Confidentiality and the Clergy

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To begin I would like to relate the story of the Rev. Ronald Salfen, a Presbyterian minister. On May 14, 1981 he found himself in the court of State District Judge John Roach of McKinney, Texas. Pastor Salfen had an important choice to make. His choice was between obedience to his calling and obedience to an order of the court. He chose to be obedient to his calling and was given a jail sentence for contempt of court. He appeared before the court as a character witness for his secretary in a bond hearing. He had discussed these matters with his secretary in confidence. He cited the Texas clergy-penitent statute and declined to reveal anything that was told to him in a confidential conversation.

Judge Roach asked him six questions and he declined to answer six times. To each question he replied, "I am sorry, your honor, I cannot answer." The judge found him in contempt of court on six counts and assessed him a fine of a hundred dollars for each count plus a sentence of twelve hours in jail for each charge. It only took the Court of Criminal Appeals in Texas a short time to have the minister released. This court also overruled Judge Roach on the charges of contempt of court.

In spite of the fact that the court order was overruled, the experience of Pastor Salfen was very unpleasant for him, his family and his congregation. His experience in such a matter as this is not unique. It is only one of many examples of the recent cases that have arisen in the area of confidentiality and the clergy.[1]

Another case that we can cite took place in England in 1860. A man by the name of William Hay was charged with robbing Daniel Kennedy of a silver watch. They arrested Hay and from his information they were led to the house of a Roman Catholic priest by the name of Rev. John Kelley. Here they received the watch and Mr. Kennedy identified the watch as his property. At the trial Father Kelley was asked how he received the watch. He refused to reply to the questions. He said, "If I answered it, my suspension would be for life as a necessary consequence. I should be violating the laws of the church, as well as natural laws." At this point Father Kelley was arrested and placed into custody.[2]

These are only two examples of the many cases that have arisen through the years in the area of confidentiality and the clergy. Should the clergy be protected when it comes to privileged communication? Generally speaking, the courts in England and America have protected this right of the clergy. John Henry Wigmore, a great legal commentator on the common law in England, concluded that four conditions of legitimate privilege exist and should be recognized by the courts. The courts for the most part have always recognized these conditions. The conditions are these: First, that the communications must originate in the belief that it will not be disclosed. Secondly, that the inviolability of that confidence must be essential to achieve the purpose of the relationship. Thirdly, that the expected injury to the relationship through fear of later disclosure must be greater than the expected benefit to justice in obtaining the testimony. And fourthly, that the relationship is one that should be fostered to meet important social goals.[3]

The subject of this paper is one of growing importance. This writer doesn't have any personal knowledge of any pastor in our synod who has been involved in a case concerning confidentiality that has reached the courts of our land. At the same time, however, we should be warned of the implications of such cases and be prepared in the case that we might someday find ourselves involved in such a situation. This is really the purpose of this essay. In order to accomplish this goal we wish to divide this paper into four sections. First, we shall take a look at the history that surrounds the subject of confidentiality and the clergy. Secondly, we will review and comment on the various state laws that are in effect concerning this subject. Thirdly, we will consider the question of confidentiality and the particular area of child abuse. And fourthly, we wish to give you some guidance so that you can be better prepared to go about the task that God has called you to perform in your congregations and among your people.

Confidentiality and History

What does Scripture have to say about the subject of confidentiality? Does God have anything to say about this in the Bible? Also, what can we learn from the history of the Christian church when it comes to confidentiality and the clergy? First of all, as might be expected, the Bible does not directly address the question. However, there are several passages in the Bible that we might do well to look at and that might assist us as we attempt to treat this subject in a manner that is truly God-pleasing and beneficial to those whom we serve as pastors.

Although God was not speaking directly to the subject of confidentiality and the clergy, He does give us some directives that could be of assistance. In Proverbs 25:9 God speaks about the matter of confidence in our relationship with our neighbors. It says: "If you argue your case with a neighbor, do not betray another man's confidence." I believe that this passage is clear as to its intention and perhaps this passage also can be applied to the question that we are considering in this essay. Do we have the right to betray what is spoken to us in confidence? This passage precludes that possibility. At the same time, however, it must be said that there are situations where greater harm would be done by not revealing the substance of the communication. Perhaps God also gives us another clue as to how He would want this matter handled when he speaks concerning church discipline. In Matthew 18:15 Jesus says: "If your brother sins against you, go and show him his fault, just between the two of you." In its first stage church discipline is undertaken in the strictest of confidence. No one has the right to inform others until one has exhausted the possibility of the person coming to repentance by personal application of Law and Gospel. Thus, perhaps, this will give us an indication of just how God would want us to handle the matter of confidentiality in our ministries.

