

CONFIDENTIALITY AND CONSTITUTIONALITY OF CHAPLAINCY

“Staying Within The Law”

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CONFIDENTIALITY...A KEY COMPONENT OF CHAPLAINCY

PRIVILEGE FROM COURT COMPELLED DISCLOSURE

- GENERAL PRINCIPLE: Court entitled to “every man’s evidence.”
- There are some communications that society wishes to encourage and therefore the law will protect them from being forcibly disclosed by courts.

GENERAL PRINCIPLES APPLICABLE TO Privileges

Exists only if communication made in confidence

Is duty of one communicating to ensure confidentiality...Hence, not present if overheard by third party.

Exception: Where “third party” overhearing is agent of other or provides necessary services.

Can be waived only by communicant

Must be by party who is owed confidence, and not waived when revealed by party owing confidence.

General Exceptions to Overcoming Privilege

Communication in furtherance of future crime or fraud.

Where is suit or crime between communicants (e.g. Suit against professionals for malpractice, for fees, crime against child whom are guardian of)

No Federal Constitutional Right To Religiously Based Privilege

- United States Supreme Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” ...because laws “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

STATES CAN CHOOSE TO ENACT SUCH PRIVILEGES

- Religiously Based Privilege Serves Society:
 - U.S. Supreme Court in Trammel v. United States, (1980) explained: "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."
- Priest Penitent Privilege Exists Under State Statute
RCW 5.60.060(3): "A member of the clergy, a Christian Science practitioner ... or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence 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."

Washington Child Abuse Exception to Confidentiality Statute

- Clergy not required to report. State v. Motherwell (1990)
Formal reports of child abuse in conformance with RCW 26.44.060 are not deemed violation of privilege.
- Washington clergy/chaplains not required to report but "may report" and not violate confidentiality laws.
 - Other states may be similar...you are responsible to know.

Others Who May Exercise Confidentiality

- Peer Support Group Counselor/CISM
 - Psychologist-Patient Privilege
 - Public Official
- Sexual Assault Victim advocate

...And How Would You Apply the Law?

- Situation: A County Deputy Prosecutor tells you that she intends to depose you regarding what a Sheriff's Deputy accused of sexual assault, may have told you.
- What would **You** do?
- Here is what **I** did.

A Case Study...

■ **Problem:**
Elder at Bethel Christian Assembly in Tacoma had vision that youth pastor Glenn "was involved with pornography" and on senior pastor's advice met with Glenn.
At meeting, Glenn confessed to child molestation and child rape with specific victims. Elder repeatedly left to get advice by telephone from pastor.
Elders (both ordained and un-ordained) met with Glenn. Though details of confession not discussed, at senior pastor's suggestion Glenn wrote letters of apology to victims and their families with help of church's financial director.

Church leaders report Glenn's acts to police

- Pierce County prosecutor charges Glenn with several counts of child molestation and child rape.
- At trial, Glenn moves to exclude:
 - 1) Confession to the elder (priest/penitent privilege);
 - 2) Letters to the victims (church had required them)

What is your opinion?

How It Plays Out Legally...

- Privilege under RCW 5.60.060(3) requires:
- Made to member of clergy

Must be made as a "confession in the course of discipline enjoined by the church."

Is an elder a "member of clergy" under statute?

Looked to RCW 26.44.020(11) definition of "clergy" as "regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination"

Elder testified he was ordained and therefore held was "clergy"

Was statement to elder a "confession?"

Conclusion if "confession" is established by clergyman's church. Is broadly construed to minimize discriminatory application.

Found in "home cell" literature that described "confession."

Confidentiality of Confession:

Held despite fact Church had policy of reporting abuse

Presume confidential absent evidence otherwise.

Letters to Victims:

Letters to victims not a "confession" to clergy...not privileged.

The Legal Outcome...

- The "Elder/Clergyman" did not have to testify.
- Glenn was convicted

Let's Analyze Your Test of Confidentiality

CONSTITUTIONALITY:

IS GOVERNMENT SPONSORED
CHAPLAINCY PERMISSIBLE UNDER
STATE AND FEDERAL
CONSTITUTIONS?

