Evidence -- Privileged Communications -- The New North Carolina Priest-Penitent Statute

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an employer-employee privilege.\textsuperscript{25} How then can a privilege be justified between a management services consultant and a corporate client?

In the report of the American Bar Association’s Committee on the Improvement of the Law of Evidence in 1937-38,\textsuperscript{26} the committee recommended a strict application of existing privileges and recommended against further recognition of so called “novel privileges.” Since that date several jurisdictions have failed to heed these recommendations. Most of the statutes noted above have been enacted since 1938. The American Institute of Certified Public Accountants has not adopted a position either in favor of or in opposition to the privilege since it may be detrimental to the profession’s interest.\textsuperscript{27} State C.P.A. societies are not affiliated with the Institute and it is these societies that sponsor privilege legislation. However, legislators are faced with the realities that the privilege is (a) virtually useless in the area of taxation, (b) of negligible benefit, and possibly a hindrance, to the effectiveness of the audit function, and (c) unwarranted as to management consultants. The benefits gained by the accountant-client relation due to the privilege are slight, and do not exceed on balance the injury that would inure to the effective administration of justice.

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In 1967 the North Carolina General Assembly enacted a new priest-penitent\textsuperscript{1} privilege statute.\textsuperscript{2} The statute is the second of its

\textsuperscript{25} Wigmore § 2286.
\textsuperscript{26} 53 ABA Rep. 570, 595 (1938).
\textsuperscript{27} Letter from Timothy T. McCaffrey, state legislation Manager, AICPA, to Harold N. Bynum, Sept. 14, 1967.

\textsuperscript{1} Usage of the term “priest-penitent” is common as a characterization of the relationship which exists between any clergyman of any religious faith and one who receives his professional aid. 97 C.J.S. Witnesses § 263 (1957). One of the most liberal extensions of this group to whom the privilege is applied is found in Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917), in which admissions of fornication by a young woman before a Presbyterian body of elders were held a confidential communication.


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
kind passed in North Carolina, the first having been enacted in 1959 and amended in 1963. Aside from the interesting fact that the former statute was substantially altered only eight years after its enactment, the changes in at least three important respects reveal with greater clarity the present status of the privilege in this state. It is the purpose of this note to discuss the changes made and their effects, and to comment upon problems left unresolved.

First, the requirement that the communicant object to the testimony of the clergyman was removed to make the privilege more absolute. Under the former statute an objection by the communicant was required to evoke the privilege, and a failure to object was interpreted as a waiver of the privilege. As a practical matter this means that the jury may be less prejudiced in that the court, rather than the communicant, calls forth the testimonial immunity. But it does not necessarily follow that the privilege exists apart from its benefit to the communicant, for he alone can waive the privilege. Assuming that it exists for the benefit of the communicant alone, then clearly it cannot be claimed by the priest to protect himself once it has been waived.

Only in open court can the privilege be waived. An express rather than an implied waiver seems to be favored, but the latter

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4 N.C. Sess. Laws 1959, c. 646, as amended, 1963, c. 200:

No clergyman, ordained minister, priest, rabbi, or accredited Christian Science practitioner of an established church or religious organization shall be required to testify in any action, suit, or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, when the giving of such testimony is objected to by the communicant; provided, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.

5 "There is a limited number of statutory privileges. They are absolute in the sense that, even in matters involving public justice, a court may not compel disclosure of confidential communications thus made privileged." People v. Keating, 286 App. Div. 150, 152, 141 N.Y.S.2d 562, 565 (1955).

6 See Reese, Confidential Communications to the Clergy, 24 Ohio St. L.J. 55, 78 (1963) [hereinafter cited as Reese].
PRIEST-PENITENT PRIVILEGE

may properly be found where the communicant testifies "concerning what transpired at confession." With regard to the other usual methods of waiver, it is certain that a statement by the communicant would suffice. It is less certain that a signed affidavit would meet this test and practically indisputable that an out-of-court stipulation by the parties would be insufficient to constitute waiver.

Second, the provision by which the judge could compel disclosure when necessary in his opinion to the proper administration of justice was omitted from the new statute. It is likely that this provision for compulsory disclosure was originally included in the old statute because of the similar provision in the physician-patient privilege statute. There is, however, greater justification for such a power where the privilege is primarily evoked in litigation involving life insurance policies and misrepresentations of health, corporeal injuries and their extent, and testimentary dispositions and the issue of mental capacity.