Historically speaking, the roots of this subject go back to the time of the earliest fathers of the Christian church. The directives in this matter developed over many years and it was usually associated with the practice of the Roman Catholic Church in the area of auricular confession. As early as the year 225 Tertullian insisted that the knowledge of sins a person might have committed be confined to the congregation. Paulinus says that Ambrose wept with the penitents when they came to him for confession and that he "never revealed to any but the Lord" what had been divulged to him. St. Augustine in his writings repeatedly emphasizes that he "endeavors to heal secret sins in secret, without exposing them." The first papal recognition of the secrecy of the confessional was by Pope Leo I, the bishop of Rome from 420 to 461. In a letter to the bishops he wrote that the manifestation of the conscience in secret confession to the priest fully sufficed and had been for a long time customary in the church. He was the first pope who "plainly and unequivocally demands only secret confession and strict silence on the part of the confessor." In the year 802 Paulinus of Aquileia observed that a priest "like a wise and perfect physician should know how to heal and cleanse wounds and not talk about them." Burchard of Worms in the year 1012 "sternly warns that a priest who tells secrets is to be disposed of and made to do penance."[4]

Luther also had a few things to say about confidentiality. He felt that a Christian should not have to reveal the contents of a confessional in a court of law. In one place Luther says,

> Within the church's sphere of authority we deal in secret with the conscience and do not take its jurisdiction from the civil state...I too have given advice in secret, and because the matter was secret, the advice was justly given in this way. If the affair comes under the jurisdiction of the civil authorities later on, we know nothing of it. Nor shall they drag us into the case.[5]

Luther was once asked whether such secrecy should be preserved even if a person was guilty of an irreparable crime, such as infanticide. Would the confessor have to testify against the person in court? Luther replied,

> By no means! For one must distinguish between the authority of the church and the authority of the state. The woman did not confess to me, but to Christ. But what Christ keeps secret, I, too,

> must keep secret and simply deny that I have heard anything. If Christ has heard anything, He may say so Himself. But during the absolution I should privately say to the woman: You harlot, never do that again.[6]

Thus Luther made it quite clear concerning his belief about confidentiality. Other Lutherans have followed. C.F.W. Walther in his *American Lutheran Pastoral Theology* written in 1872 says that he defends the right of clergy to confidentiality. Two recent statements by Lutheran denominations also uphold this same point of view. In 1960 the convention of the United Lutheran Church adopted the following statement:

> In keeping with the historic discipline and practice of the Lutheran Church and to be true to the sacred trust inherent in the nature of the pastoral office, no minister of the United Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care for souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent a commission of a crime.[7]

The American Lutheran Church adopted a similar statement the same year. The document states:

> Whereas it has long been recognized that a part of the ministry of pastors of the Lutheran Church is to hear confessions, to counsel with persons, and to give advice, comfort, and guidance to those who seek it; and
> Whereas it is imperative that, in order for such a ministry to be effective, all such communications made to pastors should be kept in the strictest confidence and should be disclosed to no one without the specific consent of the person making the communication; and
> Whereas it is a part of the traditional discipline and practice of the Lutheran church that a pastor should hold inviolate all communications made to him in his capacity as a pastor, therefore,
> Be it resolved: 1. That the Church Council recognizes and reaffirms that a part of the ministry of a Lutheran pastor is to counsel with persons, to receive their confessions, and to give advice, comfort, and guidance to those who seek it; and 2. That the Church Council recognizes and reaffirms that it is a part of the traditional discipline and practice of the Lutheran Church that the pastor hold inviolate and disclose to no one the confessions and communications made to him as a pastor without the specific consent of the person making the communication.[8]

As far as this writer knows the Wisconsin Ev. Lutheran Synod has never made an official or public statement concerning its stand on the matter of confidentiality and the clergy. Such a statement, however,. would not be out of line. We say this because there are some states that look at the official statement of a church denomination when making judgments as to the validity of a plea of confidentiality in a case that might reach the courts. Perhaps this is an item that our synod would do well to consider in the case that there might be a problem arising sometime in the future. It seems like more and more such cases of this kind are coming to the forefront and it will be just a matter of time before a WELS pastor will find himself in a court of law defending his privilege of confidentiality. It might prove to be easier under such circumstances if a pastor could point to an official statement from the synod showing that we do have a stance on this matter. This could possibly establish his case in the court.

