

Clergy Counselors and Confidentiality: A Case for Scrutiny

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As religious organizations contribute increasingly to community mental health, counseling by clergy acquires greater significance. As a result, clergy confront from time to time ethics challenges resulting from the need to balance a commitment to clients and an obligation to follow the requirements of religious doctrine. The recent New York case of *Lightman v. Flaum* highlights an example of this dilemma. A woman who asked two rabbis (Flaum and Weinberger) for help in her marriage complained that they had violated the confidentiality she expected of them. The rabbis requested summary judgment based on religious grounds, and the trial court rejected their request. The state's highest court concurred with an appeal court's reversal of the trial court. We discuss the arguments raised in this case about the extent to which clergy may owe a duty of confidentiality to those who consult them for psychological help, and we also consider the religion-based arguments that would fashion an exception to confidentiality in this unique context.

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Courts have insisted on treading lightly, if at all, in disputes that arise from the interaction of clergy with their parishioners. This judicial caution is particularly evident when clergy assert that their conduct, which was at the heart of the quarrel, was of a religious nature. We have seen this hesitancy in cases in which clergy have been accused of contributing to a parishioner's death by giving bad advice.¹ Similar hesitancy has been palpable in lawsuits brought against clergy for engaging in inappropriate sexual activity with parishioners² or for revealing confidential communications to other members of the congregation.³ It has been suggested that judicial inactivity or hesitancy in these areas may result in leaving an important societal need unmet.⁴ In other words, despite any court ruling, society has a fundamental interest in making sure that clergy do not engage with impunity in behavior defined by society as problematic but seen by clergy as ecclesiastical and thus protected by the First Amendment to the Constitution. This important point has arisen again in

the case of *Lightman v. Flaum*,⁵ in which two rabbis were accused of breaching a parishioner's confidentiality and bruising abroad what she had told them in confidence when she consulted them for help with her deteriorating marriage.

The woman's request for aid from her rabbis was understandable, because religious institutions and their clergy have traditionally carried out a broad range of functions that include liturgical, educational, political, and economic activity. These institutions and their clergy have also been engaged, with increasing energy, in the task of psychological healing. This function of applying spiritual guidance to make people feel psychologically better is well recognized. It accounts for the established role of chaplains in hospitals, both in this country and abroad, and for the acknowledged place of religious institutions in the community-based array of human services.^{6–8} This concept of a religion-based healing function also explains the development of clinics that offer combined spiritual, psychological, and traditional medical care.⁶ In this social context then, Ms. Lightman's seeking help from her rabbis was only to be expected.

It should be evident that clergy, in carrying out their professional duties of providing psychological succor to parishioners, may employ both ecclesiastical and secular rituals. The classification of their work as strictly religion-based or simply secular has

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been difficult. This has been so for at least two good reasons. First, many of the roles undertaken by clergy have been colored by traditions emanating from both religious and secular arenas. Second, different clergy often view one activity through fundamentally different lenses. This has been the case for pastoral counseling, where one set of clergy see such work as an activity that derives its core rituals from the practice of psychotherapy. At the same time, other clergy may incorporate prayer and other ecclesiastical acts into their concept of pastoral counseling.⁹

There are unique cultural characteristics about the case of *Lightman v. Flaum* because it entails a dispute between a Jewish woman and her rabbi clergy. However, their conflict raises broad fundamental questions about the concept of confidentiality that may apply across all denominations to the interaction of clergy and congregant. There is a basic societal expectation that clergy will respect the confidences of their charges. We undermine this expectation if we allow any clergy to escape responsibility by claiming, without a convincing justification, that their exemption from confidentiality is justified by ecclesiastical doctrine or practice. In other words, clergy should owe to their parishioners a fiduciary duty of confidentiality, just as do psychiatrists and other mental health professionals to their patients.

