

Silence Is Golden: Clergy Confidence and the Interaction Between Statutes and Case Law

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I. *People v. Reyes*¹

A. Broken Confidences

Edwin Reyes entered a church looking for spiritual guidance. Instead of receiving counseling in a time of crisis, Reyes exited the church in handcuffs.² Reyes confided in Father Schmidt that he had held a group hostage at gun point and even fired a shot.³ Father Schmidt learned that Reyes was still carrying the gun but did not want to turn himself in to the police; Reyes was distraught and just wanted to pray.⁴ Nevertheless, Father Schmidt ran to the police precinct, some one hundred yards away from the church, and told the officers that there was an armed man in the church rectory. The police entered the church, relieved Reyes of the gun, and arrested him.⁵

Based in part on Father Schmidt's testimony, the grand jury handed up a twenty-four count indictment, including charges of Attempted Murder in the Second Degree.⁶ The defendant moved to dismiss the indictment on the grounds that Father Schmidt's testimony was inadmissible.⁷ Reyes maintained that the priest violated a statutory obligation to keep the privileged communication secret.⁸ Because Father Schmidt's disclosure led to the indictment, Reyes argued that the charges against him should have been thrown out as "fruit of the poisonous tree."⁹

The court was faced with a two-fold decision. First, it had to determine whether the communication between Father Schmidt and Reyes was in fact protected under New York's priest-penitent privilege. Second, the court had to decide whether a dismissal of the indictment against the

¹ 144 Misc. 2d 805, 545 N.Y.S.2d 653 (N.Y. Sup. Ct. 1989).

² *Reyes*, 545 N.Y.S.2d at 654.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 653.

⁷ *Reyes*, 545 N.Y.S.2d at 653.

⁸ *Id.*

⁹ *Id.* at 655.

defendant was required if an unauthorized disclosure of a privileged communication occurred.¹⁰

B. Defining the Issue

Most states and the District of Columbia have a statutory provision conferring some degree of privilege on confidential communications between a clergyman¹¹ and a penitent.¹² Likewise, courts have interpreted Federal Rule of Evidence 501 as the statutory codification of the federal common law priest-penitent privilege.¹³

Each state that maintains such a rule employs a somewhat different statutory scheme. Some states adopted a privilege based on the proposed Federal Rule of Evidence 506,¹⁴ while other states crafted their statutes in response to the particular needs and circumstances of their jurisdiction.¹⁵ As a result, certain types of communications are protected in one jurisdiction while unprotected in another.¹⁶ Similarly, certain people could claim to be covered as clergymen in one state while denied the ecclesiastic status in another.¹⁷ Finally, some states confer the privilege

¹⁰ *Id.* at 654.

¹¹ In this Article, the terms clergy, clergyman, minister, and rabbi are used without any intent to convey gender. The only gender-specific term will be priest, which specifically means a male Catholic priest. Clergy and minister are also used generically to denote members of the clergy of any religious order. Rabbi and priest are limited to clergy of the Jewish and Catholic faiths, respectively.

¹² See Appendix *infra*.

¹³ See *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990) (holding that there is a federal common law clergy privilege covered by Federal Rule of Evidence 501); *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973); *United States v. Wells*, 446 F.2d 2 (2d Cir. 1971); see also *Mullen v. United States*, 263 F.2d 275, 277 (D.C. Cir. 1958).

¹⁴ Proposed Federal Rules of Evidence 503-506 were not adopted by Congress, but Congress “did not disapprove recognition of the privileges contained therein.” Instead, Congress adopted Federal Rule of Evidence 501, which codifies those previously recognized privileges, including that of the priest-penitent.

¹⁵ See Appendix *infra*.

¹⁶ See, e.g., *infra* notes 94-95 and accompanying text.

¹⁷ See, e.g., *infra* notes 102-04 and accompanying text.

exclusively to the penitent,¹⁸ while other states grant both the clergyman and penitent the right to assert the privilege.¹⁹

This Article examines some of these conflicts, with particular emphasis on how the New York courts have addressed—or failed to address—the parameters of its priest-privilege statute. In addition, this Article suggests certain modifications to the New York statute where it is either silent or where the courts’ interpretations are inconsistent with the legislature’s intent.

II. New York Civil Practice Law and Rules: Rule 4505—What it Says, What it Means, and How it Works

A. Statutory Source of the Priest-Penitent Privilege

In a concise but careful decision, the court in *Reyes* held that the communication between the defendant and Father Schmidt fell within the meaning of New York’s priest-penitent privilege, C.P.L.R. 4505 and was, therefore, protected.²⁰ Because Reyes had not waived the privilege, Father Schmidt’s testimony was not admissible.²¹

The *Reyes* court relied on C.P.L.R. 4505 because “New York does not recognize any common-law priest penitent privilege.”²² Thus, without the legislation, no evidentiary privilege specifically protecting confidential communications with clergy would exist.²³ Edwin Reyes’s claim

¹⁸ See N.Y. C.P.L.R. 4505 (McKinney 1992).

¹⁹ See CAL. EVID. CODE §§ 1030-34 (West 1997).

²⁰ *People v. Reyes*, 144 Misc. 2d 805, 807, 545 N.Y.S.2d 653, 655 (N.Y. Sup. Ct. 1989).

²¹ *Reyes*, 545 N.Y.S.2d at 655.

²² *Id.* at 654 (citing *Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151 (1979)). State courts do not recognize a common law priest-penitent privilege. This fact must be distinguished from the federal common law privilege. See *In re Grand Jury Investig.*, 918 F.2d 374, 384 (3d Cir. 1990).

²³ *Reyes*, 545 N.Y.S.2d at 654.

rested solely upon the priest's breach of a duty imposed by lawmakers in Albany.

The New York legislature enacted C.P.L.R. 4505 as an evidentiary privilege, affording clergy and those who confide in them an opportunity to communicate with each other without fear of forced testimony later.²⁴ The statute is written without the cumbersome subsections which tend to make laws difficult to read and virtually impossible for the non-lawyer to interpret. On its face, the statute presents a simple test for the applicability of the clergy privilege: "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."²⁵

The statute's simplicity makes judicial interpretation essential. The following are a few issues courts have been forced to decide: (1) which communications are held to be confidential in nature,²⁶ (2) who is a clergyman,²⁷ (3) who owns the privilege and who may waive it,²⁸ and (4) under what circumstances may a confidence be utilized over the objections of the penitent.²⁹ The courts' responses to these questions, set forth below, form the rules for the applicability of the priest-penitent privilege.

B. Case Law Interpretation of C.P.L.R. 4505

1. What Constitutes a Privileged Communication?

"New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance."³⁰ This single inquiry

²⁴ *Keenan*, 390 N.E.2d at 1154.

²⁵ N.Y. C.P.L.R. 4505 (McKinney 1992).

²⁶ *See infra* subpart II.B.1.

²⁷ *See infra* subpart II.B.2.

²⁸ *See infra* subpart II.B.3.

²⁹ *See infra* subpart II.B.3.

³⁰ *People v. Carmona*, 82 N.Y.2d 603, 609, 606 N.Y.S.2d 879, 882, 627 N.E.2d 959, 962 (1993).

is actually a two pronged test that is articulated in the statute: (a) the communication must have been intended to be confidential, and (b) the clergyman must have been acting in his professional character as a spiritual advisor to the penitent.³¹ The privilege attaches when the clergyman is acting as a spiritual advisor *and* the penitent is seeking such advice.³²

An interpretation of the second prong was decided in *In re Fuhrer*, when the court held that the clergyman was not acting within his professional character.³³ In *Fuhrer*, a rabbi under grand jury subpoena based his refusal to testify about his yeshiva's alleged involvement in a money laundering scheme on the clergy privilege.³⁴ The rabbi maintained that as an administrator of the yeshiva, C.P.L.R. 4505 protected both his communications with other yeshiva personnel and his knowledge of their activities.³⁵

The court rejected his argument, noting that the privilege extends only to a party "seeking religious counsel, advice, solace, absolution or ministration."³⁶ The court was unpersuaded that Fuhrer was acting "in his professional character as spiritual advisor" merely because he was ordained and an administrative employee of the yeshiva.³⁷ In order to receive the statutory protection of C.P.L.R. 4505, Rabbi Fuhrer had to be *acting* as a rabbi with regard to counseling a particular penitent.³⁸

The court never ruled *per se* on the confidentiality issue, partly because there was no actual penitent.³⁹ On the contrary, Rabbi Fuhrer was merely trying to avoid testifying about alleged wrongdoing he and others admitted.⁴⁰ The *Fuhrer* court relied in part on *United States v. Wells*.⁴¹

³¹ See N.Y. C.P.L.R. 4505 (McKinney 1992).

³² *Id.*

³³ 100 Misc. 2d 315, 320-21, 419 N.Y.S.2d 426, 431 (1979).

³⁴ *Fuhrer*, 419 N.Y.S.2d at 429.

³⁵ *Id.*

³⁶ *Id.* at 431.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Fuhrer*, 419 N.Y.S.2d 426 (stating that the privilege is applicable where the questions propounded to the witness do not bear on spiritual matters).

⁴⁰ *Id.* at 431.

⁴¹ 446 F.2d 2 (2d Cir. 1971).

In *Wells*, the defendant wrote a letter to his priest, requesting assistance in contacting the authorities.⁴² The Second Circuit Court of Appeals correctly noted that “the letter contains no hint that its contents were to be kept secret, or that its purpose was to obtain religious or other counsel, advice, solace, absolution or ministrations.”⁴³ The communication failed the federal test of confidentiality and was therefore admissible as a non-privileged communication.⁴⁴

Fuhrer and *Wells* represent judicial applications of the requirement that a spiritual purpose underlying the communication must exist in order for the privilege to attach. Seeking a clergyman’s help in performing a secular task does not warrant privilege. Another example of this principle is found in *People v. Drelich*.⁴⁵ The defendant, Philip Drelich, sought to overturn his murder conviction.⁴⁶ He claimed that he sought rabbinical guidance from Rabbi Moses Tendler after the murder and that any communication flowing from those sessions should have been excluded at trial.⁴⁷ Rabbi Tendler, however, maintained that he provided only secular assistance to the defendant, including contacting a lawyer and negotiating with the prosecutor on the defendant’s behalf.⁴⁸

The appellate division upheld Drelich’s conviction, holding that the communication was not made for spiritual purposes.⁴⁹ Significantly, the *Drelich* court noted that the “[t]he burden rests upon the individual invoking the privilege to establish that the communication sought to be shielded was made for the purpose of seeking religious counsel.”⁵⁰ Clergy confidence is not presumed merely because it is asserted by a defendant.⁵¹ To use this evidentiary privilege, the alleged penitent must convince the

⁴² *Wells*, 446 F.2d at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 123 A.D.2d 441, 506 N.Y.S.2d 746 (1986).

⁴⁶ *Drelich*, 123 A.D.2d at 441.

⁴⁷ *Id.*

⁴⁸ *Id.* at 441-42.

⁴⁹ *Id.* at 443.

⁵⁰ *Id.*

⁵¹ *Drelich*, 123 A.D.2d at 443; see also *Keenan v. Gigante*, 390 N.E.2d 1151, 1154 (N.Y. 1979).

court that all the elements of the have been satisfied before the court recognizes it.

