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The Clergy-Communicant Privilege: Blessed Are the Meek, For They Shall Remain Silent

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The clergy-communicant privilege,[1] like privileges in general, is an exception to the general rule that everyone should give testimony about facts within his or her knowledge when called on by a court to do so.[2] Unlike many evidentiary rules, which exclude evidence because it is irrelevant or unreliable,[3] privileges are based on public policy concerns and a determination that the benefits of preserving the secrecy of certain communications outweigh the need to have the evidence admitted in court.[4] Courts tend to construe privileges strictly and usually require that all the elements necessary to preserve the privilege must be present before the testimony of a person with privileged information will be excluded.[5]

North Carolina General Statutes section 8-53.2 sets out the clergy-communicant privilege and states:

> 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.[6]

The parameters of the privilege are defined by statute and any attempt to examine its scope requires a careful reading.[7] This Note examines the clergy-communicant privilege and the elements that are necessary for the privilege to apply.

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1. N.C. GEN. STAT. § 8-53.2 (1986).

2. *See* J. WIGMORE, WIGMORE ON EVIDENCE § 2285, at 527 (J. McNaughton rev. 1961 & Supp. 1986).

3. *See, e.g.*, N.C.R. EVID. 402 (1986) ("Evidence which is not relevant is not admissible."); N.C.R. EVID. 802 ("Hearsay is not admissible except as provided by statute or by these rules."); N.C.R. EVID. 804(b)(5) (Hearsay statements not covered by exceptions are admissible under certain conditions provided there exist "equivalent circumstantial guarantees of trustworthiness.").

4. *See* State v. 62.96247 Acres of Land, 57 Del. 40, 52-53, 193 A.2d 799, 806 (Del. Super. Ct. 1963).

5. *See, e.g.*, Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962) (applying N.C. GEN. STAT. § 8-53 (1986), which protects certain hospital records). In *Sims* the court examined the privilege afforded certain hospital records and stated that "[i]n some jurisdictions the privilege statutes are strictly construed on the theory that they are in derogation of the common law." *Id.*; *see, e.g.*, Johnson v. Commonwealth, 310 Ky. 557, 561, 221 S.W.2d 87, 89 (1949) (" 'The tendency of the courts is toward a strict construction of statutes making communications to clergymen privileged, and . . . only those communications are privileged which are made under the exact conditions enumerated in the statutes.' " (quoting 58 AM. JUR. *Witnesses* § 532 (1948)).

6. N.C. GEN. STAT. § 8-53.2 (1986).

7. *See In re* Williams, 269 N.C. 68, 77, 152 S.E.2d 317, 324 (strictly construing the clergy-communicant privilege), *cert. denied*, 388 U.S. 918 (1967).

It examines the requirement that the communication be made to a minister acting in his or her professional capacity, the requirement that the communicant be seeking spiritual counsel at the time of the communication, and the requirement that the communication be made in confidence. It also examines three recent cases in which the North Carolina appellate courts have interpreted and applied the privilege. The Note concludes that in two of these cases, the North Carolina Supreme Court and the North Carolina Court of Appeals correctly interpreted and applied the requirement that the communication be made to a minister acting in his or her professional capacity. It also concludes, however, that the supreme court, in its recent application of the requirements that the communicant be seeking spiritual counsel and that the communication be made in confidence, misinterpreted the wording of the privilege and may undermine the policy objectives behind it.

In 1985 and 1986 the North Carolina appellate courts examined the clergy-communicant privilege in three cases. In *State v. Jackson*[8] the court of appeals confronted a situation in which part of a conversation between a minister and her nephew involved the minister acting in a professional capacity, but also involved a discussion of family matters between close relatives. In *Jackson* the defendant was accused of raping his cousin and burglarizing her home.[9] While defendant was in jail awaiting trial, his aunt, the victim's mother—who was also an ordained minister—visited defendant.[10] During these visits the two talked and prayed together, and in the course of their conversation defendant admitted to his aunt that he had committed the crimes for which he was charged.[11]

At trial the aunt testified that she approached defendant "both as a close relative and as a minister."[12] She told the court what defendant had said to her and indicated that he admitted his guilt to her.[13] Appealing from a verdict of guilty on both counts, defendant claimed the trial court erred in admitting the aunt's testimony because she was an ordained minister and, therefore, the communication between her and defendant was protected by the state's clergy-communicant privilege.[14]

The North Carolina Court of Appeals reversed the trial court and remanded the case for a new trial.[15] The court of appeals stated that the aunt "initiated the visits to the defendant" and that she "approached him both as a close relative and as a minister."[16] The court then held it was "impossible to determine to what extent the defendant confided in [the aunt] as a relative and to what extent as a minister."[17] Thus, the court determined the entire communica-

8. 77 N.C. App. 832, 336 S.E.2d 437 (1985), *disc. rev. denied*, 316 N.C. 199, 341 S.E.2d 572 (1986).
9. *Id.* at 832, 336 S.E.2d at 438.
10. *Id.* at 833, 336 S.E.2d at 438.
11. *Id.* at 833-34, 336 S.E.2d 438.
12. *Id.* at 833, 336 S.E.2d at 438.
13. *Id.* at 833-34, 336 S.E.2d at 438.
14. *Id.* at 833, 336 S.E.2d at 438.
15. *Id.* at 834, 336 S.E.2d at 438.
16. *Id.* at 833, 336 S.E.2d at 438.
17. *Id.* at 834, 336 S.E.2d at 438.

tion was privileged, and the trial court erred in admitting the aunt's testimony regarding what defendant told her during her visits to the jail.[18]

In *State v. Barber*[19] the North Carolina Supreme Court examined a conversation between defendant and a close friend to determine whether the friend was a minister acting in a professional capacity, and whether defendant was seeking spiritual counseling at the time of the conversation. In *Barber* defendant was charged with two counts of first degree rape involving his five-year old adopted daughter.[20] Included in the testimony at trial was that of defendant's neighbor, Michael Barrier.[21] Defendant objected to Barrier's testimony on the grounds that Barrier was an ordained minister and any communication between Barrier and defendant was protected by the clergy-communicant privilege.[22] The trial court, after a *voir dire* hearing on the matter, ruled that Barrier was neither an ordained nor a licensed minister and, therefore, the privilege did not apply.[23] Barrier then testified that defendant told him about an incident in which defendant had sexual intercourse with his adopted daughter.[24]

Defendant appealed based on three assignments of error, including the trial court's refusal to exclude Barrier's testimony.[25] The supreme court held the clergy-communicant privilege inapplicable for two reasons. First, Barrier was not an ordained minister or clergyman at the time defendant confessed the incident to him.[26] Second, the court found that Barrier and defendant had been friends for some time and that the nature of their conversation indicated that defendant approached Barrier not seeking spiritual guidance but solely as a friend.[27] Therefore, the court held the privilege inapplicable, because the communication was not entrusted to Barrier in any professional capacity as a minister and because defendant was not seeking spiritual guidance at the time he made the communication.[28]

In *State v. West*[29] the supreme court interpreted the meaning of "seeking spiritual counsel and advice"[30] within the meaning of the privilege statute, and also determined whether the presence of a third party during the communication destroyed the confidentiality requirement of the privilege. Defendant in *West*

