

The Pastor-



Penitent
Relationship

Privileged Communications

A Report of the Commission on Theology and Church Relations
of The Lutheran Church—Missouri Synod

September 1999

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THE PASTOR-PENITENT RELATIONSHIP¹

Privileged Communications

Introduction

Traditionally communications within the “pastor-penitent” relationship have been considered legally privileged. It was generally thought that a clergyman could not be compelled by law to divulge the contents of such communications. However, pressures within the legal system in recent years have been brought to bear upon certain of these types of communications. A report in *Christianity Today* titled “Pastoral Privilege Questioned” detailed a possible court battle over the use of information confessed to a priest in the confessional in a case involving sexual abuse among Roman Catholic clergy.² Attempts have been made to record the private confessions of prisoners in the State of Oregon. The result was a vigorous protest from the Portland Archdiocese.³ And, in England Basil Cardinal Hume, the late Roman Catholic Archbishop of Westminster, thwarted attempts by the British government to conceal microphones in confessionals to catch criminals.⁴

Particularly with the rise of reports of sexual abuse, pressure is being placed on clergy to reveal what is said to them by the penitent under the seal of the confessional. Some states have enacted statutes compelling certain professionals, including clergymen, to report suspected cases of child abuse, even where the suspicion or knowledge arises in the context of a confession.⁵ A recent article by a Congregational Church pastor details some of the specific concerns shared by clergy over these issues.⁶

¹ This document responds to a September 1994 request from the Board of Directors of the Eastern District of The Lutheran Church—Missouri Synod “to study the question of privileged communications within the ‘pastor-penitent’ relationship on the basis of Scripture, the historical tradition of the church, and legal constraints” for guidance to the members of the Synod.

² “Pastoral Privilege Questioned,” *Christianity Today* 26 (January 11, 1993):42.

³ See the report on “Recording of Prisoner’s Sacramental Confession Violated Rights” in *Origins* 26 (February 6, 1997):537-45.

⁴ From the “Ecumenical News International” on the Internet, February 14, 1997.

⁵ See, e.g., Ohio Revised Code, Section 2151.421.

⁶ D. Elizabeth Audette, “Confidentiality in the church: What the pastor knows and tells,” *The Christian Century* 115 (January 28, 1998):80-85.

The Lutheran View of “Privileged Communications and the Pastoral Office”

In the Lutheran church communications between a pastor and a penitent in the pastor’s administration of the duties of his office, particularly in the care of the souls entrusted to him, consistently have been regarded as confidential. Such communications include private confession and absolution⁷ and private pastoral instruction and counsel. By virtue of his ordination and the office into which he is called, the pastor has had his lips sealed from speaking about the sins of the penitent to anyone, including a court of law.⁸

Martin Luther said very little about privileged communication between the pastor and the penitent, especially in terms of some of our contemporary concerns. However, he did write a brief pamphlet in 1521 titled “An Instruction to Penitents Concerning the Forbidden Books of Dr. M. Luther” in response to the use of the confessional by confessors to investigate whether the penitents were reading Luther’s writings. He encourages those penitents who are subjected to such scrutiny to say the following to their father-confessor:

“My dear sir, you are a father-confessor, not an officer. I am obliged to confess what my conscience prompts me to confess. It is not your duty to force me to confess; neither is it your duty to probe the secrets of my heart. You might just as well inquire how many pennies I have in my pocket. If I do not tell something I know, then the risk is mine—what business is it of yours? Absolve me as is your duty, and after that argue with Luther, the pope, or whomever you like. Do not make the holy sacrament of confession the occasion for a quarrel, or a disputation, or a source of danger for me. This kind of matter does not belong to the confessional. I will answer these charges at the proper place or time.”

I also make the same request of the father-confessors and ask them to restrain themselves and not snatch at God’s jurisdiction.

⁷ See Luke 10:16; John 20:21-23; Matt. 16:18-20.