In *People v. Schultz*,⁵² the defendant sought to overturn his burglary conviction on the grounds that rebuttal testimony at the suppression hearing by a priest contravened the privilege enumerated in C.P.L.R. 4505.⁵³ Citing *Drelich*, the court distinguished communications made to a clergyman for the purpose of consolation from other, non-protected communications.⁵⁴ This court was satisfied with the prosecution's contention that "the priest was sought in his secular role as a victim of defendant's burglary for the purpose of a personal apology."⁵⁵ The personal apology was not considered confidential merely because the priest was also the victim and the penitent was the perpetrator.⁵⁶

Similarly, in *People v. Dixon*, the court refused to recognize a privilege when the defendant asked the clergyman to relay an apology to his victim.⁵⁷ When the defendant called upon the clergyman to communicate a statement to a third party, the nature of the statement itself could not be considered confidential.⁵⁸ Furthermore, the court viewed the defendant's statement as an unprotected admission.⁵⁹ As such, it was not barred by the hearsay rule.⁶⁰ The *Dixon* court was clearly correct. Had the defendant confessed his crime to the minister, such a statement would have been confidential and protected by statute. A communication cannot be considered confidential, however, if it is to be relayed to a third party. Even assuming that the confession was initially confidential, the penitent waived the privilege when he asked the minister to repeat it to a third party.

In *People v. Johnson*, the appellate division refused to overturn the defendant's murder conviction predicated on the theory that evidence was

⁵² 161 A.D.2d 970, 557 N.Y.S.2d 543, *appeal denied*, 564 N.E.2d 683 (1990).

⁵³ *Schultz*, 161 A.D.2d at 971.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 199 A.D.2d 332, 333, 604 N.Y.S.2d 604, 605 (1993).

⁵⁸ *Dixon*, 199 A.D.2d at 333.

⁵⁹ *Id.*

⁶⁰ *Id.*

admitted in violation of the clergy privilege of C.P.L.R. 4505.⁶¹ The *Johnson* court opined that Muslim brothers at the mosque qualified as clergymen under New York Law.⁶² Still, the court noted that the communication between the brothers and Johnson was not for the purpose of seeking spiritual counsel or advice.⁶³ The brothers initiated the communication because they believed Johnson to be dangerous and wanted him to leave the mosque.⁶⁴ Such communications were not made with spiritual purposes and were therefore not afforded statutory protection.

When the clergyman interacts with another in a purely secular relationship, no “penitent” relationship is formed and no privilege can be invoked. In *In re N & G Children*, the respondent was contacted by a priest and told that allegations of child abuse had been made against him.⁶⁵ The priest informed the respondent that “the authorities would be advised unless he quit his job at the day-care center.”⁶⁶ Because the priest was not acting as a spiritual advisor to the respondent, the substance of their conversation was unprotected by the privilege.⁶⁷

In *United States v. Gordon*, the court applied the decision from *Wells* and refused to confer a privilege because the communications between the parties were purely business in nature.⁶⁸ The defendant, Richard Gordon, served as president of a New York corporation which provided financial and tax planning.⁶⁹ The clergyman, Father Meyers, was on leave from the priesthood and also a salaried employee of the defendant’s corporation.⁷⁰ The defendant was well aware that Meyers was not an active member of the priesthood at this time.⁷¹

⁶¹ 115 A.D.2d 973, 497 N.Y.S.2d 539 (1985).

⁶² *Johnson*, 115 A.D.2d at 973; see also *Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151 (1979).

⁶³ *Johnson*, 115 A.D.2d at 973

⁶⁴ *Id.*

⁶⁵ 176 A.D.2d 504, 574 N.Y.S.2d 696 (1991).

⁶⁶ *N & G Children*, 176 A.D.2d at 504.

⁶⁷ *Id.*

⁶⁸ 493 F. Supp. 822, 824 (N.D.N.Y. 1980), *aff’d*, 655 F.2d 478 (2d Cir. N.Y. 1981).

⁶⁹ *Gordon*, 493 F. Supp. at 823.

⁷⁰ *Id.*

⁷¹ *Id.*

The court noted that the defendant approached Father Meyers while he was functioning solely in his capacity as a salaried employee.⁷² The communications were business in nature and not spiritual; furthermore, the priest was not acting as a priest at the time. The court confidently concluded that no priest-penitent relationship was created.⁷³

In *Congregation B’Nai Jonah v. Kuriansky*,⁷⁴ the court rejected a rabbi’s argument that lists of charitable contributors are protected under the clergyman-penitent privilege: “Although this statute is to be ‘accorded a broad and liberal construction’ we are unpersuaded that the information asked for here comes under the rubric of a ‘confession or confidence’ or that it was ‘made with the purpose of seeking religious counsel, advice, solace, absolution or ministrations.’”⁷⁵ The rabbi in *Kuriansky* argued that under Jewish law, the donors made their charitable contributions under the presumption that it was confidential.⁷⁶ Although this assumption may be correct, the court held that lists of contributors and the dollar amounts would not be protected by C.P.L.R. 4505.⁷⁷ In addition to an expectation of privacy, the statute requires that the statement be made for the specific purpose of “seeking religious counsel, advice, solace, absolution or ministration.”⁷⁸ Because charitable donations do not qualify as this specific purpose, the list of donors could not be protected from subpoena.⁷⁹

The court in *Kuriansky* accepted, arguendo, that the contributions were confidential under Jewish law.⁸⁰ Beyond the privilege issue, the court also gave full credit to the argument that Jewish law generally prohibits the incrimination of co-religionists.⁸¹ Nevertheless, currently, different

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 172 A.D.2d 35, 576 N.Y.S.2d 934 (1991), *appeal dismissed*, 79 N.Y.2d 895 (1992).

⁷⁵ *Kuriansky*, 172 A.D.2d at 38 (citations omitted).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting *In re Fuhrer*, 100 Misc. 2d 315, 320, 419 N.Y.S.2d 426, 430, *aff’d sub nom.* *Fuhrer v. Hynes*, 72 A.D.2d 813 (1979)).

⁷⁹ In this author’s experience, many people make charitable contributions for the purpose of absolution.

⁸⁰ *Kuriansky*, 172 A.D.2d at 38.

⁸¹ *Id.*

opinions exist regarding what to do when a compelling state interest interferes with a religious practice.⁸² The court was simply not prepared to exempt Jews from subpoena testimony.⁸³

In *Kohloff v. Bronx Savings Bank*,⁸⁴ the court held that “[a] confession by a penitent to a clergyman for spiritual advice, aid or comfort is privileged even though the penitent is not a member of the church to which she seeks spiritual advice.”⁸⁵ Thus, confidentiality does not rest upon a past relationship among the clergyman, the penitent, and the particular church.⁸⁶ The relationship may be ad hoc and may even involve ministers and penitents of different faiths.

For that reason, the question of whether Edwin Reyes turned to his own priest, or even whether Reyes was Catholic, is irrelevant.⁸⁷ According to case law, the only relevant issue is whether he sought confidential, spiritual guidance from a clergyman.⁸⁸ Unlike Rabbi Fuhrer and Joseph Wells, Edwin Reyes certainly possessed a reasonable expectation that Father Schmidt would protect the substance of his confidential ministrations.⁸⁹ Therefore, the court held that the hearing of the priest’s testimony by the grand jury was improper.⁹⁰

New York courts have conferred privileged status to conversations made to clergymen within the context of marriage counseling.⁹¹ In *Kruglikov v. Kruglikov*, the fact that the rabbi initiated the counseling with the couple did not change the application.⁹² The substance of the discussion was held to be spiritual, thus protected under the statute.⁹³ “[W]hat

⁸² *Id.*

⁸³ *Id.* at 39.

⁸⁴ 37 Misc. 2d 27, 233 N.Y.S.2d 849 (1962). *Kohloff* was decided under N.Y. C.P.A. § 351, the pre-C.P.L.R. priest-penitent statute.

⁸⁵ *Kohloff*, 233 N.Y.S.2d at 850.

⁸⁶ *Id.* at 849. The facts of this case were omitted in the decision.

⁸⁷ See *People v. Reyes*, 144 Misc. 2d 805, 545 N.Y.S.2d 653 (N.Y. Sup. Ct. 1989).

⁸⁸ *Kohloff*, 233 N.Y.S.2d at 850.

⁸⁹ *Reyes*, 545 N.Y.S.2d at 654-55. *But see In re Fuhrer*, 100 Misc. 2d 315, 419 N.Y.S.2d 426, *aff’d sub nom.* *Fuhrer v. Hynes*, 72 A.D.2d 813 (1979).

⁹⁰ *Id.*

⁹¹ See *Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (1961).

⁹² 29 Misc. 2d 17, 217 N.Y.S.2d 845 (1961).

⁹³ Like *Kohloff*, *Kruglikov* was decided under the precursor statute, C.P.A. 351. See *Kruglikov*, 217 N.Y.S.2d at 846.

[is] said by the parties here, in the privacy of the Rabbi's study, was stamped 'with that seal of confidence which the parties in such a situation would feel no occasion to exact.'"⁹⁴

What emerges from the case law is the judicial principle that the mere presence of a clergyman does not magically transform a conversation into a sacramental confession worthy of special legislative protection.⁹⁵ While "confession" is not interpreted in the strict theological sense,⁹⁶ the confidentiality aspect remains fundamental to the analysis.

2. Who Is a Clergyman?

New York's statute confers the priest-penitent privilege upon "a clergyman, or other minister of any religion or duly accredited Christian Science practitioner."⁹⁷ This definition is expansive and invites a wide variety of spiritual counselors to claim the privilege. Nevertheless, this author has found no reported New York cases requiring the court to define clergyman in the context of C.P.L.R. 4505.⁹⁸

This lack of definition may be due to the fact that courts are generally more concerned with the nature and circumstances surrounding the

⁹⁴ *Kruglikov*, 217 N.Y.S.2d at 847 (quoting *Warner v. Press Publ'g*, 132 N.Y. 181, 186, 30 N.E. 393, 395 (1892)); *see also* *De'Udy v. De'Udy*, 130 Misc. 2d 168, 495 N.Y.S.2d 616 (1985) (holding that priest-penitent privilege arising out of marriage counseling is waivable only if husband and wife each agree). *But see* *Simrin v. Simrin*, 233 Cal. App. 2d 90, 91, 43 Cal. Rptr. 376, 377 (1965) (holding that the California statute, which limited the privilege to "the course of discipline enjoined by the church," could not be extended to the minister's role as marriage counselor). Although the *Simrin* court refused to confer a clergy privilege, it upheld confidentiality on other grounds. *But see also* *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 96, 361 N.E.2d 543, 545 (1976) (holding that conversations between bishop and married woman affecting her marriage were not confessional and therefore unprotected by the statute).

⁹⁵ *See* cases cited *supra* note 94.

⁹⁶ N.Y. C.P.A. 351 contained the phrase "in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." The Practice Commentaries to C.P.L.R. 4504 note that the legislature removed this phrase, fearing that the ambiguity may be construed to mean that the privilege would only apply if the particular faith required confession—thus limiting the scope to Catholic priests.

⁹⁷ N.Y. C.P.L.R. 4505 (McKinney 1965).

⁹⁸ *But see* *State v. Buss*, 76 Wash. App. 780, 887 P.2d 920 (1995) (holding that priest-penitent privilege did not extend to non-ordained church counselor); *see also* *In re Murtha*, 115 N.J. Super. 380, 279 A.2d 889 (1971) (holding that a Catholic nun was not a clergyman under New Jersey statute).

communication than the qualifications of the minister. In *People v. Carmona*,⁹⁹ the New York Court of Appeals stated that “[a]lthough often referred to as a ‘priest-penitent’ privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants.”¹⁰⁰ The *Carmona* court also noted that the privilege reflects the legislature’s awareness of the need to seek counsel from “those entrusted with the pressing task of offering spiritual guidance.”¹⁰¹ These statements indicate the court’s desire to view substance over form by placing emphasis on the substantive communication rather than on the strict compliance with the statutory formulation.

