

12-15-1986

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Recommended Citation

Lawrence M. Burek *Clergy Malpractice: Making Clergy Accountable To A Lower Power*, 14 Pepp. L. Rev. Iss. 1 (1986)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol14/iss1/6>

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Clergy Malpractice: Making Clergy Accountable To A Lower Power

INTRODUCTION

The day may be quickly approaching when a sign with the following language becomes as common in churches as stained glass, spires, and pews:

ATTENTION COUNSELEE (PENITENT)

Due to potential lawsuits for spiritual malpractice, this counseling room [confessional booth] is no longer available to deal with anything other than clearly superficial problems. We suggest (but do not counsel) for your possible consideration the use of prayer and Scripture, but you should do so at your own risk. If government-sponsored counseling services are unavailable due to lack of mental health funds, and you cannot afford private psychiatric care, a list of possible churches in this State who may be insured is available on request at the front office upon signing a Release from Referral Liability. If your problem is urgent and real serious, please be assured our prayers are with you. We wish you "Godspeed" and hope you will visit when you are better.¹

Nonetheless, while the placement of such disclaimer signs may seem somewhat facetious on the surface, the rationale behind their existence is gaining credibility.²

For almost seventy-five years, the legal system has recognized the potential civil liability of churches and members of the clergy in non-doctrinal matters.³ However, only in the last five years has the legal system begun to scrutinize the spiritual ministry of the church. Some might applaud this examination and imposition of civil accountability upon a church or religious organization. At the same time, others cringe at the inroads the legal system is making into areas traditionally left undisturbed, fearing increased governmental entanglement in the religious affairs of the church.

With the increasingly litigious nature of society, especially in light of the rapid rate at which fundamentalist churches are moving into the field of emotional counseling as a means of expanding the congregation, confrontation has become inevitable. As a result, the possibilities of future litigation involving the church and clergy are

1. *Demurrer at 6, Nally v. Grace Community Church of the Valley*, No. NCC-18668-B (Cal. Super. Ct., Los Angeles County, 1980).

2. *Id.*

3. *Magnuson v. O'Dea*, 75 Wash. 574, 135 P. 640 (1913) (Catholic bishop, acting as a clergyman, held not liable in a suit based upon the kidnapping of a child and resultant malicious prosecution of parents).

dramatically increasing.⁴

This comment examines the concerns of both sides of the controversy and suggests that a middle ground may exist as a means of holding the church and clergy accountable, while safeguarding their mission. Consideration is first given to a recent seminal case which has sharpened the focus of the controversy. Further consideration is then given to the constitutional, liability, and policy questions involved. Finally, a practical solution is offered which may provide a feasible framework for protecting both the church and the parishioner from legal inconsistencies.

II. BACKGROUND

While members of the clergy have been sued for a variety of reasons which stem from their church involvement and ministry,⁵ a suit was never filed under the guise of clergy malpractice prior to 1980.⁶ In that year, however, a significant milestone was reached with the filing of *Nally v. Grace Community Church of the Valley*.⁷ In *Nally*, a wrongful death action was filed against a church and its pastors following the suicide of one of its parishioners. As a result, a cause of action aimed at the church's counseling program was brought under the theory of clergy malpractice.⁸

A. *The Role and Place of Religious Counseling*

A foundational consideration, which must precede an examination of the *Nally* case, is the relationship of religious counseling to what is traditionally understood as secular or nonreligious counseling. An

4. See, e.g., *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976); *Carrieri v. Bush*, 69 Wash. 2d 536, 419 P.2d 132 (1966) (suits for alienation of affections which occurred after clergy advised wives to leave their husbands).

5. Girdner, *To Err Is Human*, CAL. LAW., Aug. 1985, at 21.

6. Prior to *Nally v. Grace Community Church of the Valley*, reports had circulated regarding a variety of legal actions initiated against various clergymen. Following extensive research, it was determined that no lawsuit had ever been filed and that the specious accounts were fabricated by insurance companies to boost sales. Beecher, *Ministerial Malpractice: Is It a Reasonable Fear?*, TRIAL, July 1980, at 11.

