STUDY GUIDE: LDS PERSPECTIVES ON THE LAW

LESSON: THE SANCTITY OF THE CLERGY – PENITENT PRIVILEGE

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Selected Reading Material:

British Commonwealth law

Articles:

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Hopwood, JT, "Confessions in Criminal Cases" (1860) *The Jurist*, Part 2, 319; (1865) 3 *Juridical Society Papers* 129.

Lyon, LN, "Privileged Communications – Penitent and Priest" (1964-65) 7 *CLQ* 327.

Nokes, GD, "Professional Privilege" (1950) 66 *LQR* 88.

Nolan, RS, "The Law of the Seal of Confession" (1913) 13 *Catholic Encyclopedia* 649.

Books:

Baddeley, EL, *The Privilege of a Religious Confession in English Courts of Justice*, London, Butterworths, 1865.

Kurtscheid, B, *A History of the Seal of Confession*, authorised translation by The Rev. FA Marks, edited by Arthur Preuss, St Louis and London, B Herder Book Co, 1927.

McNeil, JT, *A History of the Cure of Souls*, New York, Evanston and London, Harper & Row, 1951.

Winckworth, P, *The Seal of the Confessional and the Law of Evidence*, Society for the Propagation of Christian Knowledge ("SPCK"), London 1952.

Wright, CA, and Graham, KW, *Federal Practice and Procedure: Evidence*, 3rd ed, St Paul Minnesota, West Publishing Company, 1992, Vol 26 §5612.

United States law

United States Constitution, First Amendment

John C. Bush and William Harold Tiemann, The Right To Silence, (3rd ed. 1989)

Carl H.Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1 (1986)

Fred L. Kuhlmann, *Communications to Clergymen–When Are They Privileged?*, 2 VAL. U. L. REV.265 (1968).

Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends, [no author listed], Annotation, 71 A.L.R. 3d 794 (1976)

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV 1409 (1990).

Seward Reese, *Confidential Communications To The Clergy*, 24 OHIO ST. L.J. 55 (1963).

Arthur Gross Schaefer and Darren Levine, *No Sanctuary From the Law: Legal Issues Facing Clergy*, 30 Loy. L.A. L. Rev. 177 (1996).

Rian Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment As Defense to Tort Liability*, 93 A.L.R. FED. 754 (1989)

Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege–The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967)

Leonard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 146 REG. U. L. REV. 145 (2000).

Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

I. PUBLIC POLICY REASONS FOR RECOGNIZING THE CLERGY PRIVILEGE: WHY IS THE CLERGY-PENITENT PRIVILEGE IMPORTANT IN OUR SOCIETY?

Public policy

The public policy reasons in the British Commonwealth which stand in favour of the privilege are enumerated by McNicol (McNicol, S, *Law of Privilege*, Sydney, The Law Book Company Ltd, 1992, p 324.) as follows:

1. A citizen has a fundamental right to the unfettered practice of religion without interference from the law.

2. There is clear, unyielding ethical duty imposed upon ministers not to divulge what is said to them in confidence.

3. Ministers will universally disobey a law compelling confidential confessional communications, preferring incarceration over violation of their spiritual duty. They choose to obey a law of God over a law of man.

4. It is preferable to protect legislatively the priest/penitent relationship, so as to reduce unnecessary friction between church and state, and to prevent the needless criminal conviction and, in some cases, incarceration of ministers.

That author concludes: "The arguments against the creation of a priest/penitent privilege are few, and those that exist are far from compelling."

The minority judgment of L'Heureux Dubé J in the Supreme Court of Canada in *R v Gruenke* [1991] 3 SCR 263 opined that a class privilege in favour of confidential religious communications was preferable over the case-by-case privilege approved by the majority in that court, on the grounds that:

1. Religious confidentiality is vitally important, not only to the maintenance of religious organisations, but also to their individual members. Without it, individuals would be disinclined to confide in their religious leaders. Its value is the value to society of religion and religious organisations generally.

2. The Canadian charter guarantee of freedom of religion indicates that a legal privilege for confidential religious communications is commensurate with Canadian values.