“[M]ost of the cases considering the privilege assume that the person to whom the communications are made is a clergyman.”¹⁰² The possibility that a penitent may erroneously seek out an individual who is not a clergyman at all always remains. An additional possibility is that the trusted advisor’s relationship with his church is such that he performs some, but not all of the duties of a clergyman. In determining whether to apply the privilege, courts outside New York have examined both the statutory language¹⁰³ of the privilege as well as the particular church’s doctrine.¹⁰⁴

Many states have defined clergy by statute or case law. Some courts, for example, have held that church elders or deacons are clergymen in order to be afforded the privilege.¹⁰⁵ Another court held that a representative of a Bible society was not a clergyman, even though he visited with inmates on occasion to talk about forgiveness and the Bible.¹⁰⁶ “[A] Muslim brother acting as a spiritual advisor may, in some cases, be

⁹⁹ 82 N.Y.2d 603, 627 N.E.2d 959, 606 N.Y.S.2d 879 (1993).

¹⁰⁰ *Carmona*, 627 N.E.2d at 961.

¹⁰¹ *Id.* at 962 (quoting *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226, 229, 390 N.E.2d 1151, 1154 (1979)).

¹⁰² Edwin S. Barbre, Annotation, *Who Is “Clergyman” or the Like Entitled to Assert Privilege Attaching to Communications to Clergymen or Spiritual Advisors*, 49 A.L.R.3d 1205 (1974).

¹⁰³ *See Buss*, 887 P.2d at 923-24.

¹⁰⁴ *See, e.g., In re Murtha*, 115 N.J. Super. 380, 279 A.2d 889 (1971) (concluding that nuns are not Catholic clergy under church doctrine).

¹⁰⁵ *See Reutkemeier v. Nolte*, 179 Iowa 342, 161 N.W. 290 (1917).

¹⁰⁶ *See Rutledge v. State*, 525 N.E.2d 326 (Ind. 1988).

privileged. . . .”¹⁰⁷ At least one court refused to confer minister status on a self-ordained minister who received his education through a correspondence course.¹⁰⁸ The Tennessee¹⁰⁹ and Virginia¹¹⁰ statutes impose a minimum age requirement of eighteen on the clergyman in order for the privilege to attach. The older Alabama state statute required the clergyman to “[devote] a substantial portion of his time and abilities” to the ministry.¹¹¹ Child preachers and non-practicing ministers would not be protected in these states.

Georgia has held that communication with a psychic counselor is not protected under its state’s clergy privilege.¹¹² A more difficult analysis is required when the confidant is a quasi-clergyman under a legitimate church’s religious doctrine. For example, no court, insofar as this author can determine, has been faced with the decision of whether a Jewish cantor, who leads and conducts worship services, possibly officiates weddings and funerals, and instructs children, is entitled to assert the clergy privilege. In fact, no state’s privilege statute explicitly includes the cantor under its definition although thirty-three states expressly included the rabbi in their definition of clergy.¹¹³ Similarly, no state statute includes nuns in their statutory definition of clergy although, forty-four states explicitly include a priest in the definition of clergyman.¹¹⁴

Courts have opined that limiting the scope of evidentiary privileges is a public policy decision affecting the determination of who is a clergyman:

¹⁰⁷ *People v. Johnson*, 115 A.D.2d 973, 497 N.Y.S.2d 539 (1985).

¹⁰⁸ *See State v. Hereford*, 518 So. 2d 515 (La. Ct. App. 1987).

¹⁰⁹ TENN. CODE ANN. § 24-1-206 (1959).

¹¹⁰ VA. CODE ANN. § 8.01-400 (Michie 1950).

¹¹¹ ALA. CODE § 12-21-166 (1989) (superseded by ALA. R. EVID. 505).

¹¹² *See Manous v. State*, 200 Ga. App. 293, 295-96, 407 S.E.2d 779, 782 (1991).

¹¹³ *See, e.g., Congregation B’Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 576 N.Y.S.2d 934 (1991), *appeal dismissed*, 79 N.Y.2d 895 (1992). The D.C. code arguably applies to a cantor insofar as he is permitted to officiate at a wedding. The same would apply to the state statutes that define the clergy by role rather than, or in addition to, mere title.

¹¹⁴ *See, e.g., In re Murtha*, 115 N.J. Super. 380, 279 A.2d 889 (1971). Because a problem exists in defining clergy, states have reached different conclusions regarding nuns. Still no modern court, as far as this author can determine, has denied the privilege to rabbis and priests, although many state statutes omit these titles.

Since rigid adherence to the letter of the privileges promotes the suppression of truth, they should be construed and applied in sensible accommodation to the aim of a just result. In view of the obvious policy of the law to enlarge the domain of competency of the witnesses and to adapt rules of evidence to the successful development of the truth, competency should be regarded as the rule and incompetency as the exception.¹¹⁵

In *In re Murtha*, the New Jersey court held that Catholic nuns were not clergymen under the state's priest-penitent privilege.¹¹⁶ Sister Margaret Murtha was convicted of contempt of court for failing to testify at a grand jury hearing about conversations she had with a homicide suspect.¹¹⁷ Sister Murtha was asked to be a rebuttal witness if the suspect lied under oath about his involvement in the homicide.¹¹⁸ She refused, claiming that her communications with the suspect were protected under New Jersey's priest penitent privilege.¹¹⁹

The New Jersey court distinguished the role of a priest from that of nun in the Catholic Church and, in doing so, rejected Sister Murtha's contention that she could assert a privilege:

[Sister Margaret] was a religious (religieuse), a dedicated member of a teaching order of nuns, but she admittedly did not conduct any type of religious services involving pupils in the school, nor did she carry on any of the religious functions of a priest, such as hearing confessions or giving absolution.¹²⁰

The court noted that nuns are not clergymen according to Catholic theology.¹²¹ In *Eckmann v. Board of Education of Hawthorn School District No. 17*,¹²² a federal district court hearing both federal and state claims, reached the opposite conclusion about nuns' status in the Catholic church:

¹¹⁵ *Murtha*, 279 A.2d at 892 (citations omitted).

¹¹⁶ *Id.* at 893.

¹¹⁷ *Id.* at 889-90.

¹¹⁸ *Id.* at 890.

¹¹⁹ *Id.*

¹²⁰ *Murtha*, 279 A.2d at 892.

¹²¹ *Id.* at 893.

¹²² 106 F.R.D. 70, 2 Fed. R. Serv. 3d 19, 18 Fed. R. Evid. Serv. 227 (E.D. Mo. 1985).

The Sister submitted a number of affidavits to establish that a spiritual director is a recognized office in the Catholic Church, and is considered to be a form of ministry of the Gospel by the Church. It is undertaken by priests and sisters alike. In addition, since Vatican II, the Church has allowed sisters to engage in religious and spiritual direction, in giving retreats and in administering Holy Communion.¹²³

Two interesting points emerge from *In re Murtha* and *Eckmann*. First, secular courts face a difficult challenge in interpreting religious matters, including the apparently simple and straight forward question as to who is a qualified clergyman under the Catholic Church's own teachings. New Jersey and Missouri have different opinions as to the function of nuns in the Catholic church.¹²⁴ Second, the *Eckmann* court dealt with both federal and state claims.¹²⁵ As such, it was called upon to decide whether to apply the federal or state clergy privilege in resolving the merits of the case.¹²⁶ After citing diverging authorities that favored both of the possibilities, the *Eckmann* court entirely avoided the question.¹²⁷ It held that the issue was moot because the privilege applied under both state and federal law in the particular action at bar.¹²⁸ The court left unresolved the question of whether a federal court, hearing a state claim with a federal claim, must apply the federal priest-penitent privilege or the state counterpart when the results would be different.¹²⁹

Courts should not get tangled up in the determination of clergy status. The ruling on matters of religious dogma by secular courts is unseemly. Therefore, courts employ the doctrine of ecclesiastical abstention,¹³⁰

¹²³ *Eckmann*, 106 F.R.D. at 72.

¹²⁴ In the *Eckmann* diversity action, the district court had to apply Missouri state law. *Eckmann*, 106 F.R.D. at 72.

¹²⁵ *Eckmann*, 106 F.R.D. at 72.

¹²⁶ In a diversity action, Federal Rule of Evidence 501 mandates the use of the state privilege statute. See *Scott v. Hammock*, 32 Fed. R. Evid. Serv. 459, 460, 133 F.R.D. 610, 612 (D. Utah 1990).

¹²⁷ *Eckmann*, 106 F.R.D. at 72.

¹²⁸ *Id.*

¹²⁹ *Id.* at 73.

¹³⁰ See *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 878 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987); see also *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).

prohibiting them from determining issues of canon law.¹³¹ Such an analysis of religious law not only would impinge upon the Establishment Clause,¹³² but also muddles the fundamental issue of confidentiality. State legislatures—and thus courts—should shift the emphasis away from analyzing the technical nature of the confidant. Instead, the proper focus should be the penitent's expectation of privacy in view of the confidential nature of the communication.

The Florida legislature, for example, determined that for the purposes of conferring the priest-penitent privilege: "A 'member of the clergy' is a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed so to be by the person consulting him or her."¹³³ This statute is based upon the proposed Federal Rule of Evidence 506,¹³⁴ which extends the scope of the privilege to those the confession maker reasonably believes to be clergymen.¹³⁵ Quite a few states have adopted the proposed Federal Rule as their own.¹³⁶ In any one of these states, the question of whether Sister Murtha was a clergyman under Catholic doctrine would have been irrelevant, as long as the homicide suspect reasonably believed her to be a member of the Catholic clergy.¹³⁷ Sister Murtha would have been able—and in some cases obligated—to keep the confidence.¹³⁸ Unfortunately for the suspect, the homicide was committed in New Jersey, a state without such a provision.

The proposed Federal Rule of Evidence 506 approach still requires a factual determination of the penitent's state of mind by the court.¹³⁹ In

¹³¹ *Serbian E. Orthodox Diocese*, 426 U.S. at 696.

¹³² *Id.* at 712.

¹³³ FLA. STAT. ANN. § 90.505 (emphasis added).

¹³⁴ See discussion *supra* note 14.

¹³⁵ *Id.*

¹³⁶ ALA. R. EVID. 505; ALASKA R. EVID. 506; ARK. REV. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1989); HAW. REV. R. EVID. 506; KY. R. EVID. 506; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; NEB. REV. STAT. § 27-506 (1975); N.M. R. EVID. 11-506; N.D. REV. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); TEX. R. EVID. 505; WIS. STAT. ANN. § 905.06 (West 1993).

¹³⁷ See sources cited *supra* note 136.

¹³⁸ See sources cited *supra* note 136.

¹³⁹ See discussion *supra* note 14.

this author's opinion, however, such fact finding is preferable over ruling on religious dogma.

Like New Jersey, New York has no statutory provision extending the scope of the privilege to persons reasonably believed to be clergy by the penitent.¹⁴⁰ From time to time, the New York legislature has considered adopting a Code of Evidence based on the proposed Federal Rules of Evidence, including Rule 506. Nevertheless, New York has not joined the above mentioned states, and C.P.L.R. 4505 is still the operative priest-penitent privilege.¹⁴¹

The reasonable belief standard would be consistent with the stated public policy argument supporting the priest-penitent privilege itself: "[T]he Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized."¹⁴²

In *People v. Reyes*, Edwin Reyes's communication to Father Schmidt was deemed privileged because it was confidential and given to a clergyman for the purpose of spiritual counsel.¹⁴³ If Reyes had spoken with a nun, erroneously believing her to be a member of the church's clergy, a different result should have occurred.