Confidentiality and the Law

There are now forty-nine states that have laws that deal with the clergy and the matter of confidence. West Virginia is the only state that has no law covering this area of concern. Several territories of the United States and also Canada have such statutes. In addition, the armed forces of the United States have similar provisions that deal with chaplaincy and court-martial cases.

The courts generally have held that statements made to the clergy in their professional character and in the course of their discipline enjoined by the rules or practice of their religious body to which they belong are privileged communication. That, however, does not mean that a pastor will never be called upon to witness and testify in a court or at a trial. There are many examples where the particular circumstances of the case made the statutes inapplicable. The laws dealing with the relationship of the clergy and the penitent are not always consistently and strictly construed. They might differ in interpretation from one jurisdiction to another.

Permit me now to give you one example where the law of confidentiality was upheld as well as several cases where it was rejected by the courts. In the case of Dehler vs. State (1899, Indiana) the testimony of a Catholic priest was held to be properly excluded because the facts of the case were communicated to him as a confidential communication. The person brought to court was a member of the Catholic Church and her conversation was with the priest as her pastor. The court stated that the confession made to the priest was made in the course of his discipline and was therefore inadmissible in the court of law.[9]

On the other hand consider the case of Johnson vs. Commonwealth (1949, Kentucky) where a pastor was called upon to testify in a murder case. He said that he visited the defendant in the county jail the night of the murder and that the defendant told him that he had killed the deceased. An objection was made on the grounds that this information was to be considered privileged and therefore could not be used in the court. However, the court ruled that the communication to the witness was not penitential in nature and was not made in the course of the pastor's discipline. The court said that the pastor had voluntarily visited with the person in jail and that the statement by the defendant was not made because of any religious duty. The court, therefore, concluded that the communication was not confidential and could be used in the case.[10]

Another case involved the transmission of a communication to a third party. In Hill vs. State (1901, Nebraska) the defendant, immediately after his arrest on a charge of bigomy, sent for the minister. He asked the clergyman to intercede for him with his first wife for a settlement of the criminal proceedings. He wrote out a synopsis of what he wanted the minister to relay to his wife. The minister was later called upon to testify about the contents of the letter. An objection was raised. The court, however, held that a communication to a minister must have been received in confidence and with the understanding that it should not be revealed to anyone. Since this communication had been made for the purpose of being transmitted to a third party, the communication could not be regarded as being confidential.[11]

In Mitsunaga vs. People (1913, Colorado) the defendant who was in jail on a murder charge was visited by a minister. The prisoner sent word by the minister to the chief of police that he wished to make a statement concerning his association with the crime. When he was taken to the chief, the defendant, through interpreters, made two statements. During the trial he claimed that they were privileged, made to the minister as his spiritual advisor. The court, however, held that since the defendant had voluntarily employed the minister as an intermediary source between himself and the chief of police, and then voluntarily made the statements, without having been influenced by any duress or coercion of any sort, there was no error in admitting the statements as evidence.[12]

We could cite for you many additional examples and court cases dealing with the subject of confidentiality and the clergy. At times the courts have sided with the principle of the confidentiality of the clergy and sometimes they have not. Again, we would like to repeat that as a general rule the courts have upheld as privileged communication statements made to clergymen in their professional character and in their course of discipline. All state laws differ to some extent. Perhaps the following quotation will be of some help in understanding how the laws in different states are unique:

> The application of the clergy-communicant laws to counseling is unpredictable and depends to a large extent on the wording of the state statutes. A recent survey of privileged communication laws for clergy found that many states have narrowly written laws which restrict the privilege to confessions. Three jurisdictions—Alabama, Delaware, and the District of Columbia—have laws which specifically include marital counseling within the purview of the clergy and communicant relationship. Also, New Hampshire has a special privilege law for licensed pastoral counselors.

> Other states have broadly written laws which could be construed as including counseling. The Pennsylvania law, for example, states that the privilege will apply to any secret or confidential information acquired by a clergyman in the course of his duties. Although counseling is not specifically mentioned in the statute, counseling could fall within the statute because it is a frequent activity of some clergy.[13]

Since all state laws vary to some degree it would be a good idea for pastors to become aware of the statutes that have been enacted in their respective states. For your information I have copied below the laws that are currently in effect in the states of Ohio and Pennsylvania.