CASE IN POINT:
MALYON V. PIERCE COUNTY

Sheriff's Chaplaincy Under T-PCC Umbrella

- Non denominational but Christian organization that provided crisis intervention services to other municipalities, police and fire departments and 10 other entities at that time.... now about 30.
- Duties: 24 hour crisis intervention counseling, support of personnel, and death notification for Medical Examiner's Office.
- Neither organization nor volunteers received public funds.

■ Constitutional Federal Issue

■ U S CONSTITUTION: FIRST AMENDMENT

- "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...*"
- Test under "Establishment" clause is 3 pronged Lemon v Kurtzman analysis:
 - Must have a secular purpose
 - Principle or primary effect neither advances nor inhibits religion
 - Not foster an "excessive government entanglement"

CHAPLAINCY IN THE COURTS BEFORE MALYON Case

- Historical exception: Legislative chaplains (Chambers v. Marsh)
- Free Exercise exception: Military Chaplains (Katcoff v. Marsh), Prison Chaplains (Wash. Const. Art I § 11), Hospital Chaplains (Carter v. Broadlawns Medical Center)
- Only chaplaincy ever found unconstitutional was police chaplaincy (Voswinkel v. City of Charlotte)

State Constitutional Issue

- Washington State Constitution: Art. I § 11.
 - "*No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction or the support of any religious establishment.*"
- RCW 41.22.030
 - "*The legislature authorizes local law enforcement agencies to use the services of volunteer chaplains associated with an agency.*"

ACLU's CHARACTERIZATION: CHURCH V. STATE



"AS APPLIED" CHALLENGE

- Because all chaplains were Christian and because there were occasions where a chaplain participated in a spiritual discussion with a counselee the County should be barred from using any chaplain.
 - Promotional materials of private chaplaincy group identified self as "Christian Ministry"
 - ACLU reviewed chaplain reports and cited 67 that contained instances of "religious conduct" and quoted most inflammatory excerpts

Chaplaincy Reports: "Smoking Bible"

- "I had a chance to share about Jesus and she was real open to it."
- "I talked with her and she accepted the Lord and prayed with me! PTL! I will continue to follow up."
- "As it was Easter Sunday, I asked her if she would like for me to read some scripture to her or if she would like to pray."
- "Was able to share Gospel with him and he prayed with me. I will be following up with Bible Study and he said he would come to church with me."
- "We listened to her anger and frustration and shared Christ with her as her only hope. I made a follow up appt. for Wednesday and invited her to a ladies Bible study."

Defense: Remake Chaplaincy Into Opposite of Voswinkel

- Voswinkel struck down police chaplain program because:
 - Had agreement with specific congregation
 - For paid "minister"
 - Answerable to both church and state officials
- Negate Problems by Agreement And Training Of Chaplains:
 - Volunteers "to work under the direction of the Sheriff"
 - Instructed that when on duty they were answerable solely to the Sheriff and his chaplaincy coordinator and not representatives of their respective denominations (No police official discriminating between acceptable "spiritual advice" and unacceptable "religious instruction.")
 - Were uncompensated rather than paid

THE "MINISTER" PROBLEM (TPCC required volunteers be ministers)

- Voswinkel in dicta opined that "there is nothing unconstitutional in hiring a clergyman" to perform counseling services so long as make a selection "as a result of a religiously neutral process."
- County therefore published solicitation for bids to the general public containing a religiously neutral description of chaplaincy duties.
 - Only applicant was the Tacoma-Pierce County Chaplaincy and cannot discriminate on religion. (What other trained counselors willing to be on 24 hr a day call to deal with tragedies for no pay?)

Defendant's Characterization: Good v. Evil

Help us help
the hurting...



Tacoma-Pierce County
Chaplaincy

A nonprofit agency dedicated to
helping people in times of tragedy



"APPLIED" AS DEFENSE



Assertion chaplains were all Christians:

Was impermissible attack based on their religious beliefs.
TPCC only organization that applied for secular program and County could not discriminate against them just because they were Christian organization without violating First Amendment free exercise clause.