3. Public interest in privacy justifies placing emphasis on the benefit to the individual as opposed to society as a whole. The religious element in the pastor/penitent relationship promotes special values of privacy characteristic of that relationship.

4. It would be impractical and futile to attempt to force the clergy to testify, because often the clergy would refuse. Compelling disclosure or charging a cleric with contempt, could bring disrepute to the system of justice.

L'Heureux Dubé J also expressed concern about the "chilling effect" that a failure to recognise a class pastor/penitent category of privilege in Canada would have on the spiritual relationship within Canadian society. Whilst she acknowledged that not every communication between a pastor and a penitent would be protected, protection of confidential religious communications as a class was to be protected. Gruenke's particular communication with her clergyperson was not protected because she did not have any expectation of confidentiality, and had not imposed one upon her clergyperson when she made the communication.

In the United States following are samples of the public policy statements regarding the Privilege:

Trammel v. United States, 445 U.S. 40, 51 (1980)

"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."

People v. Phillips, N.Y.Ct. Gen. Sess. (1938) (printed in Privileged Communications to Clergymen, 1 Cath. Lawyer 199, 207 (1955).

"Secrecy is the essence of penance. The sinner will not confess if the veil of secrecy is removed."

DISCUSSION:

- **Do you agree or disagree with these statements of public policy?**
- **Are there other policies that you think support the existence of the Privilege that are not mentioned?**
- **Why do you think we feel the need for confidential confessions?**
- **Do you think that keeping confessions confidential could actually seve to promote sin and criminal activity?**
- **The Privilege has the effect of not allowing into evidence facts, confessions and other information that are directly relevant to legal proceedings. Why is the preservation of these secrets more important than arriving at the truth in legal proceedings?**
- **Is at least part of the concern regarding confidential confessions a political one—keeping the state out of the church's internal affairs?**
- **What other reasons would you cite in support of excluding relevant evidence from legal proceedings on the basis of the Privilege?**
- **Where would you place the limits on the extent of the Privilege?**

Church statements:

"Remember this, that forgiveness can never come without repentance. And repentance can never come until one has bared his soul and admitted his actions without excuses or rationalizations. He must admit to himself that he has sinned, without the slightest minimization of the offense or rationalizing of its seriousness, or without soft-pedaling its gravity. . . . The Lord revealed to the Prophet Joseph Smith, "By this ye may know if a man repenteth of his sins—behold, he will confess them and forsake them." (D&C 58:43.) . . .

The next step, confession of the sin, is a very important aspect of repentance. We must confess and admit our sins to ourselves and then seriously begin the process of repentance. We must also confess our sins to our Heavenly Father. Especially grave errors such as sexual sins must be confessed to the bishop as well.

. . . Every member of the Church is given a bishop or branch president who through his very priesthood ordination or calling is a "judge in Israel." In these matters, the bishop is our best earthly friend. He is one who works with the Spirit of the Lord in blessing our lives and he keeps all matters completely confidential."

President Spencer W. Kimball, First Presidency Message, Ensign, March 1983.

II. British Commonwealth Law – A Comparative View

A. The Privilege at Common Law

Standard Commentative Position

"At common law, it is generally accepted that there is no privilege in existence which would protect communications between cleric and communicant (or priest and penitent). (McNicol, S, *Law of Privilege*, Sydney, The Law Book Company Ltd, 1992, p 324.)

However, the same author continues in her next sentence: "There is, however, a paucity of judicial authority to support the claim."

Abundant textual commentary dating back to the early 19th century recites the following cases:

R v Sparkes (c 1790), unreported but referred to in *Dubarré v Livette* (1791) 1 Peake 108; 170 ER 96.

R v Gilham (1828) 1 Moody Cr Cas 186; 168 ER 1235.

Wheeler v LeMarchant (1881) 17 Ch D 675.

as authority for that proposition.

Other cases following this line of authority:

R v Hay (1860) Foster & Fin 4; 175 ER 933, where Hill J compelled a Catholic priest to give evidence on the grounds that in disclosing facts surrounding a confession, he was not asked to disclose the contents of the confession itself.

