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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

R.K., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE CORPORATION OF THE PRESIDENT )  
 OF THE CHURCH OF JESUS CHRIST )  
 OF LATTER DAY SAINTS, *et al.*, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

CASE NO. C04-2338RSM

ORDER DENYING MOTION IN  
LIMINE TO EXCLUDE CLERGY-  
PENITENT COMMUNICATION

**I. INTRODUCTION**

This matter comes before the Court on defendant Corporation of the President of the Church of Jesus Christ of Latter-Day Saints’ (“COP”) Motion In Limine to exclude evidence of a confidential 1972 disclosure by Richard Pettit, a Church member, to his Bishop, regarding Mr. LoHolt’s abuse of his son.<sup>1</sup> (Dkt. #141). Defendant argues that Mr. Pettit made the disclosure in the context of spiritual counseling, and therefore, it should be excluded under the clergy-penitent privilege, or because it is protected by the Free Exercise Clause of the First Amendment. Plaintiff opposes the motion, arguing that the communication does not meet the

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<sup>1</sup> Defendant has concurrently filed a Motion In Limine to Exclude the Reporting Statute (Dkt. #140); however, defendant suggested that the Court review the instant motion first, as a resolution in its favor on this motion would render the other motion moot. The Court agrees that it is appropriate to resolve the instant motion first.

1 criteria necessary to qualify for the clergy-penitent privilege, and that the mandatory reporting  
2 statute in effect at the time of the communication required disclosure to appropriate authorities,  
3 and enforcing that statute would not have offended Constitutional principles. (Dkt. #157).

4 For the reasons set forth below, the Court agrees with plaintiff and DENIES defendant's  
5 Motion In Limine.

## 6 **II. DISCUSSION**

### 7 **A. Impermissible Overlength Motion**

8 As a threshold matter, the Court addresses defendant's continued failure to follow the  
9 Local Rules governing the length of motions and responses thereto. *See* Local Rules CR 7(d)  
10 and (e). As this Court has previously informed defendant, overlength briefs will be stricken from  
11 the record unless prior permission is sought and granted for the overlength pages. *See* Local  
12 Rule CR 7(f). Pursuant to Local Rule CR 7(e)(4), motions in limine are limited to 12 pages in  
13 length. Defendant has impermissibly filed an 18-page motion in limine. Because defendant has  
14 not sought and received permission from the Court to file such overlength motion, the Court  
15 hereby STRIKES pages 13-18 from consideration. In addition, the Court hereby advises  
16 defendant that any future failure to follow this Court's Local Rules will result in sanctions.

### 17 **B. Clergy Penitent Privilege**

18 As a basis for his negligence claim, plaintiff argues that Bishop Borland had a mandatory  
19 duty to report Mr. LoHolt's abuse of Mr. Pettit's son, pursuant to the mandatory reporting  
20 statute in effect at that time. By failing to so report, plaintiff asserts that defendant acted  
21 negligently, and is now liable for damages suffered by plaintiff when he was abused by Mr.  
22 LoHolt during the year following Mr. Pettit's report. Defendant argues that Bishop Borland  
23 was precluded by the clergy-penitent privilege from disclosing Mr. Pettit's report to law  
24 enforcement officials, and therefore, he had a legal right not to comply with the mandatory  
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1 reporting statute.<sup>2</sup> Accordingly, defendant asserts that the conversation should be excluded  
2 from evidence as irrelevant.

3 This Court previously addressed the clergy-penitent privilege in the context of Bishop  
4 Borland's conversation with Mr. LoHolt after he received Mr. Pettit's report of abuse. There,  
5 the Court defined the privilege and the elements that must exist in order to apply it to specific  
6 communications:

7 The clergy-penitent privilege, as codified in RCW 5.60.060(3), states:

8 A member of the clergy or a priest shall not, without the consent of  
9 a person making the confession, be examined as to any confession  
10 of discipline enjoined by the church to which he or she belongs.

11 RCW 5.60.060(3). For the privilege to apply, communications between the  
12 penitent and clergy must be: (1) made to an ordained member of the clergy;  
13 (2) a confession in the course of discipline enjoined by the church; and (3)  
14 confidential. *State v. Martin*, 137 Wn. 2d 774, 791 (1999). The definition of  
15 "confession" referred to in RCW 5.60.060(3) is not set forth by statute.  
16 Instead, the word "confession" is defined by the church to which the particular  
17 clergy member belongs. *Id.* at 787. The courts prefer a broad interpretation  
of "confession" so as to avoid the discriminatory application of the statute  
based on differing judicial perceptions of a given church's practices or  
religious doctrines. *Id.* at 789. The privilege is held by the penitent and only  
the penitent can waive it. *Id.* at 791. However, the privilege may be vitiated  
by the presence of a third person during the penitent-clergy communication,  
unless the third person is necessary for the communication or the third person  
is another member of the clergy. *Id.* at 787.

18 (Dkt. #88 at 4).

