



**House
Legislative
Analysis
Section**

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**CSC FOR CLERGY AND MENTAL
HEALTH PROFESSIONALS**

**House Bills 4525 and 4526 as passed by the
House
Second Analysis (12-28-99)**

**Sponsor: Rep. Jon Jellema
Committee: Criminal Law and Corrections**

THE APPARENT PROBLEM:

The therapeutic relationship between mental health professionals and their patients or between members of the clergy and their parishioners requires a degree of trust and intimacy that rarely, if ever, occurs in other professional relationships. Unfortunately, some mental health professionals and members of the clergy abuse these relationships by using their position as spiritual or emotional counselor to seduce their clients. According to a 1984 study of 300 Presbyterian, 302 Methodist, 404 Assembly of God, and 190 Episcopalian clergy, 38.6 percent admitted to having had inappropriate sexual contact of some kind with a church member, and 76.5 percent claimed to know of a minister who had sexual intercourse with a church member. Another 1988 survey found that 12 percent of the ministers interviewed admitted to having engaged in intercourse outside of marriage, and 17 percent of these ministers admitted to having had intercourse with someone they were counseling. Other surveys have shown that 53 percent of all complaints against psychiatrists involve sexual misconduct, and between 44 and 65 percent of therapists report having treated a patient who had sexual contact with a prior therapist.

Due to the potential for exploitation and abuse in spiritual or emotional counseling situations, it has been suggested that the criminal sexual conduct laws be changed to provide stricter and more certain punishment for those counselors who take sexual advantage of their patients.

THE CONTENT OF THE BILLS:

House Bill 4525 would amend the Michigan Penal Code (MCL 750.520a et al.) to criminalize sexual penetration or contact between a mental health professional and his or her patients and between a member of the clergy and members of his or her flock, even if the patient or member of the church had consented to the sexual activity. A member of the clergy would be defined as anyone who was ordained

or recognized as a religious leader by a church, denomination, religious association or sect; any lay person who was designated to provide counseling or advice on behalf of the church, denomination, religious association or sect; or anyone who held himself or herself out as any of these. A mental health professional would mean an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is a medical or osteopathic physician licensed to practice in this state; a licensed psychologist, registered professional nurse, professional counselor, or marriage and family therapist licensed to practice in this state; or a certified social worker, a social worker, or a social worker technician registered in this state; or an individual who holds him or herself out as being a someone who meets this definition.

The bill would provide that members of the clergy or mental health professionals who engaged in sexual activity with certain persons would be guilty of either third degree criminal sexual conduct (if sexual penetration occurred), or fourth degree criminal sexual conduct (if sexual contact occurred). Third degree CSC is a felony punishable by up to 15 years imprisonment, while fourth degree CSC is a misdemeanor punishable by imprisonment for no more than 2 years or a fine of no more than \$500, or both. A mental health professional would be guilty of one of these crimes, depending upon the nature of the sexual activity, if he or she engaged in sexual activity (even if consensual) with a client or patient, who was not his or her spouse, while the person was his or her client or patient or within 2 years after the treatment ended. A member of the clergy would be guilty if he or she engaged in sexual activity (even if consensual) with a person, who was not his or her spouse, for whom the clergy member was providing spiritual counseling or advice, or emotional or mental health services or treatment, during the time of the counseling or within 2 years after the time that the counseling ended.

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"Emotional or mental health services or treatment" would mean assessment, diagnosis, treatment, or counseling of a client or patient for a mental or emotional illness, symptom, or disorder or to understand unconscious or conscious motivation, to resolve emotional, relationship, or attitudinal conflicts, or to modify behaviors that interfere with effective emotional, social, or intellectual functioning. "Spiritual counseling or advice" would mean assessment, diagnosis, treatment, or counseling of a person in a spiritual or religious context for a mental or emotional illness, symptom, or disorder, to understand unconscious or conscious motivation, to resolve emotional, relationship, or attitudinal conflicts, or to modify behaviors that interfere with effective emotional, social, or intellectual functioning.

Reporting Requirements. The bill would also require members of the clergy or mental health professionals to report suspected criminal sexual conduct violations by other mental health professionals or members of the clergy. More specifically, a clergy member or mental health professional who suspected that a person he or she was counseling had been a victim of a CSC crime and that the person who committed the crime was a mental health professional or member of the clergy, would have to promptly ask the alleged victim's permission to make a report of the allegations and inform the alleged victim that the report would not require identification of him or her as the victim. If the alleged victim agreed to making a report, he or she would have to provide written consent and specify whether he or she wanted to be identified in the report. Such a report would have to contain only the information needed to identify the mental health professional or clergy member who made the report, the person accused of the violation, and information regarding the violation. The alleged victim's name or other identifying information would not be included unless that person requests to be identified in the report.