The New York legislature enacted a more detailed definition of clergy in the Religious Corporations Law:

[A] duly authorized pastor, rector, priest, rabbi, and a person having authority from, or in accordance with, the rules and regulations of the governing ecclesiastical body of the denomination or order, if any, to which the church belongs, or otherwise from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue.¹⁴⁴

In addition to matters pertaining to the Religious Corporations Law, this definition is relied upon for purposes of ascertaining who may solemnize

¹⁴⁰ *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226, 229, 390 N.E.2d 1151, 1154 (1979).

¹⁴¹ *Keenan*, 390 N.E.2d at 1155.

¹⁴² *Id.* at 1154.

¹⁴³ 144 Misc. 2d 805, 807, 545 N.Y.S.2d 653, 655 (1985).

¹⁴⁴ N.Y. RELIG. CORP. LAW § 2 (McKinney 1990).

a wedding.¹⁴⁵ Under the Domestic Relations Law¹⁴⁶ and the Religious Corporations Law,¹⁴⁷ a non-ordained member of the clergy may solemnize a wedding if he has certain “authority from . . . the church . . . to preside over” certain church activities.¹⁴⁸

Because both Jewish and secular law allow a non-ordained member of clergy, such as a Jewish cantor, to officiate at a wedding, one could argue that he should also be able to assert a clergy privilege, especially if the communications arise out of premarital counseling incident to the solemnization. Allowing this quasi-clergyman the right to officiate over a wedding ceremony, which bears a concomitant obligation to counsel the couple, while not protecting the substance of those pre-marital counseling sessions would be inconsistent.

Still, the right to solemnize a wedding is part of the substantive law of the state, while the clergy privilege is merely an evidentiary rule. Furthermore, the public policy issues are different in these unrelated aspects of clergy law. As noted, “competency should be regarded as the rule and incompetency as the exception.”¹⁴⁹ Weddings, however, are significantly different and affect the basic status of the parties involved. As such, a ceremonial marriage is presumptively valid.¹⁵⁰

The possibility exists for the clergyman to wear two hats, one clerical and the other secular.¹⁵¹ The clergyman may be a victim,¹⁵² an intermediary,¹⁵³ or a co-conspirator.¹⁵⁴ In these circumstances, the status of clergy is probably nonexistent or at least incidental to the relationship between the parties. When the clergyman is also a police officer, however, the

¹⁴⁵ N.Y. DOM. REL. LAW § 11(7) (McKinney 1988).

¹⁴⁶ *Id.*

¹⁴⁷ See N.Y. RELIG. CORP. LAW § 2 (McKinney 1990).

¹⁴⁸ *In re Silverstein's Estate*, 190 Misc. 745, 747, 75 N.Y.S.2d 144, 145 (1947).

¹⁴⁹ *State v. Briley*, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969).

¹⁵⁰ *In re Shumski*, 31 Misc. 2d 998, 999, 220 N.Y.S.2d 5, 7 (1961).

¹⁵¹ *E.g.*, *United States v. Gordon*, 493 F. Supp. 822 (N.D.N.Y. 1980), *aff'd*, 655 F.2d 478 (2d Cir. 1981).

¹⁵² See *People v. Schultz*, 161 A.D.2d 970, 971, 557 N.Y.S.2d 543, 545, *appeal denied*, 564 N.E.2d 683 (1990).

¹⁵³ See *People v. Drelich*, 123 A.D.2d 441, 506 N.Y.S.2d 746 (1986).

¹⁵⁴ *In re Fuhrer*, 100 Misc. 2d 315, 320, 419 N.Y.S.2d 426, 430 (N.Y. Sup. Ct. 1979).

separate roles of spiritual confidant and of law enforcement agent will conflict.¹⁵⁵ Such was the case with Richard Lewis, an eighteen year veteran of the New York City Housing Police detective and an ordained minister.¹⁵⁶

While Lewis was at his church one evening, he was stopped by a man who had found a gun.¹⁵⁷ The man wrapped the gun in a package and presented it to his “minister.”¹⁵⁸ Lewis flagged down a passing police car, identified himself, and asked the on duty officer to take the gun to the precinct.¹⁵⁹ While talking to the policeman, Lewis was clear that the patrolman that he did not want to divulge the identity of the man who gave him the gun.¹⁶⁰ After a police investigation, Lewis was charged with failure to act in accordance with the Patrol Guide Procedures relating to handguns, which required Lewis, inter alia, to escort the gun’s finder and the weapon itself to the police precinct.¹⁶¹ He entered a plea of not guilty based upon the clergy privilege of C.P.L.R. 4505.¹⁶²

The trial court found Lewis guilty of the cited infractions but the Appellate Division reversed.¹⁶³ The appellate court noted that the particular circumstances of the case supported Lewis’s contention that the gun was given to him while he was functioning in his capacity as a clergyman, not a police officer.¹⁶⁴ The court was particularly persuaded by the fact that Lewis received the gun at his church while in civilian clothing rather than at the precinct.¹⁶⁵

The court also intimated that the defense of clergy privilege may not have been successful had Lewis been on duty as a detective at the time,

¹⁵⁵ See *Lewis v. N.Y. City Housing Auth.*, 542 N.Y.S.2d 165, 151 A.D.2d 237 (1989).

¹⁵⁶ *Lewis*, 151 A.D.2d at 237.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Lewis*, 151 A.D.2d at 238.

¹⁶² *Id.* at 238-39.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

if the gun had been given to him at a different location, or if the person who found the gun came to Lewis because he was aware that he was also a police officer.¹⁶⁶ Officer-minister Lewis, unlike Rabbi Fuhrer, was acting in his ministerial role with a particular communicant when he received the gun.¹⁶⁷

Lewis is significant because it reinforces the fact-specific nature of the clergy cases. Whether courts will accept a C.P.L.R. 4505 claim depends on the specific circumstances surrounding the communications, particularly the intent of the parties.¹⁶⁸ Lewis could not protect the confidence as a clergyman and, at the same time, disclose the communication that was required of him by police regulations.¹⁶⁹ As a highly decorated, eighteen year veteran of the force, the court was convinced that Reverend Lewis was not Officer Lewis that evening.¹⁷⁰

3. Who Owns the Privilege and Who May Waive it?

a. Overview—All States

A few states grant the clergyman a privilege independent of the penitent.¹⁷¹ In these states, the priest-penitent privilege creates a constitutionally cognizable right of silence in the listener, separate and apart from that of the speaker. The clergyman, of course, is not the owner of the confidence; he is merely entrusted with the duty to keep it secret.¹⁷²

¹⁶⁶ *Lewis*, 151 A.D.2d at 239.

¹⁶⁷ *Id.* But see *In re Fuhrer*, 100 Misc. 2d 315, 419 N.Y.S.2d 426 (N.Y. Sup. Ct. 1979).

¹⁶⁸ *Lewis*, 151 A.d.2d at 239.

¹⁶⁹ *Id.* at 239-40.

¹⁷⁰ *Id.*

¹⁷¹ ALA. CODE § 12-21-166 (1979); CAL. EVID. CODE §§ 1030-34 (Deering 1990); COLO. REV. STAT. § 13-90-107(1)(c) (1997); GA. CODE ANN. § 24-9-22 (1989); KAN. STAT. ANN. § 60-429 (1988); N.J. REV. STAT. § 2A:84A-23 (1987) (giving the clergyman the option to assert the privilege and statutorily permitting him to reveal knowledge of future criminal acts); OHIO REV. CODE ANN. § 2317.02(c) (Banks-Baldwin 1990) (deciding that the penitent's waiver is ineffective where the clergyman's religious doctrine compels him to keep the confidence).

¹⁷² See *De'Udy v. De'Udy*, 130 Misc. 2d 168, 495 N.Y.S.2d 616 (1985).

Thus, he may never invoke the privilege in order to bar a penitent from repeating the confidential statement. His independent privilege, however, is not waivable by the penitent.¹⁷³ He may, therefore, refuse to testify in court even after the penitent has revealed the substance of the communication.

A majority of states have enacted a priest-penitent privilege that is waivable by the penitent.¹⁷⁴ In these states, once the penitent has disclosed the communication to a third party or waived it in some other manner, the clergyman may no longer claim a privilege.¹⁷⁵ He may be compelled to testify in open court, and the priest who is unwilling to testify may be held in contempt of court.¹⁷⁶

Several states have enacted statutes that are silent on the issue of ownership and waivability of the privilege.¹⁷⁷ Of these jurisdictions, only Missouri casts the statute in terms of competency to testify.¹⁷⁸ These states create the inference that a penitent's willingness to testify does act as a waiver affecting the clergyman's ability to testify.

¹⁷³ See sources cited *supra* note 171.

¹⁷⁴ ALASKA R. EVID. 506; ARIZ. REV. STAT. § 12-2233 (1994); ARK. CODE ANN. § 16-41-101 (Michie 1987 & Supp. 1990); ARK. R. EVID. 510; CONN. GEN. STAT. § 52-146b (1991); DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West 1998); HAW. REV. R. EVID. 506; IDAHO CODE § 9-203 (1990); IOWA CODE ANN. § 622.10 (West 1998); MASS. GEN. LAWS ANN. ch. 233, § 20a (West 1986); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13-1-22 (1997); NEB. REV. STAT. § 27-506 (1943 & Supp. 1975); NEV. REV. STAT. ANN. § 49.255 (Michie 1979 & Supp. 1989); N.H. REV. STAT. ANN. § 516:35 (1989); N.M. R. EVID. 11-506; N.Y. C.P.L.R. 4505 (McKinney 1990); N.C. GEN. STAT. § 8-53.2 (1990); N.D. R. EVID. RULE 505; OR. REV. STAT. § 40.260 (1981); PA. STAT. ANN. tit. 42, § 5943 (West 1982); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976); TENN. CODE ANN. § 24-1-206 (1990); UTAH CODE ANN. § 78-24-8 (1953); WASH. REV. CODE ANN. § 5.60.060 (West 1988); W. VA. CODE § 57-3-9 (1992); WIS. STAT. ANN. § 905.06 (West 1993).

¹⁷⁵ See sources cited *supra* note 174.

¹⁷⁶ *Keenan v. Gigante*, 64 A.D.2d 585, 407 N.Y.S.2d 163 (1978), *aff'd* by 390 N.E.2d 1151 (1979).

¹⁷⁷ 735 ILL. COMP. STAT. 5/8-803 (West 1992); MD. CODE ANN. [CTS. & JUD. PROC.] § 9-111 (West 1978); MICH. COMP. LAWS § 767.5a(2) (1998); MO. ANN. STAT. § 491.060(4) (West 1996); VT. STAT. ANN. tit. 12, § 1607 (1947); VA. CODE ANN. § 19.2-271.3 (Michie 1950); WYO. STAT. ANN. § 1-12-101 (Michie 1977).

¹⁷⁸ MO. ANN. STAT. § 491.060 (West 1996).

b. Overview—New York State

New York's statute grants the privilege to the penitent rather than the clergyman.¹⁷⁹ Consequently, the clergyman may neither disclose the communication without the penitent's waiver, nor may he assert an independent privilege following such a waiver.¹⁸⁰ Under New York's evidence law, the keys to releasing the communication rests solely in the penitent's hands.¹⁸¹

The New York legislature granted the statutory privileges enumerated in article 45 of the C.P.L.R. to the one who uttered the statement rather than the one who heard it.¹⁸² Thus, section 4502 permits waiver of the spousal privilege,¹⁸³ section 4503 allows the client to waive the attorney privilege,¹⁸⁴ section 4504 empowers the patient to waive the physician privilege,¹⁸⁵ and section 4505 authorizes the penitent to waive the clergy privilege.¹⁸⁶ Likewise, sections 4507, 4508, and 4510(b) confer a privilege on communications with psychologists, social workers, and rape crisis counselors.¹⁸⁷ In each case, the communicant possesses the right to waive the privilege.

