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A (Different Kind of) Fathers' Day Column "Bless Me, Father..." Montana's Clergy Privilege

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Evidence Corner | Clergy Privilege

A (different kind of) Fathers’ Day column
“Bless me, Father, for…” Montana’s clergy privilege

By Cynthia Ford

This column deals with the application of Montana’s clergy privilege. We have already covered privileges in general, and the spousal (yes) and parent-child (no) privileges specifically. Montana’s privileges are statutory, and the statutes are construed narrowly to accommodate the competing public interest in full disclosure of relevant information.

The basic purpose for all privileges is to foster certain specified relationships:

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

The third of the thirteen specific privilege statutes in Montana protects certain religious communications:

26-1-804. Confessions made to member of clergy. A member of the clergy or priest may not, without the consent of the person making the confession, be examined as to any confession made to the individual in the individual’s professional character in the course of discipline enjoined by the church to which the individual belongs.

This statute was first enacted in 1867; its last amendment was in 2009, as part of a gender-neutralization bill.

In the 147 years of its history, the Montana Supreme Court has construed this statute in only two cases, one in 1998 and the other in 1999. (Both were criminal cases in which the defendants were convicted of sexual abuse of their respective stepdaughters.) The Court recognized two different approaches to this privilege in other states, and chose to adopt the broader (Utah), rather than the narrower (Washington) as a matter of public policy and freedom of religion. In both cases, however, the Court affirmed the trial judge’s refusal to apply the statute and held the communications to be non-privileged and admissible even on the broader interpretation of the statute. These cases teach several lessons about how to maximize your chance of successfully invoking the clergy privilege at trial.

STATE V. MACKINNON (1998)

The Supreme Court’s first encounter with the clergy privilege occurred when defendant Mackinnon’s asserted the clergy-penitent privilege as to two conversations and a related document in which he confessed to the unlawful sexual conduct with which he had been charged. The Supreme Court observed:

§ 21 Enacted in 1867, § 26-1-804, MCA, was left unchanged by the adoption of the Montana Rules of Evidence. See Commission Comments to Article V: Privileges, M.R.Evid.

Despite this statute’s long history, we are presented for the first time with an issue involving its application. In considering the application of this statute, we note that the United States Supreme Court has explained:

Testimonial exclusionary rules and privileges contravene the fundamental principle that “the public ... has a right to every man’s evidence.” As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

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2 In Scott v. Hammock (Utah 1994), 870 P.2d 947, the Utah Supreme Court held that the defendant’s disclosures about his sexual conduct with his adopted daughters, made to the bishop of his local state of the Church of Jesus Christ of Latter Day Saints, was privileged, even though LDS bishops are lay members of the Church, rather than ordained. I commend this case to you for its in-depth history of the privilege, beginning in Pre-Reformation in Old Englande and tracing its journey to the New World, as well as its lengthy discussion of the need to extend the privilege to all forms of religion.

3 In State v. Buss, 76 Wash.App. 887, 887 P.2d 920 (1995), the Washington Court of Appeals refused to apply the privilege, holding that the non-ordained “family minister” at the parishioner’s Catholic Church was not a “member of the clergy” within the language of a privilege statute very similar to Montana’s. Further, “LaMoria did not administer the Catholic sacrament of confession in the narrow, ecclesiastical sense. A narrow reading of "confession" or "course of discipline" includes only the sacrament of confession, which did not occur. Montana’s refusal to follow this approach was later validated by the Washington Supreme Court (en banc) in State v. Martin, 137 Wash.2d 777, 965 P.2d 1020 (1999).
Notwithstanding that testimonial exclusionary rules and privileges are strictly construed and accepted, *Trammel...*, under the federal First Amendment and under Article II, Section 5 of the Montana Constitution, all persons are guaranteed the free exercise of their religious beliefs and all religions are guaranteed governmental neutrality. See, for example, *Torcaso v. Watkins* (1961), 367 U.S. 40, 50, 81 S.Ct. 1680, 1683-84, 6 L.Ed.2d 982, 987; and *Rasmussen v. Bennett* (1987), 228 Mont. 106, 111-12, 741 P.2d 755, 758-59. Thus, in order to minimize the risk that § 26-1-804, MCA, might be discriminatorily applied because of differing judicial perceptions of a given church’s practices or religious doctrine, and in order to least interfere with the federal and Montana constitutional protections of religious freedom referred to above, we conclude that Utah’s broader interpretation of the clergy-penitent privilege as set forth in *Scott*, 870 P.2d 947, is the better view, and we adopt that approach.