18. *Id.*
19. 317 N.C. 502, 346 S.E.2d 441 (1986).
20. *Id.* at 503, 346 S.E.2d at 442.
21. *Id.* at 507, 346 S.E.2d at 444-45.
22. *Id.*
23. *Id.* at 507-08, 346 S.E.2d at 444-45.
24. *Id.*
25. *Id.* at 503, 346 S.E.2d at 442. Because defendant received a life sentence he appealed directly to the supreme court pursuant to N.C. GEN. STAT. § 7A-27(a) (1986). *Id.* at 502, 346 S.E.2d at 442. Defendant also claimed the trial court erred in not allowing him to cross-examine the six-year old victim concerning her testimony given during a competency *voir dire*. *Id.* at 503, 346 S.E.2d at 442. In addition, defendant claimed the trial court erroneously permitted the prosecutor to comment on defendant's failure to testify. *Id.* The supreme court found all three assignments of error meritless. *Id.*
26. *Id.* at 509, 346 S.E.2d at 445.
27. *Id.* at 509, 346 S.E.2d at 446.
28. *Id.*
29. 317 N.C. 219, 345 S.E.2d 186 (1986).
30. N.C. GEN. STAT. § 8-53.2 (1986).

was accused of first-degree rape and first-degree sexual offense.[31] The victim was defendant's fourteen-year old stepdaughter who, according to her testimony, had been subjected to several sexual attacks by defendant over a period of at least three years.[32] During the last attempted attack, the victim escaped through her bedroom window and ran to a neighbor's house.[33] After the victim told the neighbor about the previous attacks, the neighbor drove her to the parsonage of defendant's family church. The victim then told her family's minister, Reverend Black, and his wife what had happened.[34]

Later, after meeting with both the victim and her mother, the minister and his wife met with defendant at the parsonage.[35] According to Black's testimony, defendant "elaborated on his sexual desires, telling the preacher that he had had intercourse with [the victim] from when she was around nine years old, that he would just go into a 'rage' and that he had bought pornographic literature and women's underwear."[36] Following his conviction, defendant appealed claiming the conversation with Reverend Black and his wife was privileged and the trial court erred in admitting Reverend Black's testimony.[37]

The supreme court rejected defendant's claim on two grounds. First, because the minister's wife was present during the conversation, defendant had no reason to expect the communication was confidential.[38] The court interpreted the requirement of North Carolina General Statutes section 8-53.2 that the communication be "entrusted" to the minister to mean that the communication must be one intended to be confidential. Therefore, the court held that confidentiality was destroyed by the presence of the minister's wife.[39] Second, the court referred to the minister's testimony indicating that he had told defendant's wife that defendant " 'needed help' and that he 'was going to try to help him.' "[40] These words, the court stated, indicated that the minister sought out defendant for the purpose of rendering spiritual advice and counsel, not that defendant sought advice and counsel.[41] The court concluded the requirement that the communicant be seeking spiritual advice and counsel was not met; thus, the privilege did not apply.[42]

In all three of these cases the courts defined the scope of the clergy-communicant privilege by examining the language of section 8-53.2 and applying the elements of the privilege described therein. The clergy-communicant privilege

31. *West*, 317 N.C. at 221, 345 S.E.2d at 188.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 222, 345 S.E.2d at 188.
36. *Id.*
37. *Id.* Defendant appealed directly to the supreme court from a life sentence. *Id.* at 220, 345 S.E.2d at 187-88. *See* N.C. GEN. STAT. § 7A-27(a) (1986) (providing for appeal as of right from judgments of life imprisonment).
38. *West*, 317 N.C. at 222-23, 345 S.E.2d at 188-89.
39. *Id.* at 223, 345 S.E.2d at 189.
40. *Id.*
41. *Id.*
42. *Id.*

in North Carolina, as in most other states, is a creature of statute and was not recognized as a part of American common law.[43] Although legal scholars disagree about whether English common law originally recognized the privilege, communications between clergy and parishioners apparently were not considered strictly confidential, at least following the time of Henry VIII.[44] Today, however, at least forty-nine states recognize some form of the privilege by statute.[45] Although the exact wording of these statutes varies from state to state, most of them share common elements.[46]

Numerous public policy considerations justify the existence of the privilege.[47] Clergy benefit from the privilege because they can feel free to hear the problems of communicants and impart advice knowing that both are protected and that disclosure will not be compelled in court.[48] In addition, many clergy consider the confidentiality of such communications of greater importance than compliance with court-ordered disclosure. As a result, some clergy faced with this difficult choice will go to jail rather than divulge the contents of a confidential communication with a parishioner.[49] Communicants benefit from the privilege because they can feel free to seek spiritual counsel and comfort without fear that their words may be used to convict them or to injure their interests at a

43. *See In re* Williams, 269 N.C. 68, 76, 152 S.E.2d 317, 324, *cert. denied*, 388 U.S. 918 (1967).

44. J. WIGMORE, *supra* note 2, § 2394, at 869-70. Professor Wigmore indicated that following the Restoration, the English practice was to deny the privilege. *Id.* He also pointed out, however, that a few English judges stated they would not compel disclosure from a member of the clergy. *Id.* (citing Attorney-General v. Briant, 15 L.J.-Ex. (n.s.) 265, 271 (1846); Broad v. Pitt, 3 Car. & P. 518, 519, 172 Eng. Rep. 528-29 (C.P. 1828)).

45. *See* J. WIGMORE, *supra* note 2, § 2395, at 873 n.1 & 1986 Supp. at 197-98 n.1 (listing states that recognize the privilege); Smith, *The Pastor on the Witness Stand: Toward a Religious Privilege in the Courts*, 29 CATH. LAW. 1, 19-21 (1984) (listing the states that recognize the privilege and comparing their statutes).

46. For example, most of the statutes require the communication to be made to a clergyman, priest, rabbi, or religious practitioner of an established church. *See, e.g.*, ARK. STAT. ANN. § 28-1001, Rule 505 (1979 & Supp. 1983) ("clergyman is a minister, priest, rabbi, or accredited Christian Science Practitioner"); CAL. EVID. CODE § 1031 (West 1966 & Supp. 1987) ("clergyman, priest, minister, religious practitioner, or similar functionary of a church"). The communication must be made to the minister in his or her professional capacity. *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107(c) (1973 & Supp. 1986) ("professional character in the course of discipline enjoined by the church to which he belongs"); FLA. STAT. ANN. § 90.505(2) (West 1979 & Supp. 1986) ("in his capacity as spiritual advisor"). Several of the statutes also include communications made by persons seeking spiritual guidance and do not limit the privilege to confessions only. *See, e.g.*, GA. CODE. ANN. § 24-9-22 (1982 & Supp. 1986) ("seeking spiritual comfort or seeking counseling"); LA. REV. STAT. ANN. § 13:3734.1 (West Supp. 1987) ("seeking spiritual advice or consolation").

47. For a discussion of the various policy objectives behind the clergy-communicant privilege as well as the history of the privilege in England and the United States, see Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 95-114 (1983). Yellin indicated a major consideration is that, without the privilege, some clergy would "rather risk the punitive powers of the courts than disregard basic religious doctrines." *Id.* at 110. However, Yellin questioned the validity of this argument because many state statutes allow the communicant to waive the privilege. *Id.* at 111 n.76. North Carolina is one of the states that allow the communicant to waive the privilege. N.C. GEN. STAT. § 8-53.2 (1986). Whether the North Carolina privilege protects a minister who refuses to testify was a major point of contention in *In re* Williams, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967), in which the minister was jailed for contempt after refusing to testify.

