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IN REPLY REFER TO

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MEMORANDUM FOR MAJOR CLAIMANT STAFF CHAPLAINS

Subj: FOCUS 08/99 (CONFIDENTIALITY, PRIVILEGED  
COMMUNICATION AND THE CHAPLAIN'S ROLE)

Encl: (1) Talking Paper Prepared 19 May 1999

1. The enclosed talking paper on the chaplain's role in confidentiality and privileged communication is forwarded for widest dissemination within your respective claimancies. The intention is to update the January 1986 packet, entitled, "Privileged Communication and the Chaplain."
2. In addition to serving as a timely, relevant resource for chaplains and Religious Program Specialists, it can also be used in local training sessions, and as a resource when briefing the chain of command, and when working with our legal, family services and family advocacy counterparts.

A handwritten signature in black ink, appearing to read "M. R. Ferguson".

M. R. FERGUSON  
Executive Assistant to the  
Chief of Chaplains

## Confidentiality, Privileged Communication and the Chaplain's Role

### General Remarks

Over fifty-one Department of the Navy instructions and directives refer to confidential communication in some form. From mental health evaluations to financial disclosures, HIV status to the Privacy Act Program, confidentiality is a significant concern.

Military people work within these regulations in order to protect the privacy of individual Service members. However, for chaplains, confidentiality and privilege have the additional requirements of moral values and theological mandates. The blending of these components is often complex and chaplains cannot assume that other communities in the Department of Defense understand the unique requirements that dictate the keeping of confidences and maintenance of privileged communication.

Chaplains are mandated to uphold the tradition of confidentiality that Admiral Nimitz so poignantly described in his quote. The idea of confidentiality as a moral value is a given among chaplains and great leaders like Chester Nimitz. To violate that trust is not merely a breach in personal integrity, it violates the integrity of the Chaplain Corps as a whole. By virtue of their faith group endorsement, chaplains hold to the theological imperatives of privacy and understand the spiritual healing brought about by confession, forgiveness and absolution.

Military people expect chaplains to refrain from discussing counseling issues with others. Chaplains have no right to give away what is not theirs to give. Rather they advocate for the needs of the individual without breaching confidentiality and betraying the very people who seek their help.

Beyond the ownership issue, confidentiality serves a therapeutic good. Helping professions recognize the rehabilitative nature of self-direction and self-determination in healthy living. The chaplain's goal is to help the individual do the right thing with their secret even though it often is not easy.

Confidentialities kept by chaplains are not intended to protect wrongdoing or keep the individual from getting the needed help. With mature and compassionate counsel, the chaplain can encourage the counselee to take the proper course of action. In order to do this, the counselee's trust must be maintained. Helping Service members to self-disclose is no small matter. Key elements include the dictates of conscience; the mandates of institutional life in the military and the theological truths embodied in religious faith.

**"By patient, sympathetic labors with the crew, day in, day out, and through many a night, every chaplain I know contributed immeasurably to the moral courage of our fighting men. None of this appears in the statistics. Most of it was necessarily secret between pastor and confidant. It is for that toil in the cause both of God and country that I honor the chaplain most."**

**FADM Chester W. Nimitz, USN**

### Clarifying Key Elements

In a number of cases, the question of whether a particular communication is deemed "privileged" can be resolved by interpretation of applicable statutes. In this regard it is helpful to examine what constitutes a confidential communication, what is the meaning of privileged communication, and what constitutes a formal act of religion or matter of conscience.

Black's Law Dictionary defines confidential as "intrusted with the confidence of another or with their secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence." Chaplains are obligated, as care givers; to remember that confidential communication is made under circumstances in which the speaker intends for the statements to remain confidential. These moral principles apply whether the communication is oral or written.