Consequently, clergy, including Jewish rabbis, despite relying on what they define as their unique religious obligation, should not be allowed to claim blanket exemption from the fundamental expectation that clergy will generally respect the confidentiality of counseling interactions with their parishioners. This subject has gained in importance because New York State's highest court in *Lightman v. Flaum*⁵ concluded to the contrary, holding that courts should not enter this terrain of disagreement among different religious groups. This is such an important social concern, however, that psychiatrists and their subgroup of forensic colleagues, who have long struggled with the problem of safeguarding confidentiality from erosion, should attend to this case in which rabbis have essentially tried to fashion a unique exception to the rule of confidentiality. Forensic psychiatric expertise can both help the clergy shape their practice and the courts weigh the values in dispute before them.

We recognize the importance of church-state separation and the sanctity of religious liberty, and we intend to remain cognizant of these principles as we

approach discussion of the case at hand. Nevertheless, we recommend that clergy's claim for exemption from the confidentiality tradition not be accepted unquestioningly. The clergy's blanket assertion that they deserve exemption from confidentiality strictures because they are vessels of ecclesiastical ritual and doctrine should not be allowed to carry the day. Before discussing this issue in depth, we will recount the essentials of the case and provide a short historical review of the clergy-penitent privilege. We review the privilege because the plaintiff cited the testimonial privilege as an important background to her argumentation about confidentiality.

Facts of the Case

As noted by the trial court,¹⁰ plaintiff Chani Lightman and her husband Dr. Hylton Lightman, both Orthodox Jews, were experiencing marital difficulties. According to the plaintiff, this prompted her to see two rabbis, the defendants, for advice and spiritual guidance. The rabbis described the mood of the meetings rather differently from the plaintiff, portraying them as more adversarial in nature. However, the rabbis agreed that the plaintiff bared her dissatisfaction with her marriage and her deviations from religious law. Specifically, the plaintiff revealed that she had stopped going to the Mikvah, a ritual bath used by Jewish women for cleansing after their menstrual periods, and had ceased sexual relations with her husband. The plaintiff also revealed that she was seeing another man. A third party was present during at least some of these consultations: the plaintiff's mother at the meeting with one defendant and a friend at the meeting with the other.

Both rabbis reported the conversations to plaintiff's husband, and each claimed to have acted under religious obligation. The rabbis asserted that, because the plaintiff no longer used the Mikvah, they were bound to advise her husband to end sexual relations. When she later filed for divorce, both rabbis also submitted affidavits supporting her husband in seeking custody of their children. The rabbis' declarations, which described their communications with plaintiff, were apparently intended to show that granting plaintiff custody would jeopardize the Orthodox Jewish upbringing of her children.

Plaintiff brought a cause of action against the defendants for, *inter alia*, breach of the fiduciary duty of confidentiality and violation of the clergy-penitent privilege. The plaintiff pointed to a statute that ex-

cluded communications to a clergyman from courtroom evidence. Defendants countered that they were compelled by Jewish law to communicate the confidences to Dr. Lightman and to the court. They also pointed out that Mrs. Lightman was not seeking spiritual advice from them. Besides, a third party was present at the conversations between the rabbis and Mrs. Lightman. The defendants argued that granting plaintiff such a right and disregarding their own religious motivations would infringe their constitutional right to religious freedom.

The trial court allowed plaintiff's suit to proceed. The court, finding an "overwhelming public and societal interest in preserving the sanctity of such confidential communications," (Ref. 10, p 570) specifically refused to fashion a standard of confidentiality for clergy that was different from that for other professionals. The court also dismissed defendants' First Amendment argument, placing in doubt their claim to have acted under religious duty. The court asserted that, in fact, religious law did not demand disclosure and went on to detail how the rabbis could have complied with religious law without revealing any communications.

The defendant rabbis appealed. The appellate court, over a strong minority opinion, reversed the trial court's decision and granted summary judgment to the defendants.¹¹ The appellate court did not reach the constitutional issues. It simply stated that the plaintiff had waived any clergy-penitent privilege because of the presence of third parties during her meetings with the defendants. The dissent, asserting that it was unclear whether such third parties were indeed present at all the sessions, contended that summary judgment was inappropriate and that it was important to determine whether Mrs. Lightman intended her communications to be confidential. The dissent also discussed the fundamental constitutional issues, and, like the trial court, asserted that plaintiffs' suit would not have infringed the defendants' First Amendment rights.