In litigation involving the priest-penitent privilege there are few cases in which the "only evidence against a defendant is his confession to a clergyman." Moreover, doubt has been expressed that the "existence" of the privilege is a potent factor in the exclusion of relevant testimony since "it would be a poor priest or clergyman that would reveal confidential confessions and an even poorer prosecutor who would insist upon it." Appreciation for the omission of this discretionary power is enhanced when one considers that the trial judge's discretion "would be final because the only possible ground for review would have to be whether it 'was in his opinion' and even the most ingenious logician could

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7 Id. at 79. Concerning the physician-patient privilege, the court, in Capps v. Lynch, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960), said that waiver is "by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, . . . or . . . testifies to the communication between himself and physician." 8 Reese at 79.

9 This conclusion follows from analysis of the provision stating that the statute will not apply only "where communicant in open court waives the privilege conferred." Statute cited note 2 supra. [Emphasis added].


12 27 Ind. L.J. 256, 267 (1952).

hardly make 'his opinion' reviewable before an appellate court."\(^\text{14}\)

Divestment of the discretionary power gets the judge "off the hook" in uncomfortable cases because he realizes that any decision to compel a clergyman to testify is likely to result not only in contempt proceedings and imprisonment but also in marshalling public opinion in the clergyman's favor.\(^\text{15}\)

Third, the description of the confidential communication reflects broadened conditions under which the privilege may be claimed. The unswerving persuasion of the clergyman as to his professional obligations and responsibilities\(^\text{16}\) is reflected in the liberal terms in which the new privilege statute was enacted. Any information communicated and entrusted to him in his professional capacity and necessary for him to discharge his official functions is to be regarded as incompetent testimony.\(^\text{17}\) Thus it appears that the intent of the General Assembly was not to limit the communication to a confession of sins alone, the privileged status of which would depend upon the "confession" requirements of a particular church.\(^\text{18}\) Rather, the type of information to which the privilege extends is explicated by the paradoxically broadening limitation that the "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."\(^\text{19}\) However, there is no requirement that the claimant be a member of the congregation or church which the minister serves.\(^\text{20}\) Under this broadened coverage it would seem that information obtained during marriage counseling or reconciliation sessions with a clergyman would be accorded the privilege.\(^\text{21}\) It is less certain that the privilege is applicable to in-

\(^{14}\) Reese at 76.

\(^{15}\) Reese at 60-61.

\(^{16}\) For the attitude typical of most clergymen when faced with the dilemma requiring a choice of either testifying or facing contempt of court proceedings, see Greensboro Daily News, June 19, 1966, § D, at 12, col. 1-8, and In re Williams, 269 N.C. 68, 70-72, 152 S.E.2d 317, 319-321 (1967).

\(^{17}\) Statute cited note 2 supra.

\(^{18}\) See In re Swenson, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931).

\(^{19}\) Statute cited note 2 supra.


\(^{21}\) Kruglikov v. Kruglikov, 29 Misc.2d 17, 217 N.Y.S.2d 845 (Sup. Ct. 1961). The decision was under a statute similar to that of North Carolina. Such information has been denied the privilege under a dissimilar statute limiting "confessions" to those in the "course of discipline enjoined by the church." Although the statute was said not to have provided the privilege
formation in the records of a church-related agency. While North Carolina is avowedly a "strict constructionist" of privilege statutes, the court has extended the physician-patient privilege to certain hospital records so that an analogous extension of the priest-penitent privilege would not be without precedent.

Although the new statute is instructive in regard to many previously unanswered questions about the privilege in North Caroline, it is no panacea. At least two primary questions, for example, were left unresolved in In re Williams, which is believed to have had a catalytic effect on the recent statute.

The first—and less difficult—question was whether the superior court was correct in holding that "any testimony from [the minister] concerning any conversation he might have had with the defendant" would be recognized as a privileged communication. In regard to this question it should be remembered that under the new statute the communication must have reference to the giving of spiritual counsel, aid, or advice. Therefore, testimony concerning "any conversation" is too broad a classification for application of the privilege. Casual or friendly conversation unrelated to the above as to marriage counseling, the court managed to find a privilege in a pre-conference agreement with the rabbi. Simrin v. Simrin, 233 Cal.App.2d 90, 43 Cal. Rptr. 376 (1965).

