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Confidences to Clergymen: Their Legal Status as Privileged Information

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CONFIDENCES TO CLERGYMEN:

THEIR LEGAL STATUS AS PRIVILEGED INFORMATION

A Research Paper Presented to the Faculty
of Concordia Seminary, St. Louis,
in partial fulfillment of the
requirements for elective
P-200

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by

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May, 1972

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Short Title:

CONFIDENCES TO CLERGYMEN

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CHAPTER I

THE BASIC DEFINITIONS OF THE LEGAL TERMS RELATING TO THE PRIEST-PENITENT PRIVILEGE

In everyday discourse the terms "communication," "confidence," and "privilege" are defined in a more general sense than in a court of law. It becomes necessary, therefore, to define these terms more closely for the present study. Henry Campbell Black in his well-known legal dictionary, Black's Law Dictionary, defines the term "communication" in the following manner:

> Information given, the sharing of knowledge by one with another; conference; consultation or bargaining preparatory to making a contract. A communication can be either absolutely privileged or conditionally or qualifiedly privileged.[1]

Perhaps a more complete definition is found in volume fifteen of Corpus Juris Secundum:

> ...the act of communicating. The term also means intelligence, news, that which is communicated or imparted, a written or verbal message, something said by one person to another. It is not restricted, however, to mere words, but includes acts as well, embracing every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and every method by which one person can derive impressions or information from the conduct, condition, or language of another.[2]

These definitions emphasize the legal aspect of the term. "Communication" refers not only to words spoken between two persons but also to the conduct, condition, and language of a person. The term can also refer to written materials.

The legal sense of the term "privilege" goes beyond the ordinary meaning and has a variety of meanings under the law. Basically, the term refers to "a right, power, franchise, or immunity held by a person or class, against or beyond the course of the law."[3] In this sense the parish pastor in certain limited circumstances has the right or immunity in a court of law not to testify to matters which he has discussed with a person who has come to him for spiritual help. The "privilege" or right is described in volume fifteen of Corpus Juris Secundum in the following manner:

> Certain classes of communications, passing between persons who stand in a confidential or fiduciary relation to each other (or who, on account of their relative situation, are under a duty of secrecy or fidelity), which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society. The phrase describes only secret communications, the secrecy being enjoined either actually or by implication, and so does not include communications made for the purpose, or with the expectation, of being disclosed, or those made in the presence of others.[4]

The third term frequently referred to in relation to the penitent-priest privilege is "confidence." The legal sense of this term is more closely aligned with the definition afforded it in normal discourse. Black offered this definition of the term:

> Trust; reliance; ground of trust. It is as applicable to the subject of trust, as nearly a synonym, as the English language is capable of. Trust is a confidence which one man reposes in another and confidence is a trust.[5]

Often the terms "communication" and "privilege" are used

in connection with one another in a legal sense and in this present study. The term "privileged communication" is defined with some degree of precision in volume fifteen of *Corpus Juris Secundum*:

> A communication communicated in confidence, privately indorsed, secret, in reliance on secrecy....The term is employed in the law with two significations. In one sense it signifies oral or printed utterances which are not actionable although defamatory, and in this sense the term is treated in Libel and Slander paragraphs 87-120. In another sense the term "privileged communication" has reference to communications made during the existence of certain confidential relationships recognized by law and not competent to be produced in court during the trial of a case.[6]

The basic meaning of "privileged communications" in this study is information obtained during the course of counseling which a minister does with one who has sought his spiritual guidance. This information is legally exempt as evidence in a court of law under certain circumstances which shall be taken up at the proper point in this study.

CHAPTER II

A STATEMENT OF THE PROBLEM

Clergymen have traditionally been reluctant to divulge information which they have received during the course of spiritual guidance to individuals. Ministers have been known to pay a fine and go to jail before revealing the contents of communications between them and their counselees. The confidential information received by the clergyman has been considered both professionally and ethically to be a sacred trust. Wayne E. Oates refers to this covenant relationship in his book on pastoral counseling, Protestant Pastoral Counseling:

> A covenant of communication is much more than a promise not to tell anything the person has said, which may or may not be a wise thing to promise. A covenant of communication consists of a *mutual* understanding that both the counselor and the counselee will consult with each other *before* either of them discusses their conversation with *anyone* else. Thus, no one is told what has been discussed without the permission of the other to do so.[7]

Although the confidential relationship which a lawyer enjoys with his client and which a doctor has with his patient has been safeguarded under the law to great lengths, the relationship which the parish pastor has with his spiritual guardians has not fared well at all under the law. Presently fourty-four states have statutes concerning the "priest-penitent Privilege" as it is commonly termed.[8] This does not mean that in every case where a clergyman has claimed

the privilege in those forty-four states that it has been granted. William Harold Tiemann refers to this fact in his book, <u>The Right to Silence</u>:

> The fact that a state has a statute on the priest-penitent privilege, however, does not guarentee that a minister may be excluded from testifying as a witness in a trial. In nearly all of the cases in which the statute has been invoked, the courts have recognized the rule, but have found that under the particular circumstances of the case it was not applicable.[9]

Under these circumstances the minister is confronted with a serious ethical and professional problem. If he reveals confidential information received during a counseling session he is neglecting his responsibilities toward those whom he counsels. If he refuses to testify in a court of law he runs the risk of fine and/or jail. In addition, the pastor must have the complete trust and confidence of those whom he counsels before any meaningful counseling can occur. The justice's opinion in the <u>LeGore v. LeGore</u> case pertains:

> Any intermediary in a marital dispute must have the confidence of both parties and must know the true facts if he is to give effective guidance and counseling. Nothing could be more destructive of the trust and confidence that the parties would place in him, than the apprehension that he might later divulge what was told to him in confidence. Marriage counseling seeking to preserve the sanctity of marriage is most important and is definitely within the functions and duties of a minister. It is to be encouraged rather than discouraged.[10]

Thus it behooves the minister to be well acquainted with his legal rights in this area of counseling so that he may more effectively minister to those who seek his guid-

ance. This study is an effort to inform the parish pastor of his rights in this area. It is written from the viewpoint and knowledge of a layman and is not an attempt to present legal advice in any particular situation which might occur during a pastor's functions as a counselor. It is merely an attempt to lay the facts before him and hopefully enable a more enlightened approach to the possible legal pitfalls of the counseling situation. In every case where these is a legal question involved the pastor should consult an attorney.

The scope of this paper is twofold. First there is a brief history of the "priest-penitent privilege" under common law. Secondly there is a review of the privilege in the fifty states and under the Federal jurisdictions. The number of cases and statutes concerning this privilege are too numerous to be dealt with at length. Only representative cases and landmark decisions are reviewed. The statutes pertaining to the priest-penitent privilege are listed in the Appendix of this paper. No attempt has been made to analyze each statute, but there is an analysis of their content along the lines of narrow versus broadened statutes. This has reference to whether a statute gives minimal protection to the minister or whether it provides more extensive coverage in this priest-penitent relationship.

Two important previous investigations into this problem

should be mentioned. Fred L. Kuhlmann's article, "Communications to Clergymen--When Are They Privileged?" in the Spring, 1968, Valparaiso University Law Review,[11] is an excellent overview of the problem from the viewpoint of a lawyer. The second major source is a book by Harold William Tiemann entitled, The Right To Silence.[12] Tiemann holds Bachelor of Divinity and Master of Theology degrees from Austin Presbyterian Theological Seminary and has down extenxive work in the area from a minister's viewpoint.

CHAPTER III

THE PRIVILEGE UNDER COMMON LAW

A brief history of the priest-penitent privilege is in order for a proper understanding of the status of the privilege in the courts of the United States today. During the Middle Ages the priest-penitent privilege was not recognized in the courts of England under what is termed common law. Henry Campbell Black defines "common law" in his legal dictionary, Black's Law Dictionary.

> ...the common law is that body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock. As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgements and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.....As concerns its force and authority in the United States, the phrase designates that portion of the common law of England...which had been adopted and was in force here at the time of the Revolution. This, so far as it has not since been expressly abrogated, is recognized as an organic part of the jurisprudence of most of the United States.[13]

Basically common law is that body of law which is unwritten by a state legislature but is a common rule of practice which is followed in a court of law when there is no statute which takes precedent.

Reference is also made to "statute." Black defines the

term in the following manner:

> An Act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state....This word is used to designate the written law in contradistinction to the unwritten law.[14]

The common law history of the priest-penitent privilege is one of almost constant rejection. Clergy were repeatedly compelled to testify in the courts of England or face the consequences, namely, contempt of court. Most authorities agree that after the Restoration in England the privilege did not exist under common law. The justice in a North Carolina case, _In re_ Williams, held a Baptist minister in contempt of court for refusing to testify in a rape case and made the following comment in his opinion on the case:

> Apart from the statute, there is no privilege with reference to communications between clergyman, or other spiritual advisor, and his communicants or other who seek his advice and comfort.[15]

Tiemann in his book, _The Right to Silence_, states: "The commentators on the laws of evidence generally agree that after the Restoration, the common law recognized no right of privileged communications to clergymen."[16] In another place Tiemann states: "Under the common law, only two relations were recognized as privileged--those between attorney and client and those between husband and wife."[17] Fred L. Kuhlmann concurs in this opinion with the following

comment:

> This statement coincides with the views of authorities on the law of evidence and two New Jersey cases which made clear that in the absence of a statute granting the privilege the testimony of a clergyman can be compelled under the common law. Moreover, there is considerable dicta to this effect in other state court decisions.[18]

The existence of the priest-penitent privilege before the Restoration in England is attested by Edward A. Hogan in his "A Modern Problem on the Privilege of the Confessional" which appears in the Loyola Law Review.