7. No. NCC-18668-B (Cal. Super. Ct., Los Angeles County, 1980). The appellate decision in this case is reported at 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984). However, this opinion was subsequently decertified by the California Supreme Court by an order dated Aug. 30, 1984. The Reporter of the Decisions was directed not to publish this opinion in the Official Reports, by the authority of CAL. CONST. art. VI, § 14; CAL. R. CT. Div. III Rule 976. The opinion of such a case should not be cited by a court or a party to an action or proceeding, except in very limited circumstances. See CAL. R. CT. Div. III Rule 977. Therefore, all subsequent references to this appellate decision are given solely as a source of the case facts and history.

8. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 164 (1981). It is argued that the cause of action would be better labeled as "spiritual counseling malpractice." In this type of cause of action, the dispute "focuses on counseling rendered by a member of the clergy in meeting the spiritual, emotional, and religious needs of the counselee." *Id.*

underlying issue which must first be resolved is whether the church (the clergy in particular) is invading the traditional, secular counseling arena, and is therefore subject to an established duty, or whether religious counseling is unique, thereby relieving its practitioners of that duty.

Leading psychiatrists have noted an integral relationship between secular and religious counseling, arguing that in order for a person to be mentally and morally healthy, that person must recognize the existence of "sin."⁹ Sigmund Freud and Carl Jung recognized such a relationship arguing that "we psychotherapists must occupy ourselves with problems which, strictly speaking, belong to the theologian."¹⁰ Thus, in healing mental illness, counseling from a religious perspective may offer insights otherwise unavailable. As a result, religious counseling has a unique place in the overall field of counseling.

Assuming that members of the clergy do not invade an area reserved *only* for secular psychiatrists and psychotherapists, they need not be subject to the same duties imposed upon their secular counterparts. Since religious counseling has a credible basis, according to Freud and Jung,¹¹ there is no reason to assume that a member of the clergy is acting outside the scope of his overall ministry when he functions as a counselor. Since no clear lines exist "delineating the realm of religion from the realm of psychology and psychiatry,"¹² the role of the religious counselor is self evident.

While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective. Therefore, a cause of action for clergy malpractice based on incompetent religious counseling cannot rely upon the elements traditionally required in psychiatric malpractice causes of action.¹³ By necessity, allegations must be founded upon a different duty and standard of care.

9. *Id.* at 168 (quoting K. MENNINGER, *WHATEVER BECAME OF SIN?* (1972)).

10. Szasz, *The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals*, 5 N.Y.U. REV. L. & SOC. CHANGE 127, 133-35 (1975).

11. *Id.*

12. *Ericsson*, *supra* note 8, at 166.

13. Significantly, very few secular counseling malpractice suits have been filed against psychiatrists or psychologists. Such suits are usually filed only when the counseling is the result of outrageous conduct or excessive involvement in the life of the patient. See *Landau v. Werner*, 105 Sol. J. 257 (A.B. 1961), *aff'd*, 105 Sol. J. 1008 (C.A. 1961) (continued social contacts with enamoured patient); *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968) (male psychotherapist told female patient to leave husband and family, give him all of her inheritance, and live and work on his farm).

B. *The Nally Case*

In 1979, after a prior suicide attempt and subsequent counseling by the pastors of Grace Community Church of the Valley, Kenneth Nally committed suicide.¹⁴ The complaint filed by the deceased's parents included three counts: 1) clergyman malpractice; 2) negligence; and 3) outrageous conduct.¹⁵ The first count, which is the heart of the complaint and basis for the concern within the religious and legal community, alleged that Pastor MacArthur, while "acting as an agent of Grace Community Church, provided spiritual and personal counseling to plaintiffs' son, Kenneth Nally."¹⁶ The count alleged that Pastor MacArthur was aware that Kenneth was severely depressed, had suicidal tendencies, and was in need of professional counseling.¹⁷ Instead of recommending professional help, the complaint alleged Pastor MacArthur encouraged Kenneth to read the Bible, pray, listen to taped sermons, and meet with other lay counselors on the staff of the church.¹⁸ In addition, it was alleged that defendants failed to make themselves available at times requested by Kenneth.¹⁹ As a result of these acts and omissions, the plaintiffs alleged that Pastor MacArthur was negligent in failing to exercise the standard of care for a clergyman of his denomination and training within the community.²⁰

