

# **Practical Issues of Clergy Confidentiality**

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In a survey of legal issues in the ministry, about six percent of 240 clergy respondents indicated that they understood that they were required by law to testify about pastoral counseling communications if they were subpoenaed: 43 percent said they were not required by law to do so and 41 percent said they did not know (Gumper, 1983). The less than certain response of the clergy in this study reflect the legal realities of today. The laws concerning clergy confidentiality are often less definite and more complex than presumed by ministers. At an Ohio pastoral conference Rev. Larry Wiederich (1988) presented a paper, "Confidentiality and the Clergy," which prompted the appointment of a study committee to report to the Conference of Presidents. It was suggested that the Wisconsin Synod provide a statement to its clergy in regard to this issue. As a result the "WELS Policy on Confidentiality of Information" was distributed to its clergy (WELS, 1990). A discussion on the issue of confidentiality was raised at the fall conference of the Colonial Conference-South and during the summer of 1991 this topic was assigned to the essayist for further discussion at this conference.

One of the advantages we have as a church body is our common biblical foundation and doctrinal position. We add to this our common training system and the information disseminated to us through our synodical system. The recent "WELS Policy on Confidentiality of Information" is a statement on this timely topic for pastoral and legal awareness. However, while those gathered at this conference number less than thirty, they represent eight states, each with its own legislation concerning this issue. This presents some difficulties in clarifying the specific laws pertaining to each state. As a result, the essayist has gathered some pertinent information and intends to couple this with discussion of practical issues of clergy confidentiality in an attempt to present this topic in a manner which can be applied to any of the conference's congregations.

## **Confidentiality, Privileged Communication and Privacy**

Confidentiality, privileged communication and privacy are all related terms, but it is important to be aware of their distinctions. As indicated by Cory, Cory and Callanan (1979), an important obligation of mental-health practitioners is to maintain confidentiality with their clients. The obligation is not absolute, however, and therefore there is a need to develop professional ethics to determine when the confidentiality of the helping relationship might be broken. Some professionals are afforded privileged communication by law, and clients in turn have rights of privacy.

Confidentiality pertains to professional ethics whereby the client is protected by any unauthorized disclosures by the professional without the consent of the client. Clients must be able to assume that their conversations will be kept private to ensure a therapeutic environment. While confidentiality was founded by professional ethical codes, legislature and court rulings have recently subjected the professional to criminal liability. The ethical code for clergy has its roots in Scripture and among the earliest fathers of the Christian church. The directives of the code were developed over the years. In particular, the Roman Catholic Church eventually designated confession as a sacrament with the penalty of breaking this confidence being excommunication. Tiemann & Bush (1983) credit Luther, although he said little specifically to the topic of confidentiality, as a reformer of this sacrament and one who places the responsibility of keeping such a confidence on the individual clergyman.

Privileged communication is a legal term describing a right established by statute in order to protect the confidence of a client or penitent from being revealed in court without his consent. Statutes pertaining to this legal privilege are listed by occupations, such as physician-patient, psychiatrist-client, priest-penitent, etc. This privilege belongs to the clients and is meant for their protection. In rare instances the privilege may be extended

to a clergyman, as is allowed by the California legislation (Gumper, 1983). Forty-nine states have privileged communications for clergy. The description of this privilege varies and some states have specific exemptions. For example, the Family Code of Texas, along with about 35 other states, requires clergy to report suspicion of child abuse. The Texas law goes further to include in this mandatory reporting even the suspicion of neglect (Scott, 1986). While often perceived as being absolute, privileged communication does have its exemptions even for the clergy.

The third term, privacy, relates to the concept that individuals have the right to choose for themselves the time and circumstances under which personal information might be disclosed to others. Clients may waive the privileged communication in a court of law. More frequently this issue may surface for the minister when he speaks about experiences in pulpit or classroom. It is important that he sufficiently protect the privacy of those who have confided in him, but when called upon by the court to divulge such communication he may be required to do so.

### **Discussion of "WELS Policy on Confidentiality of Information"**

The "WELS Policy on Confidentiality of Information" was distributed to its clergy in 1990. It consists of two parts: "Policy Provisions" and "Guidelines for Policy Implementation" (Appendix A). The purpose of this policy is not specifically stated in the document. The essayist believes this ought to be mentioned in or with the policy. Are we bound to this as an official synodical policy and discipline of our church? Is this for our general information and a helpful resource on a timely matter? It is my understanding that this policy was provided for our general knowledge as pastors and stresses that clergy become acquainted with the legal aspects of this matter in our localities. The specific purpose of this policy has not been provided. However, the policy has been distributed and the essayist would like to use it as a means of discussion.

The discussion will follow point by point the "Policy Provisions" portion of the document. To this will be added commentary, questions and information gathered about the stated concepts.