The Court went on to discuss the differing approaches of our sister states, and concluded:

§ 24 Notwithstanding that testimonial exclusionary rules and privileges are strictly construed and accepted, *Trammel...*, under the federal First Amendment and under Article II, Section 5 of the Montana Constitution, all persons are guaranteed the free exercise of their religious beliefs and all religions are guaranteed governmental neutrality. See, for example, *Torcaso v. Watkins* (1961), 367 U.S. 40, 50, 81 S.Ct. 1680, 1683-84, 6 L.Ed.2d 982, 987; and *Rasmussen v. Bennett* (1987), 228 Mont. 106, 111-12, 741 P.2d 755, 758-59. Thus, in order to minimize the risk that § 26-1-804, MCA, might be discriminatorily applied because of differing judicial perceptions of a given church’s practices or religious doctrine, and in order to least interfere with the federal and Montana constitutional protections of religious freedom referred to above, we conclude that Utah’s broader interpretation of the clergy-penitent privilege as set forth in *Scott*, 870 P.2d 947, is the better view, and we adopt that approach.


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Thus, the Court, without being as direct as I am about to be, set the stage for application of this privilege to many different religions.

Here’s my less politic restatement: The privilege was first developed for traditional hierarchal churches with clear demarcation between clergy and lay workers. The obvious archetype is the Catholic confessional, with secret confession and absolution in a private booth housing only the priest and the penitent: “Bless me Father for I have sinned. My last confession was ... Since that confession, I have sinned by ...” If the communication was in the confessional, by a member of the congregation to a robed priest ordained by the Catholic church, it was protected from compelled testimony. It turns out, of course, that there are a multitude of religious approaches, with varying degrees of formality and confession/absolution models. The constitutional right to freedom of religion means that the clergy privilege applies to religions way outside of the mainstream, but if and only if they meet the implied requirements of the statute.

The church involved in the MacKinnon case was called the Missoula Christian Church, an offshoot of a similar church in Denver. Three of the witnesses the State sought to call at trial moved to Montana to form the church, and had on-going responsibilities as group leaders, but were not ordained. In his attempt to use the clergy privilege, the defendant put on specific evidence about the beliefs of the church:

*[T]he Church is headed by an ordained minister who conducts church services and is licensed to perform marriages. As a part of its Bible-based teachings, the Church allows its members to confess their sins to one another, but no church member has the authority to formally forgive sins. Rather, the Church believes forgiveness only comes from God.]*


MacKinnon’s wife became active in this church first, before MacKinnon was charged and pled not guilty to the sexual abuse of her 9-year-old daughter. She divorced MacKinnon in May, and became a member of the church in June. MacKinnon himself became active in the church at some point but did not become a member until October. (These dates matter). The two conversations at issues took place in July and August, both before MacKinnon had formally joined the church.

