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CLERGY LIABILITY

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Reflections on Certain "Malpractices of the Clergy"

by Robert L. Toms

On a wintery Tuesday in December of the year 1170, four knights landed fresh on the south coast of England after a chilly channel crossing. Journeying methodically to Canterbury they arrived about lunch time, and seeking surreptitious entry they found a ladder and some tools left by workmen who were in the inn having a long and spirited luncheon. Using the tools and the ladder to break into the cathedral, they found the former friend of their King Henry II, Thomas Becket, and executed him.

Henry and Thomas were deep friends and adventurous drinking buddies. When young Henry was crowned, he reached out for Thomas and appointed him chancellor, and everything went reasonably well with the friendship and the kingdom. But one day, Henry made an appointment with unexpected consequences. He appointed Thomas to the See of Canterbury. Unfortunately, Thomas took it quite seriously and decided he was called of God, a relationship he considered of a higher authority than his king, his friend, or any social compact. He reversed his direction and lifestyle, adopted a new cosmological view, began to wear a lice-infested hair shirt and adopted austere ways. He set as his first priority the task of ruling his spirit under God rather than ruling England for Henry II. All of this created primarily a lot of tension and frustration in the king until certain "malpractices of the clergy" came up. Thomas, believing the only valid authority to judge these practices was the church, was assassinated for not yielding the clergy to the secular tribunal.

Totalitarian regimes of the left and right have always been tolerant of wimpy religion but always intolerant of religion taken seriously. Machiavelli observed that religion was helpful to pacify the people, motivate armies and control the population, but gave it no other particular efficacy. Adolf Hitler had a rather clear view of this subject. An appointment was being made to a high arts council in pre-war Germany, and a rather prominent Jew was nominated. A mutual friend of the nominee spoke to Hitler about the nomination and suggested that the Jew was widely recognized as being very qualified for the position. Hitler's answer was that the trouble with Jews was that they answered to a higher power and could not be counted upon to cooperate with the agenda of the regime.

In modern societies in the free world this issue is not as acutely drawn. In an age of relativism and purported freedom from all dogma, the combination of most religion having lost its cutting edge and an almost national religion of non-religion, has eclipsed most of these issues from the imminent public view. Yet, like the earthquake faultlines, they lie there underground, as they did in 1170, waiting for the stress points to be relieved and releasing disruptive shock waves that do damage that is hard to estimate and control.

Perhaps the essence of the popular view is expressed best in a question on a respected national psychological test, "Do you answer to a higher power?" The "right answer" is clearly not "yes." Thomas Becket failed the same test in his time, and all those who today cannot accept that humans are simply matter and energy in an accidental symbiosis that was fortunately and fortuitously well structured, may give the wrong answer according to the popular dogma.

Church-state relations and regulation of religious practices is not a new subject. In fact, there is a long and bloody history derived from a fundamental cosmological rift that will continue to play out in the generations succeeding us. In spite of this history the religious world was jolted into awareness recently by the **Nally** case (**Nally v. Grace Community Church of the Valley**, No. NCC 18668-B, Los Angeles Superior Court).

This edition of **Theology, News and Notes** brings together distinguished writers to expose for you how this struggle is developing in this decade. It is our hope that the insights and issues presented here will assist you, the reader, in preparing to assure that in the areas of controversy we may be allowed to continue to seek the God we are searching for without a surreptitious entry by agents of the state. ■

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Some Reflections on Clergy Malpractice

by Edwin Meese III

I was very pleased when **Theology, News and Notes** asked for my reflections on the topic of clergy malpractice. It is a commendable thing for the religious community in America to pay close attention to developments in the law at both the federal and state level. In defining our rights and duties as citizens, these laws inevitably influence the role we can play as responsible citizens within the churches that exist in our country.

As active members of those churches, we can especially appreciate the benefits we enjoy under a Constitution that explicitly acknowledges and protects in its First Amendment the right to exercise religion, and freedom from the government establishment of religion. This twofold bulwark of religious liberty exists in our Constitution precisely because persons concerned about the vitality of religious faith took an active part in the life of our nation at its founding. Those religious citizens, schools and journals who do the same today are equally to be commended.

As a native Californian, I took note of the first clergy malpractice suit as another of the novelties arising from my home state. The **Nally v. Grace Community Church** case, which plays so prominently in this issue of **Theology, News and Notes** is, to my knowledge, still the only case of clergy malpractice that has proceeded to trial in the courts of any of our states. No such case has apparently arisen in the federal courts.

I will not attempt to offer a theory concerning clergy malpractice as this issue has not risen to the federal level and has not been within the purview of our activities within the Department of Justice. Let me touch on some basic principles, however, that relate to the topic of clergy malpractice in general.

The idea of suing the clergy for malpractice in their calling is but an aspect of a broader trend of expansion in our tort liability system to bring within its scope an increasingly wider spectrum of social activities and relationships. The California court system has not opened the doors to clergy malpractice; many other areas of life previously assumed to be immune from judicial intrusion through the tort law system have seen judicial intervention within recent years. This trend is causing increasing concern today as an example of judicial activism.

Courts become activist when they seek to make essentially legislative judgments through the ajudicatorial process—unconstrained by constitutional provisions, enacted statutes, or long-established principles of common law. To the extent that clergy malpractice represents a foray far afield from any principle recognized by the common law, enacted by statute or incorporated in our Constitution, it is a welcome right to see the courts reject the idea of yet another expansion of judicial activism.

The expansion in tort liability—offering compensation when someone has suffered a wrong—often carries a sentimental appeal when persons suffering a terrible plight come into court seeking some remedy through the law. We can sympathize with the human plight found in many difficult counseling situations, both religious and secular. It is another thing entirely, however, to expect courts to provide the remedy. Of all the institutions in our society our court system is perhaps the worst equipped to provide a solution in such an area. In order to find that a member of the clergy was negligent in his or her duties toward a counselee, the courts would first have to define what the duties of a member of the clergy are. Fortunately, we live in a country where this type of determination has historically not been made by any branch of government, let alone by the courts.

Further, the issue of clergy malpractice has inevitable implications for our religious liberties guaranteed by the First Amendment. Any governmental intrusions into the life of the church necessarily raise questions of free exercise and establishment of religion. For a court to consider the creation of a new cause of action for the "tort" of clergy malpractice would represent a substantial and serious new intrusion by the courts into religious activity. Any member of the clergy providing counseling is presumably acting in accordance with his or her religious beliefs. Under the Supreme Court's decisions interpreting the free exercise clause of the First Amendment, the government would have to show a compelling interest before overriding the religious beliefs and conduct of a minister or any other person.

Fortunately, there is a growing popular distaste for the results of judicial activism and the extreme theories of tort liability recently seen in our courts. Tort reform initiatives have had remarkable success in many state legislatures. The tide is running against further expansion of the tort liability system—rightly so, in my view—and any claims for clergy malpractice would have to swim against this tide. ■

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Legal Issues Raised by Church Counseling and Church Discipline

by Dennis R. Kasper

The recent trend toward trying to hold churches and their officials civilly liable for counseling and discipling activities has raised some difficult philosophical, theological, professional and constitutional issues. While other articles will explore these questions more fully, in order to understand the issues it may be helpful to examine first some of the ways in which the law might apply to such activities.

One of the questions presented by those seeking to apply the law to church counseling is that of the manner in which, if at all, a court can examine the competence of the counselor. The question is difficult, not only for the obvious constitutional reasons, but also because the test of professional competence requires comparing the conduct of the one being examined against that of other similar professionals in the community under similar circumstances. A minimum standard of care is thus established by the practice of other professionals in the community.

The evaluation of church counseling in this manner raises the difficult question of which professionals to use to set the standard of care. One possibility is to use other pastors. Another possibility is to use mental health professionals. In other words, if the quality of pastoral counseling is going to be examined by a court, the question is raised, should pastors be required to conform their counseling to the level of competence required of other pastors, or that of mental health professionals? If the answer is, "other pastors" the additional question of, "which pastors," also becomes important.