48. *See* Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 60 (1963).

49. *Id.* at 81.

later date.[50] As one writer explained, "[s]ince the confidential communications may give relief from tensions and anxieties, is not the psychological therapeutic value to the individual, and thus to the body politic, significant enough that we should protect the relationship that accomplishes that result?"[51]

The privilege also allows the church as an institution to protect those communications it deems necessary or beneficial for the guidance and counseling of its members.[52] In fact, the legal system's respect for the clergy and for established religion may itself be a source of justification for the privilege.[53] Finally, because trial courts are placed in an uncomfortable position when they seek to compel the testimony of a minister who insists on preserving confidentiality, the judicial system benefits from the privilege.[54] Because the testimony of a minister regarding communications with a parishioner should generally be reliable and otherwise admissible, the privilege represents a balancing of these public policy interests against the importance of hearing all available testimony to determine truth at trial. Any determination of whether to apply the privilege should take into consideration these policy objectives and determine whether applying or refusing to apply the privilege will further the objectives established by a state's legislature.

North Carolina's first clergy-communicant privilege statute, enacted in 1959, applied to communications that were "confidentially communicated" to a "clergyman, ordained minister, priest or rabbi of an established church or religious organization . . . in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust."[55] The original version also permitted a presiding judge to waive the privilege and compel disclosure if the testimony was necessary "to a proper administration of justice."[56] The statute was amended in 1963 to include "accredited Christian Science Practitioner[s]" among those to whom privileged communications might

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50. *Id.*

51. *Id.* at 81-82.

52. *Id.* at 60.

53. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1558 (1985) [hereinafter Developments].

54. *See* Reese, *supra* note 48, at 60. Professor Wigmore argued that the reasons behind recognizing the clergy-communicant privilege are the same as those for recognizing other privileges. Justification exists for a privilege if: (1) the communication originates in confidence or secrecy; (2) the communication is essential to the relation; (3) the relation involved deserves recognition and countenance; and (4) the benefits of having the privilege are greater than the damage done to justice by not compelling disclosure. J. WIGMORE, *supra* note 2, § 2396, at 878. Wigmore also noted that Jeremy Bentham, "the greatest opponent of privileges," felt the clergy-communicant privilege, or at least a privilege recognizing the secrecy of Catholic confessions, should be recognized. *Id.* (citing 4 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 588-91 (1st ed. 1827)).

55. Act of May 28, 1959, ch. 646, § 1, 1959 N.C. Sess. Laws 537, 537 (codified as amended at N.C. GEN. STAT. § 8-53.2 (1986)). The 1959 version stated:

> No clergyman, ordained minister, priest or rabbi of an established church or religious organization shall be required to testify in any action, suit or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, when the giving of such testimony is objected to by the communicant; provided, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.

56. *Id.*

be made.[57]

The current version of the privilege, rewritten in 1967,[58] does not include the word "confidential" and contains no language permitting the trial judge to compel disclosure for a proper administration of justice.[59] The current version contains several requirements that must be met for a communication to be inadmissible at trial. First, the communication must be made to a "priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church."[60] The statute does not specify what constitutes an established church, but at least one writer has suggested the term may indicate "an incorporated body."[61] Second, the information must be communicated to the minister in his or her professional capacity.[62] This requirement is common among statutes in other states and generally prevents the privilege from applying to communications made to a minister in any capacity other than confessor or spiritual counselor.[63] However, the professional capacity of ministers has expanded in recent years to include marriage counseling,[64] and at least one case has held it to include counseling persons concerning selective service

57. Act of April 11, 1963, ch. 200, § 1, 1963 N.C. Sess. Laws 293, 293 (codified as amended at N.C. GEN. STAT. § 8-53.2 (1986)).

58. Act of June 15, 1967, ch. 794, § 1, 1967 N.C. Sess. Laws 1003, 1003-04 (codified as amended at N.C. GEN. STAT. § 8-53.2 (1986)).

59. For the full text of the current statute, see *supra* text accompanying note 6.

60. N.C. GEN. STAT. § 8-53.2 (1986).

61. Reese, *supra* note 48, at 65. In *Barber* the supreme court specifically stated its decision was "not based on a determination that the Christian Ministry of Tennessee from which Barrier received a license for a ten dollar fee is not an established church within the meaning of the statute." *Barber*, 317 N.C. at 508, 346 S.E.2d at 445. An earlier case cited by the court in *Barber* involved a defendant who was charged with bigamy. State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980). In *Lynch* defendant's first marriage was performed by one Chester Wilson, who had obtained the "credentials of a minister" by sending "his name, address and ten dollars to the California Headquarters" of the Universal Life Church, Inc. *Id.* at 480-81, 272 S.E.2d at 350. The court held that defendant had not violated the state's bigamy laws because his first marriage was not legally recognized. Because the first marriage had not been solemnized by a person recognized as performing marriage ceremonies within the meaning of North Carolina General Statutes section 51-1, defendant was not legally married when he remarried and thus could not be convicted of bigamy. *Id.* at 487-89, 272 S.E.2d at 354-55; *see* N.C. GEN. STAT. § 51-1 (1985) (indentifying individuals who may perform the marriage ceremony in North Carolina). The court then went on to state: "It is not within the power of the State to declare what is or is not a religious body or who is or is not a religious leader within the body . . . . Our concern is whether the marriage is one the State recognizes." *Lynch*, 301 N.C. at 488, 272 S.E.2d at 354. In the following year, the general assembly recognized by statute "marriages performed by ministers of the Universal Life Church" prior to July 3, 1981. Act of July 3, 1981, ch. 797, § 1, 1981 N.C. Sess. Laws 1169, 1169 (codified at N.C. GEN. STAT. § 51-1.1 (1984)).

62. N.C. GEN. STAT. § 8-53.2 (1986).

63. *See, e.g.*, Johnson v. Commonwealth, 310 Ky. 557, 560-61, 221 S.W.2d 87, 89 (1949) (refusing to apply the privilege to a conversation between defendant and a minister in which the communication was made "in the same manner it would have been made to any other visitor"); COLO. REV. STAT. § 13-90-107(c) (1973 & Supp. 1986) (communication must be made to clergy acting in "professional character in the course of discipline enjoined by the church to which he belongs") *see also* Annotation, *Matters to Which the Privilege Covering Communications to Clergymen or Spiritual Adviser Extends*, 71 A.L.R.3D 794, 806-07 (1976 & Supp. 1986) (listing cases from numerous jurisdictions requiring that the communication be made to a minister acting in a professional character).

