

## Church Financial Hot Topic

### What is Ministerial Privileged Communication?

Dr. Richard Hammar is a pioneer in assisting ministers in legal and tax issues. In *Pastor, Church & Law\**, Dr. Hammar gives the minister the following advice concerning handling privileged information: Certain communications that are made to ministers, in confidence, are "privileged." This means that the minister, or counselee, cannot be forced to disclose the content of the communications in a court of law.

**Privilege:** Just what is a "privilege?" A privilege refers to evidence that is not admissible in court. There are many examples, including communications made in confidence between an attorney and client, a doctor and patient, a husband and wife, and a minister and penitent. The basis for the clergy-penitent privilege is that we want people to communicate freely with their minister without fear of having their conversation disclosed in court. After all, without this assurance, few would be willing to share potentially incriminating information with their minister, and this is not a socially desirable result.

**Requirements:** Not every communication made to a minister is privileged. In most states, the clergy-penitent privilege applies only to (1) communications (2) confidentially made (3) to a minister (4) acting in a professional capacity as a spiritual adviser.

**1. Communication:** The privilege applies only to "communications" between an individual and a minister. Communications obviously include verbal statements, but they also can include nonverbal acts that are intended to transmit ideas. Statements made over the telephone or in a letter, generally, will be "communications."

**2. Confidential:** A communication must be made in confidence to be privileged. This means that it was made under circumstances indicating that it would remain secret. Statements made to a minister in the presence of other persons generally cannot be privileged. However, if the presence of a third person is legally required (e.g., a prisoner who cannot communicate with a minister unless a guard is present), the privilege may apply... However, statements made to a minister in the presence of deacons, elders, church members, or any other persons will not be privileged, unless specifically recognized by state law.

**3. To a minister:** In order to be privileged, a communication must be made to a minister. Communications made to church board members, a minister's spouse, or "lay ministers" cannot be privileged.

**4. Acting in a professional capacity as a spiritual adviser:** Most clergy-penitent privilege laws require that the communication be made to a minister acting in a professional capacity as a spiritual adviser. Many, perhaps most, of the communications made to ministers are not made to them in their professional capacity as spiritual advisers. A minister (or court) may need to ascertain the objective of a conversation in determining whether a communication is privileged. Was the minister sought out primarily for spiritual advice? Were the statements of a type that could have been made to anyone? Where did the conversation take place? Was the conversation pursuant to a scheduled appointment? What was the relationship between the minister and the person making the communication? These are the kinds of questions, which help to clarify the purpose of a particular conversation, thereby, determining the availability of the privilege. The applicability of the privilege can be enhanced if a minister simply asks a person during a counseling session whether he or she intends the conversation to be privileged and confidential. If the counselee responds affirmatively, then there is little doubt that the courts will conclude that the privilege applies.

This document is intended to provide churches, pastors, and staff with current and accurate information about the subjects covered. However, such information is not intended to be sufficient for dealing with a particular legal problem, and the authors and distributors do not warrant or represent its suitability for such purpose. The reader should not rely upon this document as a substitute for independent legal consultation or IRS instructions. \*Used by permission. For more information on this subject and other tax matters, order *Pastor, Church & Law* (3<sup>rd</sup> ed. 2000).