RELIGIOUS COUNSELING: SAFEGUARDING AGAINST POTENTIAL LIABILITY

On March 11, 1979, Kenneth Nally attempted to end his life with an overdose of drugs. The attempt failed. Kenneth was released from the hospital to the care and custody of a pastor from the Grace Community Church of the Valley where Kenneth had previously had numerous counseling sessions with members of the staff. Less than three weeks later, Kenneth shot himself in the head ending his life.

Kenneth’s parents filed suit the following year against the Grace Community Church and its counseling staff, alleging “clergy malpractice” for the counselors’ outrageous and negligent conduct in failing to prevent Kenneth’s suicide and failing to inform his parents. The case of Nally v. Grace Community Church of the Valley introduced a new theory of “clergy malpractice” to the courts. As a result, national attention was drawn to the possibility of suing pastors, ministers, priests, rabbis, and other religious leaders for “malpractice.”

It took nine years for the Nally case to work its way through the judicial system, and the final decision left the issue of clergy malpractice unresolved. The California Supreme Court held that since the counselors had held themselves out as “pastoral counselors” able to deal with a variety of problems—not as professional, medical or psychiatric counselors—they could not be held liable for malpractice.

Due to the litigious nature of our society, religious counselors are increasingly likely to be sued for events arising during the course of their counseling activities. Lawsuits, like religious counseling, can occur in almost every aspect of a ministry. While the courts may never recognize a claim of clergy malpractice, pastors will likely be found liable under other legal theories such as breach of fiduciary duty, outrageous conduct, and invasion of privacy.
This material is designed to prepare pastors for their counseling roles in terms of legal training. Hopefully, churches and their pastors will be less vulnerable to liability if they understand and recognize the potential dangers and use caution and prudence in their counseling activities.

THE ACCUSATIONS

The following types of claims are being asserted against pastors on the basis of counseling activities:

1. Clergy malpractice or negligent counseling
2. Sexual misconduct (including sexual harassment of adults and sexual molestation of children)
3. Alienation of affections (including interference with the parent/child or spousal relationships)
4. Failure to report incidents of child abuse
5. Invasion of privacy
6. Breach of fiduciary duty and confidentiality
7. Negligent or intentional infliction of emotional distress
8. Intentional acts such as assault, battery and defamation

Churches have been held liable for the conduct of their pastors and others who counsel on behalf of the church or who are employed by the church.

The claims associated with religious counseling activities generally fall within one of three areas, namely, (1) ineffective advice, (2) intentional breach of the duty of confidentiality and/or (3) sexual contact with counseled persons.
(1) CLERGY MALPRACTICE OR NEGLIGENT COUNSELING

Clergy malpractice is considered an emerging theory of liability which is not yet fully recognized. As exemplified by the Nally case, a clergy malpractice claim is based on the assertion that a clergyman failed to exercise the degree of care and skill normally exercised by members of the clergy in carrying out their counseling duties. To date, courts have uniformly rejected claims of clergy malpractice, primarily on the grounds that such claims would violate the First Amendment and have a severe and chilling effect on the roles and privileges of the clergy. Compelling a clergyman engaged in counseling to adhere to the same standards of care as a psychotherapist or a social worker would violate the Free Exercise of Religion Clause in the Constitution.

However, the court decisions in this area have been fact-specific, and no court has held that a claim of negligent counseling against a clergyman cannot be sustained under any circumstances. For instance, if a clergyman were to go beyond pure pastoral counseling and hold himself out to be a trained counselor or psychotherapist, that might be sufficient to take the clergyman out of the protection of the First Amendment and subject him to the same liability as a licensed therapist. Also, as the clergyman’s functions become more secular, those functions are removed from any protective religious freedom. For example, practices which go beyond acceptable counseling techniques and enter the realm of coercion or brainwashing lose their constitutional protection and liability may be imposed. Similarly, church practices conducted in a coercive environment do not qualify for protection because they are not voluntary religious practices.

Moreover, under some circumstances, a religious counselor may have a legal duty to protect the counseled person or to warn innocent third parties who may be in danger from the counseled person. This duty arises from the special relationship which exists between a professional counselor and a counseled person. However, in most instances of purely religious counseling this duty would not be imposed.
Churches need to determine whether their pastors’ training or work requirements place them within any professional categories which are regulated by their state statutes. The designated professionals are required to warn third parties where a counseled person threatens physical violence against a “reasonably identifiable” third person. The counselor could meet this duty by hospitalizing the counseled person, by making a reasonable attempt to inform the third party and the police of the counseled person’s threat, or by communicating the counseled person’s threat to the Department of Social Services or to the legal custodian if the intended victim is a minor. Also, although some states have not adopted such statutes, the same rules have been adopted by the courts.

