

Confidentiality

Hello! My name is Brian DeCook. I'm an attorney from Kankakee, Illinois. I've been invited to hear three sessions with you about some legal issues that impact church planters, pastors, and churches. The first of those is the topic we'll discuss in this session which is confidentiality. There are two legal concepts that relate to communications that you as a church planter or pastor or leader will have with people who come to you for counsel, advice, and spiritual encouragement.

Before we get into the content of this session, I need to give you my legal disclaimer. That is that the contents of this lecture should not be construed as legal advice or relied upon as legal advice in any given factual situation. The material covered in this lecture is a summary overview of the topics covered. If you find yourself in a situation where the material covered in this lecture is that issue, you can consult a local attorney who is competent in this area of the law.

The first concept I want to introduce is confidentiality of communication. The second is the clergy penitent privilege that prohibits the disclosure of confidential communications in a legal proceeding. Understanding and properly applying these two concepts won't necessarily make you an effective counselor. But I guarantee you that you'll never become an effective counselor if you're unable to keep information obtained during spiritual counseling sessions confidential.

As we discuss confidentiality, we're talking about communications that create an expectation that the information exchanged will not be disclosed to third parties unless authorization or consent is obtained to disclose the information. It is my intention in this session to define the scope of confidentiality, identify the exceptions and limitations to confidentiality, and provide you with some biblical encouragement for dealing with this issue.

Why does confidentiality matter? The importance of maintaining confidentiality is best described by considering what happens when a confidential communication is disclosed without authorization. At a minimum, trust is broken and will be difficult to re-establish. It's unlikely that the person whose confidence you have betrayed will continue to seek your counsel and advice. But often, more important than the impact on your relationship with the person you're counseling is the damage a breach of

confidentiality can cause in the relationships and situations for which the counselee originally sought your advice and counsel.

If the breach of confidence becomes known to others, your credibility as someone who is able to maintain confidences will be damaged and people who might otherwise seek your counsel may hesitate to do so. In a worst case scenario, you could face personal legal liability for unauthorized disclosure of confidential information. Under a number of legal theories such as invasion of privacy, breach of fiduciary duty, and the intentional infliction of emotional distress.

The American Association of Christian Counseling addresses the duty to maintain confidentiality and its code of ethics as follows:

“Christian counselors maintain client confidentiality to the fullest extent allowed by law, professional ethics, and church or organizational rules. Confidential client communications include all verbal, written, telephonic, audio or videotaped or electronic communications arising within the helping relationship. Apart from the exceptions below, Christian counselors shall not disclose confidential client communications without first discussing the intended disclosure and securing written consent from the client or client representative.”

While this rule is binding only on counselors that are certified by the AACC, it is instructive for our discussion and that it highlights the importance of obtaining informed consent from a counselee before making any disclosure of confidential information. The counselee has the right to expect that disclosures made to you will remain confidential and that privacy will be respected. There are however some noted exceptions and limitations to confidentiality. The question is, under what circumstances can a counselor disregard the boundaries of confidentiality? We'll discuss three types of exceptions in this lecture.

The first is mandatory reporting of abuse situations such as child or elder abuse. These are public policy exceptions to confidentiality based on protecting those who cannot protect themselves and these are state-specific exceptions. We'll discuss court order disclosures and third, necessary disclosures to protect life in the face of client threats of suicide, homicide, or imminent harm to others. Some states also have a duty to warn statute that creates a duty to disclose confidential information in these situations.

We'll discuss mandatory reporting statutes in a future session on child protection. But in brief, you need to be aware of the mandatory reporting statutes in your state and how they impact clergy. Each state has its own mandatory reporting system and you should be familiar with your duties under those laws. When a court requests a disclosure of confidential information such as being called to testify in a court of law about a confidential conversation that you had with a counselee, the clergy penitent privilege is triggered.

Every state in the United States has a law making certain communication to clergy privileged, which means that neither the minister or the person who the minister is counseling can be forced to testify in open court a deposition or other legal proceeding about that conversation. In order for the clergy penitent privilege to exist, certain requirements must be satisfied. Let's look at these requirements.

First, there must be a communication that is made in confidence to a minister who is acting in their capacity as a spiritual adviser in the course of discipline. For the clergy penitent privilege to apply, there must first be a communication. The privilege only extends to actual communications between an individual and a minister. The communication must be made in confidence. This generally means that there are no other persons present besides the minister and the individual.

If a third party is present or a third party who can overhear the conversation, the expectation of privacy and confidentiality is lacking and the privilege will not apply. For the privilege to apply, the communication must also be made to a minister. Statements made to lay counselors, elders, deacons, un-ordained or self-proclaimed ministers are not privileged because they are not made to a member of the clergy. The communication must be made to the minister while acting in the professional capacity as a spiritual adviser. There is no expectation of privacy if the communication is made to the pastor when the pastor is not acting in the capacity of a spiritual adviser.

Finally, in some states, the communication must be made to the pastor in the course of discipline. While most courts interpret this requirement broadly to cover statements made in the course of spiritual counseling advice, other courts have interpreted it narrowly to apply only to confessions made to Catholic priests. Again, this area of the law is state-specific so you would need to be aware of the particular court rulings and any applicable statutes in your state to see where that state applies in this rule.

Let's look at a checklist that we can go through to determine whether the pastor penitent privilege applies in a given situation. Is there a communication? Was it made in confidence? Was it made to a pastor? Was the pastor acting in a professional capacity? Are you legally authorized to assert the privilege? Has the individual waived the privilege? In most states, either the minister or the individual can assert the clergy penitent privilege although the pastor can do so only on behalf of the individual. The minister cannot independently assert the privilege if the counselee chooses not to do so.

The privilege can be waived by the individual by disclosing the conversation with the pastor to a third party. In some states, the pastor can waive the privilege by doing the same thing. Once the privilege is waived intentionally or unintentionally, the communication is subject to disclosure in a court proceeding.

In closing this session, I want to provide you with some encouragement from God's word about confidentiality. When we break someone's confidence except in situations where the discloser is justified by law or the protection of life and safety, we engage in gossip. Here are some words of encouragement from the Book of Proverbs regarding gossip. Proverbs 11:13, "A gossip betrays a confidence, but a trustworthy man keeps a secret." Proverbs 16:28, "A perverse man stirs up dissension and a gossip separates close friends." Proverbs 20:19, "A gossip betrays a confidence, so avoid a man who talks too much." Proverbs 26:20, "Without wood, a fire goes out. Without gossip, a quarrel dies down."

Thank you for viewing this session. I pray that the Lord makes you a person one who is trustworthy to hold the confidences that the people of the Lord sends to you, share with you in communicating their needs. Lord bless you. For more information on this topic and other legal topics affecting pastors and churches, I recommend a four-volume set published by Christianity Today International written by Richard Hammar titled *Pastor, Church, and Law*. God bless you and we'll see you in the next session.