⁸ Wilhelm Löhe wrote concerning “The Seal of the Confessional”: “For his oath of office has already pressed a seal upon the lips of the father confessor, to wit, that he dare not say what has been entrusted to him in Confession. In him you have a friend who has been obligated by God Himself to be your true friend and to guard his tongue, hence, a friend who has an advantage over every other. It is even as though you spoke your confession into a silent tomb; as little as this taciturn place will your father confessor tell on you. Yes, the father confessor receives your confession in God’s stead, and just as God hears and keeps secret all confessions, so must also the father confessor keep everything secret.

Note: Not even at the insistence of worldly authority dare a father confessor reveal a confession. ‘So long as God keeps silent,’ says Luther, ‘should the chaplain or whoever hears confession also keep silent. For he who confessed it to him, has not confessed it to a man, but to God, in whose place the preacher sits. Therefore, he shall keep it secret.’ ‘One must distinguish between Church and worldly government,’ is his topic.” Wilhelm Löhe, “Simple Instructions in Confession,” trans. Delvin E. Ressel and cited in *Una Sancta X*, No. 2 (1951): 9.

The secrets of the heart are reserved for him alone, as Psalm 7[:9] says, “He searches the reins and the heart.” They should thank God that they are through with a line of inquiry so fraught with danger and are obliged to do nothing more than to hear confession and pronounce absolution. There is no need to force anyone to disclose the secrets of his heart.⁹

Dr. C.F.W. Walther refers to Luther’s comments concerning privileged communication between the pastor and penitent in Luther’s *Table Talk*:

The preacher must not reveal what has been confessed to him. In Luther’s *Table Talk* it says: “Someone asked Dr. M. Luther and said: If a pastor and father confessor had absolved a woman who had killed her child, and it was later revealed and made known by other people, would the preacher also have to testify to the judge if he were asked about it? Then he [Luther] answered: Absolutely not! For one must distinguish between churchly and worldly government since she has confessed it not to me but to the Lord Christ, and if Christ keeps it secret, I should also keep it secret and say nothing more than: I have heard nothing; if Christ has heard something, let Him tell it” (XXII, 879).

When Luther was told that the [city] council of Venice had sentenced to be burned a monk who had absolved someone for a murder he had confessed to him and had then let himself be moved by bribery to reveal it, Luther stated: “This is a correct, good, reasonable sentence and wise decision of the council, and the monk is properly burned as a betrayer.”¹⁰

It is clear that the privacy of the confessional was taken very seriously by Luther.

Dr. Walther devotes considerable space in his *Pastorale* to the seal of confession and confidentiality. Appealing to Johannes Fecht, a theology professor at Rostock (1636-1716), and an orthodox Lutheran who was opposed to Pietism,¹¹ Walther writes:

A preacher who gossips about what has been confessed to him has forfeited his office and deserves to be deposed. Fecht writes: “That obligation (not to break the seal of confession) is based on a tacit contract between the one hearing and the one making the con-

⁹ Martin Luther, “An Instruction to Penitents Concerning the Forbidden Books of Dr. M. Luther” (1521), *Luther’s Works*, American Edition [hereafter *LW*] (Philadelphia: Fortress Press, 1966), 44:224.

¹⁰ C.F.W. Walther, *American Lutheran Pastoral Theology*, translated and abridged by John M. Drickamer from the Fifth Edition, 1906 (New Haven, MO: Lutheran News, Inc., 1995), 126-27.

¹¹ Walther cites from the second edition of J. Fecht’s *Instructio pastoralis* (1722), which is edited by G. F. Fecht. By using Fecht, Walther shows that there is continuity between Luther and later Lutheran theologians.

fession. For if a minister of the church were not obligated to the strictest silence, the listener would be acting very foolishly if he confessed anything to him that could be damaging Also in this action the minister of the church is not considered to be an accuser, an investigator, or a judge. Finally not only the Roman church but also our whole Lutheran church commands that this silence be considered holy. With reference to the seal of confession, however, it should also be noted that it extends not only to what occurs in the confessional chair itself between the one hearing and the one making the confession, but also to all other private actions which the father confessor undertakes pastorally [*seelsorgerisch*] with the one making the confession unless he had explicitly recognized what he was speaking to him in a different relationship [in other words, the whole pastoral relationship is confidential]. (*Instruct. pastoral.*, Cap. XIII, sec. 33, p. 151).