19 On the instant motion, plaintiff does not dispute that Bishop Borland was an ordained  
20 member of the LDS Church. Nor is there any dispute that LDS Church clergy can receive  
21 confessions and provide spiritual guidance in the course of discipline enjoined by the church that  
22 are protected by the clergy-penitent privilege. However, plaintiff argues that the communication  
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24 <sup>2</sup> Defendant alternatively argues that the conversation should be excluded because  
25 Bishop Borland was precluded from reporting the abuse by the ecclesiastical canons of his  
26 spiritual office. However, the Court will not consider that argument as the majority of legal  
authority in support has been stricken as impermissible overlength briefing. *See supra* Part A.

1 at issue was neither a confession nor confidential, and therefore, the clergy-penitent privilege  
2 does not apply. While the Court disagrees that the communication was not privileged, the Court  
3 finds that such privilege did not excuse Bishop Borland from his mandatory duty to report, as  
4 further discussed below.

5 The Washington Supreme Court has held that both confessions and spiritual counseling  
6 are protected under the clergy-penitent privilege, assuming all other elements are met. *Martin*,  
7 137 Wn.2d at 785. In asserting the clergy-penitent privilege here, defendant argues that Mr.  
8 Pettit's conversation is protected because it occurred in connection with pastoral counseling.  
9 Mr. Pettit declares that:

10 3. When my son . . . was approximately 13 years of age, he told me that he  
11 had been touched inappropriately on a Scout outing by Jack LoHolt, a  
member of the Kent 2<sup>nd</sup> Ward who served in a Scouting capacity.

12 4. After [my son] told me of the inappropriate touching, I went to talk with  
13 the man who was Bishop of the Kent 2<sup>nd</sup> Ward at that time, Randall Borland,  
to tell him of LoHolt's actions. Within a week of our conversation, Bishop  
14 Borland released LoHolt from his Scouting position.

15 5. Bishop Borland, as my Bishop, was my spiritual advisor. I sought him out  
16 for the purposes of spiritual counseling and guidance. I was not sure how to  
respond to my son's report of LoHolt's actions. I also hoped the Bishop  
17 might do something regarding LoHolt's involvement in Scouting, which the  
Bishop did.

18 6. When I talked to Bishop Borland I expected that my conversation with him  
19 would be confidential. I believed that Bishop Borland was bound by the  
clergy privilege, and that he could not share what I told him with anyone else  
without my permission.

20 7. I did not expect Bishop Borland to call Child Protective Services or the  
21 police department to report what Jack LoHolt had done. If I thought that was  
necessary or appropriate, I would have done it myself.

22 (Dkt. #142).

23 Plaintiff argues that Mr. Pettit's declaration contradicts his earlier testimony, which made  
24 clear that Mr. Pettit did not go to Bishop Borland for a confessional purpose. Previously, at  
25 deposition, Mr. Pettit testified that he was not going to Bishop Borland for the purpose of  
26 confessing any sin, but to inform him about Mr. LoHolt's abuse:

1 Q. (By Mr. Kosnoff) When you went to Bishop Borland, you were not going  
2 to him for purposes of confessing your sin, were you?

3 A. No.

4 Q. And you would hope that he would – that – strike that. What was your  
5 reason for going to Bishop Borland?

6 A. To inform him of the situation.

7 Q. And was it your hope or intention that Bishop Borland would use this  
8 information and take some kind of concrete action with respect to Jack  
9 LoHolt?

10 A. Yes.

11 Q. And what was your – what did you hope that he would do?

12 A. Correct it.

13 Q. What did Bishop Borland say to you?

14 A. I don't remember.

15 Q. Did he tell you that he would do something about Jack?

16 A. Yes.

17 Q. And did you trust that the matter would be handled?

18 A. Yes.

19 Q. Was it handled?

20 A. Yes.

21 (Dkt. #158, Ex. A).

22 First, the Court agrees with defendant that Mr. Pettit's subsequent declaration does not  
23 conflict with that testimony. Instead, the Court finds that Mr. Pettit's declaration further  
24 explains his purpose in seeking out Bishop Borland. While Mr. Pettit admits both at deposition  
25 and in his declaration that he hoped Bishop Borland would take some action with respect to Mr.  
26 LoHolt, nothing at deposition suggests that it was Mr. Pettit's only purpose. Instead, it appears  
that plaintiff's counsel simply chose not to ask Mr. Pettit whether he sought advice or pastoral  
care at the same time, or ask any other follow up questions about the purpose of his

1 communication. In addition, Bishop Borland confirms that he received Mr. Pettit's  
2 communication in connection with pastoral counseling within the Church.<sup>3</sup> (Dkt. #144, Borland  
3 Dep. at 57).