#### **a) A clergyman's main concern is the spiritual welfare of the individual.**

As indicated in the "Guidelines for Policy Implementation" the pastor "as shepherd of the flock and caretaker of souls" has a great responsibility. This responsibility may have eternal consequences for those in his care. Likewise, he is called to this position for the specific purpose of dealing with the spiritual care of his flock. Therefore, conscientiously and descriptively the main concern of the pastor is for the spiritual welfare of his flock and those individuals in his care.

The policy states "individual". While pastors do deal with individuals within the flock, they also deal with the flock as a whole or the body of believers. In I Corinthians 5, Paul is speaking to the immorality that exists in the Corinthian congregation. In building his argument for the expulsion of the "wicked man" he uses the illustration of the little yeast that works through the whole batch of dough. Paul has a concern for the whole congregation as he publicly writes of this man's sinfulness. Indeed, we do not know how this sin was reported to Paul, but we do know that in cases of church discipline the public disclosure of information may be necessary for the benefit of the congregation.

In an article by Jim Kok, "Pastors Shouldn't Keep Secrets," pastors are cautioned that keeping secrets in the congregation can lead to problems and there are many advantages to increasing personal awareness and communication within the congregation (1981). Fred Matzke of Wisconsin Lutheran Child & Family Service warns pastors of the individual who approaches the pastor and says, "Will you keep this secret?" Often times what this individual intends to share is more manipulative than confessional (Interview, 9/24/91). The traditional role of the pastor is often thought of by both pastor and parishioner as having absolute confidence. This is not the case by law, nor is it dictated in Scripture. Matzke suggests that each pastor should clarify his role and position on confidentiality with those who come to meet with him in his role as pastor. A short statement prepared by the pastor would suffice to avoid potentially confusing and difficult situations. The

essayist has included an example of such a statement included in a counseling contract with this paper (Appendix B).

Other examples when it might be necessary to speak about a confidence may occur in seeking professional consultation, when you are counseling with a minor, or when an individual is suicidal. At any rate, the pastor ought to share with counselees the possible limitations of confidentiality. His professionalism and honesty may encourage the trust and respect of those seeking counsel.

As you may have noticed on the essayists sample "Counseling Contract", he refers to himself as a "counselor". While he was officially called to his field of mission work as an exploratory missionary, the reality of the call means that he functions in other capacities in order to meet new contacts within his community. Other pastors may take on such roles voluntarily or without their choice. Some may acquire such a role through a shared-time ministry and support themselves with another occupation, others may assume the role of school administrator as part of their Divine Call. Nonetheless, while our main concern as a Christian, and especially as a pastor, is for the spiritual welfare of others, the role of clergyman is not always so clear-cut.

Another reality of today is reported by attorney John F. Cleary of Church Mutual Insurance Company: "Many churches are becoming targets for civil litigation. Whether or not the church has liability insurance, it is an attractive target defendant both at the national and local level. The plaintiff's bar has been aware for some time that many churches own property and that the property has value" (1990). Therefore, while it is the opinion of the essayist that the church need not be paralyzed by the fear of such litigation, there ought to be precautions taken to safeguard the clergy so that they can function adequately. They need to be aware of the local laws as well as the privileges of the practice of religion guarded under the Constitution. If the "WELS Policy On Confidentiality of Information" has been produced as a source of suggested guidelines for the WELS pastor, this can be helpful. On the other hand, if this document is the official course of action in matters of confidentiality, and WELS pastors are bound to it as such, further thought ought to be given to its wording so that the WELS does not build its own gallows on which to be hanged.

**b) A clergyman should not reveal confidential communications made to a clergyman in his professional character as a spiritual advisor, except as stated in paragraph (c), (d) and (e).**

As previously stated, the essayist does feel there are instances where absolute confidentiality may not be to the advantage of the body of believers. This is not to diminish the importance of confidence within the pastoral relationship. Within this professional relationship trust, rapport, and healing can be promoted through this confidentiality. Paul, when writing to Timothy, refers to that professional character with these words: "For God did not give us a spirit of timidity, but a spirit of power, of love and of self-discipline" (I Timothy 1:7). In the context of confidentiality, there is a place for the pastor to speak boldly, but in a self-disciplined manner and with the loving concern for the souls of others as his main goal. It is wise to remember God created human beings with two ears and one mouth, and it is good practice to use them in that proportion. All Christians are encouraged to be "quick to listen, slow to speak" (James 1:19). Shortly thereafter teachers are reminded that they will be judged more severely for not demonstrating love consistent with the faith they profess (3:1). Several proverbs guard the confidential trust and label the breaker of such confidence to be a gossip (Proverbs 11:13; 20:19; 29:9-10). More often than not, it is for the benefit of all that a confidence be kept.

Outside of those exceptions governed by sanctified common sense, there are those sometimes required or permitted by law as listed under "Policy Provisions" (c), (d) and (e).