The New York Court of Appeals⁵ affirmed the appellate court's judgment for the defendants but did so on constitutional grounds. The court distinguished between secular professions, which could be regulated by the state, and religious callings, which could not. According to the court, the state could command confidentiality in secular relationships, but imposing a similar demand on religious actors would be constitutionally problematic. The First

Amendment mandates respect for religious beliefs that might, under certain circumstances, require disclosure. Moreover, entertaining challenges to religious claims would mean that courts themselves would have to interpret and apply religious law. On the level of state statutes, the state's highest court also held that the clergy-penitent privilege statute could not be construed as a source for a fiduciary duty of confidentiality. The highest court explained that a statutory privilege against disclosure of information in judicial proceedings cannot itself be the source of a broad fiduciary duty of confidentiality.

Historical Review of the Clergy-Penitent Privilege

It is instructive to review briefly the historical development of the clergy-penitent privilege in the legal context. Such a review provides some information about the principle that there is something inherently special about the exchange between clergy and their parishioners. In other words, understanding the statutory privilege helps in appreciating a longer term view of the fiduciary duty that clergy may owe their congregants to keep confidential the information communicated when the parishioners are seeking spiritual guidance.

It is debatable whether English courts recognized the clergy-penitent privilege before the time of King Henry VIII. However, the privilege certainly did not exist in later common law. After the Anglican Church became preeminent in England, its rite of confession diminished in importance. Courts, accordingly, ceased to recognize the clergy privilege. In fact, there is a long line of cases in Britain that expressly deny such a privilege.¹²

The first recorded United States case to involve the privilege was *People v. David Phillips and Wife*,¹³ decided by the Court of General Sessions for the City of New York in 1813. The case involved a Roman Catholic priest, the Rev. Anthony Kohlmann, who had returned stolen goods to their owner. The priest refused to testify at the criminal trial of the persons suspected of trafficking in stolen goods, and the court in *Phillips* upheld the priest's right not to testify. The court found a privilege rooted in the priest's right, under New York's constitution (Article 38), to exercise his religion. Four years after *Phillips*, however, in *People v. Smith*,¹⁴ another New York court found that no privilege existed for a Protestant minister. The court distinguished between the requirement of

confession in the Catholic Church and the ritual's absence in Protestantism. This distinction may have rested on the distinguishable difference between the sacramental status of Catholic confession and the nonexistence of a comparable ritual in Protestant churches. But as we shall see, while sacramental status may be helpful to the courts as a way of determining which clergy may not be compelled to testify in court, such sacramental status is of no practical use in deciding which clergy may claim exemption from an obligation to hold in confidence their communications with parishioners. In 1828, the New York legislature passed the nation's first statute recognizing the clergy privilege.¹² Following New York's lead, other states passed similar statutes recognizing the clergy privilege. Today, all states have statutes establishing some form of the clergy-penitent privilege.

State provisions vary on the issue of who may waive the privilege. Many state statutes are vague in this regard.¹⁵ Among provisions that are clear, we find four possibilities represented:

1. Neither party may waive the privilege: For example, the Michigan statute states that no clergyman of any denomination "shall be allowed to disclose any confessions made to him in his professional character."¹⁶ This apparently means that neither the clergyman nor the penitent may waive the privilege. This formulation is specifically a rule of evidentiary competence (since it completely disqualifies the clergy testimony) rather than a privilege against disclosure.