### **Privileged Communication and the Chaplain**

Known by various terms such as "religious privilege," "priest-penitent privilege," or "clergy privilege," confidentiality enters the legal realm when information is sought as evidence. Military Rules of Evidence (M.R.E. 503) defines the chaplain-penitent privilege for military chaplains and Service members. This rule recognizes that certain communications to clergy should be held confidential as a matter of public policy and outweighs the government's interest in securing a criminal prosecution. The chaplain, the penitent, and even certain third parties present during the communication can not be compelled to disclose qualifying communications. Under M.R.E. 503, the intention of the person making the communication and the circumstances under which it is given will help determine whether or not it is privileged.

In the current SECNAVINST 1730.7A, (para 1h of enclosure (1)), "chaplains are directed to safeguard the privileged communication of Service members, eligible family members, and other authorized personnel throughout the Department of the Navy."

"Privilege" is applied when that communication is made to a chaplain in his or her capacity as a spiritual advisor or to a chaplain's assistant acting in an official capacity. The following excerpt from Religious Privilege and the Military prepared by the Chaplain Resource Board in 1986 remains applicable:

This definition would seem to include at a minimum, in addition to members of the Chaplain Corps, the members of the Religious Program Specialist Rating, the equivalent enlisted support personnel of the Marine Corps and Coast Guard, civilian secretaries and seminary students on active duty in the 1945 designator.

It is important to note that the rule does not provide a definitive list of those persons, other than chaplains and chaplain's assistants, who are bound to respect the privilege. Chaplains should advise all personnel who provide religious support on a voluntary or paid basis of the inadvisability of becoming involved in privileged communications.

#### **M.R.E. 503 Communications to Clergy**

- (a) **General Rule of Privilege:** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.
- (b) **Definitions:** As used in this rule: (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman. (2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.
- (c) **Who May Claim the Privilege:** The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman and clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

The penitent or counselee owns the privilege. Even if the person who made the communication waives the privilege, chaplains are advised to maintain the confidence, in respect for the clergy-penitent privilege.

Two questions invariably arise: (1) "What if the person offering the communication is intent on harming themselves or others," and (2) "Do I have a moral obligation to disclose the communication?" Admittedly, this is a moral choice each chaplain must make. However, in practice, it is rarely as difficult as it may seem. In a recent court martial case (United States vs. Lance Corporal Michael S. Isham, 8 APR 1998) where the issue of privileged communication was an issue, the judge in his decision wrote:

The penitent who comes to the chaplain for counseling does not normally desire to carry out the threat of harming anyone. Rather, he or she wants to resolve the anguish by getting help, first from the chaplain for their spiritual and moral anguish, and then from others as may be appropriate. After ministering to the penitent's spiritual and emotional needs, in most cases the chaplain will be able to convince the penitent to voluntarily cooperate with other care givers and those in the chain of command. In cases where the Service member appears intent upon carrying out a destructive act upon leaving the office, the chaplain must take more direct measures, other than violating the confidence, to prevent the harm. In extreme cases, this may entail personally accompanying the penitent until the chaplain can guarantee that no harm will result.

The other issue, which often surfaces regarding privileged communication, is domestic abuse. This issue has captured the attention of the legal community, law enforcement agencies, social service counselors and the general public. What should the chaplain do if he or she becomes aware of an incident of physical or sexual abuse of a spouse or a child?

Spouse abuse and child abuse/neglect reporting laws, as well as DoD and other regulations, prescribe that anyone who identifies or encounters suspected or known child maltreatment shall report to the appropriate authorities. However, self-admissions made as privileged communication are generally exempted from such requirements. Because communication made as a "formal act of religion or as a matter of conscience" is protected by the privilege, problems often arise for chaplains who place themselves in a clinical counseling relationship. Chaplains should, if possible, avoid this kind of role conflict in the military setting and ensure that they act as spiritual advisors.

Chaplains can support persons by providing appropriate referrals and maintaining a collegial relationship with other health care disciplines, family services and childcare professionals. When the individual presents more than one issue the chaplain can encourage him/her to seek additional assistance. Protecting an individual's privileged communication does not eliminate our moral obligation to care that the person act responsibly within their own sense of well doing.

### **Confidentiality in Group Settings**

On occasion, the chaplain may be part of couples or group counseling programs as part of a professional team working with individuals or families. The chaplain is on the team as a chaplain and not another counselor.

