

Sexual Misconduct

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Avoiding Legal Landmines:

How Religious Professionals Can Recognize
and Avoid Hidden Legal Liabilities

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1. Sexual Misconduct in Counseling

I. The Counseling Relationship

A. Fiduciary Duty

1. When applied – trustees, officers, directors, and some informal relationships
2. Definition – relationship of trust and confidence one places in another; usually where the second person has superior knowledge, bargaining position over the first person
3. Consequences – obligation to use highest degree of good faith (loyalty) and act with reasonable prudence

B. Professional Relationship

1. When applied – secular or licensed counseling
2. Definition – counseling relationship where standard of care towards the person being counseled is equal to the degree of care a reasonably prudent licensed counselor would provide under the same or similar circumstances
3. Consequences – failure to meet the professional standard of care gives rise to liability

C. Spiritual Advisor

1. When applied – member of clergy who provides spiritual advice consistent with his/her religious beliefs
2. Definition – counselor must be member of the clergy
3. Consequences – less state regulation and risk of liability

Example: *Borchers v. Hrychuk*, 727 A. 2d 388 (Md. App. 1999)
No counseling relationship established. “Bridges over Madison County” case.

II. State Regulation

- A. Licensed Professional Counselor Act – Texas Occupations Code Sec. 503.001 et seq. (Sept. 1999) Act does not apply to recognized religious practitioners performing counseling consistent with the law of the state, their training, and any code of ethics of their professions, if they do not represent themselves to be Licensed Counselors.
- B. Licensed Marriage And Family Therapist Act - Texas Occupations Code Sec. 502.001 et seq. Exempts recognized religious practitioner.

- C. Professional Social Worker Act - Texas Occupations Code Sec. 505.001 et seq.
Exempts activity conducted or service performed by a pastoral care counselor if not using title implying that counselor is licensed in professional social work.
- D. Psychologists' Licensing Act - Texas Occupations Code Sec. 501.001 et seq.
Exempts recognized member of the clergy who is acting within person's ministerial capabilities, and if no representation that he is psychologist and if does not describe services by term "psychological".
- E. Chemical Dependency Counselors - Texas Occupations Code Sec. 504.001 et seq.
Exempts religious leader of a congregation providing pastoral chemical dependency counseling within the scope of that person's duties.

III. First Amendment of the United States Constitution

Free Exercise Clause of the First Amendment – “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”

A. Protected Conduct – exercise of religious beliefs and activities

1. The courts will not intervene in matters or disputes which would require the courts to extensively investigate and evaluate religious tenants and doctrines.
2. Freedom to believe is absolute; freedom to act is subject to regulation for the protection of society where it involves purely secular activities that are not religious in motivation

Example: *Green v. United Pentecostal Church International*, 899 S.W.2d 28 (Tex. App. – Austin 1995). Church's decision to terminate license of minister was not subject of court intervention. “Questions of church discipline and government are left to the church.” See also *Dean v. Alford*, 994 S.W.2d 392 (Tex. App. – Ft. W. 1999).

Example: *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App. – Fort Worth 1998.) Whether minister and his wife misapplied church doctrine during their attempt to drive demons from a minor girl was not a justiciable controversy.

Example: *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). Courts may not inquire into truth or falsity of religious belief. (Claim of fraud based on representation that Bible demanded adherent to tithe).

Example: *Smith v. Tilton*, 1999 WL 649359 (Tex. App. – Dallas 1999). Promise of a miracle does not give rise to claim.

- B. Unprotected Conduct – where the conflict may be resolved solely by application of neutral principles of law, such as civil, contract or property rights, even though they stem from church controversy

Example: *Smith v. Tilton, 1999 WL 649359 (Tex. App. – Dallas 1999)*. Representation in two “dun” letters that husband had pledged or vowed a contribution to the church which pledge occurred on a date after his death. Receipt of letters caused widow emotional distress.

Example: *Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996)*. Claim recognized based on pastor’s representations that he would personally read, touch, and pray over contributor’s prayer requests (claim stems from pastor’s promise to perform concrete acts). Query: If pastor promised that requests would be answered?

Example: *Sanders v. Baucum, 929 F. Supp. 1028 (USDC – ND Texas 1996)*. If a clergy person holds himself out as having skill and expertise of secular professional and undertakes to provide secular services, he can be held to the same secular standard of care by which secular professionals are held under similar circumstances.

Example: *Smith v. Calvary Christian Church, 592 N.W.2d 713 (Mich. App. 1998)*. Where church discipline involved a person not presently a member of the church, First Amendment offers no protection. First Amendment protects right to withdraw from membership.