**c) The clergyman should carefully review all applicable statutes with an attorney in the area in which he resides for guidance on the following important matters:**

It is necessary for the clergyman to be familiar with the statutes that pertain to the privileges and responsibilities of his occupation. The essayist suggests, however, that there is literature available that would be helpful to the pastor as an initial step of inquiry. *Legal Issues in the Practice of Ministry* by Lindell L Gumper is a concise, practical and fairly recently published introduction to the legal issues related to parish ministry. The essayist found that the most expedient route to finding the current legal information was through personal research at a local library. The library does need to have in its possession the editions of state law. A larger branch or a university with a law school will possess such a legal library. Later the findings were confirmed by a lawyer knowledgeable in the field. The essayist found most lawyers are not acquainted with the laws pertaining to clergy and would often need to do the research at someone's expense.

At this time refer to Appendix C. Identify the appropriate statute for your ministry. Note the varying descriptions of clergy (Minister of Gospel, Priest, Practitioner of Religion, etc.), because this legal jargon adds to possible confusion when one partakes in legal research. Pay attention to whether there is a broad or narrow description of the privileged communication given to clergy. Is privileged communication for clergy limited to confession or does it pertain to any confidence made to him in his professional character? Are there special qualifications for the clergyman? For the reader's interest, New Hampshire has also extended privileged communication to licensed pastoral counselors (N.H Rev. Stat. Ann. sec. 330-B:15).

Other regulations may pertain to the clergyman as well. Therefore it is necessary to refer to laws pertaining to certain legal matters as suggested in the "WELS Policy": "Whether a clergyman may legally reveal such information to the extent he reasonably believes that the abuse or neglect of a child may occur.

Recently there has been a rise in the interest of child abuse and the reporting of it. New legislation in many states have required certain occupations to report suspicion of this crime. These laws can be researched personally; however, one can also call city or state agencies which distribute information on the subject. Agencies to be contacted for this information might be called protective services, social services, child protective services or the like. The information in these books and pamphlets has often been translated from the legalese to a more comprehensible language for the legal layman. Local hospital chaplains or clergy associations may also be informed of current regulations.

Refer to Appendix D for a sample of such a pamphlet distributed in the state of New York. Notice New York has "mandated reporters" who are required to report child abuse. The specifics as to who are required to report, to whom and how are clearly given. Clergy is not mandated to report child abuse in New York State. As mentioned earlier, some states do require clergy to report. This has incited heated debate as to whether one should adhere to the laws of the church or the laws of the state. Marie M. Fortune (1986) believes the conflict need not be such an issue. There are limits to confidentiality and these should be left to the discretion of the clergyman. She supports that the reporting of child abuse is a good practice for the protection of the victims and the reform of those who sexually and physically abuse children. These are the reasons she stated:

- \*The fact of child abuse must be revealed in order for the victim and offender to be helped.
- \*Offenders will minimize or deny their activities.
- \*Offenders will continue to abuse children unless they get special treatment. And they will not be able to follow through on their good intentions or their genuine remorse without that help.
- \*Treatment of offenders is effective when it is ordered and monitored by the courts.
- \*Clergypersons do not have all the skills and resources needed to treat offenders or to assist victims.
- \*Quick forgiveness of the offender is likely to be a form of cheap grace, and is unlikely to lead to repentance.

Obviously in the case of a confession of child abuse it would be ideal to lead the offender to needed help, and this might mean the confession of this crime to the state authorities. This is the position that is

supported by Collins (1988). Collins' discussion of the work of Christian counselors advocates that counselors encourage their clients to share information with the person involved (e.g. police, parents, employers, etc.). If such measures are not taken voluntarily, the clergyman is in a position where he may be required by state or his own ethical position to report the crime.

Another exception to privileged clergy communication as listed in the "WELS Policy" is:

Whether a clergyman may legally reveal such information that he reasonably believes necessary to prevent a person from committing a criminal or fraudulent act that the clergyman reasonably believes is likely to result in death or substantial bodily and/or emotional harm to self or others, or which he believes necessary to prevent such harm in the future.

To this point, John Stupp, an attorney of the New York State Social Services Legal Council, stated in a telephone interview (10/18/91) that there were no statutes requiring anyone to report a crime not yet committed. However, according to the code of ethics for the bar, it was unethical to fail to report such an instance among lawyers. Buzzard and Brandon (1986) note, "The duty to warn has been included in some codes of conduct for mental health professionals, but there is no such uniformly accepted guide for clergy." Therefore, the essayist has found no legal obligation to warn a potential victim, however, there is still the moral obligation that binds the Christian.

Still another exception listed within the "WELS Policy" is:

**d) A clergyman shall reveal such information if ordered to do so by a court.**

Gumper (1983) offers some practical advice for the pastor summoned by the court:

Remember that a subpoena represents the first official step in determining whether you must testify, not the last! Some attorneys issue subpoenas with all the discretion businesses use in sending holiday greetings. The minister must respond to the subpoena by being present (or by a timely motion to quash, or suppress, the subpoena), but not necessarily by testifying. This is the time to explore ones rights and obligations in the matter, contact an independent attorney, and then state any objections to testifying. The judge will decide whether one is legally obligated to testify. If the judge orders the minister to testify, there is a moral decision as to whether to comply.