Within 30 days after receiving an alleged victim's permission to make a report, the mental health professional or member of the clergy would have to provide the report to both the local police department (for the jurisdiction in which the alleged crime occurred) and the Department of State Police. The intentional failure to file a report under these circumstances would be a misdemeanor punishable by imprisonment for no more than 93 days and/or a fine of up to \$500. If the Department of State Police, upon review of the report, determined that individual who was accused of the crime was a member of a licensed occupation, the department would be required to

promptly notify the appropriate licensing or registration board of the alleged violation. In addition, if the Department of State Police received two or more reports regarding the same mental health professional or member of the clergy, the department would be required to provide the information from the reports to the appropriate prosecuting attorneys.

A report made by a mental health professional or a member of the clergy regarding the suspected CSC crime of another mental health professional or member of the clergy and any record of such a report that was maintained by the state or local police, a licensing or registration board, a prosecuting attorney, or any other person, official, or institution would be confidential and would be exempted from the disclosure under the Freedom of Information Act. Anyone who intentionally disclosed such confidential information would be guilty of a misdemeanor punishable by imprisonment for no more than 93 days and/or a fine of up to \$500.

The bill would provide immunity from civil or criminal liability to a person who, in good faith, made a report or record under the provisions of the bill. It would be a rebuttable presumption that a report was made in good faith. However, the immunity would not apply to civil or criminal liability resulting from a violation for which a report was required.

Information regarding the identity of a victim or alleged victim of *sexual contact* by a mental health professional or member of the clergy could not be disclosed by the person who made the report or anyone else who had access to the report or other records, unless the victim or alleged victim had consented in writing to the disclosure. [Note: The bill uses the term "sexual contact" in this provision; however, that term is specifically defined in the act and is limited to touching. Other provisions of the bill apparently apply both to instances of "sexual contact" and "sexual penetration."] However, such information could be exchanged by the state or local police, a prosecuting attorney, or a licensing or registration board without violating this prohibition.

House Bill 4526 would amend the Code of Criminal Procedure (MCL 767.24) to provide an exception to the statute of limitations for certain criminal sexual conduct crimes. Current law requires an indictment for such crimes to be filed within 6 years after the commission of the offense or, if the victim is under the age of 18 when the offense occurred, by the latter of 6 years after the offense or the victim's 21st birthday.

The exception would provide an extended statute of limitations for cases involving the offenses set forth in House Bill 4525, which would criminalize sexual penetration or contact between a mental health professional and his or her patients and between a member of the clergy and members of his or her flock, even if the patient or member of the church had consented to the sexual activity. Such a case could be filed within eight years after the end of the relationship in which the actor had been providing emotional or mental health services or treatment, spiritual counseling, spiritual advice, or comfort to the victim has ended.

The bill would not take effect unless House Bill 4525 was also enacted.

Both bills would take effect June 1, 2000.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, to the extent that House Bill 4525 led to imposition of prison sentences or local sanctions, it could increase state and/or local correctional costs. To the extent the that bill increased collections of state penal fines, it could increase the amount of fine revenue going to local libraries. House Bill 4526 would have no direct fiscal impact; however, to the extent that the bill enabled additional convictions to be obtained, it could increase state or local costs of criminal sanctions. To the extent that those convictions led to increased collections of state penal fines, it could increase penal fine revenues going to local libraries. (1-14-00)

ARGUMENTS:

For:

As fifteen other states have done, Michigan should criminalize a particularly heinous type of abuse, one that is all too common and all too rarely punished. Although, according to the American Psychological Association, "all major mental health organizations recognize the unethical nature of sexual involvement with patients", current laws and professional disciplinary measures have been insufficient to resolve this problem. Sexual misconduct by clergy or mental health professionals is an abuse of power, an exploitation of vulnerability and use of undue influence. To that extent the instances of such misconduct parallel incest. Surveys have found that the effect of sexual contact between a patient and a counselor is almost always negative. Some 90 percent of the people who have had sexual relations with their

therapists have suffered harm – ranging from feelings of guilt, post traumatic stress disorder, emptiness and isolation, sexual confusion, impaired ability to trust, boundary and role confusion, emotional lability, suppressed rage, and increased suicidal risk and cognitive dysfunction, to psychiatric hospitalization, attempted and even successful suicide. In addition, the problems that caused the person to seek help are often exacerbated. These victims may also suffer physical problems ranging from mild physical problems such as headaches and nausea to ulcers, chronic fatigue, and the development of long-term physically debilitating physical problems.