4 Second, the Court finds plaintiff's reading of the clergy-penitent privilege too narrow.  
5 Plaintiff asserts that, in order to be considered privileged, spiritual counseling must be given in  
6 the "course of discipline enjoined by the church," and that equates to teaching the communicant  
7 the error of his ways, teaching the penitent the right way, pointing the way toward faith, hope  
8 and consolation, and leading the penitent to seek atonement, none of which occurred here.  
9 Plaintiff relies on the Washington Court of Appeals' decision in *State v. Martin*, 91 Wn. App.  
10 621, 629-30 (1998) in support of that definition. However, in affirming that decision, the  
11 Washington Supreme Court made clear that the "course of discipline" language requires only  
12 that the clergy member "be enjoined by the practices or rules of the clergy member's religion to  
13 receive confidential communication and to provide spiritual counsel." *Martin*, 137 Wn.2d at  
14 789. The court further made clear that the term confession should be construed in the broadest  
15 sense, and such construction should be made by the church of which the clergy is a member. *Id.*  
16 at 786-87. Further, the Washington Court of Appeals had cited approvingly to several cases  
17 from other jurisdictions that applied the privilege to communications in which the communicant  
18 did not seek atonement or admit wrongdoing. *Martin*, 91 Wn. App. at 628 n.3. Thus, the  
19 Court agrees with defendant that Mr. Pettit's communication was a "a confession in the course  
20 of discipline enjoined by the church" for purposes of this motion.

21 With respect to the statute's confidentiality requirement, Bishop Borland makes clear that  
22 the tenets of his faith require him to remain silent regarding the conversation with Mr. Pettit.  
23 Further, the LDS Church Handbook explicitly states that "leaders must keep confidences about  
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25 <sup>3</sup> The Court notes that at the time Bishop Borland testified, Mr. Pettit had not yet waived  
26 his privilege and questions were asked in hypothetical terms. Bishop Borland later confirmed  
that he received the communication he had been referring to at deposition from Mr. Pettit.

1 matters discussed when interviewing and counseling.” Indeed, Bishop Borland has testified that  
2 prior to Mr. Pettit waiving privilege, Bishop Borland maintained the confidentiality of their  
3 conversation, and never revealed it to anyone, including Mr. LoHolt. Moreover, even if Bishop  
4 Borland had revealed the source of the report when confronting Mr. LoHolt, the Court notes  
5 that the privilege is not his to waive, and there is no evidence that Mr. Pettit waived the privilege  
6 prior to his deposition in December 2005. Accordingly, the Court finds that the conversation  
7 between Bishop Borland and Mr. Pettit was confidential within the meaning of the statute.

8       However, regardless of whether the communication was subject to the clergy-penitent  
9 privileged, defendant’s argument reveals a fundamental misunderstanding as to who the privilege  
10 is designed to protect. The privilege, as courts have noted:

11       recognizes the human need to disclose to a spiritual counselor, in total and absolute  
12 confidence, what are believed to be flawed acts or thoughts and to receive priestly  
13 consolation and guidance in return....[T]he privilege is a legislative response to the  
14 urgent need of people to confide in, without fear of reprisal, those entrusted with the  
15 pressing task of offering spiritual guidance so that harmony with one’s self and others  
16 can be realized. Thus, the privilege exists because of a belief that people should be  
17 encouraged to discuss their flawed acts with individuals who, within the spiritual  
18 traditions and doctrines of their faith, are qualified and capable of encouraging the  
19 communicants to abandon and perhaps make amends for wrongful and destructive  
20 behavior.

21       *Waters v. O’Connor*, 103 P.3d 292, 296 (Ariz. Ct. App. 2005) (internal citations and quotations  
22 omitted). Thus, while the privilege may have protected Bishop Borland from being examined as  
23 to anything specific Mr. Pettit confided, it does not excuse Bishop Borland from his mandatory  
24 duty to report Mr. LoHolt’s abuse. That is because Bishop Borland could have reported to law  
25 enforcement authorities that he had knowledge Mr. LoHolt was abusing children in the church  
26 without violating Mr. Pettit’s privilege. He could have simply reported that he had knowledge  
of the abuse without revealing the name of the child or the person who reported it, or even that  
he had actually received a report of abuse. *See State v. Motherwell*, 114 Wn.2d 353, 366 (1990)  
(emphasizing that the statute simply requires reporting, and does not require an individual to  
take any other steps to prevent the abuse). Indeed, this is apparently what Bishop Borland did

1 by confronting Mr. LoHolt after receiving Mr. Pettit's report. If Bishop Borland was able to  
2 confront Mr. LoHolt without violating the privilege, as he asserts he did, he certainly could have  
3 contacted the appropriate law enforcement authorities in the same manner.

4 Accordingly, the Court declines to preclude evidence of Mr. Pettit's conversation with  
5 Bishop Borland on the basis of clergy-penitent privilege.

6 **III. CONCLUSION**

7 Having reviewed defendant's motion, plaintiff's opposition, defendant's reply, the  
8 declarations and exhibits in support of those briefs, and the remainder of the record, the Court  
9 hereby finds and ORDERS:

10 (1) Defendant's Motion In Limine to Exclude Clergy-Penitent Communication (Dkt.  
11 #141) is DENIED.

12 (2) The Clerk shall send a copy of this Order to all counsel of record.

13 DATED this 14th day of September, 2006.

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16 RICARDO S. MARTINEZ  
17 UNITED STATES DISTRICT JUDGE  
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