

# CLERGY COMMUNICATIONS & COUNSELING

## “You won’t believe what I just heard.”

### I. Competing Legal Interests

“Communications between clergymen and their communicants force the law to balance two competing policies: the need to elicit evidence important to the judicial process’ search for the truth, and the desire to maintain the integrity of the religious community by protecting the secrecy of spiritual counseling.”

Jane E. Mayes: *Striking Down the Clergyman-Communicant Statutes: Let Free Exercise of Religion Govern*, 62 Ind. L.J. 397

### II. Legal Origins of Penitential Communications

- a. Clergy penitent privilege was recognized under English Law from 1066 until the Protestant Reformation. After the Reformation, there was hostility towards anything Catholic and the right disappeared. *Nestle v. Commonwealth*, 22 Va. App. 336 (1996).
- b. Subsequently, there was no clergy penitent privilege at Common Law. Blackstone Commentaries 789.
- c. First known American case involving clergy penitent privilege was *People v. Phillips* (N.Y.Ct. Gen. Sess. 1813). No rule of evidence or other statute provided for a privilege. In an unusual move, the court rejected the Common Law and held for the priest based on the First Amendment liberty interest in the free exercise of religion.
- d. Four years later another NY court denied the privilege to an Anglican priest because he was protestant. *People v. Smith*, 2 N.Y. City Hall Rec. 77 (1817). This resulted in the NY legislature passing the first statutory privilege.
- e. The U.S. Supreme Court recognized the privilege in *dicta*. “[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife.” *Totten v. United States*, 92 U.S. 105, 107 (1875). See also, *Trammel v. U.S.*, 445 U.S. 40, 51 (1980).
- f. Does the privilege rest in the First Amendment or is it purely by legislative grace?
  - i. Split of authority.
    1. “The privilege, in modern practice, traces its existence to state statute or, in very rare cases, to state decisional law...”. *Seidman v. Fishburne-Hudgins Educ. Found., Inc.*, 724 F.2d 413 (4th Cir. 1984)
    2. “No question” that wiretapping of confession by inmate to Catholic priest “burdened Father Mockaitis’s exercise of religion as understood in the First Amendment.” *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1530 (9th Cir. 1997)

**Atty Practice Tip:** Raise the Free Exercise Clause if the statutory privilege is not available in a given case, particularly when the statute allows for a secular privilege such as attorney-client privilege. Argue that the statute is not neutral and generally applicable. “[G]overnment

regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 141 S. Ct. 1294 (2020) citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, (2020) (*per curiam*) (emphasis in original).

### III. Elements of Clergy/Penitent Privilege

#### a. Uniform Rules of Evidence, Rule 505

- i. **(a)Definitions.** As used in this rule: **(1)** "Cleric means" a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or a person that an individual who consulted that person for spiritual advice reasonably believed to be a cleric. **(2)** "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- ii. **(b)General rule of privilege.** An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the individual and the cleric while the cleric is serving as the individual's spiritual adviser.
- iii. **(c)Who may claim the privilege.** The individual may claim the privilege on the individual's own behalf. The cleric is presumed to have authority to claim the privilege on the individual's behalf. If the individual is incompetent or deceased, then an authorized personal representative may claim the privilege on the individual's behalf.

#### b. State Statutes – Each state has its own statutes and many vary from the Uniform Rules. (See Appendix 1)

### IV. Who is a Minister?

- a. In a case for slander testimony was introduced of a conversation with a deacon and elder of a church who was charged with investigating complaints against members. The objection to privilege was overruled because the deacon and elder were not ministers under the rules of that denomination. *Knight v. Lee*, 80 Ind. 201 (1881)

### V. Penitent

- a. A Methodist minister voluntarily visited a man in jail accused of murder. During the conversation the man said that he lost his temper and shot the victim. The accused did not belong to the minister's church. The minister was called to testify and an objection was made. The trial court overruled and on appeal it was found that "there is nothing in the record tending to indicate that the communication to the witness was penitential in its character or that it was made to him "in his professional character, in the course of discipline enjoined" by the rules of

practice of his denomination.” *Johnson v. Commonwealth*, 310 Ky. 557, 221 S.W.2d 87 (1949)

- b. Treasurer told the priest at her Episcopal church that she had “done something worse than murder.” The treasurer had embezzled \$30,000 from a church account. The priest asked permission to tell the church wardens and vestry about it to help resolve the matter. No clergy/penitent privilege attached because she sought the priest on a “problem solving entreaty.” *People v. Edwards*, 248 Cal.Rptr. 53 (1988)

## VI. Discipline or Practice of the Religion

### a. Identifying Religious Traditions That Have Confidential Ministerial Communications.

- i. Confidential communications between clergy and penitent are established by church doctrine or tradition in other religions, e.g., Buddhist and Church of Scientology. See Appendix 2 (letter in opposition to bill limiting clergy penitent privilege)
- ii. Do not assume a privilege because one party to a communication is a minister. First, identify the religion or denomination as the first step to determine if the privilege exists.