Anderson v Bank of British Columbia (1876) 2 Ch D 644, where Sir George Jessel MR said, "Our law has not extended that privilege, as some foreign laws have, to the medical profession or to the sacerdotal profession ... In foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a court of justice the substance of what passed in such communication."

D v NSPCC [1978] AC 171, where Scarman LJ said, "Journalists, doctors, priests and social workers cannot invoke the public interest to protect their confidences, even though all of them are engaged in work of public importance."

And Lord Hailsham said, "As to doctors and priests, it is clear that there is no absolute right to protection", though the case did find that, like the categories of negligence, the categories of public interest are never closed (per Lord Hailsham at p 230).

These decisions pronouncing against the privilege may generally be distinguished on the grounds that:

(a) they were only obiter dicta statements;

(b) for the most part, they concerned legal professional privilege and confirmed that legal professional privilege did not extend to clergymen;

(c) not all communications with clergymen, nor all evidence that they might give, will be privileged as confessional material;

(d) they generally did not reflect careful research by the judges concerned, which is understandable since the facts of the cases before them did not concern religious confession privilege in the first place.

Alternative view

There is in fact an equally strong line of authority which suggests that there is a privilege, and that those cases holding otherwise may readily be distinguished. *Broad v Pitt* (1828) 3 Carr & P 518; 172 ER 528, where Chief Justice Best said, "I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence."

R v Griffin (1853) 6 Cox Cr Cas 219, where Baron Alderson (the famous *Hadley and Baxendale* judge) said, "The principle upon which an attorney is prevented from divulging what passes with his clients is because, without an unfettered means of communication, the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given."

Ruthven v Debour (1901) 45 Sol J 272, where Ridley J prevented a Roman Catholic priest from answering a question about confessional evidence by stating to the plaintiff, "You are not entitled to ask what questions priests put in the confessional or the answers given."

R v Lynch [1954] Tas SR 47(Tasmania, Australia), where Crisp J found that at common law religious confession privilege "was confined to a ritual confession", but that under the Tasmanian statute, the privilege appeared to have been extended.

R v Gruenke [1991] 3 SCR 263, where the Supreme Court found that religious confession privilege should be decided on a case-by-case basis, weighing the respective facts against Wigmore's four principles underlying the recognition of such a privilege.

History

Despite doubts of the existence of a religious confession privilege in pre-Reformation English common law, Sir Edward Coke, in his *Second Institute* (p 629), expressly affirmed the privilege, though he said it was subject to an exception in cases of treason (the exception is doubtful and appears to have Continental roots which Coke did not wish to acknowledge, instead choosing dubious authority for his identification of the treason exception).

Tannian v Synnot (1903) 37 IR LT 275, where the Lord Chief Baron of Ireland "stated that he would not ask the witness to depose to anything connected, directly or indirectly, with confession, or in reference to his advice as to whether a man had committed a crime."

Cook v Carroll [1945] Ir Rep 515, an Irish case where Gavin Duffy J found that the "regrettable preconceptions of English judges" had led to "a disrespect to old authority and held in Ireland that a priest's refusal to give evidence of what passed in an interview between him and a girl parishioner which was not a confession was privileged and that such privilege could not be waived by a party thereto without the consent of the priest

Sir Edward Coke's citation of the 1315 statute *Articuli Cleri* of Edward II as authority for the privilege in England affirms recognition of the privilege in medieval times, as did various statutes dating back as far as King Canute and before. The Fourth Lateran Council's 1215 21st canon, binding upon Western Christendom, including England, bound priests to absolute confidentiality on pain of deposition from office and perpetual penance, at a time when most of the judges of England were clergymen. It is thus highly unlikely that a priest would have been forced to disclose confessional information when it would result in such severe clerical discipline.

Lanfranc, William the Conqueror's Archbishop of Canterbury (1070-1089) said:

> "He sins against the sacrament [Catholic penance] who in any manner whatever arouses public suspicion regarding what has been confessed to him or causes penitents to be defamed" (Kurtscheid, B, op cit, p 92).

