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Clergy-Penitent Privilege

Exclusive Online, February, 2020

Learn what statements or conversations are considered “privileged.”

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Every state has a statute or court rule making certain communications to clergy “privileged.” This generally means that neither the minister nor the “penitent” can be forced to testify in court (or in a deposition or certain other legal proceedings) about the contents of the communication.

Pastors can use these eight questions to understand whether or not a statement or a conversation could be considered privileged by a court of law.

1. Is there a “communication”?

If you answered yes to this question, go to question 2. If you answered no, the clergy-penitent privilege does not apply.

Read the next two paragraphs to learn what a “communication” can include.

Usually, a “communication” refers to an oral conversation. This can include phone conversations. It can also include correspondence (such as letters and emails) and even gestures or other physical acts if intended to transmit ideas.

To illustrate, one court ruled that a counselee who pulled a gun out of his pocket and placed it on the pastor’s desk in response to the pastor’s question about a recent murder had made a “communication.” Other courts have ruled that a pastor’s impressions of a counselee’s demeanor are not communications because one’s demeanor is not a communication.

2. Was the communication made in confidence?

If you answered yes to this question, go to question 3. If you answered no, the clergy-penitent privilege does not apply.

Read the next two paragraphs to learn what it means for a communication to be made in confidence.

A communication is confidential if there is an expectation that it will not be revealed. In some states, the presence of a third person prevents a communication from being confidential. However, if the presence of a third person is legally required (e.g., a prisoner who cannot communicate with a minister unless a guard is present), the privilege may apply.

Several state laws extend the clergy-penitent privilege to situations in which other persons are present "in furtherance of the communication." This probably would include marital counseling sessions when both spouses are present. However, statements made to a minister in the presence of deacons, elders, church members, or any other persons will not be privileged, unless specifically recognized by state law. Be sure to check state law.

3. Was the communication made to a minister?

If you answered yes to this question, go to question 4. If you answered no, the clergy-penitent privilege does not apply.

Read the next paragraph to learn more about who might or might not be considered a minister.

Communications made to church board members, a minister's spouse, or "lay ministers" cannot be privileged. But in some states, a person who a counselee believes to be a minister will be so regarded for purposes of the clergy privilege.

4. Was the communication made to a minister acting in a professional capacity as a spiritual adviser?

If you answered yes to this question, go to question 5. If you answered no, the clergy-penitent privilege does not apply.

Read the next two paragraphs to learn what it means for a minister to be acting in a professional capacity as a spiritual adviser.

Generally, this requirement is met if a person seeks out a minister for spiritual counsel or confession. If a statement is made to a minister as a mere friend, the privilege does not apply.

A minister (or court) may need to ascertain the objective of a conversation in determining whether a communication is privileged. Was the minister sought out primarily for spiritual advice? Were the statements of a type that could have been made to anyone? Where did the conversation take place? Was the conversation pursuant to a scheduled appointment? What was the relationship between the minister and the person making the communication? These are the kinds of questions which help to clarify the purpose of a particular conversation, thereby determining the availability of the privilege.

5. Are you legally authorized to assert the privilege?

If you answered yes to this question, go to question 6. If you answered no, the clergy-penitent privilege does not apply.

Read the next paragraph to learn what it means to be legally authorized to assert the privilege.

In most states, both the person who made the communication and the minister to whom it was made may claim the privilege. Rule 505 of the Uniform Rules of Evidence, which has been adopted by several states, specifies that "the privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the minister at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant." However, in some states, only the penitent or "counselee" may assert the privilege, not the minister.

6. Have all additional legal requirements been met?

If you answered yes to this question, go to question 7. If you answered no, the clergy-penitent privilege does not apply.

Read the next paragraph for more information on how to know if all additional legal requirements are met.

You will need to review your state clergy-penitent privilege statute to identify any additional legal requirements that may apply. Some states require that the communication be made in the course of spiritual “discipline.” While most courts interpret this requirement broadly to cover statements made in the course of spiritual counsel and advice, a few courts in some older cases applied this language exclusively to Catholic priests.

7. Has the privilege been waived by the counselee?

If you answered no to this question, go to step 8. If you answered yes to this question, the clergy-penitent privilege does not apply.

Read the next paragraph to learn about how a privilege can be waived by the counselee.

A privilege may be waived if a counselee discloses to others the same information shared in confidence with a minister. If the privilege is waived, it no longer protects communications against compelled disclosure in a court of law or judicial proceeding. To illustrate, one court ruled that a counselee waived any privilege when he disclosed to the police the substance of confidential communications he had made to his minister.

In some states, the minister also may waive the privilege.

8. Did the counselee confess to or disclose one or more incidents of child abuse?

If you answered no, and if all of the conditions summarized in the preceding questions have been satisfied, then the clergy-penitent privilege probably applies. To be certain, check with an attorney licensed to practice law in your state.

If the counselee did confess to or disclose one or more incidents of child abuse, then you may be legally required to report this information to the civil authorities. Check with your state [child abuse reporting law](#), and a local attorney, to be sure. Some states do not abrogate the privilege if the requirements of the privilege are met and child abuse is disclosed.

Caution. Some of these eight steps implicate complex legal issues for which the assistance of an attorney is essential.

Additional Reading

For deeper readings on clergy-penitent privilege, see these resources and articles:

- [*Pastor, Church & Law*](#) (on this [website](#) or in [book format](#))
- [“Clergy-Penitent Privilege Not Applicable to a Conversation with a Church Elder”](#)
- [“Compelling Priest to Disclose Confidential Information Violated Religious Freedom Restoration Act”](#)
- [“Murder Suspect’s Statements to Church Employee Not Privileged”](#)
- [“First Amendment Religion Clauses Prohibit Court from Resolving Confidential Communications Claim”](#)
- [“Clergy-Penitent Privilege May Not Protect Church Elders Who Did Not Report Child Abuse Case”](#)
- [“Incriminating Statements Made to Pastor Not Confidential Due to Public Setting, Retelling to Others”](#)
- [“Lay Bible Study Leader Successfully Invokes Clergy-Penitent Privilege”](#)
- [“Author’s Identity of Anonymous Letter Not Protected by Clergy-Penitent Privilege”](#)
- [“‘Spiritual Adviser’ Limits of Clergy-Penitent Privilege Outlined by Massachusetts Court Ruling”](#)

Go to the next article, [“Accountable Reimbursement Arrangements,”](#) or return to [“15 Things Richard Hammar Wants Pastors to Know,”](#) to choose an article of interest or that fits a particular need.

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