> Through blind acceptance of Lord Coke's gloss on the statute of Articuli Cleri, American lawyers have failed to discover the true nature of the privilege. The omission in Blackstone's Commentaries which has often been given great weight by the American bench and bar from our earliest day, has led to calm acceptance of the proposition that no such privilege was known to common law. More likely the privilege existed at early common law, but subsequently was banned with the banning of the Prayer Book of the Church of England.[19]

The importance of these comments is the fact that in the absence of a statute the common law obtains. Since the concensus is that the common law did not recognize the priest-penitent privilege, the result is that where there is no statute recognizing the priest-penitent privilege the courts have not recognized the privilege under common law. There have been minor exceptions to this rule as we shall see.

A brief review of the major cases that have been decided under common law is appropiate at this point. The cases re-emphasize the point that the common law did not recognize the priest-penitent privilege. The cases are arranged in chrono-

logical order to show the progression of thought in the courts concerning the priest-penitent privilege.

The earliest on record case under the common law is simply known as Anonymous (1693, England).[20] Only one phrase in Lord Chief Justice Holt's opinion obtains.

> Lord Chief Justice Holt declared that communications with an attorney or scrivener were privileged; "for he is counsel to a man with whom he will advise, if he be intrusted and educated in such way of practice; otherwise, of a gentleman, parson, etc." The meaning of the last ambiguous phrase is that the privilege would not apply to a pastor.[21]

In 1802 an Irish court decided the case of Butler v. Moore.[22] A Roman Catholic priest was called to testify to the deceased final religious affliation. The heir of Lord Bunboyne had attempted to prove that his ancestor who had been a Catholic, joined the Anglican Church and later returned to the Catholic Church. If this could be proved Lord Dunboyne was incapable of making a will to divide his property. The heir would receive a larger share of the estate than was provided in the will. When the priest was called to testify he refused to testify on the grounds of "confidential communications made to him in the exercise of his clerical functions."[23] Mr. Justice Smith ruled that the privilege did not exist under common law and found the priest in contempt of court. The priest was jailed.[24]

People v. Phillips[25] was a New York case decided in 1813. This case is of particular interest because it is one instance

in which the court decided that a priest had the privilege in the absence of a statute. Unfortunately the courts have not followed this case and it is the only one on record under state law in which the privilege was granted in the absence of a statute.[26]

Another New York case decided in 1817 is simply entitled Christian Smith's Case.[27] In this murder case the Reverend Peter J. Van Pelt, a Protestant minister, was called to testify concerning statements made to him as a minister of the gospel. The defense counsel objected to the testimony but Justice Van Ness ruled that the confession was not privileged. He stated:

> ...there is a grave distinction, between auricular confessions made to a priest in the course of discipline, according to the cannons of the church, and those made to a minister of the gospel in confidence, merely as a friend or adviser.[28]

The significance of this case is that it is the first case on record in this country of an actual distinction being made between the confessional of the Roman Catholic Church and those communications made to Protestant ministers during the course of their functions as a spiritual adviser.[29]

The Massachusetts case of Commonwealth v. Drake[30] decided in 1818 did not consider penitential confessions to fellow members of a church to be privileged information. The charge was lewdness and involved a public confession before a congregation. Tiemann reports that so far as he

can determine no court has ever ruled that a public confession before a congregation is a privileged communication.[31]

In 1853 the common law case of Regina v. Griffin[32] a chaplain of a workhouse was allowed not to testify in a criminal case. However the fact that the chaplain did not testify was more the result of the prosecution's withdrawal of its request for the chaplain's testimony than it was the result of the judge's decision in the case. Although the judge did state: "I do not lay this down as an absolute rule; but I think that such evidence ought not to be given."[33] It was on the basis of this statement that the prosecution did not press for the testimony of the chaplain.

Regina v. Hay[34] granted no privilege to a Catholic priest who refused to testify as to who gave him a watch which was charged as being stolen. The case was decided in 1860 in England. It is significant because it reveals how difficult it is to determine the scope of the priest-penitent privilege. A criminal came to a priest and handed over a watch which he had stolen. He did this in the confessional. Tiemann reveals the important point in this case.

> Surely, the handing over of the watch by the thief to the priest was as much an act of privileged communication as any penitential words spoken. By it, guilt was acknowledged and confessed. At the same time we find here an implied recognition that the confession itself was a privileged communication.[35]

The judge in the case did not agree with the point of view which Tiemann suggests. The justice made the following

comment on the case.

> ...that statements made to a priest or clergyman in sacramental or quasis sacramental confession are privileged, but anything said or done out of confession is not so, even although its disclosure may incidentally disclose the identity of the party.[36]

In a divorce case for the cause of adultery the English court granted no privilege to the vicar of a church who had heard certain admissions from the accused. In this 1893 case of Normanshaw v. Normanshaw[37] the president of the court summed up his opinion in the following words:

> ...each case of confidential communication should be dealt with on its own merits, but...it was not to be supposed for a single moment that a clergyman had any right to withold information from a court of law.[38]

Cook v. Carrol (1945, Ireland)[39] is an important modern case under common law. This case will be dealt with at length when we discuss the matter of who possesses the privilege. For the present it is sufficient to relate the background of the case and the pertinent assessment of Justice Gavan Duff. The background is that a parish priest was called to testify in a seduction case. The priest refused on the grounds of "confidential communication." Tiemann relates the opinion of the court in his own words.

> In this case the Irish court pointed out that since the privilege was not recognized under the common law of England, the priest in England could be sentenced for refusing to co-operate with the court. But the judge went on to say that the common law of England is the common law of Ireland only to the extent that the English common law is not contrary to the national independence and the public policy of Ireland. The court then declared that the denial of privilege of the

> confessional was a heresy which developed in the post-Reformation period and was contrary to the public policy of Ireland. The priest was not held in contempt for refusing to testify.[40]

Also the comments of Justice Gavan Duff himself are pertinent.

> The issue here is governed by common law, not by any Act of Parliament, and, while common law in Ireland and England may generally coincide, it is now recognized that they are not necessarily the same; in particular, the customs and public opinion of the two countries diverge on matters touching religion, and the common law in force must harmonise with our Constitution.[41]

These cases under common law provide an important insight into the decisions in the courts today. Where a state does not have a statute or where the statute is unclear in its designations the courts in the United States today have followed the common law rule of not recognizing the priest-penitent privilege. Tiemann states:

> We may conclude that on the whole, privileged communication between priest and penitent has not fared well under the common law. While there are exceptions, such a privilege has not generally been recognized by the courts. If our concern is genuine in this cause to protect the penitential confidences between priest and penitent, whatever his faith, then we must work to establish protection under statute law.[42]

With this comment in mind it is appropriate to review at this point what the various state statutes and jurisdictions have provided in the way of protection for the parish pastor from possible prosectuion for refusing to testify to confidential communications. The study of the priest-penitent privilege or clergyman-privilege under the various state statutes and jurisdictions will reveal how the courts have followed or not

followed the common law of England and the United States.

CHAPTER IV

THE PRIVILEGE UNDER THE VARIOUS STATE STATUTES AND JURISDICTIONS

The study of the priest-penitent privilege under the various state statutes and jurisdictions will take the following format. First there is a discussion of the more important state statutes and their various implications. Included here is a discussion of the "construction" of the statutes in the various jurisdictions of the United States. Black's Law Dictionary defines the legal term, "construction," in the following passage:

> The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument, or oral agreement, or the application of such subject to the case in question, by reasoning in the light derived from extraneously connected circumstances or laws or writings bearing upon the same or a connected matter, or by seeking and applying the probable aim and purpose of the provision.[43]

Black furthermore delineates between "strict construction" and liberal construction":

> Strict (or literal) construction is construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications.
>
> Liberal (or equitable) construction, on the other hand, expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designated to remedy, provided such an interpretation is not inconsistent with the language used; it resolves all reasonable doubts in favor of the applicability of the statute to the par-

> ticular case. Black, Interp. Laws, 282; Causey v. Guilford County, 192 N.C. 298, 135 S.E. 40, 46. It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument. Lawrence v. McCalmont 2 How. 426, 11 L.Ed. 326.[44]

The second portion of this chapter is devoted to a discussion of the basic conditions under which the priest-penitent privilege has been recognized in the United States in recent history. This portion is based on a study of the important cases which have been decided with reference to the various state statutes.

Although forty-four states and the District of Columbia have statutes which recognize the priest-penitent privilege, none of them really protect the clergyman to the full extent which he deserves. In six states there is no statute and it is presumed that in the absence of a state statute the common law rule of no privilege obtains. Kuhlmann listed the six states which have no priest-penitent privilege. They are Alabama, Connecticut, Mississippi, New Hampshire, Texas, and West Virginia.[45]

The states which do have statutes pertaining to the privileged nature of communications to clergymen can be divided between those states which have a narrow definition of the privilege and those which have a broadened definition. Kuhlmann states that the following states have a broadened statute concerning the priest-penitent privilege:

> California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia.[46]

The remaining states have statutes which could be defined as "narrow" in their interpretation of the privilege. These states are listed by Kuhlmann as follows:

> Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Indiana, Kentucky, Maine, Michigan, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming.[47]

The reader is referred to the Appendix of this paper for a verification of this data.

Of the states which have a narrow statute there are certain characteristics which might be listed. A survey of the Appendix of this paper which contains a complete listing of the state statutes will reveal that those states which have been listed as having a narrow statute use key phrases. These key phrases are the following: "minister of the gospel, or priest," "confessions," "in his professional character or capacity," "in the course of discipline of his church." The wording of these narrow statutes is so similar because they have all been based on the first clergyman-privilege statute to be enacted in the United States. This statute was passed in 1926 by the New York state legislature and consisted of the following single sentence:

> No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any con-

> fessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.[48]

The key phrases found in this statute and reproduced in the various state statutes which have a narrow privilege can be construed in a variety of ways and have been in the various state jurisdictions. The ambiguity of these terms argues for more explicit statutes in these states.