If the priest-penitent privilege were a matter of evidentiary law only, then the legislature would be correct in treating it like all other evidentiary privileges. Yet beyond a mere evidentiary privilege lies an undeniable element of constitutional law, the Free Exercise of Religion clause.¹⁸⁸

¹⁷⁹ See *Keenan*, 64 A.D.2d at 585.

¹⁸⁰ See N.Y. C.P.L.R. 4505 (McKinney 1992); see also *People v. Carmona*, 82 N.Y.2d 603, 627 N.E.2d 959, 606 N.Y.S.2d 879 (1993).

¹⁸¹ See *Carmona*, 627 N.E.2d at 970 (Smith, J., concurring) (stating, "[t]he privilege belongs to the penitent, and it is the penitent who must establish the statutory confidentiality of the communication").

¹⁸² See *People v. Easter*, 90 Misc. 2d 748, 751, 397 N.Y.S.2d 926, 928 (1977).

¹⁸³ See *People v. McCormack*, 278 A.D. 191, 194, 104 N.Y.S.2d 139, 143 (1951), *aff'd*, 103 N.E.2d 895 (1952).

¹⁸⁴ N.Y. C.P.L.R. 4503 (McKinney 1992).

¹⁸⁵ N.Y. C.P.L.R. 4504 (McKinney 1992).

¹⁸⁶ N.Y. C.P.L.R. 4505 (McKinney 1992).

¹⁸⁷ N.Y. C.P.L.R. 4507-4508, 4510 (McKinney 1992).

¹⁸⁸ *In re Fuhrer*, 100 Misc. 2d 315, 318, 419 N.Y.S.2d 426, 429 (1979).

New York courts first recognized the constitutional aspect of clergy confidences 184 years ago in *People v. Phillips*.¹⁸⁹ *Phillips*, the first case in the United States that dealt with the privilege, framed the issue in terms of the priest's free exercise of religion, relying in particular upon the confidential nature of the Catholic sacrament of confession.¹⁹⁰ As a result of this Catholic oriented analysis, non-Catholic clergymen who subsequently sought to invoke a privilege were not afforded the same protection.¹⁹¹ In response to this incongruity, the New York state legislature widened the judicially recognized privilege of Catholic priests by enacting its first nondenominational clergy privilege in 1828.¹⁹²

Since then, however, the New York courts have refined the clergyman's constitutional right. In *In re Fuhrer*,¹⁹³ for example, Rabbi Fuhrer contended that the Free Exercise of Religion Clauses of the United States¹⁹⁴ and New York State¹⁹⁵ Constitutions protected him against a forced disclosure.¹⁹⁶

The court believed that the impingement on the rabbi's right of free exercise of religion was justifiable.¹⁹⁷ The court recognized that freedom of religion, though protected, is not absolute: "[w]here it is asserted that governmental action impermissibly treads on one's right to freely exercise one's religion, a balance must be struck weighing the governmental interest to be served against the claimed infringement of one's First Amendment rights."¹⁹⁸

¹⁸⁹ See generally Harvard Law Review Association, *Medical and Counseling Privileges*, 98 HARV. L. REV. 1530, 1556 (1985) (noting N.Y. CT. GEN. SESS. 1813); see also generally Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent*, 23 SANTA CLARA L. REV. 95, 96-101 (1983).

¹⁹⁰ Harvard Law Review Association, *supra* note 189, at 1556.

¹⁹¹ *People v. Smith*, 2 N.Y. City Hall Rec. 77 (Rogers 1817).

¹⁹² N.Y. REV. STAT. pt. 3, ch. 7, § 72, at 406 (1828).

¹⁹³ 100 Misc. 2d 315, 419 N.Y.S.2d 426 (1979).

¹⁹⁴ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I (emphasis added).

¹⁹⁵ "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind. . . ." N.Y. CONST. art. 1, § 3.

¹⁹⁶ *Fuhrer*, 419 N.Y.S.2d at 429.

¹⁹⁷ *Id.* at 432.

¹⁹⁸ *Id.* at 429.

Similarly, in *Keenan v. Gigante*, the court of appeals held that the “statutory privilege affords appellant any necessary protection against infringement of [his] freedom of religion.”¹⁹⁹ While recognizing an adverse impact upon a minister’s free exercise of religion, New York and a majority of the states have nevertheless held that a waivable privilege does not violate the free exercise clause of the state or federal constitutions.²⁰⁰ In the area of privileged communications, C.P.L.R. 4505 is the guide in determining whether an impermissible impingement upon the minister’s free exercise of his religion has occurred.²⁰¹

c. *People v. Carmona and Others: The Effect of Waiver in New York*

The New York Court of Appeals had a recent opportunity to review and refine the waiver aspect of the penitent privilege in *People v. Carmona*.²⁰² Elias Carmona fled to Miami after he killed Olga Estremera in his New York apartment.²⁰³ In Florida, the defendant confided in two ministers, Reverends Hernandez and Mimoso, who not only convinced the defendant to turn himself in to the police but also contacted the police on behalf of the defendant.²⁰⁴ After Carmona waived his *Miranda* rights, he repeated the prior confession to the police.²⁰⁵

Carmona was convicted of second degree murder but sought to overturn the conviction on the basis that the trial court improperly admitted the testimony of the ministers.²⁰⁶ The court of appeals concurred with the trial court that Carmona spoke with the ministers “for the purpose of obtaining spiritual guidance and solace.”²⁰⁷ The issue before

¹⁹⁹ *Keenan v. Gigante*, 64 A.D.2d 585, 407 N.Y.S.2d 163 (1978), *aff’d*, 390 N.E.2d 1151, 1155 (1979).

²⁰⁰ *See, e.g.*, *Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151 (1979).

²⁰¹ *See Keenan*, 390 N.E.2d at 1154.

²⁰² 82 N.Y.2d 603, 627 N.E.2d 959, 606 N.Y.S.2d 879 (1993).

²⁰³ *Carmona*, 627 N.E.2d at 960.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 961.

²⁰⁷ *Id.* at 962.

the court was whether Carmona effectively waived his privilege by retelling his story to the police.²⁰⁸

The appellate division upheld the trial court's determination that Carmona's otherwise privileged communication "had been waived when defendant 'voluntarily repeat[ed] the substance' of those communications to the police."²⁰⁹ The court of appeals, however, specifically declined to rule on whether Carmona's conduct constituted such an implied waiver.²¹⁰ Instead, the court of appeals held that the statements made by Carmona should have been excluded because "the indelible right to counsel had [already] attached at the time he surrendered and gave his incriminating statements to the police."²¹¹ Carmona's waiver, if indeed his actions constituted an implied waiver, was ineffective, and the statements he made to the police and clergymen should have been excluded at his trial.²¹²

If Carmona's statements to the police and ministers had been the sole basis of his conviction, the court of appeals may have overturned the verdict. The court, however, found that "the error [of admitting his statements into evidence] was harmless regardless of what standard for harmless error is applied" since the prosecution presented overwhelming proof of the defendant's guilt at trial.²¹³

The lesson from *Carmona* is that, once the communicant discloses the communication, neither he nor the clergyman will be able to assert that privilege. Elias Carmona evidently waived his privilege, but the court of appeals correctly noted that those statements should have been suppressed because his indelible right to counsel had been violated.²¹⁴ Ironically, the guilty verdict was still not overturned because the court believed that Carmona would have been found guilty even had his incriminating statements been excluded.²¹⁵ The court did not find the

²⁰⁸ *Carmona*, 627 N.E.2d at 963.

²⁰⁹ *Id.* at 961.

²¹⁰ *See id.* at 961-62.

²¹¹ *Id.* at 963.

²¹² *Id.* at 964.

²¹³ *Carmona*, 627 N.E.2d at 965.

²¹⁴ *Id.* at 963.

²¹⁵ *Id.* at 965-66.

need to rule on the waiver issue per se,²¹⁶ and the question remains what conduct constitutes an implied waiver of the priest-penitent privilege.

In *De'udy v. De'udy*,²¹⁷ the court was presented with a novel set of circumstances. There, a wife and husband each sought individual marriage counseling services of the church's minister, Dr. Reifsnyder.²¹⁸ During their action for divorce, the wife sought judicial waiver of the privileged statements made by her husband to the minister.²¹⁹ Clearly, the statements made by each party were protected, and presumably, the husband could have waived his own privilege if he so desired. Nevertheless, the court held that "[t]o . . . selectively reveal the information received from one spouse and withhold that received from the other is beyond reason."²²⁰ The court recognized that he could not disclose the husband's confidences without breaching the wife's communications to him.²²¹ The court therefore required that each party waive his privilege as a condition precedent in order to compel the minister to testify about either one.²²²

Both Mr. and Mrs. De'udy waived the privilege, but that did not fully resolve the issue before the court. The minister, Dr. Reifsnyder, still refused to disclose the communications made by either party, and he asserted a privilege independent of the communicants.²²³ After a careful review, the *De'udy* court held that "the confidential information is, in the first instance, the property of the communicant and does not become the property of the clergyman who receives it for safekeeping."²²⁴ The New York rule is clear: confidential statements lack statutory protection once they have been effectively waived by the speaker.

²¹⁶ *Id.* at 963.

²¹⁷ 130 Misc. 2d 168, 495 N.Y.S.2d 616 (1985).

²¹⁸ *De'Udy*, 495 N.Y.S.2d at 617.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *De'Udy*, 495 N.Y.S.2d at 618.

²²⁴ *Id.* at 620.

In *People v. Brown*,²²⁵ the prosecution sought to admit evidence that a police officer overheard the murder suspect that he was guarding tell his minister: “Bishop Hicks, praise the Lord, I need your prayers, I have killed a man.”²²⁶ The prosecution contended that the otherwise privileged communication should be deemed waived because it was spoken in the presence of a third party, the police officer who was guarding the suspect.²²⁷

The court agreed, in principle, that a confidential communication “can be waived if it is uttered under conditions negating confidentiality.”²²⁸ Ordinarily, the defendant’s statement that was overheard would be admissible because there can be no expectation of confidentiality when words are spoken in the presence of a third party, particularly a police officer.²²⁹ Here, however, the police acted improperly by not affording the defendant and his minister privacy.²³⁰ The police should have either respected the suspect’s private communication with his minister, or they should have warned him that “anything that is overheard may be held against him.”²³¹ Having failed to do either, the court estopped the people from offering the officer’s testimony about the overheard confession.

A party may waive the privilege by certain actions that are inconsistent with confidentiality, such as disclosure of the confidence to, or in the presence of, a third party or in open court.²³² Such was the fate of Anne and Julius Ziske, who brought a medical malpractice action against Dr. Jerome Luskin, M.D., in *Ziske v. Luskin*.²³³ The plaintiffs alleged that the doctor-defendant was the cause of their marital difficulties.²³⁴ Over the plaintiffs’ objection, Dr. Luskin sought to subpoena the records of Reverend Morrow, a Roman Catholic priest, who provided both individ-

²²⁵ 82 Misc. 2d 115, 368 N.Y.S.2d 645 (1974).