> **Ohio** (Ohio Rev. Code Ann. Sec. 2317.02 and 2921.22)
> The following persons shall not testify in certain respects: (C) A clergyman, rabbi, priest, or regular ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect, when the clergyman, rabbi, priest or such minister remains accountable to the authority of that church, denomination, or sect concerning a confession made, or any information confidentially communicated, to him for a religious purpose in his professional character; however, the clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust; (E) Division (A) or (D) of this section does not require disclosure of information, when any of the following applies: (1) The information is privileged by reason of the relationship between attorney and client, doctor and patient, licensed psychologist or licensed school psychologist and client, clergyman or rabbi or minister or priest and any person communicating information confidentially to him for a religious purpose in his professional character, or husband and wife. (4) Disclosure of information by an ordained clergyman of an organized religious body of a confidential communication made to him in his capacity as such by a person seeking his aid or counsel.
> **Pennsylvania** (Pa. Const. Stat. Ann. Sec. 5943)
> No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious, organization, except clergymen or ministers who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial, or investigation before any government unit.

Confidentiality and Child Abuse

In the case of Mullen vs. United States (1958, District of Columbia) there was involved testimony of a Lutheran minister concerning a mother that had confessed to him that she had abused her children. She was not a member of his church but the minister had promised her spiritual help if she confessed. Carolyn Mullen left her children chained in her home while she was absent. She was tried in the United States District Court for the District of Columbia and was found guilty. The federal statute stated that it was a crime to torture, abuse, beat cruelly, or otherwise willfully maltreat a child. On appeal the judgment was reversed. One reason for the reversal was the testimony by the Lutheran minister who said that the defendant had admitted to him that she had chained her children. The court judged that this should have been privileged communication and should not have been allowed as testimony.[14]

You will note that the above case is dated 1958. Things are different today. A decision like that of the one above would be highly unlikely in today's atmosphere concerning child abuse. There has been a trend during the past two decades toward mandatory reporting for all professionals who have access to information

about such cases. The first mandatory reporting law was passed in 1963 and by 1974 all states had mandatory laws for reporting child abuse.

Who must report suspected cases of child abuse? At first the reporting statutes were limited to medical personnel, but in recent cases this has been broadened to include almost everyone. Some states list as many as fifty different groups or individuals who must report such cases to the authorities. Thirty-three states also impose a criminal penalty for failure to report. Most laws have catch-all phrases such as "any other person." Thus inmost states the clergy are probably required by statute to report any known cases of child abuse. This naturally places clergymen in a dilemma. Should a person come to a pastor and admit to a form of child abuse the minister is required by law to report the situation to the proper authorities. The law that is in effect in Arizona is instructive because of its language. It says:

> The physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege, provided for by the professions such as the practice of social work or nursing covered by a law or a code of ethics regarding practitioner-client confidences, both as they relate to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is in issue in any judicial proceeding resulting from a report submitted pursuant to this article.[15]

The statute is complicated but note that the language refers to "law" or "code of ethics regarding confidences." Also note that this law deals not only with abuse but with "neglect, dependency, or abandonment of children." Statutes such as this clearly present dangers to the principle of confidentiality that should exist between pastors and those that they serve. Perhaps the solution lies in the legislatures of our states. It would be advisable for clergy to seek restoration of the privilege that should exist in all cases. Perhaps it would seem to put the clergy in the position of seeming to protect those that abuse children. At the same time, however, it is clear that this is no more the case than the existence of privilege in any other situation where the clergy is dealing with sin or crime. "Abrogation under child protection legislation represents the most assertive and widespread attack on the privilege in recent years. It could contain the seeds of a very dangerous precedent when other kinds of criminal acts gain the level of populist attention that child abuse has gotten recently."[16]

Confidentiality and some Guidelines

We have noted above that for effective counseling and faithful ministering the members of our congregations must know that what is communicated to the pastor will be kept in the strictest confidence. We could hardly expect openness and trust in any other kind of situation. We would have very few of our parishioners come to us with their problems and concerns if they knew that we could not be trusted to keep these concerns in confidence. In a new book dealing with pastoral counseling that is being written by Professor Armin W. Schuetze from our Wisconsin Lutheran Seminary and that will be published by Northwestern Publishing House in the near future the author says:

> For the kind of open relationship important for pastoral care and counseling, the confidential nature of the communication between pastor and parishioner is generally assumed and may at times be directly stated in the sessions. Particularly when confession and absolution become part of counseling will both pastor and member recognize that what is happening is confidential unless there is a specific understanding to the contrary...both pastor and parishioner consider confidentiality essential to the counseling relationship so that the spiritual needs of the member can be addressed...Even if in a given situation it would seen that disclosure would be of greater benefit, the pastor might well ask whether disclosure at any time, however, would undermine the concept of confidentiality for his future ministry in the congregation.[17]