The allegedly privileged communications involved the defendant, his ex-wife, the child victim, and the church leaders (John and Coleen Contos and Ken Edwards), but not during a church service per se:

On July 16, 1995, after an evening church service conducted in a Missoula restaurant, which both Monica and MacKinnon had attended, Monica and M.G. encountered MacKinnon in the parking lot. An argument ensued concerning visitation of Monica’s and MacKinnon’s two boys. Thereafter, MacKinnon began talking to M.G. and apologizing to her, apparently to set things right with her so she would not have to testify at court proceedings. Concerned with the nature of this conversation, Monica suggested that they continue the conversation inside the restaurant in the presence of John and Coleen Contos. As a result of

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4 To help the reader account for my editorial biases and errors, I disclose that when I do go to church, it is to the very well-recognized and formally organized Episcopal Church. “We don’t do regular individual confessions, although we do stand as a group and make a general confession acknowledging unspecified errors and omissions (including the “sin of bad taste”) and asking for general forgiveness. I believe this is referred to in some circles as “Catholic lite.” When congregation members do have individual meetings for the purpose of spiritual counseling, it is easy to tell who is “clergy” and who is not.

5 Otherwise known as “wacko.” But, as I often tell my class, they might be right and by the time we figure that out, it will be too late...

6 Montana does have an “apology” privilege, MCA 26-1-814, enacted in 2005, but it applies only in civil actions for medical malpractice. I will spend another column examining apology privileges around the country, to see whether we should improve Montana’s emotional climate—and perhaps reduce its litigation load—by extending this privilege to other types of claims. For sure, MacKinnon was not the victim’s doctor...
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Monica’s suggestion, the conversation continued in the back of the lobby area of the restaurant with everyone sitting on chairs. Subsequently, on August 21, 1995, a second conversation took place at the home of John Contos involving MacKinnon, Monica, John Contos and Ken Edwards.

288 Mont. at 332-33, 957 P.2d at 25.

The defendant moved in limine to exclude reference to these conversations, as well as to an associated document. The judge took testimony of the “churchliness” [my word] of the communications, and eventually split the baby, barring the document and the August conversation but allowing four witnesses (the ex-wife, the victim, and the Contos church leader couple) to testify as to MacKinnon’s July statements.

On appeal, MacKinnon urged the Supreme Court to hold the July conversation privileged:

He asserts that testimony given by John and Coleen Contos was inadmissible under § 26-1-804, MCA, because the Contoses, in their professional character as clergy persons, and in the course of discipline enjoined by the Church, heard him confess the crime with which he had been charged two months previously. Additionally, MacKinnon asserts that Monica and M.G. should not have been allowed to testify about his statements because the July conversation was analogous to compromise negotiations and conciliation counseling. Furthermore, MacKinnon contends that because of the religious setting, he trusted that his statements would be kept confidential. Ultimately, MacKinnon claims that Monica coerced and tricked him into confessing.

288 Mont. at 336, 957 P.2d at 27. The Supreme Court rejected every one of these arguments.

At the same time that the Court endorsed a broad view of the clergy privilege, it found that even under that broad view, MacKinnon’s conversation with his ex-wife, stepdaughter, and two church leaders did not qualify. First, the Court seemed dubious but accepted Judge Larson’s assumption that the Contoses were “clergy.” However, it noted that MacKinnon was not yet a member of the church nor had he ever sought any spiritual guidance from either Contos. Most importantly, MacKinnon did not ask to meet with John and Coleen Contos for the purpose of confession or for religious guidance, counseling, admonishment or advice. Rather, Monica requested that John and Coleen Contos be present during the July conversation, but only to serve as facilitators. Moreover, during the July conversation, MacKinnon did not ask for, and the Contoses did not give, any spiritual advice or forgiveness. No prayers were given and nothing was said about

forgiveness. Rather, MacKinnon volunteered his statements without apparent encouragement in order to set things right with his stepdaughter, M.G., so that she would not have to testify at court proceedings. In this regard, MacKinnon’s statements were directed at Monica and M.G., not the Contoses. Finally, MacKinnon had no reasonable expectation that his statements would be held in confidence. MacKinnon did not seek and the Contoses did not make any representations of confidentiality. Instead, MacKinnon made his statements in a public place to his ex-wife and stepdaughter in the presence of the Contoses.


