

Clergy Confidentiality

Disclaimer—The information provided below is meant for educational purposes only and is not intended to be legal advice. Should the reader have specific legal questions—qualified legal counsel should be obtained.

Confidentiality and the Pastor

Perhaps no other issue or topic is considered less but poses significant potential to destroy a pastor's ministry than the misuse or breach of confidentiality. The sacred and hard-earned trust placed in the pastor is crucial to the pastor-parishioner relationship. Should the pastor lose his credibility due to confidentiality issues, he has all but lost his ability to minister effectively.

For the pastor, unlike the secular helping professional (physician, attorney, counselor, etc.) confidentiality rests in the context of spiritual issues. In Christian denominations, the expectations of confidentiality lie most specifically within the experience of confession. Individuals will confess sins and ask for God's forgiveness with the assistance of the clergyperson. Assurances of confidentiality give the repentant parishioner the confidence that shameful disclosures will not become public. Without such an assurance, the pastor cannot provide the spiritual counseling essential in the life of all believers.

An ethical dilemma is often faced by the clergy, however, when reports of immoral, unethical or illegal behavior are reported by the parishioner. The dilemma could be the result of (1) the clergy's uncertainty as to what behavior should be reported to the authorities; or (2) what information about the parishioner's behavior the clergy can be legally compelled to disclose in a court of law.

The pastor should, with few exceptions, not divulge information shared by a parishioner within the context of spiritual counseling.

The Legal Side of Pastoral Confidentiality

To fully understand the issue of confidentiality, it is necessary to not only understand the sacred issues but also the legal ones.

A pastor may be subpoenaed to testify in court regarding a privileged or penitential communication. A pastor cannot legally refuse to appear in court but upon taking the witness stand may assert the privilege of "clergy confidentiality." (Usually an attorney will object on the basis of clergy confidentiality or privileged communication.)

It is important to note that the privilege belongs to the person making the communication, and thus the person making the confidential communication may prohibit the clergyman from

revealing its contents. A clergyman may usually assert the privilege on behalf of the counselee.

Clergy may be held liable for revealing the contents of a privileged communication to outsiders, and therefore it is important to determine whether a communication revealed during counseling is privileged. If there is uncertainty, then the minister should discuss the confidentiality with the counselee and the minister's attorney.

Understanding the legal issues also requires defining several key terms:

1. Clergy or Clergyman: "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him;" (Nebraska statute 27-506)
2. Confidentiality: a clergyman's ethical, moral, or professional mandate to keep information he hears or is told a secret. Suffice to say, every member of the clergy, regardless of their status in ministry or licensing, has this obligation to confidentiality.
3. Privileged Communication: a "statutory protection that enables a member of the clergy to receive certain communications in the context of his/her pastoral capacity, and being immune from testifying to the same in a court of law." These protections generally come under the "rules of evidence" as they usually refer to what evidence is or is not admissible in a court of law.
4. Penitential Communication: a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.
5. Penitent: one who has made a penitential communication to a member of the clergy.

State statutes regarding privileged communication with the clergy are influenced by a social policy that would encourage a person rather than discouraging persons from confession or seeking pastoral counsel. However, it is critical that members of the clergy understand the law for their current state.

The law has traditionally respected as "privileged," communication between clergy and penitent if four fundamental conditions are met:

- Information is communicated (verbally or in writing), not assumed or deduced by observation; communication may also be any act intended to transmit ideas. A letter written to the clergy may be privileged if it seeks religious counsel and indicates on its face that its contents are to be kept secret or confidential.

- The communication is made in private to the clergyman; information disclosed in a setting where others might reasonably overhear the conversation is information given without the intent to have confidentiality. (e.g., hospital room vs. coffee shop, pastor's office vs. fellowship hall, etc.)
- The communication is made for the purpose of seeking spiritual counsel and advice in the usual course of the clergy's practice or discipline; and
- The communication is not intended to be disclosed any further.

In summary, privileged communications to a minister must not only be made in private, but they also must be made with an express or implied understanding that they will never be disclosed. The substance of the communication, the place where it is made, and the relationship, if any, between the minister and the one making the communication, are all factors to be considered.