In addition to the above, the application of state mental health licensing laws to churches may have an impact on the nature and extent of counseling the church may engage in. While many states have laws exempting ordained clergy from mental health licensing laws, similar exemptions often do not apply to non-ordained staff or lay counselors. The lack of an exemption may directly impact the type of counseling the non-ordained individual may engage in, as well as whether or not the church or individual may receive compensation for the counseling service.

Many churches have hired licensed mental health professionals to assist with counseling. Such individuals are bound by the terms of their licenses to meet certain professional standards for the care they provide. The mere fact that the counseling they do is within a church may not change their legal obligations in this regard.

In recent years it has become increasingly common for ordained clergy to hold mental health licenses. The fact that a state issued license is involved may well give the state the right to enforce standards which it would be precluded from enforcing otherwise. The situation can be quite complex, however, since it may not be possible to separate the spiritual counseling from mental health care.

Many churches also run lay counseling programs. Whether lay counselors can be held liable for the care they provide is yet to be decided. However, the nature and extent of their training and supervision may have an impact on the outcome of the issue.

In most churches there are counseling activities conducted by youth workers, Sunday school teachers, elders and deacons and others who may not be recognized as counselors per se and may not be supervised as such. While most, if not all, of their activities are likely to be held exempt from legal scrutiny, the nature and extent of the protection afforded them, and the church, may be impacted by the activity they engaged in and the nature and extent of supervision and training they received.

No matter how the issues surrounding the legal examination of counseling competence are ultimately decided, churches may be able to somewhat improve their legal position conducting an audit of sorts of their programs. Such an audit would help the church evaluate the type and quality of counseling activities being provided and to compare these activities to the existing law. It would also assist the church in designing the training and supervision of its counselors so as to minimize the risk of a problem arising which might lead to litigation.

The next area of concern involved in church counseling activities is that of confidentiality. There are two different aspects to the issue of confidentiality. The first has to do with the ability of the state, the courts of a state, or of the United States to compel an individual who has counseled or heard a confession, to disclose the information received. The second has to do with the right of privacy of the individual counselee.

Many states have laws which protect clergy from being required to disclose information which they receive in the form of a penitential communication. Often those laws are restricted to ordained clergy or to individuals who are designated by their churches to hear penitential communications. In addition, those laws are often limited to communications which are made in the form of a confession. In some instances courts have attempted to distinguish between

"The lack of an ethical requirement, however, does not necessarily relieve the counselor of some direct duty to the counselee."

confessional statements and information communicated in the course of a general counseling session and have required disclosure of the latter.

Often the breadth of the privilege to keep disclosures confidential is far more restricted for a licensed mental health professional than it is for a pastor hearing a penitential communication. In other words, a mental health professional might be required to disclose a much broader range of information than a pastor hearing a penitential communication.

With regard to non-licensed, non-clergy counselors, the ability to protect information received is substantially less clear. In many cases, it may not be possible for the lay counselor to protect the information which he or she receives at all. However, the issue must be evaluated taking into consideration the nature of the role of the counselor, the type of supervision which he or she receives and, the state law involved.

Because the laws in each state are different, it would be wise for churches engaged in counseling activities to become fully familiar with the laws of the state, taking care to evaluate their program and the personnel involved in the light of the law.

Many states have now adopted laws which **require** mental health professionals to report certain types of information which they receive. In California, for example, mental health professionals are required to report whenever they learn of child abuse, or abuse of the elderly, and to take protective steps when they learn that the counselee intends imminent harm to a third person. In some states efforts have been made to extend the reporting requirements, particularly in the area of child abuse, to members of the clergy. Where these efforts are made, serious constitutional issues arise. However, in order to get around the constitutional problems, some courts have attempted to draw a distinction between penitential communication and other information communicated in the course of counseling.

The duties to report have been given broad application in some states, particularly child abuse information. That application might extend beyond the clergy in a church to lay counselors, Sunday school teachers, day care workers and church school teachers. Because of the breadth of the application of the reporting requirements, it would be wise for churches to be aware of the particular requirements of their state and to evaluate carefully the application of these requirements to the church activities.

In at least two of the cases which are currently pending in California against churches, the issue involved is based upon the voluntary transmission of information which a pastoral counselor received in counseling to others without the permission of the counselee, rather than an effort by a court to compel the pastor to produce the information. The question here is whether or not there is any duty on the part of a pastoral counselor to keep the communications which he or she receives in counseling activities secret.

On this point the law is often not very clear. Many states have specific ethical standards which require confidentiality on the part of mental health professionals. Pastors, on the other hand, are generally not covered by those standards. If they are not covered by ethical standards established by their denomination, there may not be any requirement that they keep information received in counseling confidential.

The lack of an ethical requirement, however, does not necessarily relieve the counselor of some direct duty to the counselee. Many states have privacy statutes and some legal experts contend that the communication to a third party of information received in a counseling setting without the consent of the counselee might be an invasion of privacy. In some states it might also breach the contractual agreement between the counselee and the counselor if such an agreement is entered into, either expressly or by implication.

Where the law is unclear on the issue of confidentiality, it would be wise for pastoral counselors and lay counselors to communicate in writing at the first session with a counselee, their policy with regard to the confidentiality of communications. This is particularly important if the pastor or counselor does not intend to keep the communication completely secret.

One final area involving church counseling activities which has given rise to some litigation has to do with situations where the counselor

"...it would be wise for churches...to carefully evaluate the organizational structure of their counseling program in the light of their state's laws."

involved engages in inappropriate sexual activities with the counselee. Where this situation exists, the courts may not allow the counselor or church to hide behind their ecclesiastical nature to avoid liability, especially if the counselee is a minor.

Churches on occasion find themselves in the position of having discovered that one of the members of their pastoral staff or congregation has violated his or her vows and engaged in inappropriate sexual activity with a counselee. While it is proper for the church to exercise its own disciplinary process in that event, the church should also carefully evaluate the incident and determine whether or not it has some duty to report it to the secular authorities. Such a requirement might exist, for example, under the child abuse reporting laws if a minor is involved.

The last area of concern to be addressed by this article involves the question of church discipline. In addition to the half dozen or so New Testament admonitions with regard to church discipline, many churches have as a part of their tradition or charter specific procedures to follow in connection with church discipline.

The courts of the state have generally taken the position that the courts of the church are sacred and that their rulings are, therefore, outside of the jurisdiction of the courts of the state, particularly when church members are involved. On that basis they have often refused to review or invade the province of the courts of the church. It is important to note, however, that while a church may have disciplinary power over a member because the member has agreed to submit to the church, such power may not extend as broadly to a non-member.

In addition, in spite of the general, hands-off approach which the courts of the state have taken, lawsuits are filed from time to time arising out of church disciplinary activities. Generally those lawsuits involved claims of defamation or claims of invasion of privacy. Those claims are usually based upon allegations that the church, in announcing to the congregation the results of a disciplinary proceeding, made false statements about the conduct engaged in by the disciplined party; that the church communicated the results of the disciplinary proceedings to the other church bodies and the information was untrue; or it was an invasion of the privacy rights of the individual for the church to communicate information about the discipline to other churches.

In conclusion, it would be wise for churches engaged in counseling and disciplinary activities to carefully evaluate the organizational structure of their counseling program in the light of their state's laws. The manner in which counseling is conducted, the types of individuals involved in the counseling activity, and their training and supervision can have a substantial impact on the legal rights and duties of the church and the counselors.

Churches should also evaluate the obligations they require of church members. Churches might, for example, be postured in a much stronger position in a lawsuit if the individual suing the church had agreed in becoming a member of the church to submit to church discipline, submit disputes with the church to the internal courts of the church or the Christian Conciliation Service of the Christian Legal Society, and was informed of and agreed to abide by the church's policies regarding counseling. There are, of course, both spiritual and legal pros and cons to such requirements which must be carefully considered before they are adopted.

Finally, churches with formal counseling programs, might also wish to consider asking potential counselees to sign arbitration agreements agreeing to submit any dispute to either the internal courts of the church or the Christian Conciliation Service. Such agreements are commonly used by other professions in some states and in many states can be enforced by state law. ■

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Avoiding the Pit of Clergy Malpractice

by Samuel E. Ericsson

There are important implications flowing from a much publicized new legal theory called "clergy malpractice." One central thesis is that the essence of this new theory, when properly understood, is so inherently and inextricably intertwined with ecclesiastical, spiritual and doctrinal matters that the judicial system cannot competently deal with it nor can it constitutionally do so. After a presentation of the leading case, **Nally v. Grace Community Church**, the theory will be examined in light of the absence of the key element of duty necessary for a cause of action for professional negligence.