The Montana Supreme Court held that, under these circumstances, the clergy privilege was not implicated, even on a very broad reading. There was no error in admitting any of the testimony about this “confession” made in the presence of church leaders. On the other hand, Judge Larson did exclude evidence of the other conversation, in which the defendant went to the church leaders’ home and met with them; the Supreme Court did not criticize this ruling (because the defendant, obviously, did not). I would call this case 50/50: the defendant won half of his motion at trial, and lost half. The Supreme Court’s decision affirmed his defeat as to 50% of his claimed privilege.

STATE V. GOODING (1999)

Rocky Brian Gooding was charged with sexual misconduct towards his young stepdaughter, G.T. The abuse occurred in Libby, Montana, while the mother was at work and the stepfather stayed at home with the victim and three other children. The family moved to Spokane, Washington, in 1990 and began attending the Sunrise Church of Christ.

In approximately March 1993 Gooding began confiding with two members of the church, Gerald and Tina Glover, about prior acts of sexual molestation with G.T. At the time of these meetings, Gerald Glover was a nonordained deacon in charge of the church’s food and clothing bank. Tina Glover, Gerald Glover’s wife, did not hold an official church position.

§ 7 The first meeting between Gerald Glover and Gooding occurred at the church. Gooding sought the help of a junior minister and Gerald Glover sat in on their meeting. In the following months, Gooding met with Gerald and Tina Glover in their home to discuss his problems associated with his conduct toward his stepdaughter. Gerald and Tina were both present for some of these meetings. However, Gooding would talk to Tina alone when Gerald wasn’t available.

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§ 8 In December 1994 Detective D.A. Routt of the Spokane County Sheriff's Department interviewed Gerald and Tina Glover during an investigation into Gooding's relationship with his stepdaughter. The Glovers informed Detective Routt that Gooding had revealed to them that he had sexually molested his stepdaughter while in Montana.


The Washington detective forwarded this information to Montana authorities, who prosecuted Gooding in Lincoln County.

Prior to trial, the State added the Glovers to its witness list. Because they were in Washington, the State also filed a notice of intent to depose both Gerald and Tina Glover. After the depositions, the defendant moved to exclude the depositions from trial on the basis of the clergy-penitent privilege.

Gooding's affidavit in support of the motion in limine stated that "he considered Gerald Glover to be "a representative of my church and my spiritual adviser" (but did not say anything about Tina Glover). The Glovers' deposition testimony was split: "while Gerald Glover testified in his deposition that Gooding approached him as 'somebody to lean on ... to talk to and confess out [his] sins,' Tina Glover testified that Gooding approached the Glovers because 'he was concerned about his conduct and about going to jail.'


The trial judge denied the motion, specifically finding that neither Tina nor Gerald met the standard of the statute.

The court ruled that Gooding's initial statements to Gerald and a junior minister were not privileged under § 26-1-804, MCA, because Gerald was simply "a bystander." The court also ruled that, given the evidence presented, Gooding's statements to Gerald or Tina were not privileged because neither Gerald nor Tina met the requirements of the statute. Lastly, the court noted that Tina was "a bystander" when Gooding first came to her house to talk with Gerald.


At trial, the State strategically submitted only the deposition testimony of Tina (not Gerald). Gooding was convicted and appealed.

Gooding asserts that his statements to Gerald and Tina Glover were inadmissible under § 26-1-804, MCA, because he considered Gerald Glover to be a representative of his church and a spiritual advisor and he believed conversations held at the Glovers' house would be kept confidential.


The Supreme Court began with its standard statement in privilege cases:

§ 16 Initially, we observe that testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence. See MacKinnon, § 21 (citing Trammel v. United States (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195).

State v. Gooding, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307. The Court refused to discuss the ruling as to Gerald's deposition because the State chose not to offer that evidence.