2. The penitent only may waive: For example, Connecticut law states that a clergyman "shall not disclose confidential communications made to him in his professional capacity unless the person making the confidential communication waives such privilege."¹⁷ This apparently means that only the penitent may waive the privilege. The Oklahoma statute expresses the same idea, stating, "the clergyman is presumed to have authority to claim the privilege but only on behalf of the communicant."¹⁸ In California, a penitent "has a privilege to disclose, and to prevent another from disclosing, a penitential communication, if he claims the privilege."¹⁹ The state of New York, where the *Lightman* case took place, also falls into this category. Its law provides that "unless the person confessing or confiding waives the privilege, a clergyman shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor."²⁰

3. The clergyman only may waive: For example, Virginia law provides that "no regular minister, priest, rabbi. . . shall be required to give testimony."²¹ This formulation invests the clergy with control of the privilege (in contrast to physicians who can be compelled by patients to disclose).

4. Both together must waive in order for disclosure to occur: For example, in Colorado a clergyman "shall not be examined without both his consent and also the consent of the person making the confidential communication."²² Similarly, Alabama law provides that "either (the penitent) or the clergyman shall have the privilege, in any legal or quasi-legal proceeding, to refuse to disclose and to prevent the other from disclosing anything said by either party."²³

The clergy-penitent privilege has been defended under two general rubrics. One rationale emphasizes the value society sees in protecting the privacy of the clergy-penitent relationship. According to the United States Supreme Court, the privilege is "rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return" (Ref. 24, p 51). Other courts and commentators, however, ground the privilege in the constitutional guarantee of free exercise of religion. Note that this rationale, which is disregarded when a clergyman is forced to reveal what his religion commands him to hold secret, would grant control of the privilege to the clergyman.

In the case of *Lightman v. Flaum*, the Court of Appeals of New York⁵ made it clear that the common law had historically protected certain confidential information from disclosure at trial. A relevant example was communication made between spouses during their marriage. Then eventually, New York statutes were established that protected information obtained in certain contexts from being admissible in court: information shared between spouses, attorney and client, and physician and patient. This became known as the statutory evidentiary privilege. The Court of Appeals acknowledged that the common law had not included a clergy-penitent privilege, but that New York State eventually established a statute to protect confidential communications made by congregants to clerics of all religions.

The Court of Appeals, however, made a distinction that was crucial to such reasoning. This Court pointed out that a statutory evidentiary privilege merely reflects a state's public policy "to proscribe the introduction into evidence of certain confidential information absent the permission of or waiver by a declarant" (Ref. 5, p 1031). Thus, the Court argued that the statutory evidentiary privilege was not itself the source of a fiduciary duty of confidentiality. The Court cited the example of attorneys to show that the attorney's duty of confidentiality owed to a client is broader than that described in the evidentiary statute covering the attorney-client privilege. While the statutory evidentiary privilege may sometimes overlap applicable fiduciary duties of confidentiality, this privilege is not the basis of the fiduciary duty. The Court then concluded that no comprehensive statutory scheme regulated the clergy-congregant spiritual counseling relationship. Consequently, the plaintiff could not use the evidentiary statute, directed at the admissibility of evidence, to argue that the rabbis had breached the fiduciary duty of confidentiality owed to her.

The Court of Appeals made clear its distinction between the statutory clergy-congregant privilege and the fiduciary duty of confidentiality that clergy may owe their parishioners. In contrast, the trial court clearly thought that the privilege and the fiduciary duty were intermingled to some extent and that the duty drew strength from the privilege. In addition, the lower court argued that there was an overwhelming public interest in preserving confidential communication between clergy and congregant. We turn now to an examination of the arguments used in this case concerning the fiduciary duty.

Discussion

We suggest that an analysis of the arguments employed in *Lightman v. Flaum* leads inexorably to an examination of the meetings that took place between the rabbis and the plaintiff. Normally, this would occur at trial, or better, would be worked out through good faith negotiations among the parties. Simple questions about those meetings should be posed and answered, to evaluate the idea that disclosures of the communications that took place between the parties could be justified.

What was the purpose of the meetings? Who was present at each one? What were the expectations of the parties present? What was asked or expected of

the clergy? These questions should help organize some clearer understanding of what took place. The plaintiff asserted that she wanted to talk about the difficulties she was having with her husband and how she was responding to the stress caused by the marital conflict. We maintain that if the purpose of the meetings had been articulated in clear fashion, a reasonable person in the community would expect the clergy to keep such communications confidential.