64. *See* Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411, *disc. rev. denied*, 308 N.C. 678, 304 S.E.2d 757 (1983). In *Spencer* the North Carolina Court of Appeals applied the clergy-communicant privilege to a marriage counseling session involving the husband, wife, and minister, stating the information was communicated to the minister in his professional capacity. *Id.* at 539, 301 S.E.2d at 413.

obligations.[65]

Third, the communication must be one that is "necessary to enable [the minister] to discharge the functions of his office according to the usual course of his practice or discipline."[66] Although many courts have interpreted similar language to require the communication to be penitential in character,[67] the privilege has expanded to cover numerous types of communications that are considered necessary for a minister to fulfill the obligations of his or her office.[68]

Last, the person making the communication must be "seeking spiritual counsel and advice relative to and growing out of the information so imparted."[69] This element represents a more liberalized version of the privilege than that recognized in many of the older state statutes.[70] In some cases courts have recognized the privilege only where a confession or other communication was a required part of the church doctrine.[71] However, the more liberal language of section 8-53.2 expands the types of privileged information included to cover almost any communication between a clergyperson and a communicant as long as the communicant is seeking spiritual counsel or advice.[72]

The North Carolina privilege does not apply if the communicant waives the privilege in open court.[73] This additional provision, added in 1967,[74] actually expanded the application of the privilege. Under the pre-1967 version, the communicant had to object to admission of testimony concerning the conversation before the privilege was deemed to apply.[75] However, a minister is now incom-

65. *In re* Verplank, 329 F. Supp. 433, 435-36 (C.D. Cal. 1971).

66. N.C. GEN. STAT. § 8-53.2 (1986).

67. *See, e.g.*, People v. Johnson, 270 Cal. App. 2d 204, 207-08, 75 Cal. Rptr. 605, 607 (1969) (holding that requirements for a "privileged 'penitential communication' " were not met); Johnson v. Commonwealth, 310 Ky. 557, 560-61, 221 S.W.2d 87, 89 (1949) (communication must be penitential in character and " 'in connection with or in discharge of . . . [a] religious duty or obligation' ") (quoting 58 AM. JUR. *Witnesses* § 532 (1948)). For a list of cases holding that the communication must be "penitential in character," see Annotation, *supra* note 63, at 807-08.

68. One writer concluded that under the current North Carolina statutes "[a]ny information communicated and entrusted to [a minister] in his professional capacity and necessary for him to discharge his official function is to be regarded as incompetent testimony." Note, *Evidence—Privileged Communications—The New North Carolina Priest-Penitent Statute*, 46 N.C.L. REV. 427, 430 (1968).

69. N.C. GEN. STAT. § 8-53.2 (1986).

70. "Thus it appears that the intent of the General Assembly was *not* to limit the communication to a confession of sins alone." Note, *supra* note 68, at 430. The language of the North Carolina statute, like that found in Minnesota's clergy-communicant privilege, MINN. STAT. ANN. § 595.02 (West Supp. 1987), contains liberal wording and should include any information given to a minister while the communicant was seeking spiritual guidance. *See* Reese, *supra* note 48, at 62-64.

71. *See, e.g.*, Knight v. Lee, 80 Ind. 201, 203-04 (1881) (noting that communications must be "penitential in their character, or as are made to clergymen in obedience to some supposed religious duty or obligation"); Colbert v. State, 125 Wis. 423, 431-32, 104 N.W. 61, 65 (1905) (holding a letter to a priest was not privileged because "there was no confession, and further because . . . [the priest] was not acting in his professional character at the time"). *Contra In re* Swenson, 183 Minn. 602, 603-04, 237 N.W. 589, 590 (1931) (holding the Minnesota statute could not be limited to confessions because to do so would mean the privilege only applied to priests of the Roman Catholic Church).

72. *See* Reese, *supra* note 48, at 62-63; Note, *supra* note 68, at 430.

73. N.C. GEN. STAT. § 8-53.2 (1986).

74. Act of June 15, 1967, ch. 794, § 1, 1967 N.C. Sess. Laws 1003, 1003-04 (codified at N.C. GEN. STAT. § 8-53.2 (1986)).

75. *See In re* Williams, 269 N.C. 68, 77, 152 S.E.2d 317, 324, *cert. denied*, 388 U.S. 918 (1967); Note, *supra* note 68, at 428.

petent to testify about such communications unless the communicant waives the privilege.[76]

The North Carolina Supreme Court and the North Carolina Court of Appeals applied these elements in deciding three cases in 1985 and 1986.[77] Prior to these cases, the North Carolina appellate courts had addressed the privilege only twice. In neither of these earlier cases, however, was the court faced with the exact issues raised in this latest trilogy.[78] In *Barber* the supreme court interpreted the requirements that the communication be made to a minister acting in his or her professional capacity and that the communicant be seeking spiritual counsel.[79] In *Jackson* the court of appeals applied the requirement that the communication be made to a minister acting in a professional capacity to a factual situation in which the conversation was mixed with both spiritual counseling and a discussion of family matters in a noncounseling context.[80] In *West* the supreme court examined, from a different perspective, the requirement that the communicant be seeking spiritual counseling, and also determined that the presence of a third party during the communication destroys its confidentiality and the privilege along with it.[81]

In order for the clergy-communicant privilege to apply, the *Barber* court required that communications be made to a minister acting in his professional capacity and that the communicant be seeking spiritual aid. Both requirements are common to privilege statutes in other jurisdictions, and numerous state appellate courts have applied such requirements to specific fact situations.[82] In *Barber* the supreme court agreed with the trial court that the witness, Barrier, was not an ordained or licensed minister at the time the communication took place.[83] In addition, because Barrier was approached by defendant as a friend

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76. *See* Note, *supra* note 68, at 428.

77. State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. Jackson, 77 N.C. App. 832, 336 S.E.2d 437 (1985), *disc. rev. denied*, 316 N.C. 199, 341 S.E.2d 572 (1986). *See supra* notes 8-42 and accompanying text.

78. In *In re* Williams, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967), the supreme court refused to apply the privilege to a communication between a minister, Williams, and defendant. The court avoided the substantive issues surrounding application of the privilege by holding the minister was compelled to testify and the privilege did not apply because the communicant failed to object to the admission of the testimony. *Id.* at 77, 152 S.E.2d at 324. Shortly after the court decided *Williams*, the general assembly rewrote § 8-53.2 to require the communicant to waive the privilege in open court before it could be deemed waived. Act of June 15, 1967, ch. 794, § 1, 1967 N.C. Sess. Laws 1003, 1004 (codified at N.C. GEN. STAT. § 8-53.2 (1986)); *see* Note, *supra* note 68, at 431.

In Spencer v. Spencer, 61 N.C. App. 535, 539, 301 S.E.2d 411, 413, *disc. rev. denied*, 308 N.C. 678, 304 S.E.2d 757 (1983), the court of appeals held that communications made by a husband to a minister during marriage counseling were privileged.

79. Although these requirements are distinct, the factual circumstances that determine whether the privilege applies often are interdependent. Therefore, they are discussed together within the context of *Barber*.

80. *Jackson*, 77 N.C. App. at 833-34, 336 S.E.2d at 438.

81. *West*, 317 N.C. at 222-23, 345 S.E.2d at 188-89.

82. *See supra* note 63 and accompanying text.