The cases involving the narrow statutes are numerous.

> Only in rare instances has a court bothered to determine whether the law requires a strict or a liberal construction of privileged statutes, and the courts which have expressly addressed themselves to this question have disagreed.[49]

Of those courts which have addressed themselves to the narrow statutes *In re* Swenson[50] is the landmark case and has been considered the clergyman's "bible" in those states which have only a narrow definition of the priest-penitent privilege. This case was decided in 1931 before Minnesota broadened its statute. It is based on the 1927 Minnesota statute which reads as follows:

> A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.[51]

As we shall see the Minnesota Supreme Court construed this statute liberally. Kuhlmann believes that the Swenson decision was questionable in its logic and conclusion.[52]

The circumstances of the In re Swenson case are as follows. A Lutheran minister in Minneapolis had performed the marriage ceremony for the Sundseth's and both had been members of his church. Mr. Sunseth was the trustee of the church. He telephoned the pastor and asked for permission to see him. The request was granted and he came immediately to the pastor's office. There he related to his pastor the intimate affairs which were the cause for his wife's civorce action against him.[53]

Of importance in the court's decision to uphold the privilege and not allow the Lutheran pastor to testify was the statement by the court that a voluntary confession qualifies for the privilege in the same manner as one made under the "course of discipline" of a church such as the Roman Catholic Church which makes confession a sacrament and requires it.[54] The justice states the following opinion:

> ...The question is not the truth or merits of the religious persuasion to which a party belongs nor whether the particular creed or denomination exacts, requires, or permits a sacred communication, but the sole question is, as suggested in Best on Ev. (12th Ed.) Sec. 585, whether the party who bona fide seeks spiritual advice should be allowed it freely.[55]

Here the Minnesota court construed the words "in the course of discipline enjoined by the rules or practice of the religious body to which he belongs"[56] to mean not only confessions made to Roman Catholic priests or others to whom confessions are required by their church but also those confes-

sions which are voluntarily given and received.

Only four other cases uphold the priest-penitent privilege under narrow state statutes. They are Krugilov v. Krugilov,[57] Kohloff v. Bronx Savings Bank,[58] Vickers v. Stoneman,[59] and Dehler v. State ex rel Bierck.[60] These cases are of minor importance since they did not establish precedents. There is basically one importance in these cases. They did uphold the clergyman-privilege in states which have the narrow type of statute. These five cases do not offer much encouragement to the clergymen who live in the twenty-three states which have the narrow statutes. Kuhlmann considers this "...not the sort of judicial record to give encouragement to clergymen living in the twenty-three states which have these archaic statutes, especially when there are numerous cases decided under these statutes in which the clergyman was permitted or compelled to testify.[61]

Several cases of major importance can be mentioned which were decided under the narrow statutes and which construed the statutes more strictly than was the case in the Swenson trial. Knight v. Lee[62] declared that the confessions to an elder and a deacon of the Disciples of Christ Church are not valid as privileged information. The term "clergyman" does not mean an elder or a deacon. In Alford v. Johnson[63] conversations with a Methodist minister were not held by the Arkansas court to be made "in the course of discipline en-

joined by the rules of practice of the Methodist church."[64]
In Johnson v. Commonwealth[65] a minister of the Methodist church had voluntarily visited an accused murder in jail. The defendant, in the course of his conversation with the pastor stated that he had lost his temper and killed the deceased. Judge Rees of the Kentucky Court of Appeals ruled that the conversation and resultant information was not privileged because the conversation was not penitential in character. Judge Rees made the following opinion:

> It does not appear that the conversation between the minister and appellant, during which the statement was made, was connected in any way with the discipline of the church. The statement was made in the same manner it would have been made to any other visitor. The visit of Mr. Dixon (Rev. J.L. Dixon) to the jail where the appellant was incarcerated was voluntary on his part and unsolicited. There is nothing in the record to indicate that the appellant belonged to the Methodist Church or any other denomination or that he made the statement in question of some supposed religious duty.[66]

Here the Kentucky court construed the state statute in strict terms. Finally, there is the case of Simrin v. Simrin[67] in the state of California. This case was decided in 1965 in the same year in which California broadened its clergyman-privilege. The Simrin case was decided before the statute in California was broadened. The case involved a rabbi who engaged in marriage counseling with a couple who later divorced. In the divorce proceeding the rabbi was called to testify. The judge in the case ruled that the rabbi was not privileged in this instance because the California statute

did not apply to communications made to a marriage counselor. There was no binding spiritual confession involved. Later in the year the California statute was broadened to include marriage counseling. The justice in the Simrin case offered this comment:

> It would wrench the language of the statute to hold that it applies to communications made to a religious or spiritual advisor acting as a marriage counselor. We think this result regrettable for reasons of public policy... but the wording of the statute leaves us no choice.[68]

These cases are just a sampling of the numerous decisions under the narrow state statutes which have been construed strictly.

In recent years states have broadened the clergyman-privilege. Kuhlmann comments on this fact.

> Fifteen states in the past decade have either enacted statutes for the first time or have liberalized statutes which had been on their books. Clergyman-privilege has become a part of the law of evidence.[69]

The states which have been listed as having the broadened privilege display certain characteristics. The statutes go beyond the simple term "confession" and use words such as "communications," "information," "confidential communications," "disclosure," or "confidence." These statutes often make it clear that the course of discipline of a minister includes his functions and duties as a minister and not merely or simply the hearing of a confession.[70] The broadened statutes often include: (1) more explicit definitions of the term "clergyman"; (2) the inclusion of

quasi-legal proceedings as qualified situations where the privilege may be claimed;[72] (3) provisions for fines in the event a clergyman should divulge confidential information in a court of law;[73] (4) provision for marriage counseling as a <u>bona fide</u> course of discipline of the minister.[74]

Several specific state statutes are of interest. The Florida statute broadened the concept of the minister's duties as a counselor. The statute provides that a minister will not be allowed or required to testify to confidential communications

> ...properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline.[75]

Blaes comments on this broadened concept.

> The Florida statute sets up a standard for communications to the minister "according to the usual course of his practice or discipline." It seems that the standard of the minister's own "practice" is a much broader concept than that of the discipline of a church.[76]

The Kansas statute is one that also deserves our attention. The Kansas statute broadens the concept of the minister's discipline or obligation to include one who is authorized

> ...to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.[77]

Thus not only confessions are admissible as privileged in-

formation, but also information received in the minister's course of duty as one who "preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church."[78] Blaes relates that the Uniform Rules of Evidence[79] do not contain this broadened concept.

> The Uniform Rules of Evidence as drafted by the National Conference of Commissioners on Uniform State Laws, from which the entire Article Four of our New Code of Civil Procedure was copied almost verbatim, do not contain this broadened concept. The proposed Uniform Rule Twenty-nine adheres to the condition of a church disciplinary requirement.[80]

The California statute found in Deering's <u>California Codes</u>[81] is of interest because of its rather precise definition of terms. The terms "clergyman" and "penitential communication" are explicitly defined. In addition the clergyman has possession of the privilege as well as the penitent. Thus the clergyman can prevent the penitent from testifying in court to confidential information he has received from the penitent. The Law Revision Commission Comment as found in Deering's, <u>California Codes</u>, made this assessment.

> This section provides the clergyman with a privilege in his own right. Moreover, he may claim this privilege even if the penitent has waived the privilege granted him by Section 1033.[83]

The Georgia statute uses the terms "every communication" and "by any person professing religious faith." These terms leave considerable room for a liberal construction of

the statute and favors the granting of the privilege for the clergyman. The statute reads as follows:

> Every communication made by any person professing religious faith, or seeking spiritual comfort, to any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest or rabbi shall disclose any communications made to him by any such person professing religious faith, or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court.[84]

In the states which have broadened their clergyman-privilege two cases seem to stand out as being important in relation to the manner in which they construed these liberal or broadened statutes. These are LeGore v. LeGore[85] and In re Williams.[86] LeGore v. LeGore construed the Pennsylvania statute liberally. The In re Williams case in North Carolina was construed strictly.

In LeGore v. LeGore the justice in the Appelate court ruled that the lower trial court had wrongfully admitted testimony of a clergyman in a divorce proceeding. The justice liberally construed the words in the Pennsylvania statute which follows.

> No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any grand jury, traverse or petit jury,

> or any officer thereof, before the General Assembly or any committee thereof or before any commission, department or bureau of this Commonwealth, or municipal body, officer or committee thereof.[87] (Italics mine)

Here communications to clergymen in marriage counseling were considered privileged. The appropiate part of the judge's opinion in this case is found on page five of this paper and footnote number ten relates the source of this opinion.

In re Williams was a strict construction of a liberal or broadened statute in North Carolina. A Baptist minister refused to testify in a rape case on the grounds that it would violate his duty as a Chrisitan minister and that he did not wish to take sides. Both the prosecution and the defence had no objection to the minister's testimony yet he persisted in his refusal to testify. The judge found him in contempt of court and sentenced him to ten days in jail. The judge strictly adhered to the state statute which provides that "this section shall not apply where communicant in open court waives the privilege conferred."[88]

It remains to be determined under what general conditions the privilege has been granted in the jurisdictions of the United States today. Although the statutes vary considerably, there are general conditions under which the clergyman-privilege and the clergyman's professional relationships are recognized in most of the states. It must be remembered that the narrow statutes are less likely to allow the clergyman these rights and that the conditions

discussed in the following discourse may not apply in those jurisdictions which have the narrow statute.

Kuhlmann suggests that there are four basic tests or requirements to be met before communications to clergymen will be recognized as privileged under the narrow statutes.