***Atty Practice Tip:*** Refer to the language in the legislative opinion letter (Appendix 2) for citations to various faiths when drafting a motion to quash a subpoena if the privilege is at issue.

- b. Some Christian denominations and religions have well-established guidelines.
  - i. Roman Catholic: Code of Canon Law of the Roman Catholic Church, Canon 960-991.
  - ii. Eastern Orthodox: Gregory of Neocaesarea, *Canon XII*
  - iii. Episcopal: *The Book of Common Prayer*, “The Reconciliation of a Penitent”
  - iv. American Baptist: *American Baptist Policy Statement on Privileged Communications* (June 18, 2019)
  - v. Lutheran: *The Book of Concord – The Confessions of the Lutheran Church*, Augsburg Confession Article XI.
  - vi. LDS: Mosiah 26:29
  - vii. Scientology: *The Auditor’s Code*
  - viii. Buddhist: *The Bhikkhus’ Rules, A Guide for Laypeople compiled and explained by Bhikkhu*

## VII. The Special Problem with Pastors from Independent or Nondenominational Churches.

- a. Not all denominations have a practice or custom relative to confidential communications.

- i. Some ministers do not know the position of their own church or denomination on whether something said to the pastor must remain secret.
- ii. If the minister is in a nondenominational or independent church, the pastor and elders should look at the pros and cons of the privilege and take a position on it – one way or the other.
- iii. Pastors cannot decide whether the privilege should attach on a case by case basis.

***Atty Practice Tip:***

- As the lawyer, don't make assumptions about what the church or pastoral policy is. Probe the practice and custom. Ask: "Do you take secrets to your grave?" If non-denominational, ask with whom was the minister ordained or licensed. Was the minister taught anything on this in seminary, Bible or divinity school. *Don't ask the minister what was said in the communication.*
- Does the church have a "members only" practice for penitential confessions? In other words, the pastors do not open up the doors of their office for counseling to the general public. See, 2 Jefferson, Cal. Evidence Benchbook Privileges, § 39.5, p. 884.

VIII. Communication

- a. Is there a communication?
  - i. A letter can be a communication. Or not.
  - ii. A man comes into a church and wants to speak with a minister. A police officer who also serves as an assistant pastor at a church identifies himself as one. The man says I want to give you something. He gave him a pistol. Later in a trial for murder a prosecutor wanted to introduce into evidence the giving of the gun to the minister. An objection was made and it was sustained because the act of giving the weapon was a communication.
  - iii. Catholic priest shown gun. – Priest was called to testify and was willing to do so. An objection was made and sustained. It was reasonable for the man to believe the conversation was for spiritual purposes.
- b. Presence of a Third Person
  - i. Narrowly construed
    1. California court held that the privilege was broken during marriage counseling session with rabbi when both spouses present. *Simrin v. Simrin*, 233 Cal. App. 2d 90 (1965)
    2. No privilege when the pastor *and his wife* were present during the communication. *State v. Melvin*, 564 A.2d 458 (N.H. 1989); *State v. West*, 345 S.E.2d 186 (N.C. 1986)
  - ii. Broadly construed
    1. Presence of interpreter does not break the privilege. *People v. Harris*, 2011 934 N.Y.S.2d 639 (Sup. Ct.)
    2. Presence of stenographer, clerk, or secretary does not break the privilege. Mississippi Rules of Evidence, Rule 505

3. Husband & wife at marriage counseling with chaplain was privileged. *United States v. Harris*, No. 2020-07, 2021 CCA LEXIS 176 (A.F. Ct. Crim. App. Apr. 16, 2021)
  4. In some jurisdictions, the privilege may attach during church disciplinary hearings *Doe v. Corp. of the Pres. Of the Church of Jesus Christ of Latter-Day Saints*, 90 P.3d 1147 (Wash.App. 2004)
- c. Not Intended for Further Disclosure
    - i. Sometimes a person will come to a pastor and confess wrong doing. The person says “please tell my mother what I’ve told you, I’m sorry and want to come home.” There is no privilege because it a communication which is not expected to be in confidence.
  - d. Made in Confidence
    - i. Are their words spoken like, “Can you keep this secret?” “Please keep what I’m about to tell you private?”