What can a pastor do if he would become involved in a case involving the concept of confidentiality? What should he do if he is subpoenaed by a court to give testimony in a case where the information that he has is confidential and was given to him in his professional capacity? There are several things that might be done. First, he would do well to secure a competent attorney to advise concerning the statutes that are in effect in his state of residence. Secondly, he can notify the president of the district or even the authorities of the synod in Milwaukee to get advice and support without revealing the details that should remain in confidence. Thirdly, he can appear in court and answer those questions which do not compromise his confidentiality in the situation that he faces. Fourthly, he can respectfully refuse to answer those questions that would come into the bounds of confidential communication. In most cases the courts would excuse the pastor under these circumstances. If the court would judge that the pastor is guilty of contempt, he should be willing to pay the price for his convictions. One additional item for consideration in this area is that of clergy malpractice. This is a subject that perhaps deserves an entire paper on its own and we will only briefly touch on it in this essay. We are living in a litigious society. Anyone can sue anyone else for anything and it is often happening. People have been suing ministers as well. Perhaps ministers leave themselves most vulnerable to such lawsuits when they counsel people with problems. Perhaps you are familiar to some extent with the Nally case that has reached the courts in California. Briefly, the case was brought by Walter and Maria Nally after their 24-year-old son committed suicide. The couple's son had gone to Grace Community Church in the San Fernando Valley and several of the clergy in the 10,000 member church counseled him. So also had several psychotherapists. The son committed suicide and the parents faulted the church. They said that the clergymen had failed to inform the psychotherapists at the critical time and failed to warn them as parents about the severity of their son's condition. Thus the young man was able to take his own life. They contend that the pastoral counselors of Grace Community Church gave their son bad advice. The Nally’s have sued the church for one million dollars. The church, of course, denies any wrong in the case. Perhaps by the time this paper is presented we will have heard the outcome of this case.

We use the above case only as an example and as a warning. It could happen to any pastor. We leave ourselves especially open to such lawsuits when we counsel people who are not members of our congregation. This writer knows of at least one pastor who refuses to counsel anyone who is not a member of his congregation for this very reason. The point is that we might be liable for the advice that we give. Thus we should make sure that we are protected with the proper insurance coverage. It would be a good idea for every pastor to check his personal or church's policy to make sure that such coverage for malpractice exists. Several hundred thousand dollars to several million in coverage would not be out of line considering the situation that exists today. To date there have been only a few cases filed against clergymen for malpractice. To my knowledge none has been successful to date. The law, however, does not exempt a pastor or a congregation from lawsuits that might prove very costly even if they are won. The attorney fees resulting from such cases could run into the thousands of dollars.

In the book on pastoral theology quoted above Professor Schuetze has some good advice for all pastors. He says:

> Beyond this, the pastor must take care to remain within the area of his training and expertise. He is not a mental health counselor, a psychologist or psychiatrist, or even an expert in money management or the writing of wills. In counseling he does well at the very beginning to point out that he is functioning as a pastoral counselor and to explain what that means. Thus the expectations of the counselees are brought into focus with the pastor's objectives. This can help prevent the question of malpractice from arising.18

We hope that we have answered some of your questions about confidentiality and the clergy. May God continue to bless us in our ministries so that we may continue to effectively proclaim the name of our Savior as we preach, teach and counsel our members with their individual problems and concerns. May we continue to preach Law and Gospel and apply the same to our congregation and to the individuals that we have been called

to serve. This is the great task that our Lord has given us to carry out. May He permit us to do this without unnecessary fear or without unnecessary interference from the authorities that He has placed over us in the state and the courts.

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Endnotes

1. Tiemann & Bush, *The Right to Silence*, p. 17,18.
2. *Ibid*., p. 18-20.
3. Knapp & VandeCreek, *Privileged Communication*, p.294.
4. Tiemann & Bush, p. 34-36.
5. *Ibid*., p.59.
6. *Ibid*., p.59.
7. *Ibid*., p.60.
8. *Ibid*., p.61.
9. *Ibid*., p.128.
10. *Ibid*., p. 131.
11. Ibid., p.143.
12. *Ibid*., p. 143, 144.
13. *Ibid*., p. 150.
14. *Ibid*., p. 175.
15. *Ibid*., p. 177.
16. *Ibid*., p. 178.
17. Schuetze, ?
18. *Ibid*., ?