The rabbis asserted that the presence of a third party transformed the nature of the interaction and led them to conclude that the discussions were not confidential. We see this claim as specious and believe that a caregiver would be hard pressed to justify it on the basis that the client presented for help accompanied by a third person. In some instances, courts have not allowed the presence of a third party to destroy absolutely the confidentiality of communications between attorney and client. So in *Stroh v. General Motors Corporation*,²⁵ the court held that the daughter's presence did not vitiate the privilege between an elderly woman and her attorney. The daughter's presence was seen as helpful, because the older woman sought to communicate effectively with her attorney about a profoundly traumatic life experience. Similarly in *Sims v. State*,²⁶ the court viewed it as good public policy that confidentiality not be discarded when a man consulted his psychiatrist and brought his wife along. The court accepted that third parties could be necessary and customary participants in the consultation and treatment.

The appellate court in *Lightman v. Flaum* also noted that the plaintiff contended that the rabbis had divulged confidential information to other parties besides the plaintiff's husband. Although the Court of Appeals did not examine this claim, we think an objective observer would want to assess its veracity and to know whom the rabbis had told what and why. The rabbis' disclosing to others in addition to the husband might fatally weaken their argument that their activity and behavior were exclusively ecclesiastical. In addition, it could mandate a re-examination of the notion that the rabbis acted out of religious motivation. If clergy are to be taken seriously when they assert a compelling justification to reveal their parishioners' confidences, the revelations cannot be made to just anyone. The clergy must reasonably satisfy the expectation that they revealed the confidences only to individuals who had an ecclesiastical reason to know. Having acknowledged

the need to respect the separation of religious and secular argumentation, we do recognize that clergy may reveal confidences if they are truly under some ecclesiastical compulsion to do so. But the parties to whom the confidences are revealed must have some reasonable ecclesiastical relationship to the clergy.

In the case of *Snyder v. Evangelical Orthodox Church*,³ the Court of Appeal of California enunciated several questions that courts should ask when considering complaints about church officials' conduct: first, whether the organization is a religion and, second, whether the alleged conduct qualifies as religious expression. If these two questions can be answered affirmatively, then comes the third question of whether the alleged conduct inflicts so much harm that there is a compelling state interest in discouraging it that outweighs the values served in allowing religious freedom. We argue, of course, that revealing confidences to others besides Lightman's husband (and anyone else with a religious need to know) would by any common-sense standard not qualify as religious expression.

Now we must apply the questions articulated in the *Snyder* case to the central thesis advanced by the rabbis and their supporters in *Lightman*. In an *amicus curiae* brief written in support of the rabbis, the Institute for Public Affairs (IPA) of the Union of Orthodox Congregations of America argued that all clergy could not be expected to conform to one mode of conduct with respect to the issue of confidentiality.²⁷ The IPA then suggested that the rabbis had a responsibility under Jewish Law and to Jewish people to reveal the information confided by Mrs. Lightman. The rabbis themselves advanced this argumentation and insisted that they had a duty to protect the husband and also the children. In other words, once Mrs. Lightman told the rabbis that she was no longer attending the ritual baths, the rabbis were obligated to warn her husband. This was necessary so as to protect the religious state of her husband and, by extension, her children. We accept this argument and feel no need to question the rabbis' assertion that this ecclesiastical "duty to warn and protect" is a canon of their orthodox doctrine.

However, the New York Court of Appeals never confronted the notion raised by others that Mrs. Lightman's husband already knew from her that she was no longer attending the ritual baths. Consequently, the rabbis were not warning the husband or protecting him from anything, since he was well

aware of his wife's conduct. Indeed, a more cynical view (not ours) of this aspect of the rabbis' behavior would suggest that they simply wished to support the husband in his divorce struggle with the wife. From such a vantage point, the rabbis could be seen (by some) as doing nothing more than advancing a mere secular political interest of helping a male congregant. On the one hand, we emphasize that we do not take lightly the rabbis' claim that under Jewish Law they were obligated to protect the husband. On the other hand, we maintain that the rabbis may not cavalierly assert that their religious obligation trumps the traditional secular responsibility that caregivers have to preserve confidentiality. Their assertion must pass the test of reasonable common sense. In this case, if the rabbis were certain that the husband was aware of his wife's transgressions, their violation of confidentiality was unwarranted.