Procedurally, the defendants' demurrer to the complaint was promptly overruled, resulting in the filing of an answer.²¹ Approximately one year later, the defendants' motion for summary judgment was granted, as the trial judge could find no triable issues of fact.²² On appeal, the majority of the court of appeal concluded that issues of fact remained as to whether Kenneth Nally's suicide was caused by the intentional infliction of emotional distress, a corollary to the claim of outrageous conduct.²³ By so doing, the court of appeal avoided addressing the issue of whether Pastor MacArthur had a duty to either refer Kenneth Nally to other mental health professionals or to adequately train his fellow staff members in the area of

14. *Nally*, 204 Cal. Rptr. at 305. *See supra* note 7.

15. *Nally*, 204 Cal. Rptr. at 304-05.

16. *Id.* at 304.

17. *Id.* at 309.

18. *Id.*

19. *Id.* at 309-10.

20. *Id.* at 310. The church itself has over 20,000 members with 3,000 parishioners in attendance at an average Sunday service. When 150 prospective jurors were assembled, 50 raised their hands when asked if they had ever attended services at the church, indicating the size and impact the church had on the local community. Girdner, *Did Pastors Spur Suicide?*, NAT'L LAW J., May 13, 1985, at 6, col. 1.

21. *Nally*, 204 Cal. Rptr. at 310. *See supra* note 7.

22. *Id.* at 312.

23. *Id.* at 309.

psychological counseling.²⁴

Following the decision by the court of appeal, a second appeal was filed with the California Supreme Court. The court subsequently denied a hearing and decertified the lower court's decision.²⁵ The case then returned to trial. Following plaintiff's case-in-chief, the defendants' motion for nonsuit was granted.²⁶ Plaintiffs have again filed an appeal with the Second Appellate District.²⁷ Of significance, throughout the entire procedural history of this case, all of the courts have avoided addressing the issue of the duty owed by any of the defendants.

C. Related Cases

There is a great deal of uncertainty as to the number of clergy malpractice cases filed in the past few years, as only the most "preposterous" conduct of the clergy justifies adequate grounds for such an action.²⁸ It is believed that the *Nally* case spawned at least four related cases, each with related but distinct factual patterns.

In *Klosterman v. Hawkins*,²⁹ the plaintiff alleged that the defendant Pastor had developed a romantic and sexual relationship with the plaintiff's wife which resulted from counseling sessions following the death of a minor child. This alleged emotional involvement eventually led to the plaintiff's wife filing for divorce and moving in with the defendant. Thus, defendant's actions "fell below the standard of

24. *Id.*

25. This was done by an order dated Aug. 30, 1984. See Wise, *Clergy Malpractice Suits*, L.A. LAW., Dec. 1985, at 20.

26. *Id.* It was believed that at the time of the nonsuit, nine out of ten jurors interviewed were leaning strongly in favor of awarding damages to the plaintiffs. In dismissing the action, Judge Kalin relied heavily upon the first amendment in stating the following:

To attempt to impose standards on pastoral counseling would open up the court to a flood of clergy malpractice suits that well-established churches would be able to challenge However, the cost of defense for a small church or the traditional itinerant preacher would have a chilling effect on the free exercise of religion.

Girdner, *supra* note 5, at 21.

27. *Nally v. Grace Community Church of the Valley*, No. B015721 (Cal. Ct. App., Second App. Dist., 1985).

28. Some experts believe that about ten to fifteen suits have been filed recently although the exact number is unknown. The tendency is for jurors to side with the clergy. Plaintiffs' attorney Barker stated that, "You can only win [if the clergy's conduct] is totally preposterous." Ranii, *Clergy Malpractice—The Prayer for Relief*, Nat'l Law J., March 4, 1985, at 30, col. 1-2.

29. See Complaint, *Klosterman v. Hawkins*, No. A81004568 (Ohio Comm. Pl., Hamilton County, 1981).

care normally expected of ministers performing their function within the community.”³⁰ Procedurally, the defendant’s motion for judgment on the pleadings was denied, indicating there was some basis for the plaintiff’s pleadings.