Although a subpoena per se is not sufficient reason to violate a confidence, one should almost never testify without a formal subpoena. Testifying under compulsion may limit ones liability for the testimony. (pp. 48-49)

**e) A clergyman may reveal such information if the person consents to such disclosure.**

As stated previously the privilege of confidentiality is primarily for the protection of the clients, or penitents. This privilege can in most states be waived by the individual. While this is legally permissible, William W. Reifsnnyder urges the minister to be a judge of when this is appropriate (1986). Several reasons given for this deliberation to testify are: 1) the undermining of the mutual responsibility in the communication, 2) the undermining of the high level of trust necessary for ministers to be effective, and 3) the negative effect that such testimony might have on the broader spiritual community. A caution ought also to be issued to the clergyman who uses this privilege for his personal protection or benefit. According to Thomas (1988), who cites Bok (1983), the minister generally sees himself answerable to Gods law above the laws of society. Many ministers justify concealing information as a means of helping the individual be reconciled with God. Bok suggests, however, that ministers can use the clerical role as a means of protecting themselves, rather than the counselee. One must conscientiously and scripturally examine the greater good when deliberating on whether to

disclose a confidence. Collins (1988) sums up the ethical dilemma with this paragraph on confidentiality, which the essayist believes is applicable to the clergyman as well:

In every ethical decision the Christian counselor seeks to act in ways that will honor God, be in conformity with biblical teaching, and respect the welfare of the counselee and others. When difficult decisions must be made, counselors have an obligation to discuss the situation in confidence with one or two Christian counselors and/or with a lawyer, physician, or pastor who can help in making ethical decisions. Often these consultations can be done without your having to reveal the counselee's identity. When difficult ethical decisions must be made, the Christian counselor gets as much factual data as possible (including biblical data), sincerely trusts that God will lead, and then makes as wise a decision as possible based on the best evidence available. (p.35)

### **Case Studies**

These case studies are fictitious. They are intended for small group discussion among clergy concerning the scriptural, ethical and legal issues that pertain to these situations. Each group will be assigned a case study. A reporter will be selected from each group and report on the discussion of the group. There are questions provided with each study to stimulate discussion.

#### **Potentially Dangerous Parishioner**

Tony attends church about once every month. He sits in the back of the church by himself. You have seen him outside of church with a young woman from the neighborhood. According to the records Tony has been a member of the congregation since his confirmation eight years ago. You have been the pastor at the church for about a year. You visit him at home for the first time on your member home visits. Tony shares with you that he is very angry. You think Tony is potentially violent. He then shares with you his impulses to hurt others. He describes how he has seriously beaten his girlfriend. She has told him that she is afraid to leave him because he might beat her more severely. You believe that he is likely to seriously harm or even kill his girlfriend.

Is privileged communication applicable to this situation according to your state statute?

Would you feel compelled to notify

- Tony's girlfriend because she may be in grave danger?
- another pastor for a second opinion?
- the police or other authorities?
- Tony that you would like him to see a professional therapist?

#### **"You can't fire me, I quit!"**

Carol is single and 31. She has been a lifetime member of your congregation. She has been active in your congregation and is socially involved with many in your small church. Her attendance in worship has dropped considerably in the past year. Lately she has been seen frequently around town with the sheriff, who is separated from his wife. Members have informed you that his car is often parked in her driveway overnight. You pay Carol a morning visit. The sheriff's car is still parked in her driveway. She is reluctant to let you in and you know someone is showering in her bathroom. When you inquire about her visitor, she informs you to mind your own business and closes the door. You and her elder visit her the following week. As you sit in her living room, she acknowledges that the sheriff is a good friend of hers and will often stay the night. She doesn't believe that this is any business of the church, however. When she is informed by you that it is your business and that you will need to take the appropriate disciplinary action, she responds, "I no longer want to be part of this church. I

would like you to leave now." She refuses to talk about the matter any further and intends to submit her resignation within the week. She does so within the week. The letter contains no reasons for her resignation. To what extent do you inform the congregation of the reasons for Carol's resignation from the church?

What scriptural basis do you have for sharing this information with the congregation?

What legal precautions are necessary should you choose to make this situation public in your congregation?

What if Carol should demonstrate interest in enrolling in a neighboring WELS congregation? What should be communicated?