With regard to Tina's deposition, the Supreme Court agreed with the trial court that 'Tina was not a member of the clergy within the meaning of the statute, under any conceivable definition of that term:

§ 21 Although we have never clarified the definition of "clergy" under § 26-1-804, MCA, nothing in the record suggests that Tina Glover was a clergy person. Tina testified that she was not a minister, clergyman, or deacon of the Sunrise Church of Christ. She stated that the church does not ordain women. She also stated that she did not have any special counseling role within the church. Therefore, the District Court did not abuse its discretion in admitting statements Gooding made to Tina Glover.

Tina was acting as an ordinary confidant rather than as a clergy person.


The fact that Tina herself was not a member of the clergy of the Sunrise Church of Christ disqualified not only the statements Gooding made to her, but also those statements he made to her husband (even if Gerald were a clergyman) in Tina's presence:

§ 22 Gooding's statements to Gerald in Tina's presence were not privileged as to Tina, even if we were to conclude that Gerald met the definition of clergy. Section 26-1-804, MCA, states that "a clergyman or priest cannot ... be examined as to confessions made to him." The statute clearly creates a testimonial privilege for a "clergyman or priest"; the statute does not expressly create a testimonial privilege for a nonclerical church member for statements made in his or her presence. In interpreting a statute, we cannot add what has been omitted. See § 1-2-101, MCA.


Confidentiality is key to all the privileges, including this one. Disclosures made between parties to a privilege, in the presence of a person not in the statutorily protected relationship, are not privileged.
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Lastly, the Court found the defendant's evidence on the Sunrise Church and its organization and beliefs to be deficient:

[T]here is no factual record to support a finding that these statements were made pursuant to the practices and discipline of the Sunrise Church of Christ. Even if we had concluded that either Gerald or Tina Glover was a member of the clergy for purposes of the clergy-penitent privilege, the evidence presented to the District Court did not indicate that these admissions were made "in the course of discipline enjoined by the church." See § 26-1-804, MCA.


Thus, the clergy privilege did not cover Tina's testimony. The Gooding jury heard, properly, Tina's testimony both about what Gooding said to her when they were alone, and what he said to her husband when the three of them were together. This case was a complete loss for the defendant.

SCORECARD

Almost 150 years after the Montana legislature first enacted a privilege for confidential communications between a clergy person and a congregant, the two reported Montana Supreme Court cases about it demonstrate only a 25% success rate in seeking its protection. I do not think this means that the clergy privilege is unusable, however. I bet that there are lots of unreported trial court cases in which the privilege was asserted and granted, alleviating any discussion at the appellate level. These probably are easy cases, where the confessing person was a member of a formal church, the person to whom she disclosed her wrongdoing had a formal rank, and the tenet of the religion encouraged spiritual counseling by that priest/minister/rabbi/monk. Even though the Montana Supreme Court has signaled its willingness to extend the privilege to a wide variety of traditions and roles, those at the fringes make it harder to prove that the statutory requisites have been met.

LESSONS FROM THE CASES

A. Start with the big policy arguments.

As with all privileges, it is important to start with the legislative finding that the relationship between the communicants is both socially valuable and dependent on confidentiality. The plain language version of this argument: It is good for a person's spiritual and mental health to be able to obtain religious guidance; that guidance can only occur when the person is absolutely honest with the religious leader; the person will only be absolutely honest when she knows that her statements will be kept secret. Thus, in order for the public to be able to improve the spiritual and mental health of individual members, inuring to the benefit of all, a person must be able to confide in her religious leader.

A person asserting the clergy privilege should make two additional arguments: first, that as a matter of public policy, the Montana Supreme Court has held that the privilege should be broadly construed, citing Mackinnon. The second argument is based on the constitutional freedom of religion (also recognized in Mackinnon): "Because most churches do not set aside formal occasions for special private encounters labeled 'confession,' less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics." Mary Harter Mitchell, Must Clergy Tell?, 71 Minn.L.Rev. 723, 748 (1987) (footnotes omitted).