83. *Barber*, 317 N.C. at 509, 346 S.E.2d at 445. When Barrier was asked if he was an ordained minister, he replied:

> No, I am not ordained. I can explain this. I am a licensed exhorter by the Church of God. At the time that Grant [defendant] came and talked to me I had no licenses of any kind

and not as a minister, the court held defendant was not seeking advice and counsel within the meaning of the statute.[84] The court reached this conclusion because the two men had been friends for a number of years and because it found the nature of their conversation indicated that defendant was not seeking spiritual counseling when he told Barrier about the incident with his daughter.[85] The court compared the fact situation in *Barber* to that in *Burger v. State*,[86] in which the Georgia Supreme Court refused to apply the Georgia clergy-communicant privilege,[87] because the "minister-witness had been the defendant's friend and frequent companion."[88] In *Burger* the Georgia court, like the North Carolina Supreme Court in *Barber*, concluded the communications were "conversational statements to a friend" and were not made for the purpose of seeking spiritual guidance.[89]

The court reached a logical conclusion in refusing to apply the privilege in *Barber*, but the opinion is confusing. The witness, Barrier, was not an ordained minister, but had been a "licensed exhorter" having received his license from the Christian Ministry of Tennessee in exchange for a ten dollar fee.[90] However, there appears to have been no evidence indicating defendant had relied on the witness holding any particular position in his church when defendant made the communication.[91] The two men had attended church together, but were not members of the same church.[92] Furthermore, as the court pointed out in its opinion, defendant requested that Barrier not tell anyone of their conversation "to avoid hurting the victim."[93] Such circumstances suggest defendant was not

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with any organization. I had been licensed with the Christian Ministry out of Tennessee and they [sic] had expired at the time. My license was invalid at the time I talked to him. I was still conducting services at times but as far as to say ordianed [sic] minister I was not because [sic] to be such I had to have the hands of an ordianed [sic] minister laid upon me and I had not.

Id. at 508, 346 S.E.2d at 445.

84. *Id.* at 509-510, 346 S.E.2d at 445-46.

85. *Id.*

86. 238 Ga. 171, 231 S.E.2d 769 (1977).

87. *See* GA. CODE ANN. § 24-9-22 (1982 & Supp. 1986).

88. *Barber*, 317 N.C. at 508, 346 S.E.2d at 446. In *Burger* defendant was tried and convicted of murdering his wife and her lover after catching the two in a "compromising setting." *Burger*, 238 Ga. at 171, 231 S.E.2d at 770. After dismissing defendant's claim that the killing was justifiable in order to prevent adultery, *id.* at 171, 231 S.E.2d at 770-71, the court turned its attention to the testimony of Reverend Spurling, a witness for the State. The court held that because defendant's statements were conversational ones made to a close friend and companion and because Spurling testified that the communication was not made by defendant in " 'professing religious faith, or seeking spiritual comfort' or 'guidance,' " the privilege did not apply. *Id.* at 172, 231 S.E.2d at 771 (quoting GA. CODE ANN. § 38-419.1 (1981).

89. *Barber*, 317 N.C. at 509-10, 346 S.E.2d at 446; *accord Burger*, 238 Ga. at 172, 231 S.E.2d at 771.

90. *Barber*, 317 N.C. at 508, 346 S.E.2d at 445. The court stated its decision was not based on whether the Christian Ministry of Tennessee is an established church within the meaning of section 8-53.2. *Id.* at 508, 346 S.E.2d at 445. For a discussion on this point, see *supra* note 61.

91. Barrier testified that he knew defendant as a "[f]ellow employee and he knew I was conducting services and spreading the word but as far as being ordianed [sic], I did not have any such license at that time." *Barber*, 317 N.C. at 508, 346 S.E.2d at 445.

92. *Id.* at 507, 346 S.E.2d at 445.

93. *Id.* at 510, 346 S.E.2d at 446.

seeking spiritual counsel or advice within the meaning of the statute.[94]

However, the court placed too much emphasis on the fact defendant and Barrier were long-time friends. The court seemed to indicate their long-term friendship was enough to destroy the privilege, even if Barrier was an ordained minister of an established church.[95] The court probably inferred, however, that the long-term friendship supported its conclusion that the communication was strictly that of two friends and that no element of clergy counseling was present in the conversation. Such a conclusion could follow from the facts as presented, because defendant probably knew Barrier was not an ordained minister. However, had Barrier been an ordained minister of an established church when defendant spoke to him, and had defendant in fact approached Barrier seeking spiritual counseling, then the preexisting friendship and the fact not all of their conversation resulted from defendant's need for spiritual advice should not have destroyed the privilege.[96]

An excellent case in point is *Jackson*, in which the court of appeals applied the privilege to exclude testimony about a conversation between the defendant and his minister-aunt. In *Jackson* the court of appeals determined that an admission of guilt made to the aunt in defendant's jail cell was privileged, even though part of their conversation did not involve defendant's seeking spiritual counseling or advice.[97] The admission of guilt came after the two talked and prayed for some time and after the minister-aunt offered comfort to defendant.[98] The court held that the part of the conversation relating only to communications with a close relative and the part relating to a clergy-communicant relationship were inseparable; thus, the entire conversation was privileged.[99]

Taken together, *Barber* and *Jackson* appear to stand for consistent ideas regarding the nature of the privilege. Once the court's meaning is derived from a between-the-lines reading of *Barber*, it appears that whenever a communication is made solely for a purpose not covered by the privilege statute, the privilege does not apply, and the minister is permitted to testify about the conversation. As the *Jackson* court noted, however, when other communications are intertwined in a conversation legitimately considered privileged—as in cases in which the communicant is at least in part seeking spiritual counsel or advice—then the entire communication must be regarded as privileged. This

94. "The evidence clearly establishes that the only purpose of the defendant's visit was to confide in a friend." *Id.* at 510, 346 S.E.2d at 446.

95. *See id.*

96. To hold that a preexisting friendship destroyed the privilege would lead to a difficult and absurd result, because this would mean a minister could only offer advice and counsel to persons who were not friends. If applied to other privileges, such a holding would mean that communications between a doctor and patient who were friends would not be privileged. Likewise, even law partners who consulted each other on personal legal matters would lack the protection of confidentiality unless they constantly attacked each other. Perhaps, however, the defendant in *Barber* would have done well to heed the advice of Benjamin Franklin: "If you would keep your secret from an enemy, tell it not to a friend." B. FRANKLIN, POOR RICHARD'S ALMANACK (1741), *reprinted in* F. BARBOUR, A CONCORDANCE TO THE SAYINGS IN FRANKLIN'S POOR RICHARD 189 (1974).

97. *Jackson*, 77 N.C. App. at 833-34, 336 S.E.2d at 438.

98. *Id.*

99. *Id.* at 834, 336 S.E.2d at 438.

conclusion is demonstrated by the manner in which the supreme court distinguished *Barber* from *Jackson*. The court pointed out that the minister-aunt offered comfort and spiritual advice to defendant in *Jackson*, but stated that the conversation in *Barber*, like the conversation at issue in the Georgia *Burger* case, lacked this necessary element.[100]

Another issue raised by *Jackson* was whether defendant was seeking spiritual counsel within the meaning of section 8-53.2 because the minister-aunt visited defendant instead of defendant approaching her. The State argued the privilege did not apply, because defendant made no request for spiritual counseling and the minister-aunt visited him to "satisfy her own needs."[101] Although not directly addressing the State's argument, the court of appeals stated that the aunt "initiated the visits to defendant while he was in jail . . . and that she sought to comfort him."[102] The court of appeals apparently saw no distinction between a minister seeking out a communicant to give advice and a communicant seeking advice from a minister. The supreme court took a different view in *West*.