Anselm, his successor in office as Archbishop of Canterbury, reaffirmed this well understood need for confidentiality of confession when he said:

> "The salutary road to penance must not be barred against those who would rather conceal their transgressions until death than expose themselves to suspicion of crime." (Kurtscheid, B, op cit, p 75)

DISCUSSION

- **Why do you think there is a question as to whether the privilege existed or exists in the Common Law?**

- **Are there any advantages to having the privilege recognized in the Common Law or is it better to have it statutorily enacted?**

B. <u>The Privilege in Statutory Law – British Commonwealth examples</u>

Australia

The Australian states or territories of Queensland, South Australia and Western Australia provide no statutory protection for religious confessions.

The current statute in the State of Victoria (s 28 of the *Evidence Act* 6246/1958) has genealogy back to 1895 and provides:

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

The Northern Territory ordinance (*Evidence Ordinance 1939*, s 12) reads:

> "A clergyman of any church or religious denomination shall not, without the consent of the person who made the confession, divulge in any proceeding any confession made to him in his professional character."

The identical New South Wales (*Evidence Act 1995*, s 127) and Commonwealth (*Evidence Act 2/1995*, s 127) statutes which date to 1989, provide:

> "A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy."

Almost identical provisions have recently also been adopted in Tasmania, the Australian Capital Territory and Norfolk Island.

Canada

Only the provinces of Quebec and "Newfoundland and Labrador" provide statutory protection of any kind for religious confession privilege.

The authorised English translation of the official French statute (Québec Charter of Human Rights and Freedoms, R.S.Q.c. C-12, s 9) reads:

> "Every person has a right to non-disclosure of confidential information.
>
> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law."

The Newfoundland and Labrador statute (*Evidence Act*, R.S.N.L. 1990 c. E-16, s.8) reads:

> "A member of the clergy or a priest shall not be compellable to give evidence as to a confession made to him or her in his or her professional capacity."

New Zealand

New Zealand's *Evidence Amendment Act* (No. 2) of 1980 (s 31) has genealogy dating back to 1885 and has been interpreted by the New Zealand Court of Appeal to protect informal confessions rather than only those complying with some religious duty, ritual or established custom (*R v Howse* [1983] NZLR 246). It reads:

> "A minister shall not disclose in any proceedings any confession made to him in his professional character, except with the consent of the person who made the confession."

Papua New Guinea

The relevant provision is s 19(1) of the *Evidence Act 1975* and reads:

> "A clergyman of a church or religious denomination must not divulge in any legal proceedings a confession made to him in his professional capacity, except with the consent of the person who made the confession."

United Kingdom

None of the countries which made up the United Kingdom has a religious confession privilege statute.

DISCUSSION:

- **Is it surprising to you that the existence of the Privilege in the Common Law in the United Kingdom is questioned and that there are no statutory enactments in the United Kingdom itself?**

- **Do you think that the statutory provisions cited from other Commonwealth countries adequately protect the Privilege?**

- **Are there any statutory provisions that go too far or that you think could create problems?**

III. THE PRIVILEGE IN THE UNITED STATES

A. Codification of the Clergy-Penitent Privilege:

Almost all of the states now have codified clergy/penitent privileges. The definition of clergy and the definition of penitential communication vary greatly from state to state. Some examples:

Georgia Code Ann. 24-9-22

"Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or 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, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communications in any court."

New Jersey Statute Ann. 2A:84A-23

"Any communication made in confidence to a cleric in the cleric's professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which the cleric belongs or of the religion which the cleric professes, shall be privileged. Privileged communications shall include confessions and other communications made in confidence between and among the cleric and individuals, couples, families or groups in the exercise of the cleric's professional or spiritual counseling role."

Utah Code Ann. 78-24-8(3)

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

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."

12 Vermont Statutes Ann. § 1607

"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."