B. Present affirmative evidence on all of the requirements of the statute.

The statute's exact wording is crucial. Here it is again: "[1] A member of the clergy or priest may not, without the consent of the person making the confession, be examined as to any confession made to the individual [2] in the individual's professional character in the [4] course of discipline enjoined by the church to which [3] the individual belongs."

1. Prove that the person to whom the "confession" was made should, in fact, be considered "a member of the clergy or priest."

This is easy in a formal religion which sets out requirements such as ordination. If a degree from a seminary is involved, enter it into evidence. If there has been an ordination ceremony, have the clergy person discuss that. If there is an employment contract from the church, setting out a job title, introduce that. If the clergy person wears a distinguishing article of clothing, such as a collar, have her wear that to the hearing and explain its significance to the court. Of course, the opponent to the privilege can also seek this information. In Gooding, Tina herself sounded the death knell for application of the privilege for the statements made to her: "Tina testified that she was not a minister, clergyman, or deacon of the Sunrise Church of Christ." Game, set match...

You can still succeed on this leg of your argument if your client made the disclosure to a less traditional cleric, but you have to be more creative, and more persuasive. Mackinnon and Gooding both indicate that the Court is willing to stretch, maybe a lot, but can't/won't do so unless counsel creates a sufficient record. Maybe the simplest way to do this factually is to simply ask the clergy person: "Are you a clergy person? What makes you a clergy person?" The witness' own understanding as to his role is critical.

Another useful route is to adduce evidence from another official of the church, explaining both the appointment and functions of the type of church worker who heard the confession, as well as "the course of discipline" of the church. This is exactly what convinced the Supreme Court of Utah, in Scott v. Hammock, discussed in fn. 2, to extend the privilege to communications made to the non-ordained bishop of the local stake of the LDS Church.

As a legal argument, you should research other states' privilege cases to see and cite any which deal with the same religion and same type of clergy in that religion. If other jurisdictions

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have extended privilege to this type of disclosure to this type of person, Montana may follow suit. Thus, although Montana has not yet decided a clergy privilege case involving the Mormon Church, the Utah Supreme Court's ruling in the Hammock case should be highly persuasive.

2. Prove that, at the time of the communication, the clergy person was acting in his professional character. This is what went wrong for Mackinnon. The Court, without specifically ruling that the Contoses were clergy, held that even if they were as a general matter, the circumstances of the disputed conversation showed that that night they were acting more as a protector of Mackinnon's ex-wife: "the other facts surrounding the July conversation indicate that any statements MacKinnon made were not directed at John and Coleen Contos in their 'professional character,' that is, in their capacities as clerics or in their religious roles." Similarly, in the Gooding case, the confidante characterized herself as just that: an ordinary confidante (not privileged) rather than a clergy person (privileged).

In the perfect world, your client would have prefaced any conversation with "I would like to talk to you in your role as a clergy person, to whom I will confess my conduct in order to receive spiritual guidance and perhaps absolution." "Bless me, Father, for I have sinned..." of course will do nicely. In the same ideal universe, the privileged conversation would have occurred in a church, best of all in a confessional booth. Obviously, however, bricks and mortar and a religious symbol such as a cross or altar are not required. In Mackinnon, Judge Larson protected a conversation which occurred at the Condoses' home; it is the substance of the communication, not its location, which fulfills this requirement.

In the world in which we really live, you will have to get both your client and the "clergy" person to testify that they understood something like this to be happening, even if it wasn't articulated per se. Again, I am a big proponent of just asking:

"At the time of the conversation with defendant, were you acting in your professional character as a clergy person? What makes you say that? Even though you met in a coffee shop, not a church? Doesn't that matter? Why not?"