State v. Lender, 266 Minn. 561, 124 N.W.2d 355 (1963) (no allegation of confession of unwed mother).


The privilege was raised as a collateral matter in a criminal prosecution in the superior court when Williams, a Baptist minister called as a witness by both the state and the defendant, refused to be sworn as a witness or to testify as to his observations while in the home of the defendant. Upon the defendant's objection the court ruled that testimony concerning any conversation between the defendant and Williams, his minister, would be a privileged communication. But the defendant did not object to testimony concerning Williams' observations and the court held Williams in contempt of court for his refusal to answer a question concerning what he had seen. The case was dealt with on appeal by construing the statute strictly according to the procedural requirement of an objection by the communicant for the testimony to be incompetent.

For an overview of some of the factors which brought about the statutory change, see Finlator, "Resolution to be Presented to the Baptist State Convention of North Carolina Meeting in Winston Salem, November 14, 1966."

State v. Brown, 95 Iowa 381, 64 N.W. 277 (1895).
purposes cannot be said to fall within the protection of the privilege.29

More difficult is the complex question of whether an observation of a clergyman incident to a privileged communication is also privileged "information" within the meaning of the statute. Generally a statute creating a privilege against disclosure of a confidential communication "has been construed to include observations, as well as communications."30 Since the statute includes "any" information, there is no reason to exclude from the definition of information those observations "communicated" to the priest in the course of spiritual counseling. Such observations would circumscribe the acts of the communicant, his general attitude and his personal appearance. These are necessary concomitants of the intimate face-to-face nature of counseling. At least one state has provided by statute that clergymen are under no duty to report a communicant's gunshot wound to law enforcement officials if such a report would violate a confidential communication.31

This conclusion, however, does not answer the question of whether observations concerning persons or subjects other than the communicant are to be accorded the privilege. One may argue that were it not for the purpose of receiving privileged information the clergyman would not have been in a position to make such an observation. Thus it would follow that the privileged information should include the observations which otherwise would not have been made. The difficulty with this argument is that it has been extended beyond its practical limitations. It is analogous in this respect to the "but for" theory of proximate cause restrictions which do not allow one involved in an automobile accident to be assessed with fault merely because had he not been driving the accident would not have occurred.

But the above argument—while invalid in its application to third parties or subjects having no personal connection with the communicant—may well apply to those persons or things immediately in-

29 See Angleton v. Angleton, 84 Idaho 77, 370 P.2d 788 (1962) which held not privileged remarks during conversations in course of friendly meetings.
30 See Boyles v. Cora, 232 Iowa 822, 841, 6 N.W.2d 401, 410 (1942); cf. Buuck v. Kruckeberg, 121 Ind.App. 362, 95 N.E.2d 304 (1950), where it was held that personal observations not involving a confession enjoined by the church are admissible (observation as to soundness of mind of grantor of deed).
involved with either the communicant or the communication in a manner similar to his personal appearance. The logic of the privilege seems to require inclusion of this latter type of observation within privileged information. If it did not, for example, the effect of the privilege as to testimony concerning the penitent's admissions of thefts would certainly be vitiated by subsequent testimony of the priest that he saw the stolen goods. Thus it is clear that formulation of comprehensive rules dealing with varying factual situations must await case by case development of more specific privilege principles.

The new statute embodies the recognition by the General Assembly that the purpose of the former statute could be better served by broadening the terms defining the privilege. The new statute follows a trend among state legislatures to liberalize the priest-penitent privilege and should be well received by the clergy and the Bar. Such a direction clearly conforms to the basic policy underlying the priest-privilege that

... Knowledge so acquired in the performance of a spiritual function ... is not to be transformed into evidence to be given to the whole world.... The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the ... spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.

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Insurance—The "Other Insurance" Clause Conflict

The controversy among the courts concerning conflicting "other insurance" clauses in automobile liability policies is no small one. This conflict arises when two policies appear to provide general coverage to a driver, yet each claims exclusion from liability. That claim is generally based on provisions in each stating either that

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1 "Other insurance" clauses are "clauses which purport to vary the coverage of the policy if there is another policy or other policies protecting the risk insured against." Annot., 76 A.L.R.2d 502, 503 (1961).

32 North Carolina was among the twelve states in which priest-penitent statutes were enacted during the five-year period, 1957-1962. There has been no apparent abuse of the privilege, evidenced by the fact that no state has ever repealed its statute once it was adopted. Reese at 58.