In the state of **Nebraska**, clergy communications is addressed in Nebraska Revised Statutes 27-506: "**Communications to clergyman; definitions; general rule of privilege; who may claim privilege.**

(1) As used in this rule: (a) A clergyman is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him;

And (b) 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."

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

There are at least two exceptions to the clergy communication privilege whereby the clergy is mandated to handle information in a specific manner.

1. **Child Abuse:** Several states, including Nebraska, have passed laws requiring members of the clergy to report known or suspected child abuse to the authorities. Failure to report such abuse could lead to criminal action being taken against them. Because of the legal mandate to report such abuse, mandated reports are usually immune from civil actions if the report turns out to be false.

Nebraska Revised Statute § 28-711 states, "When . . . person has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected

to conditions or circumstances that reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department of Health and Human Services. (Child Abuse Hotline 1-800-652-1999)

2. **ADA:** Another aspect of confidentiality that may apply to clergy is that found within the Americans with Disability Act or ADA. The ADA was never intended to be a confidentiality statute; rather, it was enacted as part of anti-discrimination legislation.

The reason the ADA can apply to clergy is that it is federal law, which supersedes state confidentiality laws. Where it is relevant to clergy is that discrimination against disabled persons violates the ADA; and a clergyman can be accused of violating a person's civil rights by revealing to others the nature of their disability that otherwise would not be known (e.g., Aids/HIV, mental illness, etc.)

Now What . . .

Continue to **provide** your parishioners with **assurances of confidentiality**; in other words they must be confident that shameful or potentially embarrassing disclosures will not become public.

With the exception of your legal duty to report known or reasonably suspected incidents of child abuse, **avoid disclosures of confidential information without the express consent of the parishioner.**

Determine the **limits of your confidentiality** obligations:

- Should you promise confidentiality to all individuals regardless of what the person tells you?
- Are you obligated to keep confidential information that puts another person in harm's way, such as a threat to kill a person?
- Should you keep confidential information that threatens the integrity of the worshipping community or the safety of the gathered people?
- Should you keep confidential the confession of a colleague who says he lied about his credentials to secure a pastorate?

Once such limits are determined and defined, pastors must then decide how best to **communicate those limits in confidential settings**. Although it can be an awkward way to begin a conversation with a parishioner, it may be necessary to say, "I shall do my best to keep confidential what you tell me. However, if you disclose something to me that is illegal or puts yourself or another person in harm's way, I will be morally obligated to help you or protect another person even if that means telling what you've told me."

Handle child and spouse abusers with an understanding that Christian scripture is very specific: "Take heed to yourselves; if your brother sins, rebuke him, and if he repents, forgive him;..." (Luke 17.3 RSV) The one who sins and who harms another must be confronted so that

he might seek repentance. The scriptures are clear that repentance has to do with change: "... get yourselves a new heart and a new spirit!... so turn and live." (Ezekiel 18.31-32 RSV); the Greek word used for repentance is metanoia, "to have another mind".

In this context of repentance, accountability and justice, forgiveness and reconciliation may be possible. This should be the primary concern of the pastor.

However, it is critical to keep in mind the following about spousal and child abuse including sexual abuse:

- Batterers or incest offenders will re-offend unless they get specialized treatment.
- Offenders against children minimize, lie, and deny their abusive behavior.
- Offenders cannot follow through on their good intentions or genuine remorse without help from the outside.
- Treatment of offenders is most effective when it is ordered and monitored by the courts.
- The secret of the child's abuse must be broken in order to get help to the victim and offender.
- Clergypersons do not have all the skills and resources necessary to treat offenders or to assist victims.
- Quick forgiveness is likely to be cheap grace and is unlikely to lead to repentance.

Keep in mind also that the first amendment guaranty of **religious freedom does not necessarily insulate clergy from liability** for defaming a person or intentionally inflicting serious emotional harm on a parishioner.

The privileged communication provision does not just apply to members of your congregation. Most courts that have addressed the question have concluded that a clergy--parishioner relationship is not necessary to invoke the privilege. Thus, even though the person making the communication is not a member of the minister's church, his or her confidential communications to that minister generally will be privileged. This would appear to be the correct view, for the purpose underlying nondisclosure of confidential communications made to clergy applies with equal force to all who seek out a minister in confidence for spiritual guidance and help.