(2) CONFIDENTIALITY

When a clergyman openly discusses or otherwise discloses matters learned from private counseling sessions or fails to report such matters when required by law to do so, liability may result. Claims of invasion of privacy have been made based on pastors disclosing confessions learned in counseling, preaching denunciations from the pulpit over what was learned in counseling, and performing harsh indoctrination procedures. The clergyman’s duty of confidentiality may also extend to a third party, such as a counseled person’s spouse.

A counseled person may also sue a pastor to prevent him from testifying at trial. All states have passed clergy privileged communications laws which grant immunity to and exempt clergymen from testifying in court. These laws define who can invoke the privilege and when it will be recognized. “Communications” include the spoken word and work product of the clergy including notes, tapes, drawings or other means of preserving the information. However, the privilege does not include paper or evidence given to the clergy by the counseled person.

The pastor’s duty under the law is governed by the state where the pastor is called to testify. Generally, the privilege will be effective if these elements are shown:
1. The religious counselor had a professional identity as “clergy.”
2. The counseled person intended the communication to be private or confidential.
3. The clergyman was acting in his professional capacity (i.e. the communications had specific, relevant spiritual content, and were made in the course of the clergyman’s normal and regular professional duties).
4. The privilege has not been waived.
5. The testimony is not required by another law.

The privileged communications laws were enacted to promote effective communications between clergy and counseled persons and do not provide a basis for bringing a civil lawsuit against a clergyman who inappropriately breaches his confidences. However, the clergyman can be sued for invasion of privacy or defamation.

The religious counselor’s privilege to remain silent and maintain confidences is limited by laws requiring him to report defined cases of suspected abuse, to protect counseled persons, and to protect third parties who may be endangered by counseled persons.

Child abuse reporting laws require a broad variety of professionals to report suspected child abuse. Some professionals are designated as “mandatory reporters”, and civil and criminal penalties may be imposed if they do not comply. Most states do not include clergy as mandatory reporters but authorize clergy to voluntarily disclose child abuse. Similar laws may apply to reporting suspected abuse of the elderly or mentally ill.

When confronted during counseling with allegations of abuse, the counselor has the option of contacting the appropriate authorities immediately, even if this requires breaching the counseled person’s confidences. As long as the counselor acts in good faith he cannot be sued if the report turns out to be erroneous.
(3) SEXUAL MISCONDUCT

Most states have enacted criminal laws which prohibit psychotherapist sexual misconduct with their counseled persons. The term “psychotherapist” is generally defined broadly to include those who purport to conduct psychotherapy, and may be broad enough to include licensed and non-licensed religious counselors. In fact, many states specifically designate clergy as being subject to this regulation. Sexual misconduct is also defined broadly and includes a wide range of sexual behavior. Because of the perceived vulnerability of counseled persons, consent is not a defense.

A growing trend exists to enact laws making sexual misconduct during counseling a civil offense. Moreover, states which do not have criminal or civil statutes prohibiting this conduct, may still have viable laws against adultery and fornication and may hold the religious counselor liable on theories of outrageous conduct or breach of fiduciary duty to the counseled person.

DO RELIGIOUS COUNSELORS NEED STATE LICENSES?

Generally, religious counselors do not need licensure to conduct counseling within the parameters of their church. Most states specify that their licensing laws do not apply to religious counselors as long as they do not misrepresent their counseling credentials or improperly use professional titles.

Most state exemptions from licensure given to religious counselors require that the counselor be ordained or licensed. Thus, seminary students and other church workers are not considered “clergy” and do not qualify for the exemption. Also, the exemptions usually apply only to clergy who counsel within the accepted standards of their professions. This suggests that the counseling must be required as part of the position and must include spiritual or religious issues. It follows that the exemption may not apply to a religious counselor who counsels persons outside of the church’s congregation or to an administrator who counsels although it is not a requirement of his administrative position.
Every state imposes criminal sanctions for violations of the state licensing requirements. The most common violations are improper use of professional titles or improper descriptions of professional counseling services. Sanctions are also imposed for professional misconduct which includes such infractions as knowingly aiding a non-licensed person to hold himself out as a licensed or certified counselor.