It is not suggested that the law provide special or favored treatment for the religious community in the area of torts or that the now generally discarded concept of charitable immunity be resurrected. The religious community should not expect special treatment in cases where the conduct in question has little or nothing to do with their religious or spiritual mission. Thus, liability arising out of traditional theories of personal injury, false imprisonment, battery, assault, or duties arising out of property ownership should not differ simply because the defendant happens to be a religious organization or a member of the clergy.

A threshold question is whether "clergy malpractice" is simply another legal theory against a profession, akin to theories of legal malpractice in the field of law and medical malpractice in the field of medicine. As will be seen, it is the uniqueness of the "service rendered" by the religious community to those who seek counsel from it that sets this new theory apart from other seemingly similar torts.

It should also be noted that although moral and legal obligations often coincide, they are separate and distinct and must be treated as such. Moral obligations do not always rise to the level of a legal duty. Thus, clergy have many duties qua clergy to parishioners. To the extent, however, that these duties flow from their religious and spiritual mission, it is not the proper function of the state through its courts to act as the enforcer.

THE "NALLY" CASE

In the fall of 1979, a story made the rounds in the insurance and religious media that a clergyman had been sued and held liable in a "clergy malpractice" case. The story was initiated by the insurance industry apparently to generate interest in a new product known as "clergyman malpractice insurance."

In March, 1980, a much publicized suit was brought in Burbank, California, by Walter and Maria Nally, the Catholic parents of Ken Nally, a twenty-four-year-old seminary student who committed suicide in 1979. The parents sued Grace Community Church, the largest Protestant congregation in Los Angeles County, its pastor and its staff, alleging in three counts—clergy malpractice, negligence and outrageous conduct. In a media blitz accompanying the filing of the lawsuit, the plaintiffs' counsel indicated that the case was the first of its kind in California. Subsequent research has shown that it appears to be the first such case anywhere.

In the first count, the parents alleged that the pastor and staff had counseled their son to read the Bible, pray, listen to taped sermons and consult with church counselors. The parents alleged that the defendants were aware that their son was depressed and had suicidal tendencies and was in need of professional psychiatric and psychological care. Notwithstanding such knowledge, the plaintiffs alleged that the church and its staff persuaded and effectively prevented Nally from seeking professional help outside the church. These latter allegations proved false.

In the second count, the complaint also falsely alleged that the defendants were negligent in the training, selection and hiring of its "lay spiritual counselors" and that these counselors were unavailable to advise Ken Nally when he requested it.

The third count alleged that the defendants ridiculed, disparaged and denigrated the Catholic religion of the decedent's parents and that this attitude exacerbated Nally's pre-existing feelings of guilt, anxiety and depression. It further alleged that the defendants effectively required the decedent to spend time in isolation, thereby preventing him from talking to or consulting with persons not affiliated with the church and that this isolation proximately caused the young man to take his own life. All these allegations proved false at trial.

The evidence at trial showed that the complaint had no basis in fact or in law. Testimony showed that the young man was seen by at least **eight** physicians, psychologists and psychiatrists in the few months prior to this death. In fact, Grace Church, its pastoral staff and members repeatedly encouraged Nally to keep his appointments with the professionals and even made some of the appointments for him. A number of these professionals, along with other members of the church and staff, recommended psychiatric hospitalization for the young man, but to no avail. The testimony also indicated that the same recommendations were made to the parents.

"The inescapable conclusion...was that psychological and spiritual counseling are so intermingled that they resemble a scrambled egg."

After a four week trial in which the Nally's presented their evidence, the trial court granted the defendants' motion for nonsuit, dismissing the case and declaring that there was no factual support for either Counts I and II, and that pastors have **no legally recognizable duty in law:** (1) to investigate the condition of a counselee; (2) to inform other professionals and the counselee's family of suicidal manifestations; (3) to refer a counselee to a psychologist, psychiatrist or other professional; (4) to train and employ competent counselors according to secular standards; or (5) to make counselors available to a counselee.

Furthermore, the court found the evidence absolutely insufficient to sustain the claim in Count III of outrageous conduct and dismissed Count III also.

PROBLEMS OF DEFINITION

The traditional elements necessary to state a cause of action in negligence rests primarily on an existing duty recognized by law requiring the actor to conform to certain standards of conduct for the protection of others against unreasonable risks.

In examining the concept of duty, there exists a threshold question of defining the nature of the conduct underlying the theory of "clergy malpractice." The better label for the conduct may, in fact, be "spiritual counseling malpractice" since the dispute focuses on counseling rendered by clergy in meeting the spiritual, emotional and psychological needs of the counselee.

THE NATURE OF THE PROBLEM

The difficulty facing the courts in constructing a concept of duty in these cases is amplified by the confusion and lack of definition as to what falls within the parameters of spiritual as opposed to psychological or psychiatric counseling. What is the nature of the problem plaguing the counselee? Is it "poor mental health" or "poor moral health?" And how shall a court determine, as a matter of law, whether a counselee's problem is "sin" related or its psychological equivalent? How can one draw the line, and where should it be drawn?

It is impossible to separate the "cure of minds" from the "cure of souls." An unstated and patently invalid assumption of spiritual counseling malpractice is that clean lines exist delineating the realm of religion from the realm of psychology and psychiatry. For centuries, pastors, priests, rabbis and other spiritual counselors have been providing balm for those suffering from depression, guilt and anxiety. In relatively recent times, psychiatrists and psychologists arrived on the scene with their theories.

During the four week trial, the Nally's own experts provided the most compelling testimony showing how "clergy malpractice" differs radically from all other "professional" negligence theories. Dr. Bill Adams, a clinical psychologist and clergyman, when asked where the spiritual leaves off and the psychological begins, answered:

> Well, I don't think Jesus Christ would touch that one...There's no answer to such a question. They are intermingled.

Likewise, Dr. James Long, a psychiatrist and seminary graduate, admitted that it was impossible to separate spiritual counseling and psychological counseling. Asked how he would separate psychological guilt from spiritual guilt, Long answered, "I don't know that you can. It may have more to do with one's belief system."

Likewise, Dr. David Hall, who was Ken Nally's psychiatrist, testified that it is common for severely depressed patients to believe that their depression is a result of sin. Hall noted:

> One of the things that a depressed person might say to me is that "I have committed the unforgivable sin." Generally speaking, when we explore that assertion, we find that it is false and that this person is generally not a sinful person.

In contrast, others testified that spiritual counseling is the only thing that can relieve the deepest depression which is caused by sin and that the Nally's experts' view of sin was simply non-biblical. Obviously, a counselor's underlying perception of right and wrong (i.e. sin) is a key element in counseling.

The inescapable conclusion drawn from the trial was that psychological and spiritual counseling are so intermingled that they resemble a scrambled egg. To expect a court and jury to separate the two is to ask them to do what these "experts" admit is impossible. Yet, that was precisely the thrust of the lawsuit. The Nally's counsel, Mr. Edward Barker, declared in argument that Kenneth Nally's "real sickness was extreme religious confusion." In his opinion, churches and pastors should answer to the courts on a case-by-case basis so as to guarantee quality control in the counseling they provide those who manifest "religious confusion."

But Superior Court Judge Joseph Kalin came to a different conclusion: The theory of "clergy malpractice" is barred by the First Amendment. Witness after witness was

"There is no doubt that all religions consider spiritual maturity a significant factor in evaluating a counselor's competence."

interrogated concerning sin, guilt, forgiveness, exorcism, demonic possession, heaven and hell, eternal security, salvation, spiritual gifts and so forth. The court finally declared:

> There is no compelling state interest to climb the wall of separation of church and state and plunge into the pit on the other side that certainly has no bottom.