These cases are abuses of power in the same sense that incest is an abuse of power. Both members of the clergy and mental health professionals occupy a position of trust and authority over those whom they are counseling. The people who seek spiritual or emotional counseling are particularly vulnerable because of the intimacy and dependency that is usually part of a counseling relationship. As a result, many victims of such abuse feel powerless to resist the advances of their counselors; thus their apparent consent is not fully knowing and voluntary as it might be between two persons who were not in a therapeutic relationship. Under current law, many counselors who have sexually abused their clients are able to avoid successful prosecution by asserting that the victim consented or did not object. By eliminating consent as a defense these bills will protect people who seek counseling and have their faith and/or their trust abused by the person who is supposed to be helping them.

Against:

While the consent of a child in cases of child sexual abuse or incest may justifiably be ignored, it is a different matter entirely to claim that an adult lacks the capacity to consent. While it may be that some people who seek therapy are in such weakened condition that they may be unable to give consent, it is wrong to suggest that all persons who seek emotional or spiritual counsel lack the capacity to legitimately give consent. This is an issue that clearly should be determined on a case by case basis. That a person later came to regret or feel foolish for having granted the consent should not be sufficient to vitiate his or her consent.

Response:

Again, according to the American Psychological Association, many consider the dynamics of the therapist-patient relationship itself to vitiate consent in what otherwise appear to be consensual relationships. Others argue that consent is irrelevant, arguing that therapy is a fiduciary relationship in which "it is the

duty of the therapist to attend only to the needs of the patient and to do no harm”.

Against:

Undoubtedly, there should be protections against those counselors who intentionally betray the trust of their clients and act in a sexually predatory manner. However, the bills assume that all sexual contact between a counselor and a client is predatory. What if a counselor falls in love with one of his or her clients and the client returns those feelings and this leads to a sexual relationship between the two people? And what if, after a time, the person who was being counseled changes his or her mind about the relationship, end its and concludes that his or her feelings were clouded by the other person's position as counselor? Under the bills, if the counseled person chooses to prosecute, the counselor could spend up to fifteen years in prison. It may be argued that the counselor should have known better and should have recognized that the client's (or even his or her own) feelings could be influenced by the therapy relationship. But the question is whether the harsh criminal punishment provided in these bills is warranted where the counselor's behavior was foolish or naive, rather than intentionally predatory. It is more appropriate that such behavior be dealt with by professional ethical standards.

Furthermore, it is unfair to make such behavior a criminal offense for a spiritual or emotional counselor, but not for a professor, lawyer or other professional.

Response:

In life, mature adults often are faced with difficult choices; in this case, a mental health professional or clergy person must choose between maintaining the ethical standards of his or her profession, and his or her desire to have a personal relationship with a particular person. This is no more onerous than the demands other professions may make upon their members. Certain behavior is just not appropriate in certain circumstances. What is more, in this case, inappropriate behavior may well lead to harming the other person, and that is appropriately punished as a criminal offense. Finally, it is likely that the legislation would provide a powerful deterrent against the proscribed behavior, rather than actually leading to imprisonment of therapists and clergy persons.

Against:

A number of the provisions of these bills seem excessive. For example, any clergy member or mental health professional who engages in a sexual relationship with a former client within two years of the

end of the emotional or mental health service or treatment relationship is guilty under the bills, regardless of the duration of the treatment relationship. Thus, a person who offered one, two, or three hours of treatment or services and a year and half later entered into a sexual relationship with the former client would be guilty under the bills.

The bills also would require a counselor who suspected that another counselor had violated the bills' provisions to seek the victim's permission to report the suspected crime. This may not always be in the best interests of the victim. The time that the counselor comes to suspect such a crime has occurred may precede the time at which the victim is ready to admit or to face that it occurred. By confronting the victim and seeking his or her permission to report the suspected crime before the victim is ready, the counselor could harm the individual's healing process. The bills should, at the very least, limit the reporting requirement until after the victim has admitted that the crime occurred. Further, allowing a counselor to file a report without indicating the identity of the person making the accusation borders upon unconstitutionality; if a complaint is to be made the alleged victim should be identified.

POSITIONS:

The Coalition on Sexual Exploitation by Helping Professionals supports the bills. (1-12-00)

The National Association of Social Workers - Michigan Chapter supports the bills. (1-10-00)

The YWCA Counseling Center supports the bills. (1-12-00)

The Michigan Coalition Against Domestic and Sexual Violence supports the bills. (1-10-00)

The Michigan Counseling Association supports the bills. (1-12-00)

The Michigan Psychological Association supports the bills, but would encourage the adoption of clarifying amendments. (1-12-00)

The Michigan Psychiatric Society supports the concept, but believes that other solutions should be explored and would be more effective. (1-12-00)

The American Civil Liberties Union opposes the bills. (1-14-00)

The Michigan Catholic Conference opposes the bills.
(1-14-00)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.