The *West* court refused to apply the clergy-communicant privilege, first,

100. *Barber*, 317 N.C. at 509-10, 346 S.E.2d at 446. Although the court compared *Barber* to the facts of *Burger*, *see supra* note 88, the Georgia court's opinion in *Burger* gives little information about the exact nature of the conversation and relies on the testimony of the minister that defendant was not seeking spiritual advice. *Burger*, 238 Ga. at 172, 231 S.E.2d at 771. However, the holdings in both *Barber* and *Burger* are consistent with cases from other jurisdictions that have held communications made to a minister acting only as a friend and not in a professional capacity are not privileged. *See, e.g.*, Wainscott v. Commonwealth, 562 S.W.2d 628, 632-633 (Ky.) (communication made to minister acting as a friend not privileged), *cert. denied*, 439 U.S. 868 (1978); *see supra* note 63.

Another issue raised by the State's brief in *Jackson*, but not discussed by the court of appeals, was whether the privilege applies when the communication is intended for a third party. Brief for the State at 2-3, *Jackson* (No. 8520SC371). In *Jackson* the minister-aunt testified that defendant told her at the close of their conversation "to tell my mama [defendant's grandmother] he was sorry he caused all the trouble in the family and everything." Record on Appeal at 10-11, *Jackson*. The state argued that because defendant intended for the communication to be passed on to a third party, the privilege did not apply. Brief for the State at 2-3, *Jackson*. This argument has great support in other jurisdictions; in nearly all cases in which the communicant has requested that the information be passed on to third parties, the privilege was held inapplicable. *See, e.g.*, United States v. Wells, 446 F.2d 2 (2d Cir. 1971) (defendant, in a letter to a priest, asked the priest to contact an F.B.I. agent); Mitsunga v. People, 54 Colo. 102, 129 P. 241 (1913) (privilege inapplicable when defendant used minister to transmit a message to the chief of police); Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901) (privilege inapplicable when defendant asked minister to take message to his wife). An interesting case on this point is Naum v. State, 630 P.2d 785 (Okla.), *cert. denied*, 454 U.S. 1058 (1981), in which the court held defendant's confession to a minister was not privileged because defendant asked the minister to call an attorney for him. The court, in a touch of twisted logic, held the attorney-client privilege could not protect the confidentiality of the conversation because the minister was not an agent of the attorney, and therefore neither privilege applied. *Id.* at 787-88.

Although not addressed by the court, this exception to the privilege should not apply to the facts of *Jackson*. First, defendant merely requested the witness to tell his grandmother that he was sorry for causing trouble for his family. Record on Appeal at 10-11, *Jackson*. He did not ask that she pass along his admission of guilt. *Id.* Arguably, an innocent person could be quite sorry for causing his family trouble simply because he had been arrested. Second, the request came at the end of their conversation, *id.*, and although the court correctly held that the part of the communication made to the witness as a family member and that part made to her as a minister were inseparable, the information to be passed on came after the spiritual counseling had taken place at the end of the aunt's visit. Even if the State had successfully argued that the request to apologize to the grandmother was an admissible part of the testimony, this part said very little about defendant's guilt, and in any event, it should not have destroyed the privilege applicable to the rest of the conversation.

101. Brief for the State at 2, *Jackson*.

102. *Jackson*, 77 N.C. App. at 833, 336 S.E.2d at 438.

because the minister initiated the conversation with defendant and sought him out.[103] The court pointed to the language of the statute that requires the communicant to be "*seeking* the counsel and advice of his minister."[104] Second, the court then noted the minister had told defendant's wife that "defendant 'need[ed] help' and that he 'was going to try to help him,' " and that the minister "had sought out *defendant* for that purpose."[105] Thus, the court concluded that because the minister had sought out defendant, the element of the privilege requiring the communicant to be seeking spiritual advice and counsel was missing and, therefore, the privilege did not apply.[106]

The supreme court declined to review the court of appeals' decision in *Jackson*[107] and seemed to approve it in a case decided after the *West* decision.[108] Nevertheless, the court's reasoning in *West* clearly contradicted the court of appeals' holding in *Jackson*. In *Jackson* the court of appeals acknowledged that the minister-aunt initiated the conversation and the visits to the jail.[109] Because defendant in *Jackson* was in jail when the conversation took place, he was arguably incapable of doing a great deal of seeking of any kind. However, this does not dismiss the fact the minister in *Jackson* appeared at the jail without a request from defendant. The facts in *Jackson* clearly indicate, in the words of the court of appeals, "that [the minister-aunt] sought to comfort him."[110]

Despite the result in *Jackson*, the supreme court in *West* held the privilege inapplicable because the minister sought to help defendant.[111] The distinction created by the court in *West*, between situations in which a minister seeks out a communicant and those in which a communicant seeks out a minister, is not only inconsistent with *Jackson*, it is superficial and meaningless. First, as the supreme court noted in *West*, the conversation "appeared to be one in which the preacher was offering his advice and counsel."[112] Thus, the question raised in *Barber* over the actual purpose of the conversation—comfort from a friend or spiritual guidance by a minister—did not arise in *West*. Second, a distinction based on whether the minister sought out the communicant or vice-versa is a corruption of the statutory language and finds little if any support from the decisions of courts in other jurisdictions or from the language of other common-law and statutory privileges.[113] The attorney-client privilege, for example, is

103. *West*, 317 N.C. at 223, 345 S.E.2d at 189.

104. *Id.*; *see supra* text accompanying note 6.

105. *Id.*

106. *Id.*

107. State v. Jackson, 316 N.C. 199, 341 S.E.2d 572 (1986), *denying disc. rev. to* 77 N.C. App. 832, 336 S.E.2d 437 (1985).

108. In *Barber* the supreme court rejected defendant's claim that *Jackson* compelled the court to find the communication between defendant and Barrier was privileged. *Barber*, 317 N.C. at 509-10, 346 S.E.2d at 446. In so doing, the court distinguished the facts of *Barber* from those of *Jackson* and seemed to approve the *Jackson* court's holding based on the particular facts of that case. *Id.*

109. *Jackson*, 77 N.C. App. at 833, 336 S.E.2d at 438.

110. *Id.*

111. *West*, 317 N.C. at 223, 345 S.E.2d at 189.

112. *Id.*

113. North Carolina recognizes numerous privileges by statute, including communications between: physician and patient, N.C. GEN. STAT. § 8-53 (1986) (information which may have been

designed to encourage individuals needing counsel or assistance to communicate with an attorney without fear of having their conversations revealed in court.[114] By recognizing the privilege, courts and state legislatures have determined that the advantages of encouraging individuals to seek legal assistance outweigh the disadvantages of not allowing attorneys to testify against their clients. One can only imagine the howl that would rise from state bar associations if courts began to apply the attorney-client privilege based on whether the client sought out the attorney.[115]

Last, the distinction made by the court in *West* may injure the underlying policy objectives behind the privilege.[116] Churches that zealously encourage members to discuss their problems with clergypersons in order to gain helpful advice and spiritual counseling may now find their efforts thwarted by the court's new rule against a minister seeking out communicants. Furthermore, if the public policy promoted by the privilege includes encouraging individuals to seek spiritual guidance when they are troubled, how can the same public policy be defeated when a minister personally encourages the communicant to open up and allow the minister to offer help and guidance? Following the *West* decision, ministers seeking to rely on the privilege may become reluctant to seek out or even send for a church member who may be in need of help. If the minister and his or her church consider confidentiality essential to proper performance of their duties, then under the rule in *West* the minister must either sit idly hoping the church member will appear *seeking* help, or run the risk of being forced to disclose his communications for having taken the initiative to help a follower in trouble. Although this may not have been the intent of the court, this will certainly be the practical effect if ministers and the public follow the law as prescribed by the court in *West*.