THE NATURE OF COUNSELING

A second problem facing the courts under the spiritual-counseling theory will be to identify the scope and nature of church-related counseling. As a matter of law, what constitutes spiritual guidance and counseling? Does it include a one-time, five-minute pastoral encounter in the church parking lot, a sole hospital visit by a pastor or an impromptu unscheduled meeting in the church hallway with another pastor—all of which formed the basis for the claimed "duties " in **Nally**? Does it include confessions? Or is "spiritual counseling" limited to formal office visits where a pastor or other professional counsels, notebook in hand, at a scheduled time, on a regular basis, over a long period of time? In the **Nally** case, the complaint also alleged that the church staff failed to make themselves available to Ken when he requested their counsel and guidance. The courts will thus be called upon to determine the scope of a church's duty to be available to counselees.

THE COUNSELOR'S OFFICE

A third area in which the courts must become involved is determining whether the duty owed to a person seeking counsel would be any different depending upon the counselor's ecclesiastical office and the authority or function flowing from it. All religions identify various positions, offices or titles reflecting a person's authority and service.

The relationship a counselee has with a counselor may depend upon the nature and function of the office of the counselor. Arguably, the various offices of a given faith are not to be treated legally alike in counseling cases, any more than all those in the medical profession are treated alike in medical malpractice cases where it makes a difference whether the person is a nurse, surgeon, orderly, anesthesiologist or laboratory technician.

THE COUNSELOR'S COMPETENCE

Forth, as in other "professional" malpractice, the courts must review the training and skills of individual counselors. This will present the court with a host of new problems. Shall the review be limited to the training received in secular institutions on secular subjects, such as psychology, psychiatry and mental health counseling? Would a degree in clinical psychology from an accredited university provide the desired training? Shall a counselor's library be reviewed to see which books he or she uses in counseling individuals? If the Bible is the primary source used in spiritual counseling, shall the court determine the depth of training in the Scriptures that the counselor has had and whether the training was adequate to deal with the specific nature of the problem at hand?

Aside from the secular training, a Christian counselor's competence may depend upon many "spiritual" qualifications such as the counselor's spiritual gifts and his or her spiritual maturity. Scripture indicates that spiritual counseling is the work of the Holy Spirit and that effective counseling cannot be done apart from the Holy Spirit. The Spirit endows each believer with a spiritual gift or gifts, some of which may have a direct bearing on the counselor's ability and effectiveness. Might someone with a number of key spiritual gifts, such as wisdom, knowledge or exhortation, be held to a higher standard of care (akin to a specialist) than other spiritual counselors who may have been endowed with fewer, if any, of these specific gifts? This became an issue in the **Nally** case.

There is no doubt that all religions consider spiritual maturity a significant factor in evaluating a counselor's competence. A secular court, however, may decide to apply purely secular criteria, such as those of clinical psychology, and dismiss the religious standard as simply irrelevant.

THE CONTENT OF THE COUNSEL

A fifth area facing the court concerns the content of the counsel given by the clergy or church counselor. For example, the **Nally** complaint alleged that the counselors at the church told Nally to read the Bible, pray and listen to taped sermons and other church counselors. As a practical matter, wholly apart from the constitutional prohibitions, the courts are not equipped to evaluate the content of the counsel provided by a church to those individuals who voluntarily embrace the doctrinal stance of the church.

Thus, the theory of spiritual counseling malpractice or clergy malpractice raises mind-boggling implications as one begins to consider what the judicial sytstem is being asked to do.

The problem becomes even more difficult when coupled with the claim,

"Judicial review of counseling by clergy will inevitably draw the courts into the dangerous ground of evaluating the truth or error of the counseling given."

as in **Nally**, that pastors have a legal duty to refer their difficult cases to the "professionals." The propriety of imposing on the clergy a duty to refer leads to the question whether the courts can create a reciprocal legal duty on the part of mental health professionals to refer to clergy **all** spiritual cases—the simple as well as the serious—with a consequent liability for failing to refer their patients to the "proper" clergy in the event of a suicide? Clearly the moral model should not take a back seat to the medical model in counseling!

LEGISLATIVE EXEMPTIONS AND CONSTITUTIONAL IMPLICATIONS

States such as California have chosen not to establish statutory criteria by which to evaluate the competence of those who counsel under the auspices of a church or synagogue. In fact, several California statutes expressly exempt such counselors from licensing requirements. Provisions governing the licensing of medical professionals in California state that the act shall not be construed so as to "regulate, prohibit, or apply to any kind of treatment of prayer, nor interfere in any way with the practice of religion."

Similar language is found in the law governing licensing of psychiatrists and psychiatric technicians that provides that the act "does not prohibit the provisions of services regulated herein, with or without compensation or personal profit when done by the tenets of any well-recognized church or denomination..." Another example of the exemption of these counselors from state-defined criteria is found in the licensing of marriage, family, child and domestic counselors which provides that the act "shall not apply to any priest, rabbi or minister of the gospel of any religious denomination when performing counseling services as part of his pastoral or professional duties." However, the law does not define what "counseling services" entail.

Exemption provisions, such as those in California, indicate that the legislature has recognized that the subject matter of counseling by clergy may often be the same as that facing the licensed and regulated professional. However, the legislature, through the exemption provisions, has recognized that the secular courts are not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.

CONSTITUTIONAL ISSUES

Judicial review of counseling by clergy will inevitably draw the courts into the dangerous ground of evaluating the truth or error of the counseling given. As indicated above, the courts are not equipped as a practical matter to deal with the issues in this arena, and they are also constitutionally prohibited from rendering the kind of decisions called for in these types of cases.

In a faith healing/counseling case in 1944, Justice William O. Douglas stated that the First Amendment forbids the courts to examine the truth or verity of religious representations:

"The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.' **Cantwell v. Connecticut.** 'Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' Id Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. **Bd. of Educ. v. Barnette.** It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But is would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem

incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake the task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

The analysis by Justice Douglas applies with equal force to clergy malpractice cases. The First Amendment protects the communication of beliefs that cannot be proved and that "might seem incredible, if not preposterous, to most people."

CONCLUSION

The law of torts has been the battleground for social theory. Each new theory raises far more questions than answers and the theory of clergy malpractice is no exception. Since clergy malpractice inevitably deals with doctrinal, ecclesiastical and spiritual issues, judicial review will force the courts into dangerous territory. The Court in **Nally** was wise in steering clear of "the pit" that awaits us if we rush into this new illegal legal theory. ■

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Confidentiality in the Pastoral Role

by H. Newton Malony

When one tells something to a friend it is normally expected that the friend will keep the secret and tell no one else. This is a matter of trust which, among good friends, is assumed and doesn't even have to be requested. Confidentially between pastor and parishioner is based on this same kind of agreement. The parishioner assumes that the pastor will not gossip about what has been said and will not reveal it without permission. The parishioner's remarks have been shared in the confidence that the pastor can be trusted to keep them secret.

Some pastors approach the matter quite differently, however. One pastor always begins his talks with church members this way: "Do you expect me to keep what you tell me in confidence?" "Yes, of course!" they reply. "Well, I have no intention of doing so," he answers. "I am simply the pastor of this church. It is the people of the church who minister. If I think of anyone who can help you, I intend to tell them about your problem and ask them to get in touch with you."

This is quite a different understanding of confidentiality from that of a pastor who says, "I always tell persons who come to me that I will not reveal anything they say to me to anyone—not even my spouse. What they say to me is similar to a confession made to a Catholic priest. I promise to act as if they can trust me to keep their secrets no matter what. They trust me to minister to them and I will not violate that trust."

These pastors illustrate an important aspect of confidentiality although they vary widely in their interpretation of how it should be expressed. Both are committed to the person's best interest, in spite of the fact that one concludes this can best be served by involving others, while the second feels that no one should be told anything. Their differences are probably based on their understanding of the ordained ministry and the nature of the church, yet they are similar in their concern to act responsibly, as we shall see.

WHAT IS CONFIDENTIALITY?

Confidentiality refers to the act of protecting from disclosure that which one has been told under the assumption that it will not be revealed without permission. Although we are discussing pastors, other professionals such as attorneys, physicians and psychologists, also have relationships with persons in which confidentiality is an issue. We will compare these professionals with pastors later in this paper. At this juncture it is enough to say that pastors are not the only ones concerned about confidentiality.