The preacher should guard his tongue with all seriousness. Even if he presents a case without names for instruction, he should see to it that he does not do it in such a way that others can guess about whom he is speaking. He should destroy letters that contain confessions as soon as their purpose has been fulfilled.¹²

A clear line of continuity exists between Walther and 20th century Missouri Synod practice as it is expressed in John H.C. Fritz's *Pastoral Theology* and the *Pastoral Theology* of Norbert H. Mueller and George Kraus.¹³ Dr. Fritz's *Pastoral Theology* contains an extended discussion concerning the seal of the confessional. In a section titled "*Sigillum Confessionis*" [the seal of confession] within Chapter 12 on "The Sacrament of the Altar," Fritz writes:

A pastor should never reveal what has been told him by way of private confession. A pastor who becomes guilty of such an offense, says Walther, deserves to be deposed from office. When a confession is made, it is in the very nature of the case that there really exists a silent agreement between both parties that whatever is confessed is said *inter nos* in the strictest sense of these words and dare not be revealed. That holds good not only when persons make

¹² Walther, *American Lutheran Pastoral Theology*, 127. See also Fred L. Precht, "Confession and Absolution: Sin and Forgiveness," in *Lutheran Worship: History and Practice*, ed. Fred L. Precht (St. Louis: Concordia Publishing House, 1993), 346-47. Dr. Precht cites *Kirchen-Agende für Evangelisch-Lutherischen Gemeinden ungeänderter Augsburgischer Confession* [22], the first agenda of the LCMS, and notes the following about the order of Holy Communion for the sick that indirectly addresses the privileged character of the pastor/penitent relationship: "The privacy of this confession is guarded by the rubric that directs everyone except the pastor to leave the room" (347).

¹³ John H.C. Fritz, *Pastoral Theology: A Handbook of Scriptural Principles* (St. Louis: Concordia Publishing House, 1932), and Norbert H. Mueller and George Kraus, *Pastoral Theology* (St. Louis: Concordia Publishing House, 1990).

a confession prior to receiving Communion, but at any time: at the sick-bed, when the pastor makes a pastoral call, when a member comes to see the pastor expressly for that purpose, or whatever the circumstances may be. In this respect Christians ought to be in a position to put absolute confidence in their spiritual adviser. The pastor should be known to be a man who can hold his tongue.¹⁴

Mueller and Kraus' *Pastoral Theology* continues Fritz's accent on confidentiality:

Confidentiality: To the extent that speaking the absolution is being the voice of God, so hearing the confession is being the ears of God. To the confessional prayer of Psalm 51, to "wash away all my iniquity and cleanse me from my sin . . . [to] create in me a clean heart," the absolution responds with Ps. 103:12, "As far as the east is from the west, so far has he [God] removed our transgressions from us." Therefore, under no circumstances should a pastor reveal anything told him in confession by a penitent. Normally, the so-called confessional seal will be recognized and respected by civil authorities, but even if it were not, the pastor must stand by the promises which he has solemnly made before the altar and the congregation in his ordination and installation (i.e., not to divulge the sins confessed to him, *Lutheran Worship Agenda*, pp. 212, 225). The pastor who uses the specifics heard in the confessional (even if from a previous parish) as "sermon fodder" drives his flock away from the most blessed opportunity for personalized justification.¹⁵

Accordingly, confidentiality is critical, especially (but not only) to the penitent. The forgiveness of sin is free and total, so that God says that he no longer "remembers" the sin, that he no longer holds our sins against us (Is. 43:25; Jer. 31:34). Similarly, the pastor through whom absolution is declared no longer "remembers" the matter.¹⁶ The penitent must be assured that the communications he or she makes to the pastor are protected by the seal of the confessional. Confession is therefore encouraged when sins may be fully and freely confessed.¹⁷

¹⁴ Fritz, *Pastoral Theology*, 135. In a footnote on p. 136 Fritz notes: "While preparing the MS. [manuscript] for this book, a Lutheran minister in the State of Minnesota was held in contempt of court and sentenced to a fine of \$100 or to serve thirty days in jail because he refused to divulge a confessional secret; however, the *Supreme Court*, to which the case was appealed, *sustained* the pastor. *Theol. Mthly.*, Vol. II [1931], p. 705." (emphasis in Fritz)

¹⁵ Mueller and Kraus, *Pastoral Theology*, 122. This discussion of confidentiality occurs in a chapter dedicated to "Individual Confession and Absolution" in "Unit IV: The Pastor Applies the Word and Sacrament in Individual Circumstances."