In *Neufang v. Aetna Casualty & Surety Co.*,³¹ a case filed in Florida approximately one year after *Nally*, the plaintiff alleged that the defendant Pastor was negligent in failing to warn her of her husband’s violent propensities. One day after Mr. Neufang began marital counseling, he shot his wife, rendering her a paraplegic.³² Plaintiff alleged that the defendant had a duty to protect others as a result of knowledge acquired through his counseling ministry.

In two other clergy malpractice cases,³³ the courts have been willing to dismiss the actions because of first amendment concerns and the apparent linkage between clergy standards and questions of doctrine and theology, an area which is beyond the court’s review. Both of these cases are somewhat unique, as most actions rarely reach the trial stage. Defendants’ insurance carriers are usually anxious to settle such suits, and in those rare instances where plaintiffs are successful, the award is often relatively small.³⁴

Of the four cited cases, each was eventually dismissed, as in *Nally*, because of the trial judge’s apparent concern with constitutional issues, liability, and policy matters.³⁵ Consequently, a further examination of these three factors is essential in order to develop an acceptable approach toward the establishment of civil accountability.

III. THE CONSTITUTIONAL QUESTION

Because of the inherent religious nature of the clergy malpractice controversy, constitutional issues are raised which require consideration. The first amendment to the Constitution, drafted so as to insure a separation between religious and civil powers, states that “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.”³⁶ Embodied within that language are the free exercise and establishment clauses which stand as two sentries safeguarding the religious arena from the intrusion of the civil courts, and vice versa. As history indicates, however, the

30. *Id.* at 2.

31. See Complaint, *Neufang v. Aetna Casualty & Surety Co.*, No. 81-08118-CS (Fla. Cir. Ct., Broward County, 1981).

32. *Id.* at 3.

33. *Ranii*, *supra* note 28, at 32 (referring to *Destafano v. Grabrian*, No. 84CVO773 (Colo. Dist. Ct., El Paso County, 1984); *Brown v. Laitner*, No. 73903 (Mich. Cir. Ct., Wayne County, 1984).

34. *Ranii*, *supra* note 28, at 32 (citing *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976)).

35. *Id.*

36. U.S. Const. amend I.

separation of the two has been far from absolute.³⁷ Nonetheless, when necessary, courts act with extreme caution when venturing into the religious realm for fear of violating the intent and scope of both clauses.³⁸

A. *Free Exercise Clause*

Although the free exercise clause appears second in the sequential order of the first amendment language, its significance encompasses two important concepts: the "freedom to believe and [the] freedom to act."³⁹ As the Court in *Cantwell v. Connecticut* explained, the first freedom is one which by nature is absolute, while the second cannot be, for conduct must remain subject to regulation for the protection of society.⁴⁰

While government cannot create a law prohibiting the free exercise of religion, it can enact legislation which effectively controls how that exercise of religion is manifested.⁴¹ "To permit [uncontrolled exercise] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."⁴² Thus, courts have reluctantly inquired into the practices of a religious group under the guise of societal protection,⁴³ but have limited such intrusions to instances where societal

37. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

38. See *infra* notes 39-62 and accompanying text.

39. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1939).

40. *Id.* at 303-04.

41. *Id.* at 304. The court clearly stated that while the state cannot "wholly deny the right to preach or disseminate religious views," it is equally clear that it can regulate where, when, and the manner in which the preaching or dissemination is carried out. *Id.*

42. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

43. On numerous occasions, courts have inquired into and regulated the conduct of various religious practices. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (court regulated use of children in distributing and selling religious literature in light of child labor laws); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971) (regulation of heroin, marijuana, and peyote when used in religious observances); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967) (prohibition of illegal drugs used in religious practices); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967) (blood transfusions ordered for child even though they conflicted with religious beliefs of parents); *Hill v. State*, 38 Ala. App. 404, 88 So. 2d 880 (1956) (court affirmed state regulation of snake handling during religious services); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964) (court provided medical attention for child when denied by parents on religious grounds), *cert. denied*, 377 U.S. 985 (1964).

interests are threatened.⁴⁴

In spite of the courts' willingness to regulate religious conduct, they are reluctant to inquire into any area which involves the tenets or doctrinal formulations of a particular church or religious group. In at least one instance where a church property dispute indirectly involved a doctrinal matter, the Supreme Court noted that civil courts are forbidden under the first amendment from even inquiring into relevant doctrinal matters.⁴⁵