²²⁶ *Brown*, 368 N.Y.S.2d at 650.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Brown*, 368 N.Y.S.2d at 650.

²³² *See Ziske v. Luskin*, 138 Misc. 2d 38, 39, 524 N.Y.S.2d 145, 146 (1987).

²³³ 138 Misc. 2d 38, 524 N.Y.S.2d 145 (1987).

²³⁴ *Ziske*, 524 N.Y.S.2d at 146.

ual and joint marriage counseling to the plaintiffs.²³⁵ The court held that, “by setting forth damage to their marital relationship, . . . the plaintiffs have waived the privilege of their communication with Reverend Morrow during his counseling of them, solely as to their marital problems.”²³⁶ The court was correct in determining that an implied waiver of the priest-penitent communications occurred by the Ziskes, who brought the cause of action alleging damages to their marriage. The court emphasized that the waiver, implied by subsequent conduct, was to be narrowly construed, affecting only those statements pertaining to the marriage counseling.²³⁷ Any other confidential communications between the couple, individually or jointly, and the priest would continue to be protected under C.P.L.R. 4505.²³⁸

Once the court deemed the confidence waived by the plaintiffs, it could have ordered the unconditional disclosure of relevant facts by the clergyman or plaintiffs. The court, however, was not so harsh. Noting that the waiver was at best implied and probably unintentional, the court permitted the plaintiffs to reassert the privilege by “strik[ing] from their pleadings all references to damages to their marital relationship and to their preclusion from offering evidence relevant to such item of damages.”²³⁹

d. Exigent Circumstances

Of the states that confer upon the clergyman a privilege independent of the penitent, only New Jersey includes an explicit statutory fail-safe provision: “when the privileged communication pertains to a future criminal act . . . the cleric alone may, but is not required to, waive the privilege.”²⁴⁰ All states with an independent clergy privilege should enact

²³⁵ *Id.*

²³⁶ *Id.* at 147.

²³⁷ *See id.*

²³⁸ *Id.* Though not mentioned in the decision, the court’s treatment of implied waiver was consistent with the statutory waiver of the physician patient privilege found in C.P.L.R. 3121(a). A patient-party waives his confidentiality when he puts his physical condition into issue.

²³⁹ *Ziske*, 524 N.Y.S.2d at 147.

²⁴⁰ N.J. REV. STAT. § 2A:84A-23 (1987).

a similar provision and allow the clergyman to disclose an ongoing criminal activity or a future crime in the making. This provision would be analogous to Rule 1.6 of the Model Rules of Professional Conduct, which permits an attorney to violate his client's privilege in certain exigent circumstances.²⁴¹

The California approach is also sensible insofar as the clergyman may, if his religious faith so requires, assert the privilege.²⁴² The Law Revision Commission Comment to California's priest-penitent privilege noted that

[t]he clergyman is under no legal compulsion to claim the privilege. Hence, a penitential communication will be admitted if the clergyman fails to claim the privilege and the penitent is deceased, incompetent, absent, or fails to claim the privilege. . . . The extent to which a clergyman should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member.²⁴³

The difference between the approaches of New Jersey and California is significant. The New Jersey minister is automatically covered by the confidence statute while the California minister has the option of asserting the privilege. As a result, the New Jersey legislature felt compelled to untie the clergyman's hands if keeping a confidence poses a serious potential threat.²⁴⁴ That provision is unnecessary in California because, in a similar situation, the minister is free *not* to assert the privilege.²⁴⁵ In a non-exigent circumstance, the California minister is still permitted not to claim the privilege but the New Jersey minister has no such opportunity.

New York has no statutory rule permitting the minister to disclose an otherwise confidential communication in exigent circumstances. The court in *People v. Carmona* struggled over the minister's testimony only

²⁴¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6.

²⁴² CAL. EVID. CODE § 1034 (West 1995).

²⁴³ 7 Cal. L. Rev. Comm. Reports 1 (1965).

²⁴⁴ N.J. REV. STAT. § 2A:84A-23 (1987).

²⁴⁵ CAL. EVID. CODE § 1034 (West 1995).

to dismiss the admission as harmless error.²⁴⁶ The court could have simply articulated an exigent circumstances exception to the statutory rule. Such a judicial interpretation of the statute would not frustrate the legislature's intent. Significantly, the court in *In re Fuhrer* had no difficulty in reading into the statute an understanding that this confidentiality cannot be employed as a shield to cover up a clergyman's own criminal conduct.²⁴⁷ The New York State legislature should take note of the court's handling of these cases and adopt a statute with an unambiguous exigency rule similar to the one found in New Jersey.

Although an element of constitutional protection exists for the clergyman, states may still have a compelling interest to mandate disclosure. The New Jersey statute permits, but does not mandate disclosure.²⁴⁸ States could go even further and require the clergyman to disclose certain confidences, such as knowledge of child abuse or future crimes being planned. New York, for example, has mandated child abuse reporting statutes, which require someone who is aware of abuse to disclose such knowledge to the authorities:

[N]either the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, nor the rape crisis counselor-client privilege, as set forth in section forty-five hundred ten of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.²⁴⁹

Doctors, spouses, social workers—even rape crisis counselors—are mandated reporters, notwithstanding the privileges of Article 45.²⁵⁰ Con-

²⁴⁶ 82 N.Y.2d 603, 613, 627 N.E.2d 959, 964, 606 N.Y.S.2d 879, 885 (1993).

²⁴⁷ 100 Misc. 2d 315, 321, 419 N.Y.S.2d 426, 431 (N.Y. Sup. 1979).

²⁴⁸ See N.J. REV. STAT. § 2A:84A-23 (1987).

²⁴⁹ N.Y. FAMILY LAW § 1046(vii) (McKinney 1983).

²⁵⁰ *Id.*

spicuously absent from the above list of mandated reporters are attorneys and the clergymen. All states are loath to require clergy to disclose their privileged communications, but a strong argument can be made that such a requirement is in the public's interest in certain severe cases.

New Hampshire, for example, enacted a statute that requires "any person . . . having reason to suspect that a child has been abused or neglected" to make a report.²⁵¹ A clergyman in New Hampshire has no choice but to report suspected abuse because this statute trumps the clergy confidence provision. Utah also requires clergymen to report child abuse if their knowledge is not based upon the offender's confession.²⁵²

4. *People v. Reyes* Revisited: Usable Though Not Admissible

The court in *People v. Reyes* correctly held that Reyes's confession to Father Schmidt fell within the parameters of C.P.L.R. 4505.²⁵³ Because the communication was privileged, Father Schmidt was without authority to disclose details of the exchange without the penitent's prior permission.²⁵⁴ Nevertheless, the priest violated that rule and ran to the police, directly resulting in Edwin Reyes's arrest and indictment.²⁵⁵

Notwithstanding the obvious breach of privileged communication, the *Reyes* court was unprepared to dismiss the *indictment* against the defendant: "[I]t is clear that as in the present case a subsequent finding that an admission will not be admissible at trial does not undermine the validity of the indictment, *especially if there is other evidence beyond the suppressed evidence sufficient for an indictment.*"²⁵⁶ The court distinguished between the use of confidential testimony at the Grand Jury and

²⁵¹ N.H. REV. STAT. ANN. § 169-C:29 (1995).

²⁵² See generally Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987).

²⁵³ 144 Misc. 2d 805, 807, 545 N.Y.S.2d 653, 655 (N.Y. Supp. 1989).

²⁵⁴ *Reyes*, 545 N.Y.S.2d at 654-55.

²⁵⁵ *Id.* at 654.

²⁵⁶ *Id.* at 655 (emphasis added).

its subsequent use at trial.²⁵⁷ The court also held that the priest-penitent privilege applied to Reyes so that Father Schmidt would *not* be permitted to testify at Reyes's trial.²⁵⁸ Thus, evidence that is *prima facie* valid, may be used to obtain an indictment, even if such evidence is inadmissible at the trial itself.²⁵⁹ Father Schmidt's statement to police could be utilized at the grand jury to obtain an indictment, although it could not be offered at trial to obtain a conviction!

A similar situation occurred in *People v. Ward*.²⁶⁰ In *Ward*, Coreena Ward appealed her murder conviction on the theory that her confession to her minister, protected by C.P.L.R. 4505, was improperly disclosed to the police.²⁶¹ This confession formed the basis of a warrantless arrest, which in turn led to a confession to the police followed by a conviction.²⁶²

Ward unsuccessfully argued that her confession to the police was the "fruit of the poisonous tree" and should be suppressed.²⁶³ Instead, the court held that a protected conversation could form the basis of probable cause even if were not admissible at trial itself.²⁶⁴

Ward, *Reyes*, and *Carmona*²⁶⁵ are significant in delineating the scope of C.P.L.R. 4505. The priest-penitent privilege will bar testimony at trial by the clergyman as long as the one making the confession has not waived it. This privilege will not, however, result in a wholesale exclusion of the testimony for every purpose. Although it may be excludable at trial,

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Reyes*, 545 N.Y.S.2d at 655.

²⁶⁰ 199 A.D.2d 573, 604 N.Y.S.2d 320 (1993).

²⁶¹ *Ward*, 199 A.D.2d at 573.

²⁶² *Id.*

²⁶³ *Id.* at 573.

²⁶⁴ *Id.*

²⁶⁵ *Ward* and *Reyes* may have had a valid tort claim against their respective clergymen. The statute imposed a duty of confidentiality, and the ministers breached that duty. The penitents were "injured" by the subsequent, foreseeable criminal convictions, which may otherwise have been avoided had the clergymen remained silent. *Carmona*, on the other hand, was not necessarily injured because the court held the admission to be harmless error. The clergymen may have had valid defenses that justified the breach of confidence.

privileged testimony may still form the basis of probable cause or be used at a grand jury hearing for indictment purposes.

To require a minister to disclose confidential communications to the grand jury while protecting those same conversations at trial is at best illogical and at worst inconsistent. Furthermore, this approach frustrates the very intent of the privilege. In *Keenan v. Gigante*, the Court of Appeals of New York stated, "It is clear that the Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized."²⁶⁶ The *Keenan* court recognized that society favors penitential communications, although they are disfavored by the rules of evidence.²⁶⁷ Protecting the trial testimony makes little sense when testimony is compelled at quasi-judicial forums such as a grand jury. A more sensible approach would be to protect the confidence at all legal or quasi-legal proceedings. Alabama statutorily extends the privilege to grand jury testimony;²⁶⁸ South Carolina and South Dakota include grand jury testimony under the umbrella heading of quasi-legal trials.²⁶⁹

If the clergyman believes that he has a duty of confidence that is unwaivable by religious doctrine, then the distinction between open court and grand jury will not matter to him. The clergyman will be guided by the tenets of his faith rather than the rules of evidence, and he will risk contempt of court rather than compromise the protection of his ecclesiastic integrity. To compel disclosure would force the clergyman to choose between his religion and the court's wrath. The clergyman will probably be more willing to suffer at the hands of a human judge than at the hand of the Judge of Judges.

²⁶⁶ 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979).

²⁶⁷ *Keenan*, 390 N.E.2d at 1151.

²⁶⁸ ALA. R. EVID. 505 advisory committee's note (explaining that expressly stating that this privilege applies in all legal proceedings is unnecessary because "all privileges are applicable in all proceedings").

²⁶⁹ S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 19-13-16 (Michie 1995).