¹⁶ When teaching the doctrine of justification, pastors sometimes remind their congregations that our relationship with God through Christ is "Just as if I'd never sinned."

¹⁷ The Eighth Commandment also compels pastors and laypersons alike to hold in strict confidence incriminating communications from friends and others who confide in them.

The Ordination Rite in *Lutheran Worship Agenda*

Mueller and Kraus cite the Ordination Rite in the *Lutheran Worship Agenda* which clearly asks the candidate in the vows taken at ordination: “Will you forgive the sins of those who repent, **and will you promise never to divulge the sins confessed to you?**”¹⁸ The response to this question is “I will with the help of God.” This vow comes after the ordinator has asked the ordinand “in the presence of God and of this congregation” whether he believes the “canonical books of the Old Testament to be the inspired Word of God,” accepts the Ecumenical Creeds “as faithful testimonies to the truth of the Holy Scriptures,” believes that the *Book of Concord* is “in agreement with this one scriptural faith,” and whether the ordinand will “solemnly promise” to “perform the duties of [his] office in accordance with these Confessions, or Symbols.”¹⁹ The oath to maintain the seal of the confession is placed alongside such solemn promises as belief in the Scriptures as the Word of God and the *Book of Concord* as a true exposition of the same.²⁰

Recognition of the Privilege by the State

In recent decades civil authorities have afforded less protection to religious institutions under the First Amendment’s establishment and free exercise clauses. It is increasingly difficult to withstand the pressure to divulge confessional confidences in efforts to “discover the truth.” Nonetheless, courts generally recognize a privilege claimed by pastors who refuse to divulge what is communicated to them by parishioners—although the extent to which the privilege is recognized may vary from state-to-state. Many states recognize the privilege even beyond the traditional setting of the confessional. And, for the most part, the privilege is recognized in instances where a communication is made in confidence to

¹⁸ *Lutheran Worship Agenda* (St. Louis: Concordia Publishing House, 1984), 212 (emphasis added). This same vow is also spoken in the installation rite (225). This promise of confidentiality stands in the context of the following vows: “Will you faithfully instruct both young and old in the chief articles of Christian doctrine; will you forgive the sins of those who repent, and will you promise never to divulge the sins confessed to you; will you minister faithfully to the sick and dying; will you demonstrate to the Church a constant and ready ministry, admonishing the people to a lively confidence in Christ and holy living?” (emphasis added)

¹⁹ *Agenda*, 212, 225.

²⁰ It should be noted that in the previous *The Lutheran Agenda* (St. Louis: Concordia Publishing House, n.d.), the ordination rite is parallel except for the paragraph cited in the preceding footnote that refers to the “seal of the confession.” Thus, many pastors in the LCMS were not ordained with this vow or promise at their ordination, although many may have made this promise since 1984 in their installation in a new parish if the new installation rite was used.

a pastor while the pastor is acting in the capacity of confessor *or spiritual advisor*.²¹ It is not necessary that the person communicating to the pastor be a member of the congregation the pastor is serving.²² However, some civil authorities will not recognize the privilege if the communication is also made in front of a third person, such as a pastor's wife, secretary or other church member.

A state-by-state review of this issue is impractical. Indeed, such a review would not be determinative of the questions facing our pastors in this area. Though we are called to be obedient and responsible citizens of our community, state and nation, we also recognize that the responsibilities of our pastors are based on fundamental scriptural and theological principles irrespective of any civil authority (See, e.g., Acts 4:19-20). So also, in the context of our Lutheran heritage we seek guidance and instruction from our church fathers and those who followed them.