DISCUSSION:

- **Is there a still a common law clergy-penitent privilege in the United States apart from the statutory enactments or do the statutes prevent any recourse to a common-law Privilege?**
- **Is it better for the Privilege to be codified by statute? What are the advantages and disadvantages?**
- **What would you include if you were called upon to draft such a statute?**

B. The types of communications protected by the privilege:

As stated above, the type of communication which is protected varies greatly from state to state.

Arizona Criminal Code 13-4062

"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." (emphasis added)

California Evidence Code 1032

"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." (emphasis added)

Utah Rule of Evidence 503

"A person has a privilege to disclose and to prevent another from disclosing any confidential communication to a cleric in the cleric's religious capacity and necessary and proper to enable the cleric to discharge the functions of the cleric's office according to the usual course of practice or discipline. A communication is 'confidential' if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." (emphasis added)

Ellis v. United States, 922 F. Supp. 539 (D. Utah 1996). "A communication to LDS Church officials regarding a drowning accident involving church members was not a communication for doctrinal, spiritual, or religious purposes, but was a communication to impart information and report an event. The church leaders did not receive the communication within their religious role as clerics, but as clerics performing an executive function. Therefore, the communication was not privileged."

DISCUSSION:

- **What kinds of communications do you think should be protected?—Only direct confessions, or any private communication about any subject to a spiritual advisor? Something in between? How would you define what is privileged and what should not be?**

C. <u>LDS Lay Clergy Are Covered by the Clergy-Penitent Privilege</u>.

State v. Cox, 742 P.2d 694 (Or. App. 1986)

"It is undisputed that Beck was a member of a religious denomination. He was also a 'stake president,' with the responsibility for supervising three congregations or 'wards.' He testified at a pretrial hearing that stake presidents are accustomed to hearing 'confessions':

'On the local level there are four individuals who I guess you say serve as confessors in that comparison to the Catholic Church. And that is the bishop and the three members of the stake presidency. I'm one of those members.'

He also testified that, as a Mormon minister, he had a duty under the discipline of the church, not to disclose confidential communications made to him. Under the circumstances, we conclude that Beck was a 'member of the clergy,' within the meaning of [Oregon's clergy privilege statute]."

Scott v. Hammock, 133 F.R.D. 610, 612-613 (D. Ut. 1990).

"[T]here is no dispute that an LDS Church bishop is a clergyman within the meaning of the Utah Statute. .... [W]hether a bishop or stake president, as the case may be, such person would, in the context of this case, be a person to whom a religious communication would be privileged if the circumstances otherwise allow. The standard is whether, under the doctrines of the church, the official to whom a communication is made is expected to accept and keep confidential communications from members of the church. The LDS Church ... has presented an excerpt from its *Handbook of Instructions* which confirms the role and duties of a bishop or stake president to receive and keep confidential a communication of the church member."

Scott v. Hammock, 870 P.2d 947, 955-56 (Utah 1994). Even non-penitential communications between an LDS cleric and a Church member are privileged.

D. <u>May A Lay Member be clergy for purposes of the Privilege</u>?

Rutmeier v. Nolte, 161 N.W.2d 190 (Iowa 1917). Court held that a church governing body [a "Session" made up of church Elders] was clergy for the purposes of receiving a confession, and members of the Session could not be required to testify about that confession. The case holds that a church may decide who its clergy are.

DISCUSSION:

- **If a lay minister such as a bishop is covered by the privilege, what about a young men's president in whom a young man confides? What about a home teacher?**

- **Are there risks in so extending the privilege?**

E. <u>Communications Up and Down the Line by LDS Clergy Retain Their Privilege</u>.

Scott v. Hammock, 133 F.R.D. 610, 619 (D. Ut. 1990) "The clergy privilege protects intra-faith communications regarding a clergy-privileged communication from one ecclesiastical officer to another for the purposes of carrying out church discipline."

DISCUSSION:

- **Even if a communication up and down the line by LDS clergy retains the privilege, should such communications be made without the consent of the communicant?**

F. <u>In some states, members of the clergy hold the privilege themselves, independent of any waiver by the penitent</u>.