### **Adultery Addict**

Harry has been thought of as a model of Christian character in your congregation. He is successful in business, has a stable marriage with three children, and has been nominated for president of the congregation. A month ago Harry came to your office late one evening. In tears he confessed to you that he has had an ongoing affair with his secretary at the office. His wife is not aware of this relationship, nor to his knowledge is anyone else. You shared with him the severity of his sin and its implications for both his family and the church, which he was aware of. Deeply troubled by this he asked for God's forgiveness and you assured him that God forgives those who seek his mercy. You asked to see him the following week in order to speak with him further on this matter. He agreed and one week later arrived at your office to assure you that he did not have relations with his secretary in the past week, but was unable to release or transfer her from her position as you had advised. He still did not think it necessary to inform his wife or anyone else of his relationship with his secretary. He again agreed to another appointment one week later. This appointment he did not keep. When you did arrange to meet with him for lunch one week before the voters meeting, he confessed that his affair with his secretary had resumed. He did not believe it was the right time to share this matter with his wife, nor was he willing to decline the nomination for the office of president in the congregation.

What responsibility do you have to Harry's wife as a member of your congregation?

While Harry's confession was given to you with the understanding of confidentiality, what responsibility do you have to the congregation and its leadership?

### **The Prodi-Gal Returns**

Karen grew up in your town and was active in Sunday school and youth group until she went to the city for college. While in college she attended worship on occasion during the school vacations. There was no WELS congregation in the city where she studied and where eventually she found a job after her graduation. For the past five years she has only attended services when she has been home for an occasional holiday. Recently she has moved back to her parents' home. Both parents are active in all aspects of congregational life. You visit Karen at home. She is reluctant to return to church. She confesses that she lived a prodigal life in the city and she is now paying the consequences. She has AIDS. She is afraid of how the small town congregation might react to her participating in the church and what affect it might have on her parents.

What might be the benefits of sharing such information in the congregation?

How might one go about communicating the situation to others?

What are some of the hazards or cautions of withholding this information about Karen?

### **Teenage Counselee**

Joey is 17 years old, is frequently at youth group meetings because his mother brings him, and attends a local Lutheran High School. He is lonely, depressed and detached. Joey's father died when he was 12. According to his mother, Joey has respect for you as his pastor. She would like Joey to see you regularly for counseling. You agree to see Joey once a week. Joey wants you to promise to keep whatever he tells you secret. You promise. He does feel comfortable speaking with you and talks freely about himself. He describes his depression and that it has often caused him to think about taking his life. He reminds you of the serious auto accident less than a year ago when he drove his mother's car off the road and into a tree. It was not an accident. He had attempted to kill himself. He still desires to end his life.

Do you notify others about what Joey has told you?

How might you have precluded problems of breaking confidence with Joey prior to the session?

Joey does commit suicide. You did not tell his mother. You are subpoenaed by the court to testify as an expert witness in regard to Joey's mental stability. What do you do? Can you be held responsible for not disclosing information about Joey's condition?

### **"Spare the rod, spoil the child?"**

Miss Schmitz has 21 pupils in her class. She is the only teacher in your church's school. You are the acting principal. She is having discipline and attention problems with Juan and sends the fourth grader to you. Juan tells you that he is hungry and tired. His uncle, whom he lives with, did not like the grades he has been getting in math and confined him to a closet last night without any meals. Juan's uncle, Miguel, is not a member of your congregation, but has shown an interest and regularly attends your adult instruction class as encouraged by the board of education. You visit Miguel to talk with him about this matter. He confirms that Juan is often in need of strict discipline, but he denied ever punishing Juan in the way that was described. Juan is absent from school for the remainder of the week. At the mid-week instruction class Miguel informs you that Juan has been sick. On Monday attends school again, he is tired, weak, and shuns the attention of others. Miss Schmitz informs you of his condition. You meet with Juan, but he appears very afraid and refuses to speak with you.

How would you deal with Miquel and Juan as individuals in your spiritual care?

If you are not required to report as a clergyman, would you be functioning in another capacity?

What are your states regulations concerning the reporting of child abuse/maltreatment/neglect? If you are not sure, what would be your responsibilities in New York?

When and how might you go about reporting this suspicion to the proper authorities?

### **Conclusion**

The privileges of confidential communication vary from state to state and can lead to a tangle of legal guidelines. There is a need for clergy to be aware of the state regulations or lack thereof. He needs to conduct himself in a professional manner as a pastor and Christian who seeks to care for the spiritual welfare of his flock. There is little doubt that litigations or subpoenas may arise within our churches or synod, but we can continue to conduct our work with confidence knowing that God will give us the strength to obey God rather than man (Acts 4:19) should the event arise, and He will give us the spirit to submit to the God-given authorities when it does not conflict with His will (Romans 13:1-7).



## **Appendix A: WELS Policy on Confidentiality of Information**

### **I. Policy Provisions**

- a) A clergyman's main concern is the spiritual welfare of the individual.
- b) A clergyman should not reveal confidential communications made to a clergyman in his professional character as a spiritual advisor, except as stated in paragraph (c), (d) and (e).
- c) The clergyman should carefully review all applicable statutes with an attorney in the area in which he resides for guidance on the following important matters:

Whether a clergyman may legally reveal, such information to the extent he reasonably believes that the abuse or neglect of a child may occur.