Distinctions in Pastoral Practice

Certain distinctions may be helpful as pastors wrestle with the issue of confidentiality within the pastor-penitent relationship. The first relates to communications which may be confessional in nature as opposed to those which are not. The vow taken by many of our pastors relates specifically to "sins confessed to you." However, communications between pastor and member or penitent occur in contexts other than what might be considered strictly confessional. And pastors do not necessarily (nor are they expected to) differentiate between communications that are in the form of confessions and those that are not. In properly providing scriptural and spiritual guidance and direction, a pastor may deem it necessary to assure his members that their discussions are confidential. This provides assurance to the member who will feel more comfortable in sharing his or her concerns without fear of betrayal and will encourage full and free discourse that may well aid the pastor in his responsibilities to those he counsels.²³ Therefore, communications in such circumstances, whether "confessional" or not, should be considered confidential.

Second, the pastor has promised to undertake other solemn obligations that include the protection of his flock through the performance of his duties. The vow to keep confidences must be viewed in conjunction with other obligations that also bind the pastor. When a pastor's vow to keep confidences conflicts with other solemn promises he has made, pastoral

²¹ See, e.g., 735 ILCS 5/8-803 (Ill.).

²² See, *State v. Martin*, 959 P. 2d 152 (Wash. App. 1998).

²³ This document does not address counseling by pastors who are recognized by certifying or licensing authorities as "counselors" (e.g., marriage counselor, family counselor, etc.).

judgments have to be made by weighing the conflicting and competing interests involved.²⁴ In a sense, then, the vow of confidentiality does not stand alone as absolute.

Third, as indicated above, theological principles rather than legal constraints should guide a pastor's decisions in this regard. A pastor should not allow the particular degree of legal protection or compulsion in a given circumstance to dictate his pastoral judgments in this area. In making such judgments, the pastor should be guided by the demands of his office, not by the limitations of or protections afforded by the law.

Fourth, consideration needs to be given to a parishioner's expectations of confidentiality. The integrity of and confidence in the pastoral office are critical. Those who seek spiritual guidance must have full confidence in the pastor that statements he or she may make to the pastor in such a context will be held in strict confidence. It is only right, fair and ethical to inform the congregation of the potential limitations of confidentiality afforded to communications made to the pastor. This is so because great damage can be done to the relationship of confidence and trust between a pastor and his congregation if private communications are somehow divulged in instances where confidentiality was expected. In this context, the principles and guidelines which are included below should be shared with the congregation.

Finally, problematic questions also may arise where a pastor feels that the penitent is not truly "penitent" but rather is "using" the pastor in order to get something off his chest, with every intention to continue his erring ways.²⁵ A person is not free to "take unfair advantage" of the pastoral office through hypocritical means or to compromise or neutralize the pastor by revealing sinful behavior and then threatening the pastor should he feel compelled to disclose it.²⁶

²⁴ In appropriate circumstances a pastor should consider encouraging the penitent to reveal his or her sinful conduct to those harmed by it or even to the authorities. Also, referral to other professionals for help in dealing with the behavior and its underlying cause(s) may be appropriate. This responsibility would become even more acute in instances where, for example, a penitent may truly be "sorry" for his or her sinful conduct but the pastor determines that the penitent is likely to repeat that conduct. Persons who have abused children or who have embezzled funds must not be left in positions where temptation may overcome them. See also footnotes 25 and 26 below.

²⁵ Consider, for example, a church member who "confesses" to swindling numerous elderly members in a variety of investment scams and is now intending to move to another city where, the pastor suspects, he will undertake the same nasty business.

²⁶ An example of this is the member who embezzled funds from the church and, after suspecting that the pastor may be on to him, hurriedly "confessed" his sin before restoring the loss through monies stolen elsewhere. The pastor has every right to institute church discipline in accordance with Matt. 18:15-18.

Summary Principles and Practical Guidelines

Before we provide a set of guidelines, it may be helpful to summarize the *general principles* upon which they are based and that govern the pastor-penitent privilege.