IV. Sexual Exploitation Cause of Action

Sexual Exploitation by Mental Health Service Provider Chapter 81 of the Texas Civil Practice and Remedies Code

- A. Mental Health Service Provider – a person licensed or unlicensed who performs mental health services, including:
1. social worker
 2. chemical dependency counselor
 3. licensed professional counselor
 4. licensed marriage and family therapist
 5. member of the clergy
 6. physician
 7. psychologist

- B. Mental Health Services – if provided by a member of the clergy, does not include religious, moral, or spiritual counseling, teaching and instruction
- C. Sexual Exploitation Cause of Action:
 - 1. Sexual contact, sexual exploitation (pattern, practice or scheme of conduct for the purpose of sexual arousal or gratification or sexual abuse of any person), or therapeutic deception (representation that sexual contact or sexual exploitation is part of a patient’s treatment) by a mental health service provider.
 - 2. Patient suffers damages, directly or indirectly, including physical, mental or emotional injury, caused from above conduct (mental anguish alone is actionable).
 - 3. Defense – victim was not emotionally dependent on the provider and counseling stopped more than two years prior to conduct.
 - 4. No defense
 - a. consent
 - b. conduct occurred outside counseling sessions
 - c. conduct occurred away from counseling premises
- D. Duties of Mental Health Services Provider
 - 1. If reasonable cause to believe patient has been victim of sexual exploitation, must report alleged conduct not later than 30 days to:
 - a. prosecuting attorney in the county; and
 - b. state licensing board.
 - 2. Prior to report must inform victim of necessity to report and determine if victim desires to remain anonymous.
 - 3. Violation – Class C Misdemeanor and disciplinary action by licensing board.
 - 4. Reporting – if in good faith, immune from civil or criminal liability from reporting.
- E. Duties of Employer
 - 1. Background check - Inquire of past employers who employed the provider within five years about possible sexual exploitation.

2. Report to prosecuting attorney in the county and to licensing board and stop future misconduct, if become aware of conduct.
3. Provide a reference - Disclose occurrence to future employers or prospective employers upon request.

V. Other Causes of Action Against Counselor

- A. Clergy malpractice – No cause of action recognized in Texas. *Sanders v. Casa View Baptist Church*, 134 F.3d.331 (5th Cir. 1998).
- B. Professional malpractice – Courts will recognize cause of action for secular conduct. *Sanders v. Baucum*, 929 F.S.1028 (N.D.Tex. 1996).
- C. Breach of fiduciary duty – No cause of action recognized in Texas by member of church against clergy. *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App. – Tyler 2000, no writ).
- D. Intentional infliction of emotional distress – Courts will recognize cause of action for secular conduct.
 1. Elements:
 - a. Intentional or reckless conduct
 - b. which was extreme and dangerous
 - c. which caused emotional distress
 - d. the resulting emotional distress was severe
 2. Not mere insults, threats or indignities
- E. No license or exemption – Courts should recognize cause of action.

VI. Other Church/Employer Liability for Conduct

A. Respondeat Superior

Example: *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532 (Ga. App. 1996).

- B. Negligent Selection
- C. Negligent Supervision
- D. Negligent Retention
- E. Ratification

VII. Ministerial Counseling Policy – a recommended checklist for a clergy counseling policy:

- A. Clergy staff are not licensed
- B. Clergy staff will minister on a spiritual level only, consistent with the Church's beliefs.
- C. If an individual needs licensed counseling assistance in addition to ministering from the clergy staff, it is the responsibility of that individual to seek such counseling.
- D. Clergy staff may refer individuals to licensed counselors
- E. Communications to clergy staff during ministerial counseling will be confidential and will not be disclosed, except in the following circumstances:
 - 1. any occurrence of or intention to commit child abuse
 - 2. an intention to commit a felony
 - 3. an intention to commit suicide
 - 4. with written permission
- F. Ministerial counseling may be audio or video taped and the clergy staff may take notes.
- G. Either two clergy staff or another specially designed procedure must be followed when ministering to children or a person of the opposite sex.
- H. A parent or custodian must consent to a child's ministerial counseling prior to the sessions. Child acknowledges that if minister feels parents need to know that they will be told.
- I. No counseling may be provided by lay persons in the Church, and ministerial counseling is limited to those clergy staff designated by the Church in the policy.
- J. Each person to receive ministerial counseling must execute a memorandum acknowledging the receipt of the policy prior to the sessions, and stating that the person has read and understands the policy and agrees to follow it.

2. Sexual Misconduct in Connection with Child Abuse

- I. Implement prudent policies concerning prevention of child abuse within the church.
 - A. Theories of liability include:
 - 1. Negligent selection
 - 2. Negligent supervision

3. Negligent retention

B. A church should adopt the following:

1. Worker screening policies

Doe vs. Boys Club of Greater Dallas,

868 S. W. 2d 942 (Tex. App. – Amarillo 1994, aff'd)-applied a duty to exercise reasonable care in the selection of workers.