Whether a clergyman may legally reveal such information that he reasonably believes necessary to prevent a person from committing a criminal or fraudulent act that the clergyman reasonably believes is likely to result in death or substantial bodily and/or emotional harm to self or others, or which he believes necessary to prevent such harm in the future.

- c) A clergyman shall reveal such information if ordered to do so by a court.
- e) A clergyman may reveal such information if the person consents to such disclosure.

### **II. Guidelines for Policy Implementation**

The concepts of privileged communication and confidentiality, while both refer to the relationship between the pastor-counselor/counselee-client and are established for the benefit of the counselee, have their base established from different sources. Privileged communication is a right established by law; confidentiality is an ethical concept. Furthermore, confidentiality is a moral concept supported in Scripture. Since privileged communication is established by law, it is important that the pastors in our Synod become knowledgeable about the specifics of the laws relating to it within the state in which they reside.

Because of the great responsibility of his office as shepherd of the flock and caretaker of souls, every pastor needs to maintain and assure for his people the right of privileged communication together with its promise of confidentiality. While the concept of confidentiality has a scriptural base generally applicable to all people, it is especially applicable to a pastor as a sacred trust because of his office and God-imposed responsibilities. The assurance of confidentiality is necessary to build trust and confidence in parishioners to approach their pastor for spiritual, scriptural counseling. It is also to be understood that privileged communication and its promise of confidentiality and absolute secrecy under law does not apply only to the pastor/counselee relationship in a confessional situation. The applicability of the law of refusal to disclose information extends to all communication as a spiritual advisor.

However, the right of privileged communication is not inviolate. The right of refusal to disclose information under all circumstances is not a doctrinal absolute found in Scripture. Also, since it is a privilege granted by law, it is a privilege that law can revoke. Therefore, it is not a right that pastors should assume in all cases. Clearly, when in doubt concerning the legal ramifications of disclosure, the pastor should obtain appropriate legal counsel prior to disclosing the information in question. Of some concern are those occasions when a pastor tries to act more in the role of a mental health counselor than a pastoral counselor. In answer to this it is incumbent on us to be **pastoral** counselors whose counsel is directed to the **spiritual** lives of our people and whose aim is always to guide and keep people in the **pathway of righteousness**.

The question might well arise as to the pastor's exercise of confidentiality when he is acting in his capacity as a spiritual advisor in those areas which society may not consider spiritual. Even here when so counseling, the pastor's concern is for the spiritual well-being of his people. For example, where the pastor is serving as a **marriage counselor**, once again he is doing so clearly as a spiritual advisor basing his counsel on the scriptures and seeking the spiritual well-being of those with whom he is counseling.

There may be situations, however, in which a pastor's advice is sought for reasons lying outside the scope of his role as a spiritual advisor, for example advice on purchasing a car.

Here the scriptural principles concerning bearing false witness and the general rules of propriety would govern rather than those pertaining to privileged communication or confidentiality.

Of even greater concern is a specific area which has come to the fore in our world today -- cases of suspected child abuse or neglect. In these cases a pastor needs seriously to question his right of confidentiality. In fact, breaking confidentiality in such cases may well provide greater spiritual benefit both to the counselee and to the abused and/or the abuser. Likewise, every pastor has the shepherd's responsibility of balancing the sin of the counselee with the rights of the victim and the right of secrecy with the counselee's spiritual health.

Finally, it is recommended that every pastor acquaint himself thoroughly with the paragraphs in *The Counseling Shepherd* (Schuetze and Matzke, Northwestern Publishing, which pertain to privileged communication and child abuse (pp. 116 and 182).

**Appendix B: Counseling Contract Sample**

**COUNSELING CONTRACT**

This is an agreement between the counselor, Daniel Krause, and the client(s), \_\_\_\_\_ , concerning their forthcoming counseling relationship and the terms thereof.

Confidentiality

Confidentiality is important for a therapeutic environment to be maintained between counselor and client. Within the limits of the law and professional consultation such confidentiality will be maintained.

Tape Recording

Tape recording is used as a tool in the counseling process for review of the session by the counselor and/or for the clients to hear themselves, if it is of some therapeutic advantage. Tapes are erased following the final session. Do you agree to such tape recording according to these terms?

\_\_\_\_\_YES \_\_\_\_\_NO

Reason(s) for Counseling

(As given by the client during initial interview. This may change as the counseling process continues.)

Plan and Immediate Goals

(A general overview of the counseling process is given (i.e. the number of sessions, the type of counseling, the focus and the goals that will be pursued.)

Fees and Terms of Payment

(A sliding fee scale has been established. Payment of fees and scale will be discussed at interview and the terms will be included in the contract.)

Signatures: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

**Park Slope Bible & Counseling Center  
376 Sixth Avenue (at Sixth Street)  
Brooklyn, New York 11215  
(718) 788-2880**

## **Appendix C: Statutes on Privileged Communication to Clergy**

Forty-nine states, Puerto Rico, and the Virgin Islands have some form of statute recognizing the privilege to clergy. West Virginia has none. These statutes for the states pertaining to the Colonial Conference--South may not be the most current for your particular state since they are cited from a 1983 publication (Tiemann & Bush). Consult a social services agency, an attorney or a textbook of your states law on evidence for more recent legislation.

