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Opinion No. 01-009

Clergy-Penitent Privilege

QUESTIONS

1. Whether all communications between an employee of the Williamson County Sheriff's Department and a volunteer clergy member, appointed by the Sheriff to provide spiritual consultation, are confidential and privileged under Tenn. Code Ann. § 24-10-206.

2. Are such communications discoverable under the Tennessee Rules of Criminal Procedure or Tennessee Rules of Civil Procedure and subject to a grand jury investigation?

3. Does the Sheriff's ability to appoint and remove the clergy member in any way affect the clergy-penitent privilege?

OPINIONS

1. Yes. Provided the communications are made to the clergy member confidentially, in his or her professional capacity, according to the usual course of his or her practice or discipline, as established by the rules or customs of his or her religious organization or denomination when the employee is seeking spiritual advice or counseling. However, this privilege does not apply to any communication involving known or suspected child sexual abuse.

2. No. Such communications are privileged and therefore, not discoverable or subject to a grand jury investigation.

3. No. The Sheriff's ability to appoint and remove the clergy member does not affect the privilege.

ANALYSIS

1. Tenn. Code Ann. § 24-1-206 (a)(1) provides:

> No minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over eighteen (18) years of age, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to that person in a confidential manner, properly entrusted to that person in that person's professional capacity, and necessary to enable that person's practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

See also Tenn. R. Evid. 501, *Advisory Commission Comment; State v. Boling*, 806 S.W.2d 202, 204 (Tenn. Crim. App. 1990) (Trial court erred in admitting communications made between the defendant and his minister since the communications were made as the defendant sought spiritual counsel). But, there is one exception. This privilege is not applicable to any communication involving known or suspected child sexual abuse. Tenn. Code Ann. § 37-1-614.

"The court, not the jury, determines whether an individual meets the requirements to be considered a clergy member and is thus privileged from testifying." Cohen, Paine, Sheppeard, Tennessee Law of Evidence, § 501.15 at 274 (2d ed); *See* Tenn. Code Ann. § 24-1-206 (a)(2). "Since this privilege is designed to encourage people to engage in frequent and truthful communications with members of the clergy, it belongs to the person communicating with the clergy member. Accordingly, the communicating person may waive the privilege." *Id.*; *See* Tenn. Code Ann. § 24-1-106 (b); *State v. Cecil Gray Jackson*, Stewart County, No. M1999-01046-COA-R3-CV (Tenn. Ct. App., filed March 16, 2000)(copy attached).

Although there is no case directly on point in Tennessee, the Court of Appeals of North Carolina recognized that this privilege would apply where a sheriff's office chaplain was called to counsel a defendant charged with non-capital murder. *State v. Andrews*, 507 S.E.2d 305, 308. In North Carolina there are two requirements for the privilege to apply: "(1) defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication." *Id.* (*Citations omitted*). Although the chaplain was an employee of the sheriff's department, since both prongs of the North Carolina statute were met, the privilege applied. *Id*. at 309.

2. Provided such communications between an employee of the Sheriff's Department and clergy member are made in accordance with Tenn. Code Ann. § 24-10-206, the information is privileged and not subject to discovery under the Tennessee Rules of Criminal or Civil Procedure. Tenn. R. Crim. P. 16(b)(1)(A) permits the State to request certain information in the "possession, custody, or control of the defendant, and which the defendant intends to introduce as evidence in chief at the trial." This request may be made after the defendant requests disclosure. Tenn. R. Civ. P. 26.02(1) provides in part: "Parties

may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, ..." (*Emphasis added*). However, subsection (5) requires the party asserting the privilege to "make the claim expressly" and "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected." This allows the other party to "assess the applicability of the privilege protection."

Similarly, such communications are not subject to a grand jury investigation. See *In re Grand Jury Proceedings*, 640 F. Supp. 988 (E.D. Mich. 1986) *In re Grand Jury Investigation; Hipes v. United States*, 603 F.2d 786 (9th cir. 1979). In both of these cases, the wife was allowed to claim the marital communications privilege to bar testimony before a grand jury.

3. Because the privilege is based on the nature of the relationship between the minister and those who seek his counsel, the identity of the person appointing the minister is irrelevant.

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