III. Religious Doctrine

A. Christian Roots

The clergy privilege has its historical roots in the sacred canons of Catholicism, and the privilege can be traced back as early as the Council of Nicea, in 325 C.E.²⁷⁰ The early Christian Church believed that each competent member of the church was obliged to confess his sins at least once a year.²⁷¹ Canon 889 protects the penitent's privacy by requiring that the priest keep the sacramental seal inviolable.²⁷²

Prior to the Reformation, English courts recognized the privilege; afterward, however, England abandoned the privilege as it abandoned Catholicism.²⁷³ As a result, the priest-penitent privilege is generally regarded to be outside the scope of common law.²⁷⁴

Sacramental confession has no analogue in other branches of Christianity or in Judaism. Initially, the early New York courts permitted a priest to assert a privilege but did not allow a minister or rabbi.²⁷⁵ While the distinction made theological sense, it posed a serious challenge to the Establishment Clause²⁷⁶ as only Catholic confession would be protected.

Still, the modern clergyman of all faiths is often called upon to render counseling to troubled individuals. This role is not unique to the clergy of any particular faith, and for this reason legislatures and courts widened the scope of the privilege.²⁷⁷ In essence, the secular statute, though based initially upon the Catholic rite of confessional,²⁷⁸ has been broadened to include the priest, minister, Muslim brother, and rabbi as ecclesiastic

²⁷⁰ See generally Yellin, *supra* note 189, at 96-101.

²⁷¹ *Id.* at 97 n.8.

²⁷² *Id.* at 98 (citing Richard S. Nolan, *The Law of the Seal of Confession*, 13 CATH. ENCYCL. 649 (1913)).

²⁷³ *Id.* at 101-02.

²⁷⁴ See, e.g., *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979).

²⁷⁵ Yellin, *supra* note 189, at 104-06.

²⁷⁶ *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 207 (1955).

²⁷⁷ See N.Y. C.P.L.R. 4505 (McKinney 1992).

²⁷⁸ See generally Yellin, *supra* note 189, at 96-101.

spiritual counselors.²⁷⁹ From this fact, the definition of clergy needs to be interpreted broadly enough to facilitate rather than impede uninhibited spiritual counseling. Communications to quasi-clergy should also be protected as long as (a) a reasonable belief exists that they are providing spiritual counseling, and (b) the other requirements (confidentiality, waiver, etc.) are met.²⁸⁰

B. Jewish Law

1. Overview

Unlike his Catholic counterpart, the Jewish clergyman is no different religiously from the non-ordained Jew.²⁸¹ The rabbi and cantor have the same religious obligations—no more and no less—as do the non-ordained Jew.²⁸² The rabbi's education and training give him the right to adjudicate matters of law, but no specific sacraments or requirements are imposed on rabbis distinct from the general Jewish population.²⁸³

All Jews—clergy and lay people alike—are obligated to follow the teaching of the Bible: “Thou Shalt not go up and down as a talebearer among thy people.”²⁸⁴ The prohibition of talebearing²⁸⁵ only applies to a rabbi's confidential communications with penitents, but it also applies to *anyone's* knowledge of his neighbor's activities, regardless of how the knowledge was gained.²⁸⁶ So strong is this talebearing law that the Talmud records the case of a student who was expelled from the academy for revealing a twenty-two-year-old secret.²⁸⁷

²⁷⁹ *Id.* at 114-21

²⁸⁰ N.Y. C.P.L.R. 4505 (McKinney 1992) (discussing the previously mentioned proposition in the “notes of decisions” following the statutory text).

²⁸¹ *See generally* 13 ENCYCLOPEDIA JUDAICA 1445 (1978).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ LEVITICUS 19:16.

²⁸⁵ LEVITICUS 19:16.

²⁸⁶ Talmud Yoma 4b (citing LEVITICUS 19:16). The Talmud (Sanhedrin 31a) records a specific prohibition for judges to reveal the private discussions amongst themselves regarding a case before them, but that law is also predicated on this verse.

²⁸⁷ Sanhedrin 31a.

The prohibition against talebearing is not absolute.²⁸⁸ It must be tempered by other ethical and legal considerations, including the other obligation found in the selfsame verse: “Do not stand by idly while your brother’s blood is being shed.”²⁸⁹ When your neighbor is in imminent harm,²⁹⁰ you must tell him, even if this act means disclosing a secret.

Judaism makes a distinction between general gossip at the marketplace and proper courtroom testimony.²⁹¹ What is forbidden at the coffee table or marketplace as gossip is permitted—even obligatory—at the *Bet Din* (rabbinical court).²⁹² The *Shulkhan Aruch* contains certain testimonial privileges;²⁹³ however, the principles of waiver, justice, and exigency are as prominent in the Jewish code as they are in the secular codes of the states.

2. To Disclose or Not to Disclose

Unlike the approach adopted by New Jersey, which permits a minister to waive the privilege under certain circumstances,²⁹⁴ Jewish law would *mandate* disclosure of known child abuse, as well as knowledge of other criminal activity,²⁹⁵ particularly if the issue concerned a future crime that

²⁸⁸ LEVITICUS 19:16.

²⁸⁹ LEVITICUS 19:16. Therefore, respondent’s argument in *Congregation B’Nai Jonah v. Kuriansky* was incomplete at best. 172 A.D.2d 35, 576 N.Y.S.2d 934 (1991), *appeal dismissed*, 590 N.E.2d 244 (N.Y. 1992).

²⁹⁰ Under Jewish law, the harm is not limited to physical harm. A non-party is obligated to prevent his fellow from suffering a monetary harm if he is in the position to do so. *See generally* Michael J. Broyde, *The Pursuit of Justice in JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSIONAL* 25-29 (1996).

²⁹¹ *See generally* Broyde, *supra* note 290.

²⁹²DYEHL BYYX WTWDEB TLEWT WRYBXL wYW DWDYEHL YWARW WBYRXL TWDE EDWYw YM LK :X”KS TWDE ‘LH M”X E”Ww Translated: “Whosoever has knowledge of testimony concerning another, and is fit to offer such testimony, and such testimony is material, is obligated to testify. . . .” *Shulchan Aruch*, Laws of Choshen Mishpat § 28.

²⁹³ Literally “Set Table.” It is the authoritative code of Jewish law.

²⁹⁴ N.J. STAT. ANN. § 2A:84A-23 (1987).

²⁹⁵ *See generally* Broyde, *supra* note 290; Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771 (1996).

was avoidable.²⁹⁶ No cases exist, as far as this author can determine, that have dealt with the situation of a clergyman *required* by religious doctrine to disclose a confidence though compelled by state statute to *remain silent*. Would a balancing test in such a case hinge on the particular confidence being protected? Such an analysis would again force the court into the unenviable position of interpreting religious law's disclosure requirements and likely violate the Doctrine of Ecclesiastical Abstention.²⁹⁷

A person who seeks guidance from religious counsel must also be bound, to some degree, by the dictates of the faith from which he is seeking comfort. Thus, a penitent's ability to prevent his rabbi's testimony is inconsistent with Jewish law that requires it. Likewise, inconsistency is found when a penitent compels his priest to testify when the sacrament of confession precludes divulgence of that confession.

By disclosing the secret to a clergyman, the penitent impliedly submits himself to the dictates of that faith. Thus, even if Rabbi Tandler was offering the defendant spiritual guidance,²⁹⁸ he should be free to disclose that information if the teachings of Judaism so require. Likewise, the defendant should be estopped from preventing the rabbi from fulfilling this important religious duty.

IV. Concluding Thoughts

About a year ago, I received a phone call from a man who told me rather nonchalantly that he wanted to kill his brother. Clearly, the call came to me in my capacity as a pulpit rabbi. The caller intended the statement to shock me and wanted to communicate the gravity of his hatred toward his brother. He wanted to talk about private and confidential family issues, but most of all, he wanted to know that I would keep

²⁹⁶ N.H. REV. STAT. ANN. § 169-c:2 (1979). In that regard, the New Hampshire statute on mandatory reporting would pose no conflict to the rabbi who gains such information, whether by the penitent or a third party.

²⁹⁷ See *Serbian E. Orthodox Diocese v. Millivojevich*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976) (noting that the court must accept the decisions of the highest church in an organization and cannot second guess ecclesiastical laws).

²⁹⁸ See *People v. Drelich*, 123 A.D.2d 441, 506 N.Y.S.2d 746 (1986); see also text accompanying *supra* note 49.

his confidence under any circumstance.²⁹⁹ Before I allowed the caller to continue to disclose the substance of his anger, I informed him that if I believed he was even in the least bit serious about the threat, I would feel compelled to report him to the police.³⁰⁰ I soon learned that the caller was angry and hurt by his brother's betrayal, but I sincerely believed that his words were an expression of pain rather than a declaration of a real intent to commit a fratricide.

Legislatures are right to protect the confidential communications between penitents and members of the clergy. They are also right in setting reasonable limits. Age requirements, certain mandatory reporting statutes, the expectations of the penitent, and the clergyman's religious doctrine must all be taken into consideration. The clergyman can play a role in promoting peace and justice, but he can also be a willing or unwitting pawn of others. The legislatures and courts must fashion a reasonable and consistent evidentiary statute that respects both religion and the judicial system's need for integrity.

²⁹⁹ This author suspects that all members of the clergy will, at some point in their careers, receive a similar call. For an excellent analysis of the rabbi's role, see Pearce, *supra* note 295.

³⁰⁰ One of the more challenging aspects of the pulpit is learning to distinguish cries of pain and anger from threats made in anger.

Appendix

Summary of Priest-Penitent Statutes

ALA. R. EVID. 505.

- (a)(1) Definitions. As used in this rule: A “clergyman” is any duly ordained, licensed, or commissioned minister, pastor, priest, rabbi, or practitioner of any bona fide established church or religious organization; the term “clergyman” includes, and is limited to, any person who regularly, as a vocation, devotes a substantial portion of his or her time and abilities to the service of his or her church or religious organization.
- (2) A communication is “confidential” if it is made privately and is not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (b) General Rule of Privilege. If any person shall communicate with a clergyman in the clergyman’s professional capacity and in a confidential manner, then that person or the clergyman shall have a privilege to refuse to disclose, and to prevent another from disclosing, that confidential communication.
- (c) Who May Claim the Privilege. The privilege may be claimed by the communicating person, by that person’s guardian or conservator, or by that person’s personal representative if that person has died, or by the clergyman.

ALASKA R. EVID. 506.

- (a) Definitions. As used in this rule:
 - (1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.
 - (2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- (b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.
- (c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

ARIZ. REV. STAT. § 12-2233 (1994).

In a civil action a clergyman or priest shall not, without the consent of the person making a confession, be examined as to any confession made to him in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs.

ARK. REV. R. EVID. 505.

- (a) **Definitions.** As used in this rule:
 - (1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
 - (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (c) **Who May Claim the Privilege.** 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 clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

CAL. EVID. CODE §§ 1030-1034 (West 1995).**§ 1030. Clergyman**

As used in this article, “clergyman” means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.

§ 1031. Penitent

As used in this article, “penitent” means a person who has made a penitential communication to a clergyman.

§ 1032. Penitential communication

As used in this article, “penitential communication” means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret.

§ 1033. Privilege of penitent

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

§ 1034. Privilege of clergy

Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

COLO. REV. STAT. ANN. § 13-90-107 (West 1997).

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(c) A clergyman, minister, priest, or rabbi shall not be examined without both his consent and also the consent of the person making

the confidential communication as to any confidential communication made to him in his professional capacity in the course of discipline expected by the religious body to which he belongs.

CONN. GEN. STAT. § 52-146b (1991).

A clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry shall not disclose confidential communications made to him in his professional capacity in any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding, unless the person making the confidential communication waives such privilege herein provided.

DEL. R. EVID. 505.