> 1. The communication must be made to a clergyman.
> 2. The communication must be a "confession."
> 3. The confession must be made to the clergyman in his professional character.
> 4. The communication must have been made "in the course of discipline enjoined by the rules of practice" of the clergyman's denomination.[89]

The terms "clergyman," "confession," "in his professional character," and "in the course of discipline enjoined by the rules of practice" have been construed strictly by most courts. Clergymen in those twenty-three states which have the narrow statute find that in the majority of the cases decided in their respective states the courts have not allowed the privilege. Tiemann states:

> The tendency of the courts is toward a strict construction of those statutes making communications to clergymen privileged, and, usually, only those communications are privileged which are made under the exact conditions enumerated in the statutes.[90]

The first general requirement for the privilege is usually that it be made to a "clergyman." Courts have ruled and a few statutes explicitly indicate[91] that person who is self-ordained is not to be classified a clergyman and is not entitled to the privilege. Also courts have ruled that an elder of a church or a deacon does not qualify as a clergy-

man. There is one exception to this rule in the case of Reutkemeier v. Nolte[92] in the Iowa Supreme Court (1917). The court

> ...acknowledged that in the Presbyterian Church the Session stands in much the same disciplinary relationship to the members of the congregation as the priest alone does in the Roman Catholic Church. Whether this ruling would apply to other denominations having ordained officers charged with the spiritual discipline of the congregation is not known. But the logic would seem to point that way.[93]

The next requirement for the clergyman-privilege seems to be that the communication must be in the form of a confession. This is not true in the more liberal state statutes which allow communications during marriage counseling to be classified as privileged. For instance see the statutes of California, Delaware, and the District of Columbia in the Appendix of this paper. Yet the majority of the statutes in the United States today require that the communications to the clergyman be "confessions." Some states are less strict as to the meaning of this term than other states. Many states require that the statements to the clergyman must be penitential in character. The person must be seeking spiritual consolation or forgiveness for sin. The Kansas statute requires that the person must believe in God. In Section Four it states:

> "penitent" means a person who recognized the existence and the authority of God and who seeks or recives from a regular or duly ordained minister of religion advice or assistance in determing or discharging his moral obligations, or in obtaining God's mercy or forgiveness

for past culpable conduct.[94]

Other states and court rulings have determined that "confessions" can mean voluntary penitential statements as opposed to those which are required by a church rule or discipline. Here the case of In re Swenson applies.[95]

The third requirement is that the statements be made to the clergyman during his capacity as a clergyman and in his "professional character." In a case entitled, McGrogan's Will[96] the court ruled that a simple matter of a minister receiving two checks totalling $5000.00 coupled with a voluntary expression from the deceased to the effect that the church would get all of her money upon her death was not related in a spiritual advier relationship. The minister was not acting in his professional capacity as a spiritual adviser. In People v. Gates[97] admissions to the president of a consistory of a church were not held to be made to the president in his professional character as a clergyman. It can be said that where the minister is acting solely as an agent for a person or advising him concerning matters outside the realm of spiritual guidance those statements may not be held to be privileged in a court of law.

Statements by parishioners or others to a clergyman to the effect that another person has comitted a crime or statements that reveal information about another person are not held to be privileged. They are not penitential; they

do not confess sin but only reveal it. Yet it must be remembered that several states do cover these types of communications also. As was mentioned, marriage counseling is one instance were non-penitential statements are covered in some states by the clergyman-privilege. The Delaware statute pertains here.[98]

The fourth general requirement for the clergyman-privilege is that it be made "in the course of discipline enjoined by the rules of practice" of a particular church or denomination. This implies that the statements to the clergyman must not only be a confession but they must be required by the church and its teachings. In most cases this would mean that only the Roman Catholic church would qualify, but most jurisdictions have broadened the concept so that other churches can claim the privilege. The Minnesota Supreme Court in the case of In re Swenson stated this broadened concept in the following terms:

> It is important that the communication be made in such a spirit and within the course of "discipline" and it is sufficient whether such "discipline" enjoins the clergyman to receive the communication or whether it enjoins the other party, if a member of the church, to deliver the communication. Such practice makes the communication privileged, when accompanies by the essential characteristics, though made by a person not a member of the particular church or of any church. Man, regardless of his religious affliation, whose conscience is shrunken and whose soul is puny, enters the clergyman's door in despair and gloom; he there finds consolation and hope. It is said that God through the clergy resuscitates. The clergymen practise the thought that "the first of all altars is the soul of an unhappy man who is consoled and thanks God."[99]

Here the confession of a man who is not a member of a church is regarded as privileged. Obviously a man who is not a member of a church could not be under any discipline of the church to engage in confession since he does not belong to a church. Yet the clergyman may or may not be under such a discipline. Thus the traditional statute phrase that a confession must be made "under the discipline of a church and its rules" is not explicit as to whethdr the "discipline enjoined" refers to the fact that a given clergyman must hear confession under the rules of his church or whether a given parishoner must make confession. Either possibility could be meant by the indeterminant phrase "in the course of discipline enjoined by the church to which he belongs." Many of the broadened or newly enacted statutes have moved away from this type of phraseology.

Wigmore in his treatise entitled, A Treatise on the Anglo-American System of Evidence in Trials at Common Law,[100] states that the following four requirements should be met in order that the clergyman-privilege might be granted:

> 1. The communications must originate in a confidence that they will not be disclosed;
> 2. This element of confidentiality must be essential to the full and satisfactory maintence of the relation between the parties;
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[101]

These requirements are reflected in the foregoing discussion concerning Kuhlmann's four requirements which he has listed.

Several particular situations remain to be discussed in relation to the pastor's counseling situations. It might be asked: Are written materials considered to be confidential information under the clergyman-privilege? In Colbert v. State,[102] a trial for arson, a priest of a village had received an anonymous letter confessing the crime of arson. The priest took the letter to the defendant's residence and read it to her. He later testified in court that she was excited and wrote at his dictation and gave him a statement that no stranger spoke to her on the date of the fire, and that the letter was unknown to her. The priest testified in court that the handwriting of the original letter and that of the written statement were the same. The written statements were admissible as evidence in the trial.

In Allen v. Lindeman Kuhlmann reports that

> ...the Iowa court compelled a clergyman to produce certain letters as evidence in an alienation of affection suit. The letters had been found by the defendant's wife in the defendant's home and had been delivered by her to her pastor for safekeeping. The court said it was dealing with an independent document and not a direct communication, and that if such evidence were to be excluded, justice could be thwarted simply by delivering important papers to a clergyman.[103]

Kuhlmann also reports that in the case where a rector received written statements from a man charged with bigamy the statements were not privileged. In the Hills v. State[104]

case the defendant had written out points he wanted the rector to bring before his wife.[105]

It appears that written statements are not exempt from disclosure in a court of law. The clergyman is best suited in a counseling situation if he does not make any written account of the discussion and if he does not accept written materials from those whom he counsels. Joslin makes a good point along these lines in the following statement:

> In most cases, it is also very important that these innermost secrets communicated to the minister not be recorded in writing by the minister, nor any memorandum made which would divulge the confidence. They should be retained only in the memory of the minister.[106]

Another point to consider is whether the clergyman-privilege remains in effect when a third party has overheard the confidence whether planned or not. Tiemann gives his viewpoint in these words:

> The courts have generally held that when a privileged communication is overheard, whether by accident or design, by some person not a member of the privileged relation or a necessary intermediary, such a person may testify as to the communication. In fact, he is said to be absolutely unaffected by the rule of privilege.[107]

There seems to be no precedent upon which Tiemann's opinion can be based. But in the absence of a court ruling on this matter it is best to concur with Tiemann that the person who overhears a privileged communication can and may be compelled to testify in a court of law.

The question arises as to whether the observations which

the clergyman makes during the course of his counseling duties is privileged information. For instance, can the minister be compelled in a court of alw to testify as to the physical or mental condition of his counselee? Evidently he can and may be compelled to testify. In Boyles v. Cora (Iowa, 1942) a clergyman was compelled to testify concerning observations he made in a counseling situation.[108] The case of Buuck v. Kruckenberg is more significant. Justice Crumpacker of the Appellate Court of Indiana made the following comments in a reversal of a lower court opinion.

> On this testimony the witness was asked to express his opinion as to the soundness of mind of Currie Blume on the 31st day of January, 1947. The appellee objected to the question and upon the objection being sustained moved to strike out the entire testimony of the witness which motion was also sustained.
>
> These rulings were made upon the theory that the testimony of the witness concerned matters communicated to him as a clergyman as to which he is made an incompetent witness by Burns' Statute Paragraph 2-1714. The statute, however, made the witness incompetent only as to "confessions or admissions" made to him "in course of discipline enjoined by" his church. It is apparent that the testimony of Rev. Hofius concerned neither a confession nor an admission on the part of Carrie Blume made to him in the course of any disciplinary action enjoined upon him by his church. He was clearly a competent witness and it was error to strike out his testimony and to refuse to receive his opinion based thereon as to Carrie Blume's soundness of mind.[109]

The case of Schaeffer's Estate (Pennsylvania, 1941) concurred in the opinion that personal observations are not exempt from a court of law.[110]

There remains the question of possession of the privilege.

The legal question divides along the line of reasoning that privileges usually must be claimed and do not exist when there is no claim to them. The consideration of the clergyman-privilege poses the question: does the counselee alone have the privilege or right to exclude testimony in a court of law or does the pastor also have the right to exclude testimony even when the counselee wishes that the testimony be given?

A justice commented on the attorney-client privilege in the following manner:

> The privilege of nondisclosure belongs to the client alone (Svenson v. Svenson, New York Reports, Vol. 178, p. 54) and disclosure should not be compelled when a client's liberty is at stake in criminal trial.[111]

This opinion has generally been followed in relation to the clergyman-privilege. In Gill v. Bouchard (Quebec, 1896)[112] the Quebec court determined the opposite opinion, though. This case does not seem to set a precedent.