<u>California Evidence Code 1033 and 1034</u>

1033: "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."

1034: "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."

<u>New Jersey Statutes 2A:84Aa-23</u>

"The privilege accorded to communications under this rule shall belong to both the cleric and the person or persons making the communication and shall be subject to waiver only under the following circumstances:

(1) both the person or persons making the communication and the cleric consent to the waiver of the privilege; or

(2) the privileged communication pertains to a future criminal act, in which case, the cleric alone may, but is not required to, waive the privilege."

<u>Mockaitis v. Harcleroad</u>, 104 F.3d 1522, 1530-31 (9th Cir. 1997). [warden had surreptitiously tape recorded a prisoner's confession]

"No question exists that [the warden] has substantially burdened Father Mockaitis's exercise of religion as understood in the First Amendment. Father Mockaitis was exercising his religion in a priestly function. He was seeking to participate in the Sacrament of Penance understood by the Catholic Church to be a means by which God forgives the sins of a repentant sinner and restores the sinner to life in God's grace. .... When the prosecutor asserts the right to tape the sacrament he not only intrudes upon the confession taped but threatens the security of any participation in the sacrament by penitents in the jail; he invades their free exercise of religion and doing so makes it impossible for Father Mockaitis to minister the sacrament to those who seek it in jail."

"A substantial burden is imposed on [the Archbishop's] free exercise of religion as the responsible head of the Archdiocese of Portland by the intrusion into the Sacrament of Penance by officials of the state.... Archbishop George has justifiable grounds for fearing that without a declaratory judgment and an injunction in this case the administration of the Sacrament of Penance for which he is responsible in his archdiocese will be made odious by the intrusion of law enforcement officers."

***See also* Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L.R. 171 (1998).**

DISCUSSION:

- **Should the clergy have an independent right to assert the Privilege or should that Privilege belong to the communicant?**

G. <u>Clergy Privilege Also Protects Documents Related to Penitential Communications and to Church Disciplinary Councils</u>.

Hadnot v. Shaw, 826 P.2d 978, 989 (Okla. 1992).

"Initially parishoners sought discovery by interrogatories and requests for production of writings, Church records, and reports pertaining to their expulsion [from LDS Church membership]."

"The Free Exercise Clause prohibits civil courts from inquiring into any phase of ecclesiastical decisionmaking–its merits as well as procedure. Internal ecclesiastical procedure need not meet any *"constitutional concept of due process"*. This is so because the church's judicature *rests solely on consent which in turn is anchored on the ecclesiastical respondent's church affiliation.* Because *religious judicature is immune from any civil inquest*, it is also protected from intrusion by discovery. The church's immunity from disclosure rests neither on a statute nor a code or evidence. Rather its shield is of a *constitutional dimension*. It is founded on the Free Exercise Clause's prohibition against secular re-examination of merits and procedure in ecclesiastical judicature. In sum, if a matter lies within ecclesiastical cognizance, the church stands protected from any interference by the Free Exercise Clause." [emphasis in original]

Scott v. Hammock, 133 F.R.D. 610, 619 (D. Utah 1990).

"It is appreciated that the communication in this case [i.e., internal LDS Church documents] is different than one that involves a declaration by the church member to an assemblage of church officials. In this case, the communication was passed vertically from one religious authority up to another within the church hierarchy. Such communication was necessary as a part of the church sanction process and in carrying out church discipline. The need for the privilege to follow the communication in such circumstances is obvious and appropriate. Otherwise, the privilege would be destroyed and the confidence abridged. Therefore, the repeating of the defendant's [i.e., the penitent's] statement and its communication to superior religious authorities must be deemed cloaked with confidentiality and privileged from forced disclosure."

Corsie v. Campanalonga, 721 A.2d 733 (N.J. App. 1998). Communications in a vicar's files made by a priest in confidence to a vicar were protected by the cleric-penitent privilege, but not every document contained in the file was necessarily privileged.

***See also*:**

Nicholas Cafardi, *Discovering the Secret Archives: Evidentiary Privileges for Church Records*, 10 J. L. & RELIGION *95* (1993/94).