### **DELAWARE**

Del. Code Ann. tit. 10, sec. 4316

#### **Prohibition of Examination of Minister of Religion**

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**

D.C. Code sec. 14-309

#### **Clergy**

A priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science may not be examined in any civil or criminal proceedings in the Federal courts in the District of Columbia and District of Columbia courts with respect to any--

- (1) 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 the confession or communication; or
- (2) communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking the advice; or
- (3) communication made to him, in his professional capacity, by either spouse, in connection with an effort to reconcile estranged spouses, without the consent of the spouse making the communication.

### **MARYLAND**

Md. Cts. & Jud. Proc. Code Ann. sec. 9-111

#### **Minister, Clergyman, or Priest**

A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation.

## NEW JERSEY

N.J. Stat. Ann. sec. 2A:84A-23 (Rule of Evid. 29 )

### **Priest-Penitent Privilege**

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.

*\*Section 2A:84A-29*

*Authors note: This section provides for waiver of the privilege by contracting not to claim it and by uncoerced, knowing disclosure of otherwise privileged information.*

## NEW YORK

N.Y. Civ. Prac. Law and Rules sec. 4505 (McKinney)

### **Confidential Communication to Clergy Privileged**

Unless 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

N.C. Gen. Stat. sec. 8-53.2

### **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.

## PENNSYLVANIA

Pa. Cons. Stat. Ann. sec. 5943 (Purdon)

### **Confidential 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 the consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

**VIRGINIA**  
Va. Code sec. 8.01-400

**Communications Between Ministers of Religion and Persons They Counsel or Advise**

No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen 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 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.

**Appendix D: New York State Mandatory Child Abuse Reporting**

**MANDATED REPORTERS**

Mandated reporters are those individuals who must report, or cause a report to be made, whenever they have reasonable cause to suspect that a child coming before them in their professional or official capacity is abused or a maltreated, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian or custodian or the person legally responsible for the child comes before them in their professional or official capacity and states from personal knowledge, facts, conditions, or circumstances, which, if correct, would render the child an abused a maltreated child.

An abused child is under 18 years of age whose parent or other person legally responsible for his care inflicts or allows to inflicted upon the child or creates or allows to be created a physical injury or a substantial risk thereof by other than accidental means which causes or creates a substantial risk of death, serious or protracted disfigurement, a protracted loss or impairment of physical or emotional health or protracted loss or impairment of the functions of a bodily organ.

An abused child also is one whose parents or other person legally responsible for his care commits or allows to be committed a sex offense as defined in Article 130 of the Penal Law; commits incest; allows, permits, or encourages such child to engage in prostitution; or allows such child to engage in acts or conduct which constitute a sexual performance.

A maltreated child is one who is under 18 years of age whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of the parent or other person legally responsible for his care to exercise a minimum degree of care: 1) in supplying the child with food, clothing, shelter or compulsory education, or medical, dental, optometrical, or surgical care though financially able to do so or offered financial or other reasonable means to do so; or 2) in providing the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm or a substantial risk thereof, including the use of excessive corporal punishment, or by misusing drugs or alcohol to the extent that he or she loses self-control of his actions, or by abandoning the child.

In addition, Social Services Law specifically defines abuse and maltreatment as it relates to a child who is living away from his or her home in a residential care program.

If you suspect child abuse or maltreatment while acting as a staff member of a medical or other public or private institution, school, facility or agency, you must immediately notify the person in charge of such institution, school, facility or agency of his or her designee. That person then also becomes responsible for reporting or causing a report to be made to the SCR. The law, however, does not require more than one report from any institution, school, facility or agency on any one incident of suspected abuse or maltreatment.

Those persons mandated to report are:

- Physicians
- Surgeons
- Medical Examiners
- Coroners
- Dentists
- Osteopaths
- Optometrists
- Chiropractors
- Podiatrists
- Social Service Workers
- Day Care Center Workers
- Child Care Workers
- Family or Group Family Day Care Providers
- Peace Officers
- School Officials
- Employees or Volunteers in Residential Care Facilities
- Residents
- Interns
- Registered Nurses
- Hospital Personnel engaged in admission, examination, care or treatment
- Christian Science Practitioners
- Foster Care Workers
- Mental Health Professionals
- Psychologists
- Police Officers
- Other Law Enforcement Officials
- District Attorney or Assistant District Attorney
- Investigators Employed in the Office of District Attorney

### **PURPOSE OF REPORTING**

The purpose of the mandatory reporting statute is to identify suspected abused and maltreated children as soon as possible, so that such children determined to be abused or maltreated can be protected from further harm and, where appropriate, can be offered services to assist their families. The intervention of the appropriate local child protective service cannot begin until a report is made. Consequently, as a mandated reporter you play a critical preventing any future abuse or maltreatment to a child.