Cook v. Carrol (Ireland, 1945)[113] is an important case under common law in determing the possession of the privilege. Here the justice determined that the privilege resided with the priest alone. The justice gave his reasoning.

> As between himself and his attorney, the client is master of the situation, so that if he thinks fit to waive his privilege, the privilege disappears and the lawyer, his paid servant, cannot set it up. But the priest is not hired, and a parishioner's waiver of privilege should not, as a matter of course, destroy the priest's right to keep his secret, where the sacerdotal privilege is regulated by law; ...to protect the priest against having to testify is only a half-measure of justice, if others may blurt out the conversation; the essential

> foundation of the relation established is the acceptance from the outset by all concerned of the inviolable secrecy of the meeting under the aegis of the parish priest; that is the capital consideration, and we must protect confidences which would never have been exchanged at all but for the absolute and implicit faith of his two parishioners in him. If in a crisis his extraordianary prestige as parish priest is utilized, we cannot afterwards, having gotten his aid in the closest secrecy, treat him as a cipher, a mere onlooker, whose determination to have the secret guarded may be ignored as soon as one of the contestants seeks to get the better of the other by broadcasting it.[114]

The Cook v. Carrol is an exception to the rule that the pen-penitent alone possesses the privilege.

There is a definite need for the clergyman to have the right or possession of the privilege in his own right. This was reflected in the opinion of Justice Gavan Duff as quoted above. The need is especially evident in marriage counseling. Kuhlmann comments on this aspect.

> Either party...should be able to claim the privilege even though the other may be willing to waive it. Thus, if a husband consult a clergyman with regard to marital difficulty and learns from the clergyman certain facts which he subsequently would like to introduce into evidence in a divorce proceeding, the clergyman should be in a position to prevent a breach of the confidence.[115]

There is concrete evidence that the statutes are moving in this direction as is evidenced in the California statute passed in 1965 and quoted fully in the Appendix. Here is the pertinent phrase:

> Subject to Section 912,[116] a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.[117]

The Law Revision Commission in California made this comment

as regards the new California statute:

> This section provides the clergyman with a privilege in his own right. Moreover, he may claim this privilege even if the penitent has waived the privilege granted him by Section 1033.[118]

This is only one statute in one state. There remains a great need to grant the privilege to the pastor in the fullest sense of the term.

Before this discussion of the clergyman-privilege in the fifty states is brought to a conclusion there are two minor points of interest. A reading of the statutes as listed in the Appendix of this paper reveals two technicalities. First certain statutes provide that the clergyman-privilege is granted only in civil cases or only in criminal cases. The Virginia statute provides:

> No regular minister of religion,...shall be required in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner,...[119]

It seems that the Louisiana situation is similar. Kuhlmann states in parentheses next to his listing of the Louisiana statute that it is "apparently applicable only to criminal cases."[120] Kuhlmann's reason for this comment is probably that under the clergyman-privilege in Louisiana the statute is found only in the Louisiana Criminal Procedures Code[121] and not in the Louisiana Civil Procedures Code. In several states the statutes explicitly state that the clergyman-privilege pertains in both civil and criminal actions. The

minister should be aware of the situation in his own statute.

The California statute reveals a technical point of law that should interest the pastor. Under Section 912, entitled, "Waiver of Privilege," of the California Evidence Code[122] subsection "c" relates: "A disclosure that is itself privileged is not a waiver of any privilege."[123] Thus the person who comes to the pastor and relates privileged information obtained in the husband-wife relationship which is privileged under law does not waive this husband-wife privilege by revealing to the pastor in confidence the information obatined in the marital relationship. Another example of this technicality is where a physician consults a physician who is a specialist and consequently reveals the information derived from his patient. This does not negate the patient's privilege. The pastor is under an obligation to prevent his parishioner's privilege from being waived by his own actions. Thus he should refrain from revealing confidences to those whom he consults if at all possible.

In some cases this is impossible. For instance the pastor may see the need to consult a sychiatrist or other professional and refer a parishoner to such a person. The law does not always protect the clergyman who reveals confidences to other professionals. In this case the clergyman is definitedly in an inferior position to the physician or lawyer who more often than not finds protection under the

law in this respect.

This concludes the discussion of the clergyman-privilege under the various state jurisdictions. The conclusions of this study of the problem at the state level are incorporated with the conclusions at the end of this paper in Chapter Six.

CHAPTER V

THE PRIVILEGE IN THE FEDERAL JURISDICTIONS

The clergyman-privilege under Federal jurisdictions is uncertain. There are no Federal statutes concerning the privilege. In general the laws and statutes of the various states pertain in the Federal jurisdictions. In other words the laws of the state in which litigation begins govern the Federal courts in their decisions unless the state law contradicts Federal statutes or the Federal Rules of Civil and Criminal Procedure.[124] Kuhlmann attests to the fact that the clergyman-privilege is uncertain in the Federal jurisdictions:

> The status of the clergyman-privilege in Federal courts is uncertain. If it exists at all, it is difficult to say how far it extends. There is no Federal statute on the matter and the Federal Rules of Civil and Criminal Procedure do not deal specifically with the subject. There are, however, two Federal cases which recognize the privilege.[125]

The two Federal cases, United States v. Keeney[126] and Mullen v. United States,[127] will be discussed subsequently.

First it should be mentioned that there is a statute on the clergyman-privilege in the District of Columbia. The statute reads as follows:

> An act to prohibit the examination in District of Columbia courts of any minister of religion in connection with any communication made to him in his professional capacity, without the consent of the party to such communication.

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that no priest, clergyman, rabbi, practitioner of Christian Science, or other duly licensed, ordained, or consecrated minister of any religion authorized to perform a marriage ceremony in the District of Columbia shall be examined in any civil or criminal proceedings in the courts of the District of Columbia--
>
> (1)with respect to any confession, or communication made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making such confession or communications, or
> (2) with respect to any communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking such advice, or
> (3) with respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.[128]

This provision is more extensive than most of the state statutes. It recognizes marriage counseling as a bona fide spiritual relationship between pastor and counselee. The statute seems to allow more room for a liberal construction than do most state statutes.

Although Congress has seen fit to pass the statute on clergyman-privilege for the District of Columbia, it has failed to pass a Federal statute on the matter. On February 6, 1959, Senator Kenneth B. Keating introduced Senate bill 965 which would have granted such a privilege to clergymen in the Federal courts or before committees of Congress. He sought to amend Chapter 119 of Title 28, of the United States Code, by inseritng immediately following Section 1825 the

following new section entitled 1826:

> 1826. Privilege of clergymen and news reporters.
>
> (1) A clergyman, or other minister of any religion, shall not be allowed in any court of the United States to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.
>
> (2) A person engaged or employed in the work of gathering, compiling, editing, publishing, disseminating, broadcasting or televising news shall not be required in any court of the United States to disclose the source of information procured by him for such publication, broadcasting or televising unless such disclosure is necessary in the interest of national security.[129]

The bill died in committee. Two other bills were introduced in the House of Representatives by Representative Multer of New York on January 27, 1959, but they too died in committee.

Not only has Congress sought action on the clergyman-privilege on the Federal level, but also the United Nations has seen the need for such a privilege. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities under the chairmanship of Arcot Krishnaswami recently compiled a "Study of Discrimination in the Matter of Religious Rights and Practices." This study produced sixteen rules for dealing with problems involved in this area. Rule fifteen of the study makes the following statement:

> No cleric who receives information in confidence, in accordance with the prescriptions of his religion, should be compelled by public authorities to divulge such information.[130]

Before the discussion of the two important Federal cases is undertaken something should be explained more fully at this point. The Federal courts generally follow the state statutes in which the Federal court sits. Also the construction of the state statute in the state court is usually binding in a Federal court. This rule of practice is found in volume fifty-eight of American Jurisprudence under paragraph 364:

> In a civil action in the Federal court, the statutes of the state in which the court sits determine the admissibility of evidence which is objected to as being privileged communication. The construction of the statute in the state court is likewise binding on the Federal court.
>
> As to criminal cases, the privileges of witnesses are governed by the principles of the common law unless provided otherwise by act of Congress or the Rules of Criminal Procedure.[131]

It is appropiate at this point to discuss the two Federal cases mentioned earlier. Mullen v. United States[132] is of particular interest. This case involved confessions made to a Lutheran minister by a woman who was not a member of the pastor's church. The pastor had promised spiritual aid and comfort to the woman if she confessed.

The woman was Carolyn Mullen. She was the mother of several children. Carolyn Mullen was accustomed to chaining her children in her house while she was absent. The woman was tried in the United States District Court for the District of Columbia and was convicted under a Federal

statute making it a crime to torture, beat cruelly, abuse, or otherwise willfully mistreat a child. The appeal of her case was heard by the United States Court of Appeals for the District of Columbia Circuit on November 21, 1958. The decision which was handed down on December 4, 1958, reversed the lower court's conviction. Part of the grounds for reversal was that the testimony of the Lutheran pastor was privileged information.

One important aspect of this case is that although the Federal courts generally follow common law in the absence of a statute,[133] this Federal court in effect ruled that the common law was obselete. The judge stated in the case:

> ...recognition of the privilege in Federal courts does not depend upon finding that it has either existed uniformly at common law or has been approved in terms by acts of Congress.[134]

At another point in Judge Fahy's opinion he states the following principle:

> It thus appears that non-recognition of the privilege at certain periods in the development of the common law was inconsistent with the basic principles of the common law itself. It would be no service to the common law to perpetuate in its name a rule of evidence which is inconsistent with the foregoing fundamental guides furnished by that law. And...the denial was never uniform or resolute, so strong were the claims of reason in support of the privilege.[135]

Judge Fahy further comments:

> When reason and experience call for recognition of a privilege, which has the effect of restricting evidence, the dead hand of the common law will not restrain such recognition.[136]

This is a Federal case which upheld the clergyman-privilege and disregarded the common law rule of no privilege in the absence of a statute. Kuhlmann offers this comment upon the court's decision:

> Whether other Federal courts will follow this interpretation, whether they will follow it in civil cases, and under what circumstances they will recognize the privilege, are all unanswerable questions at this time.[137]

In any event the case of Mullen v. United States is an historic decision and offers some encouragement that the privilege may be recognized on the Federal level.