The supreme court's second reason for refusing to apply the clergy-communicant privilege in *West* was that confidentiality was destroyed by the presence of Reverend Black's wife during the conversation with defendant. The court took notice that the word "confidential," which was an element of the privilege found

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acquired in attending to a patient in a professional character); psychologist and client, *id.* § 8-53.3 (information which may have been acquired in rendering professional psychological services); school counselors and students, *id.* § 8-53.4 (information which may have been acquired in rendering counseling services to any student enrolled in public school system or private school). In addition, North Carolina recognizes a common-law attorney-client privilege. Dobias v. White, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954). The wording of these privileges makes no distinction regarding the application of the privilege based on who seeks out whom.

114. *See* United States v. United States Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

115. Several circumstances may arise in which an attorney may approach a client, and the conversation would be covered by the attorney-client privilege. For example, if the attorney and client have an ongoing relationship, the attorney may approach the client to get needed information. The supreme court in *West* never addressed whether a preexisting relationship between a clergyperson and a communicant added strength to defendant's argument that the privilege applied. Although the clergy-communicant privilege should apply regardless of whether the communicant is a member of the minister's church, *see* Reese, *supra* note 48, at 83, the existence of an established relationship between the clergyperson and the communicant certainly strengthens the argument that the communicant was seeking spiritual counseling at the time the communication was made. In *West* defendant and his family were members of the minister's church when the communication took place. *West*, 317 N.C. at 221, 345 S.E.2d at 188.

116. *See supra* notes 47-54 and accompanying text.

in the pre-1967 version of the statute, had been removed by the 1967 general assembly.[117] However, the court stated that this exclusion was "clearly not intended to broaden application of the privilege to all genre of general conversation with one's spiritual mentor, but merely to broaden the range of advisory and counseling practices to which it applies."[118] Thus, the court concluded the necessity for an expectation of confidentiality was not affected by the change, and in the absence of such a confidential relationship, a communication is not privileged.[119] The court then held that because the minister's wife was present during the conversation with defendant, the communication was not confidential and the privilege did not apply.[120]

Although this second reason for denying the privilege in *West* rests on firmer ground than the first, this distinction too is not as solid as would appear at first glance. The notion that the privilege requires confidentiality and that confidentiality is destroyed by the presence of a third party has great support among other jurisdictions and is a rule frequently applied to privileges in general.[121] Traditionally, the clergy-communicant privilege, if it existed at all, existed only if the communication was confidential.[122] However, because the general assembly removed the word "confidential" as a requirement for the privilege to apply, an argument can be made that confidentiality is not an absolute requirement.[123] On the other hand, the language removed from the statute in 1967 appears to refer to confessions and like communications for which confidentiality is deemed essential to church teachings and for which revelation of their contents would "violate a sacred or moral trust."[124]

A question the court did not consider in *West*, however, was whether the relationship of the third party to the minister and his work makes a difference in determining if the communication was made in confidence for the purpose of applying the privilege. For example, in *In re Verplank*[125] the Federal District Court for the Central District of California held that nonclergy counselors who assisted a minister at a college by conducting "draft counseling" were covered by the privilege.[126] The court held the privilege afforded the counselors the same protections as the minister, because they engaged in activities that "conform 'at least in a general way' with a significant portion of the activities of a

117. *West*, 317 N.C. at 223, 345 S.E.2d at 189.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See, e.g.*, Milburn v. Haworth, 47 Colo. 593, 108 P. 155 (1910) (statement made by defendant to minister and four church members held not privileged); State v. Van Landingham, 283 N.C. 589, 602, 197 S.E.2d 539, 547 (1973) (" 'Communications between attorney and client are not privileged where made in the presence of third person, not the agent of either party . . . .' ") (quoting 97 C.J.S. *Witnesses* § 290 (1957)).

122. *See* J. WIGMORE, *supra* note 2, § 2396, at 878.

123. Compare the 1959 version of the privilege, *see supra* note 55, with the current version. *See supra* text accompanying note 6.

124. Act of May 28, 1959, ch. 646, § 1, 1959 N.C. Sess. Laws 537, 537 (codified as amended at N.C. GEN. STAT. § 8-53.2 (1986)).

125. 329 F. Supp. 433 (C.D. Cal. 1971).

126. *Id.* at 436-37.

minister of an established Protestant denomination, to the extent necessary to bring them within the privilege covering communications to clergymen."[127] The court went on to compare the relationship between "Rev. Verplank and the other counselors at the Center [as] closely akin to the relationships between a lawyer and the nonprofessional representatives that he engages to assist him in serving his clientele."[128]

In *Reutkemeier v. Nolte*[129] the Iowa Supreme Court held that a confession made by a fourteen-year old girl in the presence of church elders was privileged within the meaning of the state's statute. In its opinion, the court took the broad view of the term "minister" as applying to a larger group of individuals, depending on the particular church's doctrine.[130] Thus, the court held that the presence of church elders of a Presbyterian Church during a confession did not destroy its confidential nature.[131]

Before holding that the presence of the minister's wife in *West* destroyed the privileged nature of the conversation with defendant, perhaps the supreme court should have looked more carefully at the duties of the wife with regard to her role in church activities.[132] Not every church can afford to hire several counselors to assist a minister in counseling church members, and this duty may on occasion fall, as do many other duties, to the husband or wife of the minister. If the minister's wife was a completely detached person who never assisted her husband in affairs of the church, the court's holding in *West* would be more readily acceptable. However, such a finding does not appear in the court's opinion in *West*. In fact, because Mrs. Black was present at the parsonage while defendant confessed to having committed such atrocious acts, and because the minister's advice and counseling were administered in her presence, Mrs. Black appears to have been something more than a detached bystander or a snoopy relative digging out gossip.

Although the burden of showing that a privilege applies generally falls on the one who seeks to invoke it, the *West* court acknowledged that defendant was seeking spiritual advice.[133] Contrary to appearances at the moment of trial, the clergy-communicant privilege does not exist to protect defendants from prosecu-

127. *Id.* at 436 (quoting Proposed Rules of Evidence 51 F.R.D. 315, 372 (1971)).

128. *Id.* The privilege covering communications between attorneys and their clients has been extended to third persons who act as agents for the attorney. *See, e.g.*, Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (clerk employed by an attorney is incompetent to testify about confidential matters communicated in his or her presence); State v. Van Landingham, 283 N.C. 589, 602, 197 S.E.2d 539, 547 (1973) (confidentiality is destroyed if the communication is "made in the presence of a third person, *not the agent of either party*") (quoting 97 C.J.S. *Witnesses* § 290 (1957) (emphasis added)).

129. 179 Iowa 342, 161 N.W. 290 (1917).

130. *Id.* at 346-51, 161 N.W. at 292-93.

