

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).¹ Although every state has criminal penalties for ‘failure to report’, enforcement has dramatically increased *post-Penn State*.

¹ 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 14, 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*.

About Gregory Love and Kimberlee Norris:

Love & Norris, Attorneys at Law

Gregory Love and Kimberlee Norris have a nationwide sexual abuse litigation practice representing victims of sexual abuse. In addition, they represent ministry and secular organizations such as churches, non-profits, private schools, camps and para-church ministries in crisis management and the design and implementation of child safety systems.

MinistrySafe/Abuse Prevention Systems

In addition to an active law practice, Love and Norris are co-founders and Directors of MinistrySafe and Abuse Prevention Systems, entities dedicated to sexual abuse awareness and prevention. MinistrySafe and Abuse Prevention Systems (APS) provide Sexual Abuse Awareness Training (live and online) and assist ministries and child-serving organizations in the design and implementation of safety systems that reduce the risk of child abuse. In an average month, eight to nine thousand ministry personnel are trained online through the MinistrySafe/APS system.

Love and Norris are frequent speakers, addressing national and regional audiences for organizations such as the National Association of Church Business Administration (NACBA), National Council for Adoption (NCFA), Christian Camp and Conference Association (CCCA), American Camp Association (ACA), Presbyterian General Assembly (PCA), Youth Ministry Institute (YMI), the Church of the Nazarene (International), Philadelphia Insurance and Young Life.

Representative consultation clients include the United States Olympic Committee, Awana International, Church of the Nazarene- Global Ministries, Sovereign Grace Ministries and Philadelphia Insurance Companies. Both serve as guest lecturers at Dallas Baptist University, Southwestern Baptist Theological Seminary and Dallas Theological Seminary, and are actively involved in High School Ministry at Christ Chapel Bible Church in Fort Worth, Texas.

MinistrySafe and Abuse Prevention Systems are endorsed by Philadelphia Insurance Companies, the Christian Camp and Conference Association and the American Camp Association. MinistrySafe's Sexual Abuse Awareness Training is approved by the Texas Department of State Health Services and the Departments of Insurance for Georgia, Texas, Washington, Oregon, California, Nebraska, Missouri, Iowa, Kansas and Oklahoma. MinistrySafe's Sexual Abuse Awareness Training is an approved CEU for the Association of Christian Schools International (ACSI).

**APPENDIX 1:
EXCERPTS OF TEXAS FAMILY CODE SECTION 261**

Sec. 261.101. PERSONS REQUIRED TO REPORT; TIME TO REPORT.

(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

(b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001 or 261.401, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

(b-1) In addition to the duty to make a report under Subsection (a) or (b), a person or professional shall make a report in the manner required by Subsection (a) or (b), as applicable, if the person or professional has cause to believe that an adult was a victim of abuse or neglect as a child and the person or professional determines in good faith that disclosure of the information is necessary to protect the health and safety of:

- (1) another child; or
- (2) an elderly or disabled person as defined by Section 48.002, Human Resources Code.

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a

professional, and an employee of a clinic or health care facility that provides reproductive services.

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

- (1) as provided by Section 261.201; or
- (2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Sec. 261.109. FAILURE TO REPORT; PENALTY.

(a) A person commits an offense if the person is required to make a report under Section 261.101(a) and knowingly fails to make a report as provided in this chapter.

(a-1) A person who is a professional as defined by Section 261.101(b) commits an offense if the person is required to make a report under Section 261.101(b) and knowingly fails to make a report as provided in this chapter.

(b) An offense under Subsection (a) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the child was a person with an intellectual disability who resided in a state supported living center, the ICF-MR component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect.

(c) An offense under Subsection (a-1) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect.