



HENRY McMASTER
ATTORNEY GENERAL

April 6, 2010

The Honorable A. Shane Massey
South Carolina Senate, District 25
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Massey:

We received your letter requesting an opinion of this Office concerning priest-penitent privilege. You asked whether S.C. Code §19-11-90 applies to ministers who are licensed by their denominations, not ordained. Additionally, you asked which party may waive the priest-penitent privilege. Prior opinions of this Office have addressed the priest-penitent privilege in various contexts. This opinion will address those prior opinions, relevant statutes, and caselaw.

Law/Analysis

S.C. Code §19-11-90 provides that:

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.

The South Carolina Supreme Court held that, "South Carolina recognizes privilege in civil matters in attorney-client relations, husband-wife relations, and priest-penitent relations." South Carolina State Highway Dept. v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973).

In an opinion of this Office dated February 9, 2004, we stated as follows:

Nothing in §19-11-90 limits the scope of the privilege to a religion specifically involving a "priest." Nor is there any indication in this statute that the privilege does not extend to

members of the clergy generally. While the Code Title to §19-11-90 does refer to the “priest-penitent privilege,” such term is not referenced in the body of this Code Section. Rather, §19-11-90 makes reference to the privilege’s applicability as being to a “regular or duly ordained minister, priest or rabbi”

The so-called “priest-penitent” privilege in South Carolina is, in reality, a clergy-penitent privilege applicable generally to all clergy. Consistent with Rivers v. Rivers, [292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987)] and §19-11-90, the clergy-penitent privilege includes any “regular or duly ordained minister, priest or rabbi.” The privilege’s sweep would also likely extend, pursuant to §20-7-550, to a Christian Science Practitioner or religious healer and penitent.

In interpreting §19-11-90, the rules of statutory construction must be invoked. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987) explains that the fundamental rule of construction is to ascertain legislative intent and give effect to such intent. Words of the statute must be given their plain and ordinary meaning,¹ but construed in light of the General Assembly’s intended purpose.² The language of the statute is “no regular or duly ordained minister, priest or rabbi.” The plain and ordinary meaning of this language, when read in light of the Legislature’s intent, indicates that regular ministers, priests, and rabbis and ordained ministers, priests, and rabbis are protected from disclosing confidential communication properly entrusted to him in his professional capacity.

The last sentence of §19-11-90 reads: “This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.” It is difficult to ascertain whether “the party” to whom is referred in the statute is the priest or the penitent. The plain and ordinary meaning of “the party” does not guide one to either conclusion. Hence, one must look to the legislative intent.

The priest-penitent privilege is comparable to the attorney client privilege.³ It is well established that “it is the client who is the holder of the privilege, the power to waive it is his, and [his] alone, or his attorney or agent acting with his authority.” 1 McCormick on Evidence § 93 (6th ed.). Since “the attorney-client privilege belongs to the client, only the client can waive the privilege. The waiver

¹ State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

² State ex rel. McLeod v. Montgomery, 244 S.C. 308, 126 S.E.2d 778 (1964).

³ See also, S.C. Code § 44-53-140 states that when one is seeking treatment, counseling, or therapy for a drug problem, the “results of any examination to determine the existence of illegal or prohibited drugs in a holder’s body shall not be admissible in any proceeding against such holder. The privilege belongs to the holder and if he waives the right to claim the privilege the communication . . . shall be admissible.”

must be distinct and unequivocal.” 32 S.C. Jur. Witnesses § 31. An attorney owes a duty of confidentiality to his or her client; as a result, an attorney may invoke the attorney-client privilege on behalf of his or her client. Neither the attorney nor the client may be compelled to testify in court about protected communications. However, under normal circumstances, the attorney may not waive the privilege on client’s behalf.

Of course South Carolina is not bound by a North Carolina statute; however, N.C.G.S.A. § 8-53.2 (Communication between clergymen and communicants) is comparable to S.C. Code §19-11-90 (Priest-penitent privilege). The language of N.C.G.S.A. § 8-53.2⁴ is more specific and directly explains that the privilege “shall not apply where the communicant in open court waives the privilege conferred.” It is clear that only the communicant or penitent may waive the privilege.

Conclusion

Nothing in §19-11-90 limits the scope of the privilege to a religion or denomination specifically involving a “priest” or “ordained minister.” The opinion of this Office is that the statute extends to members of the clergy generally. While the language “licensed minister” is not used in the statute, the overarching intent of the Legislature indicates that a member of the clergy, regardless of religion or denomination, is protected from disclosing confidential communication⁵.

Just as the attorney may not waive the privilege on the client’s behalf under the attorney-client privilege, the clergyman may not waive the privilege on the penitent’s behalf under the priest-penitent privilege.

With this understanding, the language “party in whose favor it is made” should be interpreted as the penitent. Both the clergyman and the penitent alike may invoke the priest-penitent privilege.

⁴ “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.C.G.S.A. § 8-53.2.

⁵ Not every communication made to a clergyman is privileged. Under the statute, the communication must have been: 1) confidential; 2) disclosed to [a member of the clergy]; 3) entrusted to the [clergyman] in his or her professional capacity; and 4) of a type necessary to enable the [clergyman] to discharge his or her functions of the office. 32 S.C. Jur. Witnesses § 22

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However, only the penitent may waive the privilege or instruct the clergyman to waive the privilege on his behalf.

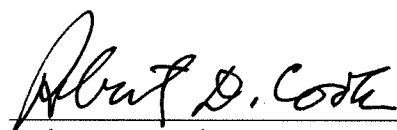
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



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