The other Federal case on the clergyman-privilege is United States v. Keeney.[138] This was a prosecution of a former United Nations employee for contempt of Congress for refusing to answer a question while testifying before a Senate subcommittee. On the motion for acquittal the District Court Justice Holtzoff held that the information which the committee sought as to whether anyone in the State Department aided her in obtaining employment with the United Nations was not privileged even under the rules and regulations of the United Nations.[139]

Although the case did not involve privileged information between a clergyman and a penitent the court did comment on the existence of the clergyman-privilege in passing. Judge Holtzoff in his opinion stated:

> The subject of privileged communications is within the field of municipal law and is governed by the law of

> the United States and not by any principle of international law. Under the law of the United States privileged communications are strictly limited to a few well-defined categories, such as communications between attorney and client, clergyman and penitent, and physician and patient....The law does not recognize that communications between an employer and employee are privileged, even though there may be a moral duty not to disclose such communication except when ordered by a competent tribunal.[140]

Kuhlmann makes this comment on the judge's opinion:

> It would be interesting to know how the court reached this unqualified and positive conclusion--but no authority is cited and no reasons are given.[141]

This concludes the discussion of the clergyman-privilege at the Federal level. The conclusions of this study at the Federal level will be drawn in the next chapter.

CHAPTER VI

CONCLUSION

It has been shown that the clergyman-privilege in the various jurisdictions of this nation is not as well established as many clergyman may suppose it to be. The Federal courts have made few comments upon the privilege and their is no Federal statute to guide their decisions. It seems that the privilege at the Federal level of jurisdiction is at least questionable. Mullen v. United States is the case which may offer the most encouragement to the clergyman, but the ruling of the court in this case is an exception to the rule. Thus it is doubtful whether Federal courts in the future will follow the Mullen case as a precedent.

The states which do have statutes on the books concerning the privilege often do not offer the protection which clergymen deserve in the types of counseling which they undertake. The cases which have been decided in the various jurisdictions have more often than not denied the privilege and construed the statutes strictly. It seems that the privilege under state jurisdictions offers more hope than at the Federal level, but the clergyman's position in the various states is by no means absolutely secure. The states which have enacted the stronger type of statute on the clergyman-privilege offer the most protection to the

pastor. In these states which have the stronger or broadened type of statute marriage counseling is sometimes considered a valid relationship in which confidences may be considered privileged under the law. Certain states have provided that the pastor may possess the privilege as well as the counselee. The California statute which is listed in the Appendix of this paper on page sixty is an example of this type of statute. The privilege in the states which have the narrow statute is much less secure. The court decisions in these states have left little hope for a positive statement on the privilege in these states. New statutes are definitedly needed in these states.

There seems to be no logical basis upon which the courts have decided cases concerning the clergyman-privilege. The decisions have often been inconsistent from one jurisdiction to another. Kulhmann makes the following comment:

> Unfortunately, the cases form no pattern and offer no constructive guidelines for the clergyman. The court's decision on the issue of privilege often seems to depend more on the result the court wants to reach on the substantive issue in the case than on a logical application of the clergyman-privilege statute. One gets the impression which cannot, however, be documented, that where the court wants to reach a result that can best be attained by exclusion of the clergyman's testimony it has interpreted the statute strictly; whereas, in cases where the clergyman's testimony is needed to reach or fortify the desired result on the substantive issue, the court has not hesitated to construe the statute liberally. There is little rhyme or reason to the cases. On the contrary, a view of the cases demonstrate how uncertain and unpredictable the clergyman's position is.[142]

In this light it behooves the minister to take precautions in his counseling situations. Denominations should pass resolutions making it clear that their pastors are under a church discipline to hear confessions and other communications relating to spiritual aid and comfort. Clergy should make certain that counseling is conducted in a confidential atomosphere. The pastor should have the counselee sign a statement that the clergyman will not be called upon to testify in court to information gained in the counseling session. Clergy should warn the counselee that the conversation may not be privileged. The pastor should know his own state statute.[143]

The pastor should not be hampered in the performance of his spiritual functions. Judge Fahy in Mullen v. United States correctly stated the principle involved:

> Sound policy--reason and experience--concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secret of a penitent's confidential confession to him, at least absent of the penitential's consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not to be transformed into evidence to be given to the whole world....The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.[144]

To this end, namely, the spiritual well-being of counselees, the clergyman-privilege should be broadened and enacted more firmly into statute law. This paper has sought to reveal this need for stronger statutes which clergyman have often not realized or neglected.

FOOTNOTES

[1] Black, Henry Campbell, Black's Law Dictionary (St. Paul, Minnesota: West Publishing Company, 1968), p. 349.

[2] Corpus Juris Secundum (Brooklyn: The American Law Book Company, 1951), XV, 638-639.

[3] Black, p. 1359.

[4] Corpus Juris Secundum, XV, 639.

[5] Black, p. 369.

[6] Corpus Juris Secundum, LXXII, 954.

[7] Oates, Wayne E., Protestant Pastoral Counseling (Philadelphia: The Westminister Press, 1968), p. 175.

[8] See the Appendix for a complete listing of these state statutes.

[9] Tiemann, William Harold, The Right to Silence (Richmond, Virginia: John Knox Press, 1964), p. 92.

[10] Pennsylvania District and County Reports, Second Edition (Philadelphia: The Legal Intelligencer, 1964), XXXI, 108.

[11] Kuhlmann, Fred L., "Communications to Clergymen--When Are They Privileged?", Valparaiso Law Review, II, No. 2 (Spring, 1968) 265-295.

[12] Tiemann.

[13] Black, pp. 345-346.

[14] Black, p. 1581.

[15] In re Williams, North Carolina Reports (Raleigh, North Carolina: Bynum Printing Company, 1967), CCLXIX, 68-81.

[16] Tiemann, p. 36.

[17] Ibid., p. 77.

[18] Kuhlmann, p. 266.

[19] Hogan Edward A., "A Modern Problem on the Privilege of the Confessional", Loyola Law Review, VI, No. 1 (1951-1952), 13.

[20]Wigmore, John Henry, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (Boston: Little, Brown and Company, 1961), Paragraph 2394.

[21]Tiemann, pp. 85-86.

[22]Wigmore, Paragraph 2394.

[23]Tiemann, p. 86.

[24]Tiemann, p. 86.

[25]The Lawyers Reports, Annotated (Rochester, New York: The Lawyers Co-operative Publishing Company, 1917) CMXVII d, 279.

[26]Tiemann, p. 88.

[27]Wigmore, Paragraph 2394.

[28]Ibid.

[29]Tiemann, p. 86.

[30]The Lawyers Reports, p. 279.

[31]Tiemann, p. 86.

[32]Wigmore, Paragraph 2394.

[33]Tiemann, p. 88.

[34]Tiemann, p. 87.

[35]Ibid.

[36]The English Reports (Edinburgh: W. Green and Son, 1930), CLXXV, 933.

[37]Tiemann, p. 87.

[38]Ibid.

[39]Ibid., p. 88.

[40]Ibid., p. 89.

[41]The Irish Reports (Dublin: Incorporated Council of Law Reporting for Ireland, 1945), 515.

[42]Tiemann, p. 91.

[43]Black, p. 386.

[44]*Ibid.*, p. 386.

[45]Kuhlmann, p. 266. Kuhlmann lists West Virginia among the states having no statute because the statute that does exist in West Virginia pertains only to the jurisdiction of a justice of the peace and not to courts of record.

[46]*Ibid.*, p. 277.

[47]*Ibid.*, p. 267.

[48]*Ibid.*, p. 268.

[49]*Ibid.*, p. 269.

[50]*Northwestern Reporter* (St. Paul, Minnesota: West Publishing Company, 1963), CCXXXVII, 589.

[51]*Minnesota Law Review* (Minneapolis: The University of Minnesota, 1931), XVI, 105.

[52]Kuhlmann, p. 271.

[53]*Northwestern Reporter*, CCXXXVII, 589.

[54]Kuhlmann, p. 270.

[55]*Northwestern Reporter*, CCXXXVII, 591.

[56]*Minnesota Statutes*, Annotated (St. Paul, Minnesota: West Publishing Company, 1967), Paragraph 595.02(3).

[57]*New York Supplement Reporter*, Second Series (St. Paul, Minnesota: West Publishing Company, 1961), CCXVII, 845.

[58]*Ibid.*, CCXXXIII, 849.

[59]*Michigan Reports*, LXXIII, 419.

[60]*Indiana Appeals, Law Reports*, XXII, 383.

[61]Kuhlmann, pp. 272-273.

[62]*Indiana Reports*, LXXX, 201.

[63]*Arkansas Reports*, CIII, 236.

[64] Tiemann, pp. 96-97.

[65] *Kentucky Reports* (Lexington, Kentucky: Commercial Printing Company, 1949) CCCX, 557.

[66] *Ibid.*, p. 560.

[67] *California Reporter* (St. Paul, Minnesota: West Publishing Company, 1965), XLIII, 376.

[68] *Ibid.*, 378-379.

[69] Tiemann, pp. 287-288.

[70] Kuhlmann, p. 281.

[71] See the statutes of California, Delaware, District of Columbia, Florida, Georgia, Illinois, Kansas, New Mexico, North Carolina, Pennsylvania and South Carolina in the Appendix.

[72] See the statutes of Illinois, Pennsylvania and South Carolina in the Appendix.