Assertion participated in spiritual discussions:

Reflected underlying anti-religious agenda.
Report analysis was "lies, damn lies and statistics"
Atheistic psychologists do same counseling.

U.S. CONSTITUTIONAL DEFENSE

- Try to avoid Lemon test by applying historical and free exercise exceptions.
 - History established that draftsmen of 1st Amend saw no threat from legislative or military chaplains.
 - Like in military and prison, absent a chaplain program "practice of religion would otherwise be denied as a practical matter to all or a substantial number" in Sheriff's Department.
- Apply three prong Lemon test to chaplaincy.
 - Secular Purpose (Not disputed element.)
 - Primary effect to advance religion
 - Excessive Government Entanglement

Lemon's Second Prong: "Primary effect to advance religion?"

- Claimed chaplain reports showed "repeated effort to promote religious worship and exercise."
- Defense: "Advancing religion" not "primary" effect.
 - Merely acknowledges private choice of person in crisis.
 - Reflects accepted secular professional practice (DSM IV).
 - Services available to all regardless of their beliefs.

Lemon's Third Prong: "Excessive Government Entanglement?"

- County had exclusive relationship with a Christian Ministry to perform services.
- Defense: Voswinkel
 - Christian organization operates chaplaincy only because it was the only respondent to a religiously neutral solicitation for bids to provide volunteer services.
 - Counseling position to which any counselor could apply on religiously neutral grounds is not a government action that could reasonably be said to threaten an establishment of religion
 - Otherwise requires religious discrimination by County.

State Constitutional Issue

- *"No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Art. 1 sec. 11*
 - Services not "religious" because same as secular approach.
 - No public money or property "appropriated for" or "applied to" such counseling.
 - Not "religious establishment" because neutrally selected.

STATE CONSTITUTION UNCONSTITUTIONAL

- Free Exercise: Refusing crisis intervention to those whose response is to raise spiritual concerns is "hostility" not "neutrality" in government's relations with religious believers and non-believers.
- Free Speech: Barring crisis intervention services because one in crisis may need to discuss spiritual beliefs punishes a citizen by depriving him of a service solely because of the content of his speech.
- Equal protection: No compelling reason to deny crisis intervention services to member of protected class where services otherwise available to all.

MALYON DECISIONS



Superior Court, Court of Appeals and Supreme Court
Nine (9) Long Years

Malyon is the "final piece of the chaplaincy case law picture" – 35 Hastings Const. L. Q. 505 (2008)

- Last challenge from Freedom From Religion Foundation against VA hospital system's chaplain program that was dismissed in August 2008 because it lacked taxpayer standing (Freedom from Religion Found., Inc. v. Nicholson, 536 F.3d 730 (2008))
- FFRA expected to file another suit once they find someone in VA hospital who claims they were harmed by the chaplaincy program.

How To Structure Chaplaincy To Avoid Constitutional Challenges?



"The question is how to do it! These things must be done ... delicately." -- Wicked Witch of the West

Choosing Chaplains

■ RELIGIOUSLY NEUTRAL SOLICITATION

Use procedure for public bidding on government contract because designed to avoid appearance of impropriety or allegations of **back room deals**.

COMPOSITION OF CHAPLAINS

TPCC not sectarian (composed of many denominations, not all Protestant), but complicated by being unabashedly Christian.

Avoided problem because was only applicant and cannot discriminate against because Christian

Preferable be as interdenominational and multi-faith as possible but if not, essential be willing to work with those outside their group.

Program Guidelines And Duties

- **Have** outside entity coordinate chaplaincy for no compensation other than providing services and things necessary for volunteers to function.

Ensure private entity providing volunteers have policies against proselytizing.

Should not ban all religious or spiritual issues -- not only because bad from therapeutic perspective -- but can be seen as discriminatory.

Do not have reports detail spiritual or religious aspect of counseling and thereby through incompleteness or illegibility give ammunition that imposed religious or spiritual issue on subject.

Program Guidelines And Duties, cont.

Avoid if possible any chaplain activity conducted, or offices located, on municipal property.

- **Copy the "Winner"** as nearly as possible.

QUESTIONS?