IX. Who holds the privilege?

- a. Penitent
  - i. A defendant waived the privilege and subpoenaed a priest to testify. Priest found in contempt of court for refusing to testify. *Commonwealth v. Kane*, 388 Mass. 128, 445 N.E.2d 598 (1983).
  - ii. A defendant wanted to prevent the testimony of a stake president of an LDS church who counseled him. It was error to allow in the testimony under Oregon law because penitent holds the privilege. *State v. Cox*, 87 Or. App. 443 (1987) Or. Evid. Code 506(2)
  - iii. A high school conducted an audit. There were some questions about missing money that the bookkeeper couldn’t explain. The bookkeeper had access to checks and funds and was tried for embezzlement. At trial the bookkeeper was asked about her communications with her pastor. There was an objection and the trial court kept statements out of evidence. A layperson under the Virginia Code is not a holder of the privilege, but only the minister. *Nestle v. Commonwealth*, 22 Va. App. 336, 470 S.E.2d 133 (Va. Code Ann. § 19.2-271.3).
- b. Cleric
  - i. Some jurisdictions confer a testimonial privilege only on clergy. They alone may elect to waive that privilege in their sole discretion and within the dictates of their religious beliefs. See, *Nestle v. Commonwealth*, 22 Va. App. 336, 470 S.E.2d 133 (1996) (Va. Code Ann. § 19.2-271.3)
- c. Both
  - i. The privilege can be asserted by either the penitent or the cleric.

X. Provide a Notice

- a. Many parishioners or members of the public seeking spiritual counsel from ministers assume that their communications are confidential. This may not be

accurate. A court in Illinois found that statements made by a minor in juvenile detention to a Pentecostal chaplain were not privileged because the practice of the chaplain's denomination did not encompass penitential confessions. The minor thought the communications were confidential because he was speaking to a minister. "[T]he [clergy-penitent privilege] statute does not provide that the penitent's 'perception' determines when this confidence arises." *People v. Thomas*, 2014 IL App (2d) 121001.

**Atty Practice Tip:** When advising clergy, the best practice is to provide full disclosure to a penitent **before** the pastoral communication starts as to whether what is said in private will remain a secret or not. (See Appendix 3A for notice of privilege and 3B for notice of no privilege).

## XI. Difficulties with the Bi-Vocational Minister

- a. Many pastors working in churches are both licensed counselors and ordained ministers.
  - i. For what reason is the person seeking help from the minister? Does the minister and the counselee have the same understanding of the reason for the meeting?
  - ii. Is there payment?

## XII. What about Child Abuse Reporting?

- a. Some states have expressly done away with the privilege as it relates to child abuse reporting.
  - i. New Hampshire: "The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter." NH Rev. Stat. § 169-C:32
  - ii. North Carolina: "No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue." NC Stats. § 7B-310
  - iii. Rhode Island: "The privileged quality of communication between husband and wife and any professional person and his or her patient or client, except that between attorney and client, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter." RI Gen. Laws § 40-11-11
  - iv. Tennessee: All persons are mandatory reporters. TN Code § 37-1-411. However, a member of the clergy may be exempt from testifying. TN Code § 24-1-206
  - v. Texas: "In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in

the case of communications between an attorney and client.” TX Family Code § 261.202

- b. Determine what constitutes abuse and neglect in your state or county.
  - i. Some counties read abuse or neglect broadly to cover parental failure to support gender transitioning or lack of support for minors coming out as gay, lesbian, or bisexual.
  - ii. Others assert that “excessive yelling” constitutes abuse. *Emotional abuse* is defined as “failure to provide warmth, attention, supervision, normal living experiences See, Los Angeles County Dept. of Children and Family Services (FAQ).
  - iii. In addition to sexual and physical abuse, there is *spiritual, financial, and technological* abuse. *Health Education Framework*, Chapter 6: Grades Nine Through Twelve (April 2019 Revision), p. 43-44 and 59 at line 1444.

### XIII. How to Assert the Privilege?

- a. Written discovery. Object and cite to the statute from your state – even if in federal court – and do not provide a response beyond the objection. Do not agree to stipulations to seal the record.
- b. Depositions. Object, cite to the statute from your state, and direct deponent not to answer the question.
- c. Trial. Object, cite to the statute from your state.
  - i. By failing to raise this issue in the trial court, defendant may not now claim error. *People v Watkins*, 468 Mich. 233, 235, 238-239 (2003).
- d. Minister subpoenaed to testify. File motion to quash. (See Appendix 4: sample notice of motion, memorandum of law, clergy declaration, attorney declaration, proposed order.)

***Atty Practice Tips on Writing:*** The best practice for motions to quash is a minimalist approach. File an affidavit or declaration signed by the cleric with the motion in which the factual statements address each element of the privilege statute. In the memorandum of law, add a short paragraph on the First Amendment religion clauses so that issue is preserved for appeal. On appeal, refer to the legislative opinion letter in Appendix 2 for a fuller discussion which should include an overview of the historical background, the evolution of the privilege, and fully developed free exercise of religion argument).