“Having found that the [Defendant] owed a duty to its members to exercise reasonable care in the selection of its workers, the failure to make any inquiry was a breach of that duty as a matter of law.”

2. Two adult rule (more than one adult supervising in each activity)

3. Six month rule (selection of a worker after reasonable time to become acquainted with the worker).

4. Memorialize due diligence in selection and supervision.

C. Statute of Limitation – 2 years following child’s eighteenth birthday.

Marshall vs. First Baptist, 949 S.W.2d 504 (Tex App-Hou[14th] 1997, no writ)

II. Child Abuse Prevention Policy

A. Why Churches Need A Child Abuse Prevention Policy

1. Consistency in Practices

2. Reasonableness of Procedures

B. Importance of Following the Policy

1. Once a policy is adopted, it must be followed

2. Possible negligence per se if not followed.

C. What the policy should consider

1. Worker enlistment

a. All paid and volunteer workers

b. Proper screening procedures

c. 6 month rule

2. Worker training
 - a. Legal definition of child abuse
 - b. copy of the church's policy for reporting child abuse
 - c. Regular additional training and education
3. Worker supervision
 - a. Two adult rule
 - b. Reasonable ratio of workers to children
 - c. church staff should supervise, make unannounced visits into classes, etc.
 - d. Identification system
 - e. Enforce Policies
4. Worker performance reviews
5. Physical facilitates
 - a. Visibility into rooms
 - b. Cameras
 - c. Secure area
 - d. Restrooms
 - e. Outdoor playground area
6. Insurance
 - a. Liability insurance coverage available to cover child abuse.
 - b. Charitable Immunity and Liability Act of 1987
7. Reporting
 - a. Reporting procedure set forth in the policy
 - b. All workers familiar with the procedure
 - c. Reporting required by state law
 - d. Immediately contact insurance company and report occurrence
 - e. Contact attorney
8. Steps to take in event of Child Abuse
 - a. Appoint someone to oversee matter
 - b. Investigate thoroughly, don't treat as frivolous
 - c. Maintain confidentiality of victims and accused as much as possible
 - d. Cooperate with law enforcement
 - e. Suspend immediately the accused from duties if a worker
 - f. Keep victim's families advised of status of investigation

- g. If abuse is confirmed, immediately dismiss worker
- h. If evidence inconclusive, consider moving worker to position that does not involve children
- i. Keep congregation informed as to matters which are not confidential
- j. Prepare a media response

9. Transition Rules for implementation

III. Worker Selection Policy

A. Screening Process

1. Develop Written Job Description

- a. list minimum qualifications
- b. list duties and responsibilities
- c. list limitations on scope of authority

2. Use Written Applications

- a. other churches served in
- b. prior work/employment
- c. personal references
- d. prior residences – at least the prior 7-10 years
- e. prior criminal record
- f. personal data: present name, prior names or aliases, address, social security number, drivers license number, telephone number
- g. certifications/declarations
 - (i) representation that the information provided is true and correct and acknowledgement that church is relying upon the information.
 - (ii) authorization to check references, prior church service, prior work experience, and perform criminal background check; release of church and its agents from liability for all investigations performed.
 - (iii) authorization for third parties to provide information to the church; release of the third parties from liability if provide in good faith.
 - (iv) waiver of right to inspect results of investigation.
 - (v) covenant to abide by all rules and policies and refrain from unscriptural conduct.
 - (vi) acknowledgement of at-will relationship.
 - (vii) authorization for church to provide future references to third parties without liability.

3. Perform background checks of personal references, prior churches, and prior employment

- a. document by letter or memoranda

- b. person contacted, date, method of contact
- c. standard questions - examples:
 - (i) reason left
 - (ii) would you hire applicant again
 - (iii) prior performance
 - (iv) prior misconduct or crimes
- d. for clergy who “counsel”, must make inquiry of past employers for previous 5 years regarding occurrences of sexual misconduct.

4. Criminal background checks

- a. geographic area covered
- b. time period covered
- c. convictions, charges or arrests
- d. misdemeanor, felony or both
- e. date of offense, type of offense and disposition
- f. cost
- g. consent

5. Interview of Applicant

- a. document by notes and memoranda
- b. participants: understanding of role, purpose and function
- c. obtain Christian testimony
- d. discussion of Church policies: protect children against child abuse, identify competent and safe workers and/or drivers, etc.
- e. advise of expectations of job performance
- f. obtain commitment to follow policies and meet performance expectations

B. Worker Selection Policy Should Apply to All Workers

C. Document the Worker's Personnel File

D. Confidentiality of Records – use for internal church purposes only

E. Maintain for period exceeding statute of limitations

3. Sexual Misconduct in the Workplace

I. Prerequisites For a Claim.

A. Prerequisites with Respect to the Employer

- 1. Employ 15 or more employees for each work day in each of 20 or more calendar weeks in the current or preceding calendar year.