The "blindness" concept, as required by the Supreme Court, was clearly evident on the state level in *Christofferson v. Church of Scientology*,⁴⁶ where the plaintiff's suit was based on allegations of outrageous conduct and fraud. The court held that statements made by religious bodies must be considered within the overall doctrinal context of that particular religion. As a result, courts cannot sift through the various individual tenets to scrutinize which are valid religious doctrines and which are not, because such activity is beyond their jurisdiction.⁴⁷

In *United States v. Ballard*,⁴⁸ the case which became the basis for the previously cited holdings, the Supreme Court clarified the limited scope of a court's inquiry into religious matters. It was stated that courts are forbidden to examine the veracity or truth of any religious teaching or representation.⁴⁹ While some doctrinal precepts and religious tenets may seem unconventional, peculiar, and fanciful, the Court reasoned that the same could be said of the teachings of Christ in the early age of Christianity.⁵⁰ The intent of the free exercise clause, therefore, is to allow any group to preserve and foster religious beliefs which are beyond the scope of judicial scrutiny.⁵¹ It has since been decided by the Court that the only inquiry a court can make is whether these views or beliefs are truly held by the parties in question.⁵² The courts cannot proceed beyond that level of

44. *Davis v. Beason*, 133 U.S. 333 (1890). The court stated the following:

With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

Id. at 342. See also, *United States v. O'Brien*, 391 U.S. 367 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963).

45. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hill Presbyterian Church*, 393 U.S. 440, 450 (1969).

46. 57 Or. App. 203, 228, 644 P.2d 577, 600 (1982).

47. *Id.*

48. 322 U.S. 78 (1944).

49. *Id.* at 83.

50. *Id.* at 86-87.

51. *Id.*

52. *United States v. Seeger*, 380 U.S. 163, 185 (1965). See also *Theriault v. Carlson*, 495 F.2d 390, 394 (5th Cir. 1974).

inquiry.⁵³

As to the relationship between the free exercise clause and the clergy malpractice controversy, it is apparent that the government has a right and duty to regulate a counseling ministry when it threatens health, safety, welfare, or other pressing societal interests.⁵⁴ Such regulation and inevitable judicial scrutiny, however, cannot extend to areas relating to religious or doctrinal content. Thus, for any governmental regulation or civil accountability to exist, it must involve a *neutral* area which does not touch upon the doctrines or tenets of the counselor, client, or parishioner.

B. The Establishment Clause

As previously noted, the first amendment restricts not only the enactment of laws prohibiting the free exercise, but also the establishment of religion.⁵⁵ The amendment was intended to protect society from the intrusion of government sponsored and authorized religion,⁵⁶ while at the same time protecting religion from " 'perversion' by a civil magistrate."⁵⁷

Traditionally, the Supreme Court has been concerned with the imposition of particular religious beliefs on society, either directly⁵⁸ or indirectly,⁵⁹ through legislation or judicial involvement.⁶⁰ In *West*

53. *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal. 2d 121, 131, 245 P.2d 481, 491 (1952).

54. At least one commentator has argued that pastoral counseling cannot be a threat to the public welfare and thus is outside the scope of governmental regulation and supervision. He states that the government's interest in providing a remedy for injury relating to the mental and spiritual areas is not overriding when considered in light of religious freedoms. Comment, *Made Out Of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 538 (1983).

The potential imposition of a significant societal burden, however, is considered by another writer to justify governmental and judicial involvement in a clergy malpractice case. If the suicide in *Nally* had failed and severe brain damage resulted, creating a dependence upon the state for medical and financial support, then that societal interest would be strong enough to impose some type of regulation of religious counseling. Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213, 233 (1985).

55. See *supra* note 36.

56. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

57. *Id.* at 432.

58. *United States v. Ballard*, 322 U.S. 78, 86 (1944).