131. *Id.*

132. The court may not have considered this aspect of the privilege because an earlier case established that the presence of an attorney's spouse destroyed confidentiality and thus the attorney-client privilege along with it. *See* State v. Van Landingham, 283 N.C. 589, 602, 197 S.E.2d 539, 547 (1973). Whether the same rule would apply if the spouse worked in the attorney's law office is less clear, because the spouse could be considered an agent of the attorney and, therefore, presumably within the privilege. *See id.*

133. *West*, 317 N.C. at 223, 345 S.E.2d at 189.

tion. Most persons, other than criminal defendants, would prefer the evidence be admitted to achieve conviction, especially if the defendant is as despicable as defendant West. The privilege exists, however, to protect the social interest of encouraging all persons to seek spiritual guidance and counseling. Thus, to place the entire burden of enforcing the privilege on the defendant is to ignore the social benefits sought to be preserved by protecting the communication. If society as a whole benefits from the privilege, then society as a whole should be concerned with protecting it.

If the court in *West* was trying to indicate that defendant impliedly waived the privilege by making the communication in the presence of the minister's wife, then the court should have taken notice of the statutory language requiring the communicant to waive the privilege in open court.[134] If the court intended that the privilege never existed because the wife was present, then the court may have taken too narrow a view of the privilege in light of the more liberal language contained in the modern statute. The view of other courts that have extended the privilege to nonclergy persons who assisted ministers with their duties[135] likewise seems to indicate the supreme court may have construed the North Carolina privilege too strictly. Furthermore, many of the cases in other jurisdictions in which the presence of a third party was held to destroy the clergy-communicant privilege can be distinguished from the facts in *West*. For example, in *Milburn v. Haworth*[136] the Colorado Supreme Court held the privilege inapplicable to a communication made in the presence of a minister and four other church members. The court in *Milburn* found that the statement made by defendant was more in the nature of a casual conversation than a privileged communication.[137] Likewise, in *Knight v. Lee*[138] the Indiana Supreme Court refused to apply the privilege to a communication made to a church elder, who was not a minister, because the communication made was not a "confession within the meaning of the [statute]."[139] In *West* no doubt existed as to the nature of the communication; the privilege was deemed destroyed simply by the presence of a third person.

Finally, the *West* court should have focused its attention on the policy objectives underlying the clergy-communicant privilege to determine whether these objectives were being furthered by its decision. If the benefits of having such a privilege outweigh the detriments that result from excluding otherwise reliable testimony, then the public policy goals of the privilege should be at the heart of the court's decision.[140] Likewise, if these objectives are damaged by a narrow interpretation of the privilege, then the court should carefully consider this damage when attempting to narrowly construe the statutory language giving

134. N.C. GEN. STAT. § 8-53.2 (1986).

135. *See supra* text accompanying notes 125-31.

136. 47 Colo. 593, 108 P. 155 (1910).

137. *Id.*

138. 80 Ind. 201 (1881).

139. *Id.* at 203.

140. *See supra* notes 47-54 and accompanying text.

rise to the privilege.[141]

It seems difficult to imagine how the presence of the minister's wife could undermine the objectives sought by recognizing the clergy-communicant privilege. If the purpose behind the clergy-communicant privilege is to encourage individuals to seek spiritual help and guidance in times of personal tragedy, and to avoid the awkward situations created when ministers are compelled to testify about conversations with parishioners during counseling, then why should the presence of the minister's spouse or any other person aiding the minister defeat the purpose of the communication? Although the court took the traditional approach afforded other privileges in holding that the presence of a third party destroys confidentiality and the privilege along with it, little need or justification appears for such a strict construction as it applies to this privilege. If courts are willing to recognize other exceptions to the presence of a third party rule, for example, when legal assistants are present during counseling by an attorney, then a similar privilege should apply to the only person who may be available to assist a minister in his or her work—the minister's spouse. Although this may be viewed as an expansion of the clergy-communicant privilege, the privilege is still subject to specified restrictions, and it seems unlikely that persons who disclose incriminating evidence while seeking spiritual counseling are likely to stray far from the minister's office. In any event, if the minister is actually engaged in rendering spiritual advice or counsel, the mere presence of the minister's spouse seems to fall short of sufficient reason to destroy the privileged nature of the communication.[142]

It is easy to sympathize with the court's ultimate outcome in the *West* decision. The defendant in that case stood accused of a despicable crime, and the record contained more than enough evidence for a jury to return a guilty verdict.[143] However, to base a rule of law on the hard facts of one case is to ignore the importance of consistent and carefully reasoned legal precedent. Society pays a very heavy price for privileges. Every time a criminal defendant like Jackson is sent back for a new trial, there exists the risk that a guilty person will go unpunished simply because otherwise competent evidence—evidence that

141. Even if, as the court asserted in *West*, the confidentiality of a communication between a minister and a communicant is damaged by the presence of a third party, this does not mean the policy objectives promoted by the privilege are undermined. *See Developments*, *supra* note 53, at 1644. "Confidentiality is a means of attaining these goals, not an independent good in itself. When disclosure occurs and confidentiality is to some degree compromised, it does not necessarily follow that the values promoted and protected by confidentiality are correspondingly undermined." *Id.*

142. A separate but related issue concerns whether the minister's wife in *West* could have been compelled to testify, or whether the privilege should also cover her. If the court had found that the wife closely assisted the minister and therefore was not unlike the draft counselors in *Verplank*, then certainly the wife should not have been compelled to testify. On the other hand, the language of the statute codifying the privilege in North Carolina is quite specific and only applies to certain persons. *See* N.C. GEN. STAT. § 8-53.2 (1986) ("no priest, rabbi, accredited Christian Science practitioner or a clergyman or ordained minister of an established church shall be competent to testify"). For a discussion of the need to extend the privilege to communications with lay counselors working within a church, see W. TIEMANN & J. BUSH, THE RIGHT TO SILENCE 194-99 (1983).

143. In addition to the minister's testimony, the State introduced as evidence a tape recording made by defendant in which he described sexual fantasies about the victim. Record on Appeal app. at 1-5, *West* (No. 213A85). This evidence, coupled with the testimony of the victim, leaves little doubt about defendant's guilt.

would establish guilt beyond a reasonable doubt—must be kept from the jury. In fact, sound logical arguments have been presented that society would best benefit by the abolition of all privileges.[144] But the North Carolina General Assembly, like state legislatures in forty-nine other states, has decided that the advantages of protecting these communications are worth the price paid. If the courts make application of the privilege difficult for the public to understand, however, both clergy and church members will be reluctant to rely on it to protect their communications. If this happens, the objectives of the privilege will be defeated and all that will remain will be those situations in which a communication, like the one in *Jackson*, happens to fall within the privilege. The price for the privilege is paid by having reliable evidence excluded from trial, but society is still cheated of the benefits.

Until the general assembly takes a closer look at the clergy-communicant privilege and establishes more distinct rules regarding its application, ministers and the public are destined to make what they can of the law as the supreme court has left it.[145] Perhaps in future cases, however, the court will take greater care in handling the assets of privileged communications, especially because the people of North Carolina have already incurred the liabilities.

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144. Jeremy Bentham, for example, attacked privileges with a vengeance. In describing the attorney-client privilege, Bentham stated its only purpose was to give assistance to the guilty, because the innocent have little to gain by it and the guilty have only to lose if it is abolished. 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 302 (J. Mill ed. 1827), *reprinted in* E. CLEARY & J. STRONG, EVIDENCE 805-06 (3d ed. 1981).

145. A good starting point for the general assembly would be the Mississippi clergy-communicant privilege, which provides: "A clergyman's secretary, stenographer, or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity." MISS. CODE ANN. § 13-1-22(4) (Supp. 1986).