2. Engage in an industry affecting commerce.
- B. Employee must file written claim with Equal Employment Opportunity Commission or Texas Commission on Human Rights prior to filing lawsuit.
- II. Quid Pro Quo or Economic Harassment
- A. Employer is strictly liable for the quid pro quo or economic harassment conduct of supervisory employees.
- B. Elements of cause of action:
1. The employee was a member of a protected class.
 2. The employee was subjected to unwelcome harassment in the form of sexual advances or request for sexual favors.
 3. The harassment complained of was based on sex.
 4. A tangible employment action resulted from the employee's refusal to submit to a supervisor's sexual demands, by changing the terms or conditions of the employee's employment.
- III. Hostile Work Environment Harassment.
- A. Elements of cause of action:
1. Plaintiff belongs to a protected class
 2. Plaintiff was subjected to unwelcome sexual harassment
 3. Harassment complained of was based upon or because of sex
 4. Harassment complained of was sufficiently severe or pervasive to create an abusive working environment (it affected a term, condition, or privilege of employment).
 5. The employer is liable as follows:
 - a. If a co-worker commits sexual harassment and the employer knew or should have known of the harassment and failed to take prompt, effective or remedial action.
 - b. If a supervisor commits the sexual harassment, the employer is liable unless:
 - (i) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
 - (ii) The employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

4. Sexual Misconduct – Criminal Acts of Third Parties

I. Duty

“With regard to criminal acts of third parties, property owners owe a duty to those who may be harmed by the criminal acts only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable”. *Melon Mortgage Company v. Holder*, 1999 WL694868 (Tex 1999).

II. Premises Liability

A. Property owners/occupiers are liable for criminal acts of third parties if a duty exists under the following analysis.

1. Determine foreseeability of the general danger (the “Timberwalk” factors)

- a. Similarity
- b. Recentcy
- c. Frequency
- d. Publicity
- e. Proximity

Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex 1998)

2. Determine whether the plaintiff was foreseeable.

B. If a duty exists based upon this analysis, the landowner owes a legal duty to use ordinary care to protect invitees from criminal acts of third parties.

5. Charitable Immunity and Insurance

I. Charitable Immunity

A. Objective of legislation granting limited immunity: to protect the charity’s assets from claims while still providing a recovery for a victim.

B. Charitable Immunity and Liability Act of 1987 – Texas Civil Practice & Remedies Code Section 84.001 et seq.

1. Charity – organizational and operational tests; does not include a private primary or secondary school or hospital
2. Volunteer – person performing services without remuneration other than for actual expenses.

- a. Direct service volunteer – immunity if in good faith and course and scope (limited liability if arises from operation of a motor vehicle).
- b. Officer, director, or trustee volunteer – immunity if in course and scope (limited liability if arises from operation of a motor vehicle).
- C. Employees – limited liability if in course and scope and organization has liability insurance coverage (\$500,000/\$1,000,000/\$100,000 or \$1,000,000 combined single limit).
- D. Organization – limited liability if has liability insurance coverage (\$500,000/\$1,000,000/\$100,000 or \$1,000,000 combined single limit).
- E. No immunity/limitation for act or omission which is intentional, willfully or wantonly negligent or done with conscious indifference or reckless disregard.

II. Insurance

A. Liability – examples of types of liability insurance:

1. General liability insurance.
2. Automobile liability insurance.
3. Hired and non-owned insurance.
4. Sexual misconduct insurance.
5. Counseling acts insurance.
6. Directors and officers insurance.
7. Employment practices insurance.
8. Special events insurance

B. Property

C. Worker’s Compensation

D. Employee Dishonesty

III. Insurance Coverage Issues For Sexual Misconduct Claims

- A. Several courts have held that an employer’s general liability insurance policy provides no coverage to the employer for a negligent hiring, supervising, training, or retention cause of action when an employee engages in intentional misconduct. *King*

v. Dallas Fire Insurance Company, 27 S.W.3d 117 (Tex App-Hou[1st], 2000 petition for review pending) (“We do not find a decision that is squarely on point on this issue, but we do find state and federal decisions applying Texas law that have spoken generally on the proposition. In essence, these courts have denied coverage to the insured if the complaintant’s injury is the result of a negligent act of the principal that is *related to* and *interdependent on* the intentional conduct of the agent”) (emphasis in the original).

- B. *American States Insurance v. Bailey*, 133 F.3d 263 (5th Cir. 1998) Decided that an insurer had no duty to defend a church on claims arising from the sexual misconduct of its pastor. The court reasoned that the church’s alleged liability for negligent hiring, training, and supervision was “related to and interdependent” on the intentional sexual misconduct of the pastor, so that the sexual action exclusion in the general liability policy precluded the church’s alleged acts from being an “occurrence” covered by the policy.