59. With regard to the reimbursement of transportation costs for children attending parochial schools, the Court stated the following:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or re-

Virginia State Board of Education v. Barnette,⁶¹ the Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁶² Thus, in order for the government to impinge upon the establishment clause protection, it must meet the triple pronged test enunciated in *Lemon v. Kurtzman*: 1) "the statute must have a secular legislative purpose"; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) "the statute must not foster 'an excessive government entanglement with religion.'"⁶³ Thus, the governmental impact on religion must be minimal at best. Clearly, it must not foster or hinder the beliefs of any particular group.

When the establishment clause is examined in light of the clergy malpractice controversy, it appears that government and the courts can only become involved in religious counseling from a *neutral* perspective. No attempt can be made to regulate the context or methodology of the religious counselor, for to do so would violate the *Lemon* test.⁶⁴ Nevertheless, the door is open for the state and judiciary to impose restraints and standards upon the member of the clergy as a religious counselor apart from his methodology or religious message.

C. California Statutory Provisions

The California Legislature has drafted various statutory provisions which directly or indirectly affect either religion in general or the specific religious activities of particular groups. Care has been taken to avoid any potential conflicts with either the United States or California Constitution, particularly those provisions which involve first amendment protections. The legislature, particularly cognizant of the religious tenets of certain groups regarding faith healing and prayer, has made definite, affirmative attempts to avoid the regula-

main away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs . . .

Everson v. Board of Educ., 330 U.S. 1, 15 (1946).

60. See *Fowler v. Rhode Island*, 345 U.S. 67 (1952). The Court, in considering the case of a Jehovah's Witness minister who was arrested for preaching in a park, stated that the courts have no right to determine whether a particular religious practice of one group is in fact not religious, and thereby removing that denomination's first amendment protections. Likewise, the courts cannot approve, disapprove, classify, regulate, or in any manner control or dictate the content of a sermon. To do so would result in the advocacy of a particular religious position. *Id.* at 70.

61. 319 U.S. 624 (1943).

62. *Id.* at 642.

63. 403 U.S. 602, 612-13 (1971).

64. See *supra* note 61 and accompanying text.

tion or prohibition of protected religious practices.⁶⁵ Thus, state government has deliberately avoided any conflict between its regulatory power and religious freedom.

Of particular significance to the matter of clergy malpractice and religious counseling has been California's tendency to avoid including the clergy within its regulatory powers.⁶⁶ Specifically, statutory provisions exclude the clergy from licensing requirements when engaged in a counseling ministry⁶⁷ thereby avoiding any potential conflict with first amendment language. If the state opted to regulate the clergy in the same manner it regulates other professionals in the field of medicine or psychiatry, it would be forced to evaluate the content, perspective, and methodology of each clergy member's counseling ministry, an area which is inextricably intertwined with his or her religious foundation.

While it is clear that the constitutional question creates the presumption that no one can investigate, regulate, or evaluate the counseling ministry of a religious entity or its clergy from a religious perspective, it is equally clear that a *neutral* ground for establishing civil accountability may exist. What is required is the establishment of a standard which is *neutral* on its face and which keeps the government and courts from invading areas which are forbidden by the Constitution, namely areas of content and methodology. In order to keep the legal system from invading this sacred area, a *neutral* standard must be established which provides protection for the church

65. See, e.g., CAL. BUS. & PROF. CODE § 2063 (West Supp. 1986). This section provides, in pertinent part, the following:

Nothing in this chapter shall be construed so as to discriminate against any particular school of medicine or surgery, school or college of podiatric medicine, or any other treatment, *nor shall it regulate, prohibit, or apply to any other kind of treatment by prayer, nor interfere in any way with the practice of religion.*

Id. (emphasis added).

66. Section 4508 of the California Business and Professions Code states the following:

This chapter does not prohibit provisions of the services regulated herein [service provided by psychiatric technicians] with or without compensation or personal profit, *when done by the tenets of any well-recognized church or denomination, so long as they do not otherwise engage in the practice set forth in this chapter.*

CAL. BUS. & PROF. CODE § 4508 (West 1974) (emphasis added).

67. Section 4980.01 of the California Business and Professions Code states: "The provisions of this chapter *shall not apply to any priest, rabbi or minister of the gospel of any religious denomination when performing counseling services as part of his or her pastoral or professional duties.*" CAL. BUS. & PROF. CODE § 4980.01 (West Supp. 1986) (emphasis added).

and clergy, while at the same time providing relief for an injured counselee.