LEGAL PRECAUTIONS FOR CHURCH COUNSELING MINISTRIES

The CLA is recommending that churches consider the following precautions in order to reduce the risk of being sued for actions taken during counseling activities.

1. Be selective as to whom you allow to counsel.
2. Institute procedures to thoroughly investigate the background of all counselors.
3. Conduct a criminal background check on all counselors annually.
4. Have a written policy statement concerning counseling, and make sure that each counselor reads and agrees to abide by its provisions. (See page 10-11 for a sample policy statement.)
5. Do not make claims of providing "secular" counseling, and do not allow counselors to perform purely secular functions.
6. Do not allow counselors to hold themselves out as psychotherapists or professional, medical, or psychiatric counselors.
7. Do not imply that religious counselors have qualifications which they do not.
8. Check your state's licensure laws to see if your state regulates counseling performed by religious counselors or establishes requirements for those who use counseling titles.
9. Do not use or imply the use of state regulated professional titles such as "licensed professional counselor", "clinical social worker", or "pastoral counselor" unless licensed to do so.
10. Avoid strictly psychiatric diagnosis and interventions. Religious counseling should always include discussions of Biblical principles and spiritual considerations.

11. Have each counselor begin every counseling session by explaining that he, as the counselor, is not a professional counselor but is a spiritual advisor whose advice will be Biblically based.

12. Counselors should always have a large Bible present and prominently displayed during counseling sessions.

13. Counselors should always refer to the Bible as the source of their advice and read at least one relevant verse of Scripture during each counseling session.

14. Counselors should always pray at least once during every counseling session, asking God to give them wisdom in the counseling session.

15. Counselors should never give any advice contrary to the Bible regardless of the circumstances or situation involved.

16. Counseling should be voluntary and not coerced.

17. The church and its counselors should take necessary precautions to insure the confidentiality of the counseling sessions.

18. Have counselors keep extensive notes of all counseling sessions, including the problem presented and the spiritual advice given. For purposes of confidentiality, these records should be kept separate and secure.

19. Counselors should only counsel members of the same sex, or if counseling members of the opposite sex, they should be accompanied by a staff member of the opposite sex.

20. Clearly state the church’s position that sexual relations with counseled persons are prohibited.

21. Two adults should be present at all times when counseling children.
22. No counselor should go into a child’s home while the parents are absent.

23. No counselor should go into a private place with a child alone.

24. If an allegation is made against one of your counselors, immediately take action to investigate that allegation and to remove that counselor from further duties until a satisfactory investigation has been completed. Obtain the names and statements of all those involved and any witnesses. Obtain written statements signed by the witnesses and notarized.

25. Institute the policy that when a counselor finds that a problem appears to be beyond the counselor’s skill, the counselor stops counseling immediately and refers the counseled person to a professional, medical, or psychiatric counselor with more specialized training.

26. When allegations of child abuse, or other abuse, surface during counseling, make notes documenting the allegations, the observations of actual injuries, including dates and places, and urge the counseled person to contact the authorities, if appropriate. If your state designates religious counselors as mandatory reporters, you must immediately report the allegations. Otherwise, you have the option to contact the appropriate authorities, but are not required to do so.

27. Verbal or written descriptions of counseling services should emphasize the Biblical and spiritual dimensions of religious counseling.

28. Never counsel a given person on a regular basis for more than six months.

29. Be sure your church liability insurance policy covers religious counseling activities.

30. Be selective as to whom you begin counseling. It is much easier to never begin a counseling relationship than it is to terminate one after counseling has begun.
COUNSELING AGREEMENT

All counseling done by anyone associated with ________________ Church shall be spiritually and Biblically based. As a religious counselor for the church, I hereby agree to abide by the following rules:

1. I will be selective as to whom I begin counseling.
2. I will not make claims of providing "secular" counseling and will not perform purely secular functions.
3. I will not hold myself out as a psychotherapist or professional, medical, or psychiatric counselor.
4. I will not imply that I have qualifications which I do not have.
5. I will not use or imply the use of state regulated professional titles such as "licensed professional counselor," "clinical social worker," or "pastoral counselor," unless I am licensed to do so.
6. I will take necessary precautions to insure the confidentiality of the counseling session.
7. I will keep extensive notes of all counseling sessions, including the problem presented and the spiritual advice given. For purposes of confidentiality, I will keep these records separate and secure.
8. I will not go into a private place with a child alone.
9. I will not go into a child's home while the parents are absent.
10. I will not counsel a child unless accompanied by another adult.
11. I will not counsel members of the opposite sex unless accompanied by a staff member of the opposite sex.
12. I will not have any personal relationship outside of the counseling context with a person I am counseling.
13. I will not coerce anyone into beginning or continuing counseling sessions.
14. I will make notes documenting any allegations of child abuse, or other abuse, which surface during counseling and my observation of any physical injuries, including dates and places. If appropriate, I
will urge the counseled person to contact the authorities.

15. If I find that a counseled person has a serious problem requiring professional treatment, I will immediately refer the person to a professional, medical, or psychiatric counselor with specialized training.

16. I will never counsel a given person for more than six months.

17. I will avoid strictly psychiatric diagnosis and interventions.

18. I will emphasize the Biblical and spiritual dimensions of the religious counseling in any verbal or written descriptions of my counseling services.

19. I will begin every counseling session by explaining that I am not a professional counselor and that I am a spiritual advisor whose advice will be Biblically based.

20. I will have a large Bible present and prominently displayed during my counseling sessions.

21. I will always refer to the Bible as the source of my advice and read at least one relevant verse of Scripture during each counseling session.

22. I will pray at least once during every counseling session asking God to give me wisdom during the counseling session being totally dependent on Him and His Word.

23. I will never give any advice that is contrary to the Bible regardless of the circumstances or situation involved.

As a religious counselor for the church, I hereby agree to submit the following information:

a. Transcripts from all institutions of higher learning  
b. Authorization for Release of Information  
c. Authorization for Criminal Record Check

Date __________________ Signature__________________________
AUTHORIZATION FOR RELEASE OF INFORMATION

I hereby authorize any person making inquiry on behalf of ________________________________ to obtain any information from schools, apartment managers, employers, or individuals, relating to my activities. This information may include, but is not limited to, academic, residential, achievement, performance, attendance, personal history, credit history, disciplinary, arrest, and conviction records. I hereby direct you to release such information upon request, whether favorable or unfavorable, to any representative of this institution presenting this authorization or a photocopy or facsimile of it.

I hereby release any individual, including record custodians, from any and all liability for damages, of whatever kind or nature, which may at any time result to me on account of compliance, or any attempts to comply, with this authorization.

This authorization shall be void six months from the date of execution.

A photocopy or facsimile copy of this document and any signature shall be considered for all purposes as an original.

_________________________________  __________________________________
Date                                               Signature

STATE OF ________________________________
COUNTY OF ________________________________

The foregoing instrument was acknowledged before me this ___ day of __________, 19___,
by ________________________________  Personally Known____ OR Produced Identification____.
Type of Identification Produced______________________________.
My Commission Expires:

_________________________________
Notary Signature

_________________________________
Printed Signature
AUTHORIZATION FOR CRIMINAL RECORD CHECK

I hereby authorize any person making inquiry on behalf of _________________ to obtain any information from police departments and any other criminal justice agencies relating to any criminal record. This information may include, but is not limited to, arrest and conviction records. I hereby direct you to release such information upon request, whether favorable or unfavorable, to any representative of the above-named institution presenting this authorization or a photocopy or facsimile copy of it. In order to assist in the compilation of this information, I hereby give the following information:

Name______________________________
Maiden Name (if applicable)______________________________
Date of Birth____________ Place of Birth______________________________
Aliases if any______________________________
Driver's License Number______________________________ State_________ Expiration Date_________
Social Security Number______________________________

I hereby release any individual, including record custodians, from any and all liability for damages, of whatever kind or nature, which may at any time result to me on account of compliance, or any attempts to comply, with this authorization. This authorization shall be void six months from the date of execution.

A photocopy or facsimile copy of this document and any signature shall be considered for all purposes as an original.

_________________________  __________________________
Date  Signature

STATE OF _______________________
COUNTY OF _______________________

The foregoing instrument was acknowledged before me this ___ day of ________, 19____, by __________________________. Personally Known_____ OR Produced Identification_____
Type of Identification Produced______________________________
My Commission Expires:

_________________________  __________________________
Notary Signature  Printed Signature