3. Prove that the person making the confession "belongs" to the church.

Again, for some religions this is easy. There may be baptismal, confirmation or other membership records. In Mackinnon, although the Court did not discuss how it made the distinction, it observed that Mackinnon became "active" in the church after June but did not "join" the church until October (coincidental that this was the same month in which he went to trial and claimed the privilege?); the communication at issue was in July. The timing was better for Gooding: although there was no "membership" date, it appeared that the whole family had been attending the church for about three years before the confession occurred. The Court appeared to accept that Gooding belonged to the church, but was highly skeptical of this for Mackinnon. The simplistic questions here, for both clergy and the person confessing, are: "Do you/she belong to the church? What makes you say so? Did you/she belong to the church on the date of the confession?"

4. Prove that "the confession ... was made in the course of discipline enjoined by [that] church." Defense counsel in Mackinnon did a good job on this point during the argument in limine:

Specifically, the District Court heard testimony concerning the status of John Contos, Coleen Contos and Ken Edwards within the Missoula Christian Church, the structure and discipline of the Church, as well as the circumstances surrounding the July and August conversations.


By contrast, the Supreme Court faulted counsel in Gooding for failing to address this requirement: "[T]here is no factual record to support a finding that these statements were made pursuant to the practices and discipline of the Sunrise Church of Christ." State v. Gooding, 1999 MT 249, 296 Mont. 234, 240-41, 989 P.2d 304, 308.

In the Utah case discussed above, the church itself moved to quash the subpoena issued to it, and so had the opportunity to put on its own evidence about its beliefs:

The LDS Church and Hammock argue that a broader construction is necessary to avoid discriminating against religious denominations that do not require formal confessions, but whose doctrine and practice require their clerics to provide confidential spiritual counseling, guidance, and advice to their parishioners. The LDS Church points out that many religious denominations, including a number of Protestant churches, teach that admission of wrongdoing is an important part of their religious doctrine and practice, but have no formal requirement for making admissions of wrongdoing to a cleric. In addition, the LDS Church argues that whether or not formal penitential confessions are required by a denomination, the role of a cleric in providing spiritual guidance and counseling cannot properly be limited to formal confessions and the law ought to recognize that fact. With respect to its own doctrine and practice, the LDS Church states that its members are required to engage in a process of repentance by which confidential admissions of wrongdoing may be made to a bishop or stake president at the beginning, during, or at the end of the repentance process and that confidential nonpenitential communications between a bishop or stake president and members of the LDS Church are an essential part of that process. Indeed, the LDS Church asserts that according to its course of discipline, it is impossible to separate a specific "penitential confession" from...
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the process of providing religious and spiritual counseling, guidance, and admonishment intended to persuade a church member to forsake and make amends for wrongful conduct.

Scott v. Hammock, 870 P.2d 947, 951 (Utah 1994). The lesson here is to be as specific as possible about the practices of the church at issue, focusing on the spiritual importance of confidential communications and counseling in that religion. The best way to do that is to move in limine, and to call as witnesses at the pretrial hearing not just the church person to whom the disclosure was made but also a higher-ranking church official who can speak generally about church doctrine, practices, and personnel.

CONCLUSION

Confession may be good for the soul, but unless it is done in accordance with the privilege statute, may cost the penitent his physical liberty or worldly possessions. All religious confessions qualify for the privilege, but having a confidant does not. The devil is in the details.

Cynthia Ford is a professor at the University of Montana School of Law where she teaches civil procedure, evidence, family law, and remedies.

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It’s inexpensive: The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, $125 for attorneys in practice for less than five years, and $200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn’t require that you share a percentage of your fees generated from the referrals!

You don’t have to take the case: If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

You pick your areas of law: The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

It’s easy to join: Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers’ professional liability insurance policy. To join the service simply fill out the Membership Application at www.montanabar.org -> For Our Members -> Lawyer Referral Service (http://bit.ly/yXl6SB) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org. Kathie is happy to better explain the program and answer any questions you may have. We’d also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

Lawyer Referral & Information Service

When your clients are looking for you ... They call us

How does the LRIS work? Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers “just have a question” or “don’t have any money to pay an attorney”. As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

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