To repeat, in all cases confidentiality presupposes a relationship in which a person confides information about him/herself under the assumption—stated or unstated—that it will be kept secret. For example, if we are diagnosed as having high blood pressure we assume that the doctor will not tell anybody about it. Further, if we seek an attorney's advice on whether to sue a merchant who has cheated us we assume that the attorney will not share this information with anyone. And if we receive counseling from a psychologist about a compulsion to look under our bed before we go to sleep we assume that

"If we seek pastoral help for a marriage problem we assume that no one else—in the church or outside it—will be told about it."

the counselor will not communicate that problem to others. So it is with a pastor. If we seek pastoral help for a marriage problem we assume that no one else—in the church or outside it—will be told about it.

This assumption is an important first aspect of confidentiality. If this assumption is not present there is no confidentiality required, although certainly discretion should be exercised. Sometimes it is said that if a third person is present confidentiality is not assumed. This may or may not be true—as in marriage counseling, for example—yet the point is still well taken that where a person **assumes** he or she is sharing information in confidence, confidentiality is involved.

The second major aspect of confidentiality is that of permission. Even if confidentiality is assumed in the relationship, the information may be shared with others if the person gives permission to do so. The pastor who said he might share with other church members what was being told to him illustrates the way in which permission is often obtained. A person who continued to talk after hearing the pastor say what he did would be giving permission for the information to be shared. A more typical situation might be one in which a person would ask a physician to tell another doctor about a specific physical condition in order to obtain a specialist's opinion. Sometimes pastors or counselors are asked by persons to state that they are good parents in child custody cases, for example. In these situations the individual requests that information which was shared in confidence be shared with others. Under these conditions, within the scope of the permission granted, confidentiality does not apply.

There are several ways of looking at the giving of permission, however. A pastor may feel caught between a mother and a father when asked to testify in court on behalf of one of them. The pastor may have counseled both parents during a crisis in their marriage and might feel that each has strengths and weaknesses. In order to avoid difficulty, some pastors tell couples when they first start talking with them that they will not become involved in any legal procedures in which they might have to reveal information that was shared in private, nor will they take sides in favor of either party.

On the other hand, it has been said that the right to reveal information lies with the person, not the pastor. Thus, if the person gives permission, the professional (pastor, physician or psychologist) has no alternative but to testify. This is the case when one is served with a subpoena or a release-of-information form signed by a client or parishioner.

However, in the late 1970s a San Francisco psychiatrist refused to honor such a release in spite of the fact that a former client had given permission for him to reveal certain information that had originally been shared in confidence—indeed, even requested that he do so. The psychiatrist was sentenced to three days in jail. He appealed the judgment all the way to the United States Supreme Court contending he had a right to refuse to testify; the Supreme Court said he did not. Although he suggested that testifying would jeopardize the trust other clients had in his promise that their conversations were confidential, the judge contended that he could not withhold information when the person involved wanted it revealed.

A classic illustration can be seen in Victor Hugo's "Les Miserables," in which the hero, Jean Valjean, confesses his identity as an escaped prisoner to a priest, who keeps his secret even though an innocent man is about to be convicted through mistaken identity. Jean Valjean himself confesses his identity to a stunned courtroom while the priest remains silent.

This leads us to a discussion of the uniqueness of the priest/penitent relationship, on which the right of pastors to remain silent about confidential information has been based.

PRIEST/PENITENT, PASTOR/PARISHIONER

Today's relationship between pastors and their parishioners stems from a relationship between priests and penitents that has developed over the last two thousand years of Christian history. Although these relationships are presently safeguarded under the rubric of "privileged communications," in which privacy is safeguarded by confidentiality, it was not always so.

In the early church, gossip was condemned and equated with such sins as slander (2 Cor. 12:20), maliciousness (Rom. 1:29), and idleness (1 Tim. 5:13). It was assumed that leaders would be free of these characteristics. However, the present tradition comes more likely from the authority Christ gave to the apostles

"However, the obligation and the privilege of keeping confidential what one knows about another is not absolute. There are limits."

to forgive or not forgive sins (John 20:23) and to permit or prohibit certain behavior (Matt. 16:19).

This authority appeared early in the history of the church in the act of the confession of sins. Penance was the act whereby judgment was pronounced, forgiveness offered, and retribution or recompense prescribed. In spite of the fact that there was much dialogue over whether the church was competent to forgive sins, by the fourth century the practice of confession and penance was fairly standard. Yet, interestingly enough, in most if not all cases the act was public rather than private.

In the Eastern Church the penitent went through four stages that began with prostrating himself or herself on the steps of the church and seeking the prayers of the people as they came to service. The process then included kneeling before the congregation and having special prayers said. It ended by restoration to the Eucharist. In the Western Church confession took place during Lent and included clothing the penitent with goat's hair and sprinkling the head with ashes. Holy Thursday was the time when public reconciliation occurred and the penitent was allowed to take Holy Communion.

These public acts gave way to private confession, however. The practice is thought to have begun in the British Isles and was standard throughout the church by the ninth century. Private confession became the norm. The act of penance became a sacrament and confession of serious sins became a mandate. Church law required the priest never to reveal what had been told to him in this relationship.

What is known today as "clergy privilege" has become the rule by which most pastor/parishioner relationships are now understood. Although originally confined to what was told the priest in confession, many have assumed that it applies to whatever is told the pastor, be it in visiting the sick, administering the business of the church, or counseling in the pastor's office. All information gained by whatever means is assumed to be confidential and the pastor is assumed to have an obligation as well as a privilege, to remain silent about it.

It is helpful to realize that this pastoral privilege of not having to reveal what one knows, is different from that accorded to the attorney. While both are based on the assumption that for society to be preserved, certain relationships need to be safeguarded, clergy privilege is grounded in the relationship of persons to God while attorney privilege is grounded in the relationship of persons to their accusers. By this is meant that western society has considered that reconciliation of the individual with God is of equal importance with the fair and unbiased administration of justice. Although one was based on church law and the other on common law, the intent is the same, namely, to assure that society continues to function in a cohesive manner.

The minister is considered to be an agent of God just as the attorney is considered to be an agent of justice. Nothing is gained in the God/human relationship by public revelation of what was told the minister, and nothing is gained in the administration of justice by self-incrimination or by information forced from one's confidant. All persons have a right to ministry just as they have a right to counsel.

In addition to ministers and attorneys, spouses, physicians, journalists, and accountants are all protected from having to testify about what has been shared with them in confidence on the basis that society considers these relationships especially important to maintain.

THE LIMITS OF CLERGY PRIVILEGE

However, the obligation and the privilege of keeping confidential what one knows about another is not absolute. There are limits.

The legal opinion of Wigmore (1961) regarding the rules of evidence have generally been accepted as the conditions under which confidentiality functions. In addition to the conditions that the communication must have originated in the confidence that the information would not be disclosed, that confidence is essential for the satisfactory maintenance of the relationship, and that the relationship is one which society wants to foster. The decision rules that the injury to the relationship must be greater than the benefit to justice. This last condition requires a judgment both on the part of the professional, such as a pastor, and on the part of the judge who might require such a breach of confidence. Weighing the benefit to justice against the relationship is not an easy task.

An example from the field of counseling illustrates the difficulty in this regard. A counselor was talking for some time with a man who confided that he had been abusing his child. The counselor believed that the man had been making much progress. In fact, he shared the information about child abuse while telling the counselor that he was not doing it as much as he had earlier. The counselor

"...a rule of thumb that has come to be used by professionals...that confidence will not be breached unless a person is a danger to self or others."

knew that the man had not revealed this to anyone outside his family and that, if apprehended, he would know immediately who had reported the matter to the police. The counselor thought, "Will he stay in counseling if he finds out that I told the police?" He probably would not. The counselor would have the problem of deciding whether the disruption of the relationship would be of less benefit than would be gained by seeing that justice was done and that the child was protected from abuse. (Some state laws now require professionals to report child abuse.)