[73] Tennessee makes violation a misdemeanor and the clergyman is subject to a possible fifty dollar fine and six months imprisonment in the county jail or workhouse.

[74] See the statutes of Delaware and the District of Columbia.

[75] *Florida Statutes*, Annotated (St. Paul, Minnesota: West Publishing Company, 1960), VII, 120.

[76] Blaes, Emmet A., "Penitent Privilege Under the New Code," *Kansas Bar Journal*, XXXIII, 330.

[77] *Kansas Civil Procedures Statutes*, Annotated (Kansas City, Missouri: Vernon Law Book Company, 1965), IV, 324.

[78] *Ibid.*

[79] *American Law Institute, Model Code of Evidence* (Philadelphia: American Law Institute, 1942), Rule 219, pp. 64-65.

[80] Blaes, p. 331.

[81] *California Codes*, Annotated (San Francisco: Bancroft-Whitney Company, 1966), Paragraph 1030-1034, pp. 523-528.

[82] *Ibid.*, p. 528.

[83] *Ibid.*, p. 528.

[84] *Code of Georgia*, Annotated (Atlanta: The Harrison Company, 1954), XIII a, 101.

[85] *Pennsylvania District and County Reports*, XXXI, 107-108.

[86] *North Carolina Reports* (Raleigh, North Carolina: Bynum Printing Company, 1967) CCLXX, 68-81.

[87] *Pennsylvania Statutes*, Annotated (St. Paul, Minnesota: West Publishing Company, 1971) XXVIII, 128.

[88] *North Carolina General Statutes* (Charolettesville, Virginia: The Michie Company, 1969), IB, 176-177.

[89] Kuhlmann, p. 268.

[90] Tiemann, p. 80.

[91] *Pennsylvania Statutes*, Annotated, XXVIII, 128.

[92] *The Lawyers Reports*, Annotated, CMXVII d, 274-276.

[93] Tiemann, p. 105.

[94] *Kansas Civil Procedures Statutes*, Annotated, IV, 324.

[95] *Northwestern Reporter*, CCXXXVII, 589.

[96] *Pennsylvania District and County Reports*, Second Series, XXVI, 37-41.

[97] *New York Common Law Reports*, XXVI, 311.

[98] *Delaware Codes*, Annotated (St. Paul, Minnesota: West Publishing Company, 1970), V, 211.

[99] *Minnesota Statutes*, Annotated, XXXVIII, 340-341.

[100] Wigmore, Paragraph 2394.

[101] *Ibid.*

[102] *Wisconscin Reports*, CXXV, 423.

[103]Northwestern Reporter, Second Series, CXLVII, 610.

[104]Nebraska Reports, LXI, 589.

[105]Kuhlmann, p. 283.

[106]Joslin, Stanley G., The Minister's Law Handbook (Manhasset, New York: Channel Press, 1962), p. 116.

[107]Tiemann, p. 107.

[108]Tiemann, p. 108.

[109]American Law Reports, Annotated, Second Series, XXII, pp. 1145-1146, 1149-1150.

[110]American Law Reports, Annotated, Second Series, XXII, p. 1159.

[111]New York Reports, CCCVIII, p. 459.

[112]American Law Reports, Second Series, XXII, p. 1156.

[113]Ibid., pp. 1157-1158.

[114]Irish Reports (1945), pp. 515-525.

[115]Kuhlmann, p. 291.

[116]California Codes, Annotated, Article VIII, Paragraph 912.

[117]Ibid., Paragraph 1034, pp. 526-527.

[118]Ibid., Paragraph 1034, pp. 527-528.

[119]Virginia Codes, Annotated (Charolettesville, Virginia: The Michie Company, 1971), II, p. 63.

[120]Kuhlmann, p. 279.

[121]Louisiana Criminal Procedures Code, Annotated (St. Paul, Minnesota, 1967), X-XII, p. 331.

[122]California Codes, Annotated, Paragraph 912, Article VIII.

[123]Ibid., Paragraph 912, Article VIII.

[124]American Jurisprudence (San Francisco: Bancroft-Whitney Company, 1948), LVIII, 216.

[125] Kuhlmann, p. 285.

[126] *Federal Supplement* (St. Paul, Minnesota: West Publishing Company, 1953), CXI, 231-236.

[127] *Federal Reporter*, Second Series (St. Paul, Minnesota: West Publishing Company, 1959), CCLXII, 275-281.

[128] United States 87th Congress, 1st Session, Senate Report 805, Calendar 787, House Rule, 5686.

[129] Tiemann, pp. 114-115.

[130] *Ibid.*, p. 115.

[131] *American Jurisprudence*, Paragraph 364, LVIII, 216.

[132] *Federal Reporter*, CCLXIII, 275-281.

[133] *American Jurisprudence*, Paragraph 364, LVIII, 216.

[134] *Federal Reporter*, Second Series, CCLXIII, 278.

[135] *Ibid.*, CCLXIII, 280.

[136] *Ibid.*, CCLXIII, 275.

[137] Kuhlmann, p. 286.

[138] *Federal Supplement*, CXI, 231-236.

[139] *Ibid.*, CXI, 231-236.

[140] *Ibid.*, CXI, 234-235.

[141] Kuhlmann, p. 285.

[142] *Ibid.*, p. 269.

[143] *Ibid.*, pp. 293-294.

[144] *Federal Reporter*, CCLXIII, 280.

APPENDIX

Below are listed the state statutes concerning the clergyman-privilege. They are listed in alphabetical order. The District of Columbia statute is included.

ALASKA. Alaska Rules of Civil Procedure, Rule 43(b), Section 3.

> A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional capacity, in the course of discipline enjoined by the church to which he belongs.

ARIZONA. Arizona Revised Statutes, Annotated, Paragraph 12-2233.

> In a civil action a clergyman or priest shall not, without the consent of the person making a confession, be examined as to any confession made to him in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs.

-----. Arizona Revised Statutes, Annotated, Paragraph 13-1802.

> A person shall not be examined as a witness in the following cases:
>
> (4) A clergyman or priest, without consent of the person making the confession, as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

ARKANSAS. Arkansas Statutes, Annotated, Paragraph 28-606.

> No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules or

practice of such denomination.

CALIFORNIA. California Codes, Annotated, Paragraphs 1030-1034.

Paragraph 1030. "Clergyman".

As used in this article, "clergyman" means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.

Paragraph 1031. "Penitent".

As used in this article, "penitent" means a person who has made a penitential communication to a clergyman.

Paragraph 1032. "Penitential Communication".

As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications, and, under the discipline or tenets of his church, denomination, or organization has a duty to keep such communications secret.

Paragraph 1033. "Privilege of Penitent".

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

Paragraph 1034. "Privilege of Clergyman".

Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

-----. California Codes, Annotated, Paragraph 912.

Paragraph 912. "Waiver of Privilege".

(A.) Except as otherwise provided in this section, the right of any person to claim a privilege provided by... Paragraph 1033 (privilege of penitent), and Paragraph

1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if holder of the privilege, without coercion, has disclosed a **significant** part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has legal standing and opportunity to claim the privilege.

COLORADO. Colorado Revised Statutes, Annotated, Chapter 154-1-7(4).

(4). A clergyman or priest shall not be examined without the consent of the person making the confession as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

DELAWARE. Delaware Codes, Annotated, Title 10, Paragraph 4317.

No priest, clergyman, rabbi, "practitioner of Christian Science", or other duly licensed, ordained, or consecrated minister of any religion shall be examined in any civil or criminal proceedings in the courts of this state--

(1) with respect to any confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making such confession or communication,

(2) with respect to any communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking such advice, or

(3) with respect to any communication made to him, in his professional capacity, by either spouse in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.

DISTRICT OF COLUMBIA. District of Columbia Codes, Annotated, Paragraph 14-309.

An act to prohibit the examination in District of Columbia courts of any minister of religion in connection with any communication made to him in his professional capacity, without the consent of the party to such communication.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that no priest, clergyman, rabbi, practitioner of Christian Science, or other duly licensed, ordained, or consecrated minister of any religion authorized to perform a marriage ceremony in the District of Columbia shall be examined in any civil or criminal proceedings in the courts of the District of Columbia--

(1) with respect to any confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making such confession or communications, or

(2) with respect to any communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking such advice, or

(3) with respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.

FLORIDA. Florida Statutes Annotated, Paragraph 90.241.

(1) No minister of the gospel, no priest of the Catholic church, no rector of the Episcopal church, no ordained rabbi, no practitioner of Christian Science, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over the age of twenty-one years, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to him in his professional capacity, and necessary to enable him to discharge the functions of his office ac-

cording to the usual course of his practice or discipline, wherein such person so communication such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(2) Such prohibition shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by affidavit properly sworn to by such a one, or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

(3) Nothing in this section shall modify or in anywise change the law relative to "hearsay testimony".

(4) It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as herein prohibited is offered, to determine whether or not that person possesses the qualifications which prohibit him from testifying to the communications sought to be proved by him.

GEORGIA. Code of Georgia, Annotated, Paragraph 38-419.1.

Every communication made by any person professing religious faith, or seeking spiritual comfort, to any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court.

HAWAII. Hawaii Revised Statutes, Paragraph 621-20.

No clergyman of any church or religious denomination shall, without the consent of the person making the confession, divulge in any action, suit, or proceeding, whether civil or criminal, any confession made to him in his professional character according to the uses of the church or religious denomination to which he belongs.

IDAHO. Idaho Codes, Annotated, Paragraph 9-203 (3).

A clergyman or priest can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

ILLINOIS. Illinois Revised Statutes, Annotated, Chapter 51, Paragraph 48.1.

A clergyman, or priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him in his professional character or as a spiritual adviser in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he professes, nor be compelled to divulge any information which he obtained by him in such professional character or as such spiritual adviser.

INDIANA. Indiana Statutes, Annotated, Paragraph 2-1714.