One further point deserving consideration is that the rabbis should have advised Mrs. Lightman at some point during their discussion that Jewish Law would obligate them to divulge what she had told them. This would have made it clear that they were indeed acting out of religious obligation to protect the whole family, thereby removing any question of duplicity on the rabbis' part.

One final point deserves mention. In reporting the facts of the case, we noted that when Mrs. Lightman filed for divorce, both rabbis submitted affidavits supporting the husband in seeking custody of the children. These declarations from the clergy were intended to show that granting custody of the children to Mrs. Lightman would jeopardize the Orthodox Jewish upbringing of her children. While we felt considerable sympathy for the rabbis' claim that their obligation under Jewish Law was to talk to the husband about what his wife had discussed with them, it stretches the imagination to understand how the rabbis could extend their mandate to cover the submission of the affidavits. The husband had the obvious choice of obtaining an affidavit from any orthodox clergy who could present in court the importance of having the children raised by the parent who continued to observe Jewish Law.

But Rabbis Flaum and Weinberger were obviously not content with the presentation of objective data to the court hearing the custody case. They wanted to support Dr. Lightman in the custody struggle, which they claimed was mandated by their religious obligations. We contend that it should have been possible

for the rabbis to support Dr. Lightman without breaking the confidentiality owed to Mrs. Lightman. The rabbis could have assisted Dr. Lightman's lawyer to find an expert on Jewish Law who could have testified about the religious obligations of Jewish parents raising children. There was a primary relationship established between the rabbis and Mrs. Lightman by virtue of her discussion with them. Certainly, religious doctrine could lead to the redefinition of that relationship. But absent an ecclesiastical reason for such redefining, the rabbis should not have felt themselves free to ignore the primary relationship and actively assist the husband in his custody petition.

We concede that the boundaries of religious relationships differ in important ways from those of secular associations. The clergy's religious obligations may on some occasions take precedence over any duty of confidentiality owed to their congregants. However, we suggest that in these relationships, it is critical that the clergy's behavior be examined to make sure that common sense qualifies it as religious expression and that their conduct is based on religious doctrine. We are not saying that the rabbis had no reason to be concerned about the religious upbringing of the children. We are arguing that the rabbis, in taking seriously both their religious obligations and the duty of confidentiality owed their parishioners, needed to question themselves. Was there any way to meet their religious obligation without sacrificing fulfillment of the fiduciary duty owed to a congregant in a counseling transaction?

Conclusion

Without question, clergy have the right to disclose confidential conversations when they have religious reasons for doing so. But how they use that right must be subject to some review, one that must of course respect any religious reasons they have for making their disclosure. The duty to disclose or protect information may serve ecclesiastical purposes. In contrast, some clergy conduct may have no justifiable religious explanation. Sexual abuse is a clear example.

We have argued that courts must do better than take refuge in irrelevant and peripheral issues such as the presence of a third party client's helper in the confidential discussions. It is equally unacceptable simply to drop the analysis after distinguishing the statutory evidentiary privilege from the true sources

of the fiduciary duty of confidentiality and referring vaguely to problematic constitutional issues.

Showing proper respect for religion certainly cannot mean avoiding review altogether. Taking reasonable measures to utilize common-sense discretion does not compromise religion. In the courtroom, simple appropriate expedients, such as using hypothetical questions and engaging the proper relevant and neutral professional expertise, would strongly support religious values rather than undermine them. The clergy of many denominations willingly engage in supporting their congregants' mental health, often directly through pastoral counseling. They bring unique good to the mental health enterprise. A sensitive approach to the fiduciary duty of confidentiality, understood in common-sense terms, will only enhance their contribution.

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