This introduces a rule of thumb that has come to be used by professionals in these matters, namely, that confidence will not be breached unless the person is a danger to self or to others. In this case the counselor might decide that the child was in real danger and would thus report the matter. However, the counselor could conceivably decide that the man was improving and that the child was not in immediate danger. In order to preserve the counseling relationship in which the man was obtaining help and to keep the family intact, the counselor would decide not to report the matter. Clearly, the question is complex, and the decision of whether to withhold or share information is one that can only be made after much thought.

Perhaps the best known example of this dilemma is that of **Tarasoff v. Board of Regents of the University of California.**[1] An outpatient at the hospital on the Berkeley campus informed his psychotherapist that he was planning to kill a young woman student when she returned to school in the fall. The therapist notified the campus police through a formal written request for assistance in dealing with a man he considered potentially dangerous to others. The campus police took the man into custody but released him when they found him to be rational. Hearing about the matter, the psychologist's supervisor requested that the letter to the campus police be returned and that it, along with the therapy notes from the session in which the man threatened the life of the young woman, be destroyed. Neither the intended victim nor her parents were warned.

Tatiana Tarasoff was killed by Prosenjit Poddar on October 27, 1969, and her parents filed suit against the University of California. Finally, after several court decisions, the case was settled out of court and resulted in a substantial amount of money being paid to the young woman's family.

Clearly, the issue was not a matter of whether the therapist warned the authorities or whether he misjudged the violent potential of the client. What was at issue was the failure to warn the intended victim. It is noteworthy that the professional has a duty to protect society from that which would disrupt it. Murder is clearly such a disruption.

Of related interest is whether a professional can predict violence with certainty. Some years ago a young man positioned himself in a tower on the University of Texas campus and sprayed the courtyard below with bullets that killed several police. It was revealed that he had talked of killing before that time in conversations with his psychiatrist. Many people felt that the psychiatrist should have assumed greater responsibility in reporting the matter, but the psychiatrist concluded that he was working with the young man on his violent impulses and that to report him before he did anything would have provoked him to leave therapy. Although his decision turned out to be in error, it is important to note that the California State Psychological Association[2] argued in the **Tarasoff** case that warning the possible victim would have been a gross breach of the therapeutic relationship and that predicting violence with certainty is highly questionable. The courts rejected these arguments but the issues are by no means straightforward, as anyone who has counseled persons about their problems knows.

Suffice it to say that pastors are limited by their own obligation to society and by the requirement to protect persons from harming themselves or others. No pastor can take refuge in the statement, "I only deal with spiritual matters." A pastor is a member of society and lives in this world as well as the next. As Everstine et al. suggest (about psychologists):

> As a result of this kind of thinking, the therapist may be drawn into a double-bind situation in which he or she is (a) damned if the client is not provided with help to overcome violent tendencies and (b) damned if the violent tendencies are not reported to "proper authorities."[3]

This double bind is not confined to psychologists. Pastors experience it too.

Two other issues regarding the limits of confidentiality should be mentioned. The first has to do with whether or not the person can order the pastor to reveal a confidence. In

"...they should treat all that they hear as confidential because by divulging it they may endanger or make more difficult the lives of those entrusted to their care."

the case of the psychiatrist who went to jail rather than reveal a confidence, the court rules that the client rather than the doctor held the power to end the confidence. This is true for physicians, attorneys, psychologists and accountants but may not be true for ministers. They hold the power to withhold information shared with them in confidence **even if** the parishioner waives the right to secrecy. No legal power can force a minister to reveal a confidence if the rules of the minister's church require that it be kept secret. Ministers are the only professionals who have this right. Others must testify if ordered to by the court or if confidentiality is waived by the client. It is important to note that this privilege applies only where the explicit rules of the church specify that their ministers have a duty to keep information secret. If the church rules do not state this, a minister may be required to breach confidentiality. However, this is not usually the case. Courts typically honor a pastor's refusal to testify.

The second issue has to do with the breadth of confidentiality for which pastors are responsible. Here they are most like family physicians, who are concerned for the total health of their patients, not just the symptoms that may accompany a specific complaint. As Everstine et al. noted, most physicians assume a "duty of silence" in regard to their patients and agree with that portion of the Hippocratic oath which states, "Whatever in connection with my profession, or not in connection with it, I may see or hear in the lives of men which ought not to be spoken abroad I will not divulge as reckoning that all should be kept silent."[4] Pastors, like physicians, assume a lifelong, broad, interpersonal, and familial responsibility for persons. Thus, they should treat all that they hear as confidential because by divulging it they may endanger or make more difficult the lives of those entrusted to their care.

This is a much broader concern than most other professionals assume in regard to those with whom they work. It also makes the keeping of confidences a much more serious issue because much that a pastor hears is not in a private office but is communicated as the pastor fulfills the day-to-day parish duties of ministry and administration.

THE SEVERAL SETTINGS OF PASTORAL CONFIDENTIALITY

We have said that the vocation of pastor includes functions that differ from those of the typical professional who deals with persons. A comparison with one of these, the psychologist, illustrates this point.

Function	Psychologist	Minister
Preacher		X
Pastor		X
Teacher	maybe	X
Administrator	maybe	X
Consultant	X	maybe
Diagnostician	X	
Counselor	X	X
Researcher	maybe	
Writer	maybe	maybe
Colleague	X	X
Confidant		X
Friend		X
Family member	X	X

The list is not meant to be exhaustive, but it can easily be seen that the minister is involved with people in more unofficial and casual but, nevertheless, essential ways than is the psychologist. Comparisons with other helping professionals would reveal similar relationships.

This means that the pastors carry a much wider range of contacts and are privy to much more information about the lives of persons than are other professionals. Not only is there more and varied information communicated but the possibilities for sharing that information in interactions are greatly increased. It is one thing to go from one's office to home and back with occasional contacts over the phone with other professionals, and quite another thing to sit with a family member during an operation, attend a women's luncheon, counsel a troubled family, and plan next year's budget all in the same day! For example, the professional psychologist may sit in a controlled office setting and speak to others about narrowly defined professional matters, after which it is possible to go home to a leisurely supper followed by a relaxed evening with the family. On the other hand, the pastor may not relax until after 10:00 p.m., having switched roles at least four times during the day. This is not an easy task, and what is or is not permissible to share in these several settings may become blurred in the process.

As was noted earlier, pastors are most like family physicians in assuming an overarching concern for the general welfare of those with whom they deal. At the very least, pastors implicitly share with physicians the Hippocratic admonition to do no harm even if they cannot be of help. However, even here it is apparent that in comparison, the roles of the physician are more limited and are expressed within a controlled office situation.

A full list of the types of situations where pastoral confidentiality might be violated would be extensive. The

"If a pastor intends to use an illustration in preaching or writing based on actual events, prior permission should be obtained from the person(s) involved."

descriptions that follow will illustrate dilemmas pastors often face. "What should they reveal and to whom?" —this is the question.

- When the pastor refers someone to a counselor
- When the counselor asks for background information
- When the pastor and counselor work with the same person
- When a lawyer requests information in a divorce or child custody case
- When informing new staff members about the persons with whom they will be working
- When giving illustrations in a sermon
- When telling newcomers about the church
- When training lay counselors or church visitors
- When handling administrative problems such as choosing leaders or dealing with ineffectiveness
- When resolving disputes between church members
- When told about misbehavior in church members ranging from peccadilloes to major offenses
- When a church leader is divorced or is accused of immorality
- When dealing with families at births, weddings, illness, transitions, deaths
- When writing letters or a column for a newspaper or church newsletter
- When keeping pastoral records
- When leaving the church and sharing with the new pastor what to expect from certain persons
- When talking with a fellow pastor
- When talking with family or spouse
- When told something by or about church officials that would harm their effectiveness
- When giving advice over the phone

Many other situations could be added to this list. Finding one's way through these complex relationships and feeling that one has not violated confidences or harmed others is a little like wending one's way through a maze with five alternatives at each turn! However, there are some guidelines to help ministers in these endeavors.