IV. THE LIABILITY QUESTION

Assuming that the judiciary is not absolutely barred from regulating the religious arena on constitutional grounds, the matter of liability becomes a chief concern. Since clergy malpractice is a novel cause of action lacking its own legally standardized elements, an analogy can be drawn to the concept of negligence in order to determine if liability is possible.⁶⁸ It is essential, however, that such an analogy not be overemphasized, because a marked difference exists between ordinary negligence and that alleged in clergy malpractice.⁶⁹ According to Professor Prosser, in order for liability to be imposed, there must be the following: (a) a duty recognized by the law; (b) a failure to conform to a standard required; (c) a reasonably close causal connection between the injury and the conduct; and (d) actual loss or damage.⁷⁰ Thus, the two critical factors in a clergy malpractice cause of action involve the imposition of both a duty and a standard of care.

A. *The Imposition of a Duty*

The creation of a duty is not the crystalization of a mystical concept, but a conclusion based on a particular policy.⁷¹ If a court believes a particular plaintiff or class of plaintiffs should be granted

68. In *Nally*, the clergy malpractice allegation is couched in negligence terminology and, as interpreted by dissenting Justice Hanson, was in essence a negligence action. Plaintiffs alleged that defendant John MacArthur was "negligent in failing to exercise the standard of care for a clergyman of his sect and training in the community." *Nally*, 204 Cal. Rptr. at 310. See *supra* note 7.

69. Comment, *supra* note 54, at 512. The author clearly notes that clergy malpractice is a form of professional misconduct implying a different standard of care than that imposed in ordinary negligence.

70. Professor Prosser summarized the four elements of negligence as follows:

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause.'

4. Actual loss or damage resulting to the interests of another.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

71. In *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 434, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 22 (1976), the court stated that duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting W. PROSSER, LAW OF TORTS 332-33 (3d ed. 1964)).

protection, a legal duty is imposed.⁷² Therefore, a legal duty is imposed when a particular individual or group is susceptible to injury or damage and the courts decide that the conduct should be statutorily regulated.

With regard to spiritual or religious matters, the clergy, by necessity, is immune from the imposition of a civil duty. For purely pragmatic reasons it would be virtually impossible to impose a duty upon a minister, priest, or rabbi in terms of the performance of his spiritual or ministerial functions.⁷³ For at least three decades, the legal community has recognized that in relation to the clergy's religious functions, if a duty were to be imposed, it would run to the church as a whole and not to an individual parishioner.⁷⁴ Consequently, the clergy should be immune from the imposition of a duty when it involves a spiritual ministry or religious function performed in relation to the entire congregation or parish.

However, when the member of the clergy holds himself out to the church and community as being especially skilled in a particular area, the duty which is normally associated with that represented skill should be imposed. A licensed medical doctor does not have the same duty imposed upon him as the psychiatrist. If a doctor, after being so licensed, begins representing himself as a psychiatrist, an increased duty would naturally be imposed. The same should be true of a member of the clergy who represents himself as a competent counselor.⁷⁵

72. *Tarasoff*, 17 Cal. 3d at 434, 551 P.2d at 343, 131 Cal. Rptr. at 22. The court stated that "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Id.*

73. Bergman, *Is The Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 57 (1981). Rabbi Bergman noted that there are some uniquely sacerdotal functions such as preaching, chanting, performing a mass, or baptizing which are not performed by anyone except the clergy. If the court were to impose a duty or standard, it would violate the prohibitions established in the first amendment. *Id.*

74. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3 (1951). Curtis stated, "The loyalty of a priest or clergyman runs, not to the particular parishioner whose joys or troubles he is busy with, but to his church It is the church . . . not he, but he on its behalf, who serves the communicant . . ." *Id.*

75. Bergman, *supra* note 73, at 64. Bergman notes that while a duty cannot be imposed on a neighbor who occasionally offers advice, it may be imposed upon a member of the clergy who represents himself as possessing a degree of expertise and competence in counseling. *Id.*

In the last ten years, more members of the clergy are representing themselves as being competent counselors. According to Robert Plunk, vice president of Preferred Risk, a clergy malpractice insurer, "Many ministers are spending 25 to 60 percent of their time [in face-to-face consultation:] . . . [s]ome churches have a job description for

California statutes do not fully immunize the clergy acting in such a capacity from the imposition of *any* duty, only the duty to obtain a license.⁷⁶ The imposition of a duty would not hinder, thwart, or automatically curtail the ministry of the clergy member but only insure some level of competency or capability once he begins to actively represent himself as possessing counseling skills. Thus, a duty could be imposed when the clergy functions in areas not inherently associated with its well recognized roles.