(a) Definitions. As used in this rule:

- (1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
- (2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual adviser.

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

D.C. CODE ANN. § 14-309 (1981).

A priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a 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.

FLA. STAT. ANN. § 90.505 (West 1998).

- (1) For the purposes of this section:
 - (a) A “member of the clergy” is a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed so to be by the person consulting him or her.
 - (b) A communication between a member of the clergy and a person is “confidential” if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.
- (2) A person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a member of the clergy in his or her capacity as spiritual adviser.
- (3) The privilege may be claimed by:
 - (a) The person.
 - (b) The guardian or conservator of a person.
 - (c) The personal representative of a deceased person.
 - (d) The member of the clergy, on behalf of the person. The member of the clergy’s authority to do so is presumed in the absence of evidence to the contrary.

GA. CODE ANN. § 24-9-22 (1982).

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court.

HAW. REV. R. EVID. 506.

(a) Definitions. As used in this rule:

(1) A “member of the clergy” is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the communicant.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the latter’s professional character as spiritual advisor.

(c) Who May Claim the Privilege. The privilege may be claimed by the communicant or by the communicant’s guardian, conservator, or personal representative. The member of the clergy may claim the privilege on behalf of the communicant. Authority so to do is presumed in the absence of evidence to the contrary.

IDAHO CODE § 9-203 (Michie 1948).

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

735 ILL. COMP. STAT. 5/8-803 (West 1992).

A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

IND. CODE ANN. § 34-1-14-5 (West 1983).

Except as otherwise provided by statute, the following persons shall not be competent witnesses:

- (4) Clergymen, as to the following confessions, admissions, or confidential communications:
 - (A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church.
 - (B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor.

IOWA CODE ANN. § 622.10 (West 1998).

1. A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the

person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician assistants, advanced registered nurse practitioners or mental health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

KAN. STAT. ANN. § 60-429 (1994).

(a) Definitions. As used in this section,

- (1) the term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his or her regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization;
- (2) the term "regular minister of religion" means one who as his or her customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he or she is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister;
- (3) the term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and

teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his or her church, sect, or organization;

(4)“penitent” means a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God’s mercy or forgiveness for past culpable conduct;

(5)“penitential communication” means any communication between a penitent and a regular or duly ordained minister of religion which the penitent intends shall be kept secret and confidential and which pertains to advice or assistance in determining or discharging the penitent’s moral obligations, or to obtaining God’s mercy or forgiveness for past culpable conduct.

(b)Privilege. A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he or she claims the privilege and the judge finds that

(1)the communication was a penitential communication and

(2)the witness is the penitent or the minister, and

(3)the claimant is the penitent, or the minister making the claim on behalf of an absent penitent.

KY. R. EVID. 505.

(a)Definitions. As used in this rule:

(1)A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2)A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- (b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.
- (c) Who may claim the privilege. 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 clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

LA. CODE EVID. ANN. art. 511 (West 1995).

A. Definitions. As used in this Article:

- (1) A “clergyman” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
- (2) A communication is “confidential” if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

B. General rule of privilege. A person has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

C. Who may claim the privilege. The privilege may be claimed by the person or by his legal representative. The clergyman is presumed to have authority to claim the privilege on behalf of the person or deceased person.

ME. R. EVID. 505.

(a) Definitions. As used in this rule:

- (1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
- (2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- (b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (c) **Who May Claim the Privilege.** 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 clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1978).

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.

MASS. GEN. LAWS ANN. ch. 233, § 20A (West 1986).

A priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

MICH. COMP. LAWS ANN. § 600.2156 (West 1986).

No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

MINN. STAT. ANN. § 595.02 (West 1988).

Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

- (c) A member of the clergy or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to the member of the clergy or other minister in a professional character, in the course of discipline enjoined by the rules or practice of the religious body to which the member of the clergy or other minister belongs; nor shall a member of the clergy or other minister of any religion be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice, aid, or comfort or advice given thereon in the course of the member of the clergy's or other minister's professional character, without the consent of the person.

MISS. CODE ANN. § 13-1-22 (1997).

- (1) As used in this section:
 - (a) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious denomination.
 - (b) A communication is "confidential" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.
- (2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.
- (4) A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

MO. ANN. STAT. § 491.060 (West 1996).

The following persons shall be incompetent to testify:

- (4) Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him in his professional capacity as a spiritual advisor, confessor, counselor or comforter;

MONT. CODE ANN. § 26-1-804 (1997).

A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

NEB. REV. STAT. § 27-506 (1975).

(1) As used in this rule:

- (a) A clergyman is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him; and
- (b) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

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

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

NEV. REV. STAT. ANN. § 49.255 (Michie 1996).

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character.

N.H. REV. STAT. ANN. § 516:35 (1979).

A priest, rabbi or ordained or licensed minister of any church or a duly accredited Christian Science practitioner shall not be required to disclose a confession or confidence made to him in his professional character as spiritual adviser, unless the person confessing or confiding waives the privilege

**N.J. STAT. ANN. § 2A:84A-23 (West 1994);
N.J. R. EVID. 511.**

Any communication made in confidence to a cleric in the cleric's professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which the cleric belongs or of the religion which the cleric professes, shall be privileged. Privileged communications shall include confessions and other communications made in confidence between and among the cleric and individuals, couples, families or groups in the exercise of the cleric's professional or spiritual counseling role.

As used in this section, "cleric" means a priest, rabbi, minister or other person or practitioner authorized to perform similar functions of any religion.

The privilege accorded to communications under this rule shall belong to both the cleric and the person or persons making the communication and shall be subject to waiver only under the following circumstances:

- (1) both the person or persons making the communication and the cleric consent to the waiver of the privilege; or
- (2) the privileged communication pertains to a future criminal act, in which case, the cleric alone may, but is not required to, waive the privilege.

N.M. R. EVID. 11-506.

A. Definitions. As used in this rule:

- (1) a "member of the clergy" is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting that person;

(2)a communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

- B. General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy as a spiritual adviser.
- C. Who May Claim the Privilege. The privilege may be claimed by the person or by the person’s guardian, conservator or, upon death, personal representative. The member of the clergy may claim the privilege on behalf of the person. The authority to claim the privilege is presumed in the absence of evidence to the contrary.

N.Y. C.P.L.R. 4505 (McKinney 1992).

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.

N.C. GEN. STAT. § 8-53.2 (Michie 1944).

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.

N.D. REV. R. EVID. 505.

(a) Definitions. As used in this rule:

- (1)A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious

organization, or an individual reasonably believed so to be by the person consulting him.

- (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
- (c) Who May Claim the Privilege. 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 clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1996).

The following persons shall not testify in certain respects:

- (C) A clergyman, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect, when the clergyman, rabbi, priest, or minister remains accountable to the authority of that church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the clergyman, rabbi, priest, or minister for a religious counseling purpose in the clergyman's, rabbi's, priest's, or minister's 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 the clergyman's, rabbi's, priest's, or minister's sacred trust.

OKLA. STAT. ANN. tit. 12, § 2505 (West 1993).

A. As used in this section:

1. A "clergyman" is a minister, priest, rabbi, accredited christian science practitioner or other similar functionary of a religious organization, or any individual reasonably believed to be a clergyman by the person consulting him; and

2. A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- B. A person has a privilege to refuse to disclose and to prevent another from disclosing his confidential communication made to a clergyman acting in his professional capacity.
- C. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman is presumed to have authority to claim the privilege but only on behalf of the communicant.

OR. REV. STAT. § 40.260 (1981).

- (1) As used in this section, unless the context requires otherwise:
 - (a) “Confidential communication” means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
 - (b) “Member of the clergy” means a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.
- (2) A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member of the clergy in the member’s professional character.

PA. STAT. ANN. tit. 42, § 5943 (1982).

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 com-

pelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

R.I. GEN. LAWS § 9-17-23 (1997).

In the trial of every cause, both civil and criminal, no member of the clergy or priest shall be competent to testify concerning any confession made to him or her in his or her professional character in the course of discipline enjoined by the church to which he or she belongs, without the consent of the person making the confession. No duly ordained minister of the gospel, priest, or rabbi of any denomination shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him or her in his or her professional capacity, and necessary and proper to enable him or her to discharge the functions of his or her office in the usual course of practice or discipline, without the consent of the person making the communication.

S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976).

In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

S.D. CODIFIED LAWS ANN. §§ 19-13-16 to -18 (Michie 1995).

§ 19-13-16

As used in § 19-13-16 to 19-13-18, inclusive:

(1) A “clergyman” is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

§ 19-13-17

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

§ 19-13-18

The privilege described by § 19-13-17 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 clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

TENN. CODE ANN. § 24-1-206 (1989).

- (a)(1) No minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over eighteen (18) years of age, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to that person in a confidential manner, properly entrusted to that person in that person’s professional capacity, and necessary to enable that person to discharge the functions of such office according to the usual course of that person’s practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.
- (2) It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as prohibited in this section is offered, to determine whether or not that person possesses the qualifications which prohibit that person from testifying to the communications sought to be proven by that person.
- (b) The prohibition of this section shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit

properly sworn to by such a one or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

- (c) Nothing in this section shall modify or in any wise change the law relative to “hearsay testimony.”
- (d) Any minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, and any regular minister of religion of any religious organization or denomination usually referred to as a church, who violates the provisions of this section, commits a Class C misdemeanor.

TEX. R. EVID. 505.

- (a) Definitions. As used in this rule:
 - (1) A “member of the clergy” is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.
 - (2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member’s professional character as spiritual adviser.
- (c) Who May Claim the Privilege. The privilege may be claimed by the person, by the person’s guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy to whom the communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.

UTAH CODE ANN. § 78-24-8 (1996).

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

- (3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

VT. STAT. ANN. tit. 12, § 1607 (1947).

A priest or minister of the gospel shall not be permitted to testify in court to statements made to him by a person under the sanctity of a religious confessional.

VA. CODE ANN. § 8.01-400 (Michie 1994).

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 to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly 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.

WASH. REV. CODE ANN. § 5.60.060 (West 1995).

- (3) A member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

W. VA. CODE § 48-2-10a (1966).

In any action brought pursuant to the provisions of this article, no priest, minister, rabbi or other clergyman, as defined in section twelve-a

[§ 48-1-12a], article one of this chapter, of any religious denomination or organization who is not a party to said action shall be compelled to testify regarding any communications or statements made to such clergyman in his capacity as spiritual counselor or spiritual adviser by a party to said action, if (a) both the clergyman and the party making such communications or statements claim that the communications or statements were made to the clergyman in his capacity as a clergyman and spiritual counselor or spiritual adviser to such party; and (b) no person, other than the clergyman, such party and the spouse of such party, was present when such communications or statements were made; and (c) the party making such communications or statements does not either consent to their disclosure or otherwise waive the privilege granted by this section: Provided, That the privilege granted by this section shall be in addition to and not in derogation of any other privileges recognized by law.

WIS. STAT. ANN. § 905.06 (West 1993).

- (1) Definitions. As used in this section:
 - (a) A “member of the clergy” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.
 - (b) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
- (2) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member’s professional character as a spiritual adviser.
- (3) Who may claim the privilege. The privilege may be claimed by the person, by the person’s guardian or conservator, or by the person’s personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The member of the clergy’s authority so to do is presumed in the absence of evidence to the contrary.

WYO. STAT. § 1-12-101 (1977).

- (a) The following persons shall not testify in certain respects:
 - (ii) A clergyman or priest concerning a confession made to him in his professional character if enjoined by the church to which he belongs.