GUIDELINES FOR KEEPING PASTORAL CONFIDENCES

The first guideline is personal rather than professional. As far as possible, ministers should keep their personal lives separate from their professional roles. Although this is impossible in an absolute sense, nevertheless, it should be a goal toward which ministers aspire because if they don't they will find themselves using information defensively or manipulatively. For example, one minister was displeased with his house and encouraged the church to purchase a better one for him. Some in the congregation supported him while others did not. He got angry with his opponents and shared with some of his supporters the rumor that one of the people who disagreed with him was having an affair with the organist. What a misuse of information! Without question, it did harm far beyond the anger it evoked from the people involved. This is not to say that the couple should not have been confronted, but the way in which the pastor used the information mixed his personal feelings with his professional role. Too often ministers confuse their own feelings of self-worth with whether persons support a program they have planned. Getting too much invested in one's own ideas can easily give rise to that sort of unfortunate situation.

Another aspect of this matter is the personal life of the minister. In earlier days the minister was called the "parson"—literally person—**the** one in the community to whom others looked for example and integrity. While that may be too high an expectation it is still important for the minister to be as well adjusted and free from conflict as possible. Of course, this includes keeping his or her own spiritual development alive and growing. To the extent that ministers are happily married and mentally healthy they can better manage the knowledge they have of others in the labyrinth of roles involved in ministry. This is part of the genius inherent in the admonitions of 1 Timothy 3, where the writer details the characteritistics to seek in those who desire to become bishops and deacons. Apart from the moral implications of these characteristics there is the dynamic reality that one can function better if one's personal life is intact.

If a pastor intends to use an illustration in preaching or writing based on actual events, prior permission to use the information should be obtained from the person(s) involved. It does not matter whether or not the event occurred in a previous parish, nor does it matter that one changes the conditions to

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Clergy Liability: A Theological Perspective

by Richard J. Mouw

The legal liability of church-related counselors is a topic that simply begs for interdisciplinary, interprofessional attention. The issues are many sided: legal, psychological, pedagogical, sociological, and theological. No single discipline or profession provides a perspective that can by itself solve the problems. Indeed, it is unlikely that all of them working together can come up with anything like a neat "solution." At best we can hope to gain increasing clarity on the issues involved—clarity that can, in cooperation with healthy doses of common sense and good will, generate some helpful reference points and guidelines for the adjudication of specific cases.

What can theology contribute to this quest for adjudicatory wisdom? I will focus here on three theological issues which are crucial for developing Christian sensitivies regarding the counseling liability discussion: How are we to understand our identity as a people who are called by God to be compassionate disciples of Jesus? How are we to understand the regulating role of the state with reference to our work of discipleship? And how is all of this to be structured and carried out in a pluralistic society?

CHRISTIAN IDENTITY

To be a Christian is to be reconciled to God through the atoning work of Jesus Christ. As a recipient of God's grace, offered in Jesus, a Christian desires —although the desire may be stronger at some times than at others—to live a life that is pleasing to the divine Creator.

We evangelicals, in talking about what it means to be Christian people, have often placed a central emphasis on a "personal relationship with Jesus Christ." And rightly so. But we have also been learning much in recent years about the importance of Christian community. We are not saved merely for a very personal "walk" with the Lord. We are called to identify with the worldwide fellowship of Christian believers, to be members of the local manifestation of the one, holy, Catholic Church.

And this Church has a very rich and complex communal life. God's redeemed people gather together regularly to sing, to pray, to be instructed by preaching, to be nourished by sacramental celebration and to build each other up for proper patterns of obedient Christian living.

As a Christian people we are very much aware of what we receive from God. But we also know that God showers gifts upon us so that we may in turn be agents of the Divine Reign: we are receivers in order that we might become actors. Having heard the good news, we proclaim it to others. Having been nurtured at the Lord's table, we go into the world to feed the hungry. Having been shaped by God's tender mercies, we become active disciplers of others.

Many of us believe that the receiving and giving of counsel has a special place in this rich and complex life and mission. It always has. From the very beginning, Christian leaders have understood the offering of practical pastoral advice to be an important part of their ministry. Priests have listened to confessions and prescribed correctives for the lives of individuals. Christian people have formed "household" groups for the purpose of promoting fellowship and nurture.

These traditional activities have been pursued with renewed vigor in recent years. People have shown a strong interest in the idea of the church as a "caring community," a place where

> "we share our mutual woes,
> our mutual burdens bear,
> and often for each other flows,
> the sympathizing tear."

Various programs and strategies have emerged for promoting these kinds of sensitivities to human hurts and joys: intentional communities, small groups, pastoral counseling services, retreats, group "confessionals," education in "listening skills," "incarnational evangelism," and so on.

For purposes of this present discussion, it is important to underscore the fact that for many Christians, the activities and concerns associated with these programs and strategies are absolutely essential to the life of Christian discipleship. We believe that our Lord wants us to bear each other's burdens. To be followers of Jesus is to cultivate the compassion of Jesus in our relationships with fellow believers, and to demonstrate that compassion to those who have not accepted the Gospel.

The intense interest in recent years in a Christian ministry of compassion has occurred in a larger social context

"...none of this means that the Christian community must passively accept whatever definitions of its life and ministry that a legal system might wish to impose upon it."

that has also seen the rapid growth of the psychological "helping professions." And there can be no doubt that the increase in church-related counseling activities is fed by many of the same social currents that have spawned the rapid expansion of professional psychiatric and psychological services in the culture at large. But this is not simply a case of the church jumping onto a secular bandwagon. The recent Christian interest in functioning as a "caring community" is an intensification of deep impulses that have been at work in the Christian church from the beginning. We are dealing here with matters that are at the heart of the Gospel.

When our Christian patterns of spiritual "care-giving" become items of dispute in the civil courts, then we face issues that are of great importance for the life and witness of the Christian community. When judges and legislators speak and act as if they have a right to offer authoritative delineations of the "practice" and the "malpractice" of spiritual care-giving in the Christian community, Christians must be very much on their guard.

THE ROLE OF THE STATE

Not that we believe that civil authorities have no legitimate business addressing questions of how the churches pursue their ministries. God has provided human beings, we believe, with the machinery of government so that we may live together within a lawfully ordered framework of social interaction. This requires that the rights and obligations of both individuals and institutions be given careful definition, and the church is not exempt from this network of codifications.

But none of this means that the Christian community must passively accept whatever definitions of its life and ministry that a legal system might wish to impose upon it. Not even Romans 13, the passage most often appealed to when Christians want to advocate a passive obedience to governments, will permit this understanding of the situation. The Apostle Paul insists there that the authorities to whom we must be subject are ones that "are not a terror to good conduct." Similarly, the prayers that we are urged to offer for civil authorities in 1 Timothy 2:1-2, are to be directed to the end that we may be permitted to live "godly" lives. And in 1 Peter 2:11-17, the call to "be subject for the Lord's sake to every human institution" is accomplished by the plea that we "maintain good conduct"—of the sort that even though some "Gentiles" may describe Christians as "wrongdoers," they may nonetheless "see your good deeds and glorify God on the day of visitation."

In our efforts to be "subject" to civil authorities, we must always be mindful of our primary obligation to do those good works that are pleasing to the Lord. Within our democratic framework, this requires that we make it very clear to those who write and interpret our laws that there are certain "good works" which are for us non-negotiable expressions of our religious commitments. And the kind of spiritual care that requires us as a community to attend to the deepest hopes and fears of the human spirit is one such expression.

Governmental authorities are obliged on this view of things to guarantee us the right to act in accordance with these sincerely held convictions. This is not to say that the people who administer—who formulate, enact and adjudicate—our system of laws must actually like what we are doing. This is where it is important to counter on a consistent basis, those silly allegations often heard these days that Christians want to break down the "wall of separation" between church and state. We are not asking the government to favor or to endorse our particular programs of ministry, in the manner of a coach who encourages and cheers on her team. Rather we are asking the government to permit us to carry on our ministries within a framework of justice. In this sense, the government functions more like a referee who, whatever her own personal preferences, enforces the rules out of a commitment to fair play. We do not ask for the privilege of functioning as the "established" religion of the realm; but we do ask for the right to live out our non-negotiable commitments to the One who calls us to Christian obedience in all spheres of human life.