1. The Lutheran Church—Missouri Synod practices and encourages individual confession and absolution which is a significant function of the pastoral office.
2. Historically, the Lutheran church has consistently and resolutely maintained the seal of the confessional, that is, the confidential nature of confessional communications. The Lutheran church expects its pastors to maintain this position.²⁷
3. Scriptural teaching regarding the pastoral office and its responsibilities supports the principle that communications made to a pastor by a person confessing his or her sin(s) are not to be disclosed.
4. Although there may be a distinction between communications to a pastor that are confessional in nature (made for the purpose of receiving forgiveness) and those that are not (offered for other reasons), communications to a pastor as pastor—except in the most extraordinary circumstances—are to be held in strict confidence as privileged communications.
5. Although certainly to be respected, the status of the civil law as it relates to confidential communications to a pastor does not dictate a pastor's decision as to whether and to what extent a communication is to be divulged.²⁸

²⁷ It is interesting to note that provision 7.45 in the *Constitution, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America* declares: "In keeping with the historic discipline and practice of the Lutheran church and to be true to a sacred trust inherent in the nature of the pastoral office, no ordained minister of this church shall divulge any confidential disclosure received in the course of the care of souls or otherwise in a professional capacity, nor testify concerning conduct observed by the ordained minister while working in a pastoral capacity, except with the express permission of the person who has given confidential information to the ordained minister or who was observed by the ordained minister, or if the person intends great harm to self or others."

²⁸ The Synod should consider offering through its legal counsel or the legal counsel of its Districts appropriate legal representation to pastors facing difficult questions or dilemmas in this area.

Therefore, the Commission on Theology and Church Relations offers the following *guidelines* for a pastor regarding confidential communications²⁹ received by him in his capacity as pastor:³⁰

1. A communication made by a penitent seeking absolution for a particular act must not be divulged, even if the act was criminal and even if the law may compel its disclosure.³¹ We recognize that in such an instance, the pastor's refusal may lead to criminal prosecution while his disclosure may lead to church discipline.
2. A communication made outside the context of a confession by a person who recognizes the sinfulness of the conduct communicated and who is not likely to put others in danger by repeating it, is not to be divulged.³²
3. Where a communication made to a pastor is confidential, it should not be disclosed solely because the penitent shared the communication in the presence of a third person.³³
4. Where a communication is made (whether in or outside the context of a confession) suggestive of an intended and/or imminent harmful act such that the person's or someone else's safety would be jeopardized if steps were not taken to hinder the penitent, a pastor must exercise his judgment in protecting the interests of those in danger.³⁴

Certainly situations may arise that are difficult to place within these guidelines. In such circumstances a pastor should seek the counsel of his

²⁹ Confidential communications may also be in written form.

³⁰ These guidelines should be read and considered as a whole.

³¹ Cf. footnote 24.

³² Such a communication may, for example, be made by a spouse and consist of an acknowledgment that he or she is susceptible to pornography, gambling, or had committed adultery years earlier. Certainly a pastor may encourage the person to share with or "confess" this to his or her spouse and others harmed by the sin, but the pastor should not divulge it.

Such a communication may also refer to a past sin or crime (such as income tax evasion) that the person uses as an example of his or her conduct in life prior to coming to faith in Christ as Savior.

³³ We are mindful of guidelines followed by some of our pastors who will only counsel with members of the opposite sex in the presence of a third person. We also recognize that in such instances the applicable law may not protect the pastor from being compelled to disclose the communication. See footnote 28.

³⁴ Of course, in such circumstances a pastor should first spend the available time with the penitent urging and admonishing that person against any such threatened harmful acts. Also, the person in the greatest danger of harm may be the penitent himself or herself (e.g., where the penitent may be under the influence of alcohol or drugs).

Generally, a pastor should seek that course of action which least impacts on the confidentiality of communications made to him as pastor.

fellow pastors and above all seek to discern God's will through prayerful examination of Scripture, the Lutheran Confessions and the writings of the fathers and teachers of the church.

Finally, the Commission recommends that congregations adopt these guidelines and make them generally available to their members.