The following persons shall not be competent witnesses:

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

IOWA. Iowa Code, Annotated, Paragraph 622.10.

No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the person in whose favor the same is made waives the rights conferred...
(Last part refers to a physician in a civil suit.)

KANSAS. Kansas Civil Procedures Statutes, Annotated, Paragraph 60-429.

(A.) Definitions. As used in this section,
(1) the term "duly ordained minister of religion, means a person who has been ordained, in accordance with the ceremonial ritual, or dsicipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization;

(2) the term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister;

(3) the term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization;

(4) "penitent" means a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct;

(5) "penitential communication" means any communication between a penitent and a regular or duly ordained

minister of religion which the penitent intends shall be kept secret and confidential and which pertains to advice or assistance in determining or discharging the penitent's moral obligations, or to obtaining God's mercy or forgiveness for past culpable conduct.

(B.) Privilege. A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that

(1) the communication was a penitential communication and
(2) the witness is the penitent or the minister, and
(3) the claimant is the penitent, or the minister making claim on behalf of an absent penitent.

KENTUCKY. Kentucky Revised Statutes, Annotated, Paragraph 421.210 (4).

(4) nor shall a clergyman or priest testify concerning any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person confessing.

LOUISIANA. Louisiana Criminal Procedures Code, Annotated, Paragraph 15-477.

Paragraph 15-477. Privileged communications to clergymen.

No clergyman is permitted, without the consent of the person making the communication, to disclose any communication made to him in confidence by one seeking his spiritual advice or consolation, or any information that he may have gotten by reason of such communication.

-----. Louisiana Criminal Procedures Code, Annotated, Paragraph 15-478.

Paragraph 15-478. Right to exclude testimony; nature of privilege; waiver.

The right to exclude the testimony, as provided in the

three articles last preceding, is purely personal, and can be set up only by the person in whose favor the right exists. If the right is waived, the legal adviser, the physician and the clergyman, as the case may be, may be examined and cross-examined to the same extent as any other witness.

MAINE. Maine Revised Statutes, Title 16, Paragraph 57.

Paragraph 57. "Privileged communications; clergymen".

(A.) Definitions. "Clergyman" means a priest, rabbi, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization;

(2) "Penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a clergyman thereof;

(3) "Penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a clergyman in the course of the discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(B.) Privilege. A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication if he claims the privilege and the judge finds that the communication was a penitential communication and the witness is the penitent or the clrgyman, and the claimant is the penitent or the clergyman, making the claim on behalf of an absent penitent.

MARYLAND. Maryland Annotated Code, Article 35, Paragraph 13.

No minister of the Gospel, clergyman or priest of an established church, of any denomination, shall be compelled to testify in relation to any confession or communication made to him in confidence by one seeking his spiritual advice or consolation.

MASSACHUSETTS. <u>Massachusetts Annotated Laws</u>, Chapter 233, Paragraph 20A.

> Paragraph 20A. "Certain Communications to Priests, Rabbis, Ministers, and Christian Science Practitioners Shall Be Privileged."
>
> A priest, rabbi, or ordained or licensed minister of any church or an accredited Christian Science practitioner shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nore shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

MICHIGAN. <u>Michigan Statutes</u>, Annotated, Paragraph 27A. 2156.

> No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

MINNESOTA. <u>Minnesota Statutes</u>, Annotated, Paragraph 595.02(3).

> (3) A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person.

MISSOURI. Missouri Revised Statutes, Annotated, Paragraph 491.060(4).

Paragraph 491.060. The following persons shall be incompetent to testify:

(4) A minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination.

MONTANA. Revised Codes of Montana, Paragraph 93-701-4.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

-----. Revised Codes of Montana, Paragraph 94-8801.

The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code.

NEBRASKA. Nebraska Revised Statutes, Paragraph 25-1201.

Paragraph 25-1201. "Witnesses; incompetent, when."

Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify:

(4) a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

-----. Nebraska Revised Statutes, Paragraph 25-1206.

Paragraph 25-1206. "Witnesses; other privileged relations; communications; competency."

No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

NEVADA. Nevada Revised Statutes, Paragraph 48.070.

Paragraph 48.070. "Confessor and confessant relationship."

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character.

NEW JERSEY. New Jersey Statutes, Annotated, Paragraph 2A: 84A-23.

2A: 84A-23. "Priest-penitent privilege. Rule 29."

Subject to Rule 37, a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes.

-----. New Jersey Statutes, Annotated, Paragraph 2A: 84A-29, Rule 37.

Paragraph 2A: 84A-29, Rule 37. "Waiver of privilege by contract or previous disclosure; limitations.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of

any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to the first question shall not operate as a waiver with respect to any other question.

NEW MEXICO. New Mexico Statutes, Annotated, Paragraph 20-1-12.

Paragraph 20-1-12. "Privileged communications."

(c) A clergyman cannot, without the consent of the person making the confession, be examined as to any confession or disclosure made to him in his professional character.

(f) If a person offer himself as a witness and voluntarily testify with reference to the communications specified in this act, that is to be deemed a consent to the examination of the person to whom the communications were made as above provided.

NEW YORK. New York Civil Practice Law, Paragraph 4505.

Paragraph 4505. "Confidential communication to clergy privileged."

Un less the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.

NORTH CAROLINA. North Carolina General Statutes, Paragraph 8-53.1.

Paragraph 8-53.1. "Communications between clergymen and communicants."

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an

established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

NORTH DAKOTA. North Dakota Century Code, Paragraph 31-01-06.

Paragraph 31-01-06. "Attorneys, clergyman, priests, physicians, surgeons, and public officers cannot testify regarding confidential communications."

A person cannot be examined as a witness in the following cases:

(2) A clergyman or priest, without the consent of the person making the confession, cannot be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

OHIO. Ohio Revised Codes, Annotated, Paragraph 2317.02.

Paragraph 2317.02. The following person shall not testify in certain respects:

(B) A clergyman or priest, concerning a confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

OKLAHOMA. Oklahoma Statutes, Annotated, Title 12, Paragraph 385.

Paragraph 305. "Persons incompetent to testify enumerated."

The following persons shall be incompetent to testify:

(5.) A clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

OREGON. Oregon Revised Statutes, Paragraph 44.040.

Paragraph 44.040. "Confidential Communications".

(C) A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

PENNSYLVANIA. Pennsylvania Statutes, Annotated, Title 28, Paragraph 331.

Paragraph 331. "Confiential Communications to Clergymen."

No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall not be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, or before any commission, department or bureau of this Commonwealth, or municipal body, officer or committee thereof.

RHODE ISLAND. General Laws of Rhode Island, Annotated, Paragraph 9-17-23.

Paragraph 9-17-23. "Privileged Communications to clergymen."

In the trial of every cause, both civil and criminal, no clergyman or priest shall be competent to testify concerning any confession made to him in his professional character in the course of discipline enjoined by the

church to which he belongs, without the consent of the person making the confession. No duly ordained minister of the gospel, priest or rabbi of any denomination shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline, without the consent of the person making such communication.

SOUTH CAROLINA. Code of Laws of South Carolina, Annotated, Paragraph 26-409.

Paragraph 26-409. "Ministers priests, and rabbis not required to disclose confidential communications."

In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

SOUTH DAKOTA. South Dakota Compiled Laws, 1967, Annotated, Paragraph 19-2-2.

A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined in the church to which he belongs.

TENNESSEE. Tennessee Codes, Annotated, Paragraph 24-109.

Paragraph 24-109. "Clergymen--Communications Confidential--Testimony prohibited--Waiver"

No minister of the gospel, no priest of the Catholic

Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over the age of twenty-one years, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to him in a confidentail manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

Such prohibition shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit properly sworn to by such a one or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending. Nothing in this section shall modify or in anywise change the law relative to "hearsay testimony."

-----. Tennessee Codes, Annotated, Paragraph 24-110.

Paragraph 24-110. "Penalty when clergyman testifies contrary to preceding section."

Any minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, and any regular minister of religion of any religious organization or denomination usually referred to as a church, violating the provisions of Paragraph 24-109, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) and imprisoned in the county jail or workhouse not exceeding six (6) months.

UTAH. Utah Code, Annotated, Paragraph 78-24-8(3).

Paragraph 78-24-8. "Privileged Communications."

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

VERMONT. Vermont Statutes, Annotated, Paragraph 12-1607.

Paragraph 1607. "Priests and Ministers."

A priest or minister of the gospel shall not be permitted to testify in court to statements made to him by a person under the sanctity of a religious confessional.

VIRGINIA. Virginia Code, Annotated, Paragraph 8-289.2.

Paragraph 8-289.2. "Communications between ministers of religion and persons they counsel or advise."

No regular minister of religion, over the age of twenty-one years, of any religious organization or denomination usually referred to as a church, shall be required in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advise relative to and growing out of the information so imparted.

WASHINGTON. Washington Revised Code, Annotated, Paragraph 5.60.060.

Paragraph 5.60.060. "Who are disqualified--Privileged Communications."

(3) A clergyman or priest shall not, without the consent of the person making the confession be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

WEST VIRGINIA. West Virginia Code, Annotated, Paragraph 50-610.

Paragraph 50-610. "Persons Incompetent To Testify."

The following persons are incompetent to testify as hereinafter provided, and not otherwise:

(d) A minister, clergyman or priest of any religious denomination, concerning any confession made to him according to the course of discipline enjoined by the church to which he belongs.

WISCONSIN. Wisconsin Statutes, Annotated, Paragraph 325.20.

Paragraph 325.20. "Confessions to Clergymen."

A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.

WYOMING. Wyoming Statutes, Annotated. Paragraph 1-139.

Paragraph 1-139. "Privileged Communication and Acts."

The following persons shall not testify in certain respects:

(2) A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

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