Chaplain membership on evaluation boards can be problematic. Such boards might include the drug or alcohol rehabilitation board, family advocacy case reviews, etc. Chaplains are not there to provide confidential information about the person being evaluated. Rather, they function as non-voting pastoral

care consultants who address pastoral care issues. They will not address specific cases of named Service members and families.

### **Summary and Conclusion**

Chaplains maintain confidences in order to provide a safe place for Service members to share concerns, questions, or burdens without fear of disclosure, and provide an avenue for absolution as an “act of religion.” Chaplains seek to provide an environment of respect and trust fostering a helping response. Providing this environment establishes a place for those who might otherwise have no other option.

Is all communication to a chaplain confidential? Is it privileged? Information communicated to the chaplain in the capacity as friend, naval officer, social companion, neighbor, or military superior is not privileged. Even so, chaplains still presume confidences as a professional ethic. It stands to reason when chaplains remain consistent in proclaiming their professional status as clergy and it is clearly communicated to the people they serve, the criteria of privilege are more likely to be presumed in any given matter of private counsel with people.

Chaplains determine the purpose for which the consultation takes place, the capacity in which the consultation takes place, whether the disclosure is of the character likely to be regarded by the Service member as confidential, and whether the consultation is rooted in essentially religious, spiritual, or moral considerations. Chaplains are not “secret” keepers for the purpose of withholding knowledge. They keep confidences by means of holding in trust that which the individual must come to terms with in themselves and before their God.

Essential on-the-job training for chaplains includes a study of litigation, journal reports, pastoral care techniques, and Naval regulations. Dean Seward Reese, Dean and Professor of Law at the College of Law, Willamette University, put the issue of confidentiality and privileged communication in perspective when he said,

“Among the things that are considered reprehensible and detestable by all men is the violation of a confidence by anyone. Among the most hardened criminals, as well as among the most saintly and law abiding citizens, the feeling of revulsion is the same. A person should know they cannot confide in the town gossip, but if he cannot confide in a priest when seeking remission of sin or seeking spiritual aid and comfort, this would strike at the concept of confidence in a most critical area. Of all people, the minister is supposed to represent the highest in ethics and morals. His business deals with right and wrong, the ethical and unethical.”

### **SELECTED DIRECTIVES AND MILITARY INSTRUCTIONS**

An on-line query of the Department of the Navy directives site will provide highlights of all the instructions and directives which address confidentiality. That site may be found at <http://neds.nebt.daps.mil>. A sampling of these instructions include:

**SECNAVINST 1730.A (OPNAVINST 1730.1C) “Religious Ministries in the Department of the Navy.”** Specific references in the SECNAVINST include the following:

-Enclosure (1), subparagraph h. "Roles and Function of Chaplains," (3) directs chaplains to safeguard the privileged communication of service members and their families.

-Enclosure (1), subparagraph j. "Collateral Duties," chaplains may not serve in capacities which conflict with privileged communication, e.g. Family Advocacy Point of Contact or Equal Opportunity Officer.

**SECNAVINST 1752.4 (OPNAVINST 1752.1A) "Sexual Assault Victim Intervention Program."**

The instruction does not intend that the chaplain become the (ashore) SAVI Program Coordinator nor does it intend that the chaplain become the (afloat) SAVI Point of Contact. It does intend that chaplains be a proactive member of the SAVI team in support of all service people involved in such incidents and bring confidentiality and privilege to bear on their participation as supported by Reference (q) within the OPNAV iteration of these instructions.

**SECNAVINST 1752.3A (OPNAVINST 1752.A) "Family Advocacy Program."**

The instruction does not intend that chaplains function as the Family Advocacy Representative (FAR) shipboard or ashore. Chaplains provide pastoral care and counsel and in some cases serve in coordinating committees while maintaining the requirements of confidentiality and privilege as noted in paragraph 7d. of the SECNAVINST, which defines the chaplain's role regarding privilege.

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