befall another. [18] If the Rabbi reveals the confidence, he will run the risk of suffering financial harm through a lawsuit for damages related to the breach of confidence.

In this case, many halakhic authorities rule that the danger to the life or physical well being of another take precedence over one's own financial needs. [19] While one may find halakhic authorities who rule that the obligation to save the life of another is suspended in the case of serious financial loss, [20] it is improper for rabbis to function in accordance with that view. Accordingly, rabbis should ensure that steps are taken to prevent the possibility of any such physical harm befalling another. [21] In addition to being required by halakha, it is possible that secular law would support revealing confidences when necessary to prevent physical harm. [22] Additionally, it appears unlikely that any communal backlash would result as a result of a Rabbi fulfilling his halakhic obligation to rescue others from physical harm. To the extent that secular law does not support this conclusion (or the halakhic conclusion in other cases discussed *infra*) in a given jurisdiction, a Rabbi may want to consult with a lawyer to determine if there is a way to observe his halakhic obligations without running afoul of secular law requirements. [23]

2. Through a confidence told to him, a Rabbi is aware of the fact that improper financial harm will befall another. [24] If the Rabbi reveals the confidence, he will run the risk of suffering financial harm through a lawsuit for damages related to the breach of confidence.

In this case, if the financial harm is severe and likely, many halakhic authorities rule that one is exempt from the duty to prevent financial harm to another, when the financial harm to oneself through this activity is greater than 20% of one's true worth, including future income.[25] In the context of revealing certain confidences, a Rabbi could arguably face a loss of such an amount if there is a chance of his being sued in secular court for damages resulting from breach of confidentiality or if such breach could result in the loss of his job. However, even in such a case, the proper and pious activity would be for the Rabbi to take steps to prevent harm from occurring despite the fact that it could result in harm to the Rabbi. Of course, the Rabbi should follow the guidelines set forth above in Section II.A. ("Repeating Harmful Information and Truth Telling"). Additionally, it may be appropriate for the Rabbi to take into account the possible "chilling effect" that revealing any confidences may have on his community. [26]

3. Through a confidence told to him, a Rabbi is aware of the fact that religious harm will befall another. [27] If the Rabbi reveals the confidence, he will run the risk of suffering financial harm through a lawsuit for damages related to the breach of confidence.

Assuming that the information revealed to the Rabbi is reliable as a matter of Jewish law, the Rabbi has an obligation to take steps to protect others from religious harm. [28] However, if the financial harm that would be suffered by the Rabbi as a result of divulging the information is severe and likely, a claim could be made that the Rabbi would be exempt from the duty to

prevent religious harm to another because of the intense financial harm that will befall the Rabbi. [29] Of course, as we pointed out in the previous section, such exemption (according to the authorities who rule that there is such an exemption) would only be applicable in cases of severe financial duress. Additionally, Rabbis should hesitate to avoid doing that which is religiously proper out of fear of punishment from the government. [30] Accordingly, it may be halakhically reasonable to limit the exemption in cases of religious harm to instances where the severe financial harm to be suffered by the rescuer is certain, and not merely possible. [31] However, even in a case where the grounds for permitting such an exemption do exist, revealing information when (and to the extent) necessary to prevent religious harm is certainly the proper and pious activity, subject to the guidelines set forth in the previous sections.

It is important to note that, although our discussion illustrates that there are circumstances in which disclosure of confidential information is warranted, these cases represent the rare exception to the general rule that all matters discussed with a Rabbi must be kept confidential. It is only after a very careful and painstaking analysis that a decision can be made that the general rule is not applicable in a given case. It is of the utmost importance that congregants continue to have confidence in the integrity of their rabbinical leaders. To this end, it may be a good idea for each Rabbi to enunciate ahead of time to his congregants, or others who come to him for counsel and advice, what the halakhic guidelines are with respect to confidentiality so that there not be any misunderstandings that could result in community tensions or a reluctance among congregants to come to their rabbis for valuable advice and counsel.

One final note: To the extent that the secular law is inconsistent with halakha with respect to these issues, the issue of *Dina De'Malkhuta Dina* (the obligation of Jews to follow the law of the land) invariably comes to mind. The halakhic parameters of the concept of *Dina De'Malkhuta Dina* are extremely complex and beyond the scope of this memorandum.[32] However, suffice to say that the concept of *Dina De'Malkhuta Dina* is mainly directed towards the sphere of taxation and certain other monetary matters (such as landlord-tenant regulations or certain creditor-debtor regulations aimed for the betterment of society [33]), but is not applicable when the secular law runs directly contrary to the exercise of a religious obligation. [34] Thus, to the extent that the halakha mandates disclosure of information, then disclosure is obligatory even if it will result in an inevitable violation of secular law. The discomfort heaved upon Rabbis due to the entanglement of secular law requirements with the dictates of halakha only serves to underscore the necessity for a more conscientious application of the free exercise clause of the U.S. constitution by the secular courts.