You may become aware of a family's circumstances where, in your professional judgment, you do not suspect that child abuse or maltreatment yet exists, but believe that there is future likelihood of it occurring. In those situations, you should consider making a referral to the local social services department for preventive or other needed services.

### **HOW TO REPORT**

Reports should be made immediately – at any time of the day and on any day of the week – by telephone or by a telephone facsimile machine to the State Central Register of Child Abuse and Maltreatment (SCR). The telephone numbers are:

- Statewide Toll-Free State Central Register 1-800-635-1522

- Facsimile Line: 1-800-635-1554 (users should contact the SCR to obtain forms and applicable instructions)
- Onondaga County: (315) 422-9701
- Monroe County: (716) 461-5690

You should provide the following information, if known, when making an oral report:

- the names and addresses of the child and his parents or other person responsible for his care; family composition; the name and address of the residential care facility or program in which the child resides or is receiving care;
- the child's age, sex and race;
- the nature and extent of the child's injuries, abuse or maltreatment, including any evidence of prior injuries, abuse or maltreatment to the child or his siblings;
- the name of the person or persons responsible for causing the injury, abuse or maltreatment;
- the source of the report;
- the actions taken by the reporting source, including the taking of photographs, or X-rays, removal or keeping of the child, or notifying the medical examiner or coroner; and
- any additional information which may be helpful.

A signed, written report (DSS-2221A) must be filed within forty-eight hours of an oral report. You should submit written reports to the appropriate local child protective services except that a written report involving a child cared for away from his or her home (i.e., foster care, residential care) should be submitted to the State Central Register (SCR), New York State Department of Social Services, 40 North Pearl Street, Albany, New York 12243.

## **OBLIGATIONS OF CERTAIN MANDATED REPORTERS**

### **1. Photographs and X-Rays**

You may take color photographs or arrange for them to be taken at public expense. The purpose of these photographs is to preserve evidence of any areas of trauma visible on a child named in a report. You may also ask the local CPS to take photographs when appropriate. If medically indicated, you may arrange for x-rays to be taken at public expense.

Whenever you are on the staff of an institution, school, facility, or agency you must immediately notify the designated person in charge and that person must take or arrange for, at public expense, color photographs of visible trauma and must, if medically indicated, arrange for x-rays to be taken. Any photographs or x-rays taken must be sent to the child protective services at the time the written report (DSS-2221A) is sent, or as soon thereafter as possible.

### **2. Protective Custody**

Certain mandated reporters shall take all appropriate measures to protect a child's life and health including, when appropriate, taking protective custody of a child without the consent of a parent or guardian if such mandated reporter has reasonable cause to believe that the circumstances and condition of the child are such that continuing at home or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health.

Those persons having the authority and responsibility to take a child into protective custody are: (a) peace officers; (b) police officers; (c) law enforcement officials; (d) agents of a Society for the Prevention of Cruelty to Children; (e) child protective caseworkers of a city or county department of social services; (f) persons in charge of a hospital or similar institution. In addition, when a physician (i.e., private practice) treating a child has reasonable cause to believe that the child is in imminent danger, the physician shall notify the local department of social services or appropriate police authorities to take custody of the child.



## **MANDATORY REPORTING OF DEATHS TO MEDICAL EXAMINER OR CORONER**

You must notify the appropriate medical examiner or coroner when you have reasonable cause to suspect that a child has died as a result of child abuse or maltreatment.

The medical examiner or coroner must investigate the matter and report his findings to the police, the appropriate district attorney, the local child protective service and, if the institution making the report is a hospital, to the hospital.

## **IMMUNITY OF THE REPORTER**

To encourage prompt and complete reporting of suspected child abuse and maltreatment, the Social Services Law, Section 419, affords you certain legal protections from liability. Any persons, officials or institutions who in good faith make a report, take photographs and/or take protective custody, have immunity from any liability, civil or criminal, that might be a result of such actions. All persons, officials or institutions who are required to report suspected child abuse or maltreatment are presumed to have done so in good faith as long as they were acting in the discharge of their official duties and within the scope of their employment and so long as their actions did not result from the willful misconduct or gross negligence of such person.

## **PENALTIES FOR FAILURE TO REPORT**

Any person, official, or institution required by the law to report a case of suspected child abuse or maltreatment, who willfully fails to do so, may be guilty of a Class A misdemeanor. Furthermore, any person, official, or institution required by the law to report a case of suspected child abuse or maltreatment who knowingly or willfully fails to do so may be civilly liable for damages caused by the failure to report.

**MANDATED REPORTERS HOTLINE  
FOR CHILD ABUSE &  
MALTREATMENT REPORTS  
1-800-635-1522**

New York State  
Mario M. Cuomo, Governor  
Department of Social Services  
Cesar A. Perales, Commissioner  
Pub. #1159 (12/86)

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