OUR PLURALISTIC SETTING

Many elements of the older theological discussions of "church and state" no longer directly apply to our social situation. During the Reformation the question often was how a specific "established" church—Calvanism in Geneva, Lutheranism in Saxony,

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Anglicanism in England—should relate to the relevant political authorities. In early America the challenge was to find ways of distributing religious rights among a variety of Christian churches.

Today, of course, the situation is very different. Discussions of the rights of the religious groups to pursue their visions of the good life must attend to a bewildering variety of belief-systems, from voodoo cults in Miami, to witches' covens in San Francisco, to Theosophists in Trenton, to the First United Methodist Church of Centerville.

The situation is further complicated by the fact that the sorts of conflicts that arise today in the area of religious practice do not simply pit one religious group against another. They often have to do with conflicts between the convictions of a religious group and the values and standards of some other kind of social group, such as a board of education, or a medical staff, or an organization of persons whose family relationships have been adversely affected by cultic activities.

This is, of course, the situation with church-related counseling. If the care-giving patterns of the Christian community become issues of public controversy, it is most likely because these patterns are challenged by family members or friends who are convinced that a loved one has been subjected to religious manipulation, or by a group of professionals who challenge the right of the church to exercise certain kinds of authority over the lives of its members.

How are we to deal with these situations? Again, no one discipline or profession can answer all our questions here. Certainly theology cannot serve as the be-all and end-all of the discussion. But from the little that has already been said here, some relevant considerations emerge.

First, we must enter these discussions with theological clarity about who we are. This is of crucial importance given the complexities that attend questions about the nature and limits of church-related counseling. In dealing, for example, with the differences between the extensive spiritual care-giving that may occur in a church setting and the services that are offered by psychiatric and psychological professionals, very different kinds of puzzles might arise. In some cases the proper task may be to sketch out the differences between pastoral care and the very legitimate kind of help that might be offered by another sort of professional. In other cases the differences of opinion may themselves be spiritual ones, from a Christian point of view. If a group of secular professionals object, for example, to a Christian group's insistence that its members acknowledge their genuine guilt before God for sins of omission and commission, then the difference is not simply between areas of competence; it has to do with a fundamental clash of worldviews.

In all of this it is important that we know who we are as Christians, so that in these difficult and complex discussions we might do a credible job of giving to everyone an account of "the hope that lies within us." We need to make our case intelligently and carefully.

Second, we must be theologically clear about what we may expect by way of government protection for our Christian mission. Evangelical Christians have often been guilty of dealing with difficult matters of social concern by tossing out cliches and proof-texts. Glib talk about "rendering unto Caesar" will not guide us through the thicket of questions regarding our legal liability in the area of church-related counseling. We must gain a theologically-shaped understanding of who we are as a Christian people, and what it is that we expect by way of legal protection as we pursue the ministries to which we are called as the people of God.

Third, we must not demand any kind of privileged status for our Christian efforts. We do not want the legislative and judicial branches of our governments to give us preferential treatment. All that we must ask for is that our sincerely held convictions be respected—not because they are true, but because they are sincerely held.

One very important means of gaining credibility in this area is to speak out on behalf of the rights of other groups, however strongly we may disagree with them. If, for example, there are people in our society who have a sincere interest in giving and receiving psychological care within a framework of a highly "secularistic" system of thought, then we must advocate their right to do so. However, this does not mean that we want the spiritual contest to take place within a social system that is structured in accordance with the norms of public justice.

To be sure, there are legitimate questions about how far a system of law can be stretched by way of attempting to embrace religious and ethical diversity. And we must be sensitive to the difficulties here. But we must also operate with a bias in favor of diversity, advocating the

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maintenance of a social system in which people are allowed to pursue their sincerely held convictions to the maximum degree permitted by justice.

Finally, we must work hard to keep our own Christian house in order. No government that is committed to justice can allow blatant cases of abuse to occur, whether in the family, or in business or in the church. By tolerating practices which are potentially abusive and manipulative within our own church communities, we run the risk of drawing attention to ourselves in such a way that we might invite the imposition of restrictions that will quickly diminish our freedom to pursue full obedience to the Gospel. We must police ourselves or else we will be policed by others. To think very carefully about what we are doing, in the light of the Scriptures and with a cultivated awareness of both the strengths and weaknesses of our Christian past—this is itself a very important part of what it means to be a "caring community." ■

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Confidentiality in the Pastoral Role

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safeguard the identity of the persons. There may be, and often are, persons in the congregation who know the other parish and can make the identification. Again, people often know when preachers are disguising information and can make transpositions which allow them to identify the persons being described. One minister's wife, for example, said she always knew when he spoke, to think east when he said west, male when he said female. In all cases, the issues should be cleared with those whose story is being used.

This is not only an ethical matter, it is also a professional and legal matter having to do with the best care for persons and the possibility that one can be sued if an individual has not given permission. Everstine et al. report a case in which two mental health professionals lost a suit involving their use of a client's case in a book in spite of the fact that they had disguised the identity. The court ruled that confidentiality had been breached because prior consent to use the information had not been given.[5] Pastors could be held to be liable in the same manner.

Although obtaining prior permission may involve extra effort, it will be experienced by people as genuine concern and will result in more effective ministry.

Written consent should be obtained for the use of any information that is to be printed—even if only as duplicated sermons for dispersal within the congregation. The consent form should include the following details:

1. What information is to be used
2. Where and under what conditions it is to be used
3. For how long the permission is granted
4. How the person may revoke the permission
5. What the pastor will do if she or he desires to use the information in any other way and at any other time

Although these details may seem overly specific, they nevertheless indicate full respect for the privacy and the rights of the individual and communicate a genuine concern by the pastor not to abuse the trust of others. Further, they will protect the pastor from legal action.

Without question such a signed statement should be requested from those who ask a pastor to testify in any court trial or from those a pastor has referred to another professional, such as a psychiatrist, psychologist or physician.

Care in such matters will strengthen the bonds between pastor and parishioner, protect everyone from embarrassment, and help keep all concerned out of legal complications. ■

[1]L. Everstine et al., "Privacy and Confidentiality in Psychotherapy," **American Psychologist**, vol. 35, no. 9 (1980), pp. 828-840.
[2]H. Guervitz, "Tarasoff: Protective Privilege vs. Public Peril," **American Journal of Psychiatry**, vol. 134 (1977), pp. 282-292.
[3]L. Everstine et al., loc. cit., p. 831.
[4]Ibid., p. 829.
[5]Ibid., pp. 829-830.

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Fuller Offers Clergy Liability Seminars

The legal liability of pastors and church-related counselors demands interdisciplinary and interprofessional attention. No single discipline or profession provides a prospective that can, by itself, solve the problem. But the problem is real and events today confront the church, clergy, and parachurch worker with the "no-win" threat of litigation—for the cost of any such action can be disastrous to both plaintiff and defendant alike. When patterns of pastoral and spiritual care-giving become items of dispute in civil court, then we face issues of great importance for the life and witness of the Christian community.

That is why Fuller is offering a series of three clergy liability workshops designed to explore the legal issues related to confessional, counseling and disciplining activities, and offer participants a working understanding of the problems involved, and some practical solutions to those problems. The topics discussed will include: competence, licensing and supervision, confidentiality, church discipline, organization of church counseling programs and insurance.

Attorneys Robert Toms and Dennis Kasper, partners in Caldwell & Toms, Incorporated of Los Angeles, will conduct the workshops. "Part of the practice of law is to prevent problems where you can," said Kasper. "Our experience in this area has led to a desire to get good information to the church community at large, to help them exercise their freedoms with care, averting possible problem areas."

The first 1987 workshop will be at the Holiday Inn, Laguna Hills, California, on January 22. The second workshop will be held at the Holiday Inn, Palo Alto, California, on January 29. The third workshop will be held at the Holiday Inn, Santa Barbara, California on February 5.

Each workshop commences with registration at 9:15 a.m., continuing to 3:00 p.m. Lunch is provided, together with an extensive resource notebook. The cost is $25.00—a fee that has been generously subsidized by the donation of our speakers' time. For further information or registration, contact Cheryl Mitchell, conference registrar, at (818) 584-5340. Please note that each workshop is limited to 60 persons so that pre-registration is advisable.

Editor.

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