Jeffrey Hunter Moon, *Protection Against the Discovery of Disclosure of Church Documents and Records*, 39 CATH. LAW. 27 (1999).

H. Civil Liability for Breach of the Clergy-Penitent Privilege

***Alexander v. Culp*, 705 N.E.2d 378 (Ohio App. 1997).**

"In the case of a clergy member, there is no statute akin to R.C. 4731.22 [physician 's license could be revoked for disclosure of confidential patient information], prohibiting the disclosure of confidential information. . . . There is no statute upon which to base an action for statutory negligence in this case."

"Even if this action is deemed a clergy malpractice action, the Supreme Court has not disallowed such an action. Public policy supports an action for breach of confidentiality by a minister. There is a public policy in favor of encouraging a person to seek religious counseling. People expect their disclosures to clergy members to be kept confidential. Such a policy is expressed in R.C. 2317.02, although this statute does not create statutory negligence. Whether a particular case interferes with First Amendment freedoms can be determined on a case-by-case basis." [citations omitted]

Hester v. Barnett, 723 S.W.2d 544, 554 (Mo. Ct. App. 1987).

"While the [clergy privilege] statute no doubt means to encourage an effective relationship between the spiritual advisor and the communicant, the enactment has no effect beyond its actual terms. . . . There is no intimation that [the statute] intends any effect beyond a judicial proceeding – let alone a cause of action for the breach. The privilege, moreover, was not known at common law, and hence the pleading cannot be understood to invoke any tort principle of that system of law to validate a[n] ... action for its breach. . . . The tradition that a spiritual advisor does not divulge communications received in that capacity, moreover, even if a tenet of 'ministerial ethics'. . ., describes a moral, not a legal duty. In the absence of a legal duty, a breach of a moral duty does not suffice to invest tort liability."

Lightman v. Flaum, 736 N.Y.S.2d 300, 304-05 (N.Y.App. 2001).

Congregant brought action against two rabbis asserting breach od fiduciary duty and other claims based on disclosures made by rabbis in connection with divorce proceeding.

"We find a distinction between confidential information under the rules and regulations that govern secular professionals and information cloaked by an evidence privilege under the CPLR. This difference demonstrates that statutory privileges are not themselves the sources of fiduciary duties but are merely reflections of the public policy of this State to proscribe the introduction into evidence of certain confidential information absent the permission of or waiver by a declarant."

"The clergy and the other classes of professionals specified in CPLR article 45 are also fundamentally different with respect to the extent of State regulation of their professional practices. Individuals employed in other fields subject to statutory privileges derive their authority to practice from the State.... In contrast, clerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant spiritual counseling relationship. This explains plaintiff's inability to identify a source of defendants' alleged duty of confidentiality independent of CPLR 4505."

"[T]he prospect of conducting a trial to determine whether a cleric's disclosure is in accord with religious tenets has troubling constitutional implications. To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place fact-finders in the inappropriate role of deciding whether religious law has been violated."

"Guided by these well-settled principles and in the absence of a statute, regulation or other source delineating the scope and nature of the alleged fiduciary duty, we view the CPLR 4505 privilege in the manner intended by the Legislature–as a rule of evidence and not as the basis of a private cause of action.... [W]e hold that, as a matter of law, CPLR 4505–directed at the admissibility of evidence–does not give rise to a cause of action for breach of a fiduciary duty involving the disclosure of oral communications between a congregant and a cleric."

***See also*: Lori R. Metz and Linda M. Bolduan, *Clergy Person's Breach of Confidentiality: Is It Actionable in Tort?*, THE BRIEF 24 (Winter 1999).**

IV. THE APPARENT CONFLICT BETWEEN CHILD ABUSE REPORTING STATUTES AND THE CLERGY PRIVILEGE

Some states list clergy as mandatory reporters of child abuse, and provide no exception for confessions or confidential communications. This conflict between a duty to church and God versus a duty to the state is explored in the lesson on Child Abuse.