B. The Imposition of Standard of Care

Assuming that a duty may be imposed on a member of the clergy who represents himself as being a competent counselor, a conclusion avoided by the *Nally* court,⁷⁷ it is imperative that a realistic standard of care be imposed which protects both the members of the clergy and the counselee. It is in this area that most of the controversy arises.

One writer has expressed concern over the imposition of any standard of care.⁷⁸ Samuel Ericsson, of the Center of Law and Religious Freedom, suggested that the courts would have difficulty in imposing a standard of care due to the inherent nature of church related counseling.⁷⁹ However, the problem does not center on the time or circumstances surrounding the counseling activity, but on the impression the clergy member has created in the mind of the counselee regarding their interaction. A minister, priest, or rabbi who includes comments in weekly sermons which are intended to meet psychological or emotional needs would not likely be perceived as performing or acting as a counselor in the usual sense. Likewise, a couple who approaches a member of the clergy seeking marital ad-

a minister who does nothing but counseling." Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?*, 16 TRIAL, July 1980, at 12.

76. See *supra* notes 65-67 and accompanying text.

77. *Nally v. Grace Community Church of the Valley*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303, 309 (1984). The majority opinion stated, "we need not also decide whether Pastor MacArthur or the church had a duty to adequately train the pastors in methods of psychological counseling." *Id.*

The court of appeal reversed the lower court's decision regarding the summary judgment, finding triable issues of fact as to the claim of intentional infliction of emotional distress. In doing so the court appears to have deliberately avoided addressing the duty issue. *Id.* See *supra* note 7.

78. See Ericsson, *supra* note 8, at 170-71. Of significance is the fact that the author of this article is also co-counsel for defendant Grace Community Church.

79. *Id.* at 169-70. Ericsson notes that counseling is a broad concept within the religious context. A clergy member's counseling may include a five minute phone call from a distressed individual, the hearing of a confession, or a formal office visit. In arguing against the imposition of any standard, he implies that a different type of counseling would necessitate a different standard, thereby encouraging judicial scrutiny. *Id.*

vice may not perceive him as a counselor when the issues do not touch on emotional, psychological or spiritual matters.

However, when a parishioner seeks out the clergy for the purpose of mental, moral, psychological, or emotional healing, he likely would perceive the clergy as possessing the skills necessary to provide the help he desires. In that setting, the format of the counseling or the amount of time spent is irrelevant. What is relevant, is the relationship established by the representation of the clergy and the corresponding perception of the counselee.

A second concern is whether a different standard should be imposed depending on the ecclesiastical office of the counselor.⁸⁰ Since a cause of action for clergy malpractice can be filed only against a member of the clergy (i.e., a religious professional), the category of those subject to possible liability is relatively limited. Since a standard of care cannot be imposed in a vacuum, a generalized, relevant class (religious professionals) must be identified.⁸¹ As a result, once one is classified as a member of the clergy, the specific ecclesiastical office should be irrelevant, since the same minimum standard would be imposed on the highest professional ecclesiastical office, as well as on the lowest. Consequently, the *office* of the religious professional should not be determinative as to the existence of any potential liability.

If one accepts the plausibility of imposing a standard of care, a critical question must be answered as to which standard to impose. Three such standards have been proposed: 1) that which is imposed on the secular practitioner;⁸² 2) that which is denominationally specific;⁸³ and 3) that which varies according to the state of the art.⁸⁴

80. *Id.* at 170-71. Ericsson suggests that a different standard arguably would have to be imposed depending on whether the counselor was a bishop, priest, Pope, minister, or Sunday school teacher. In the medical community, different standards are imposed on doctors and orderlies. Thus, in the religious community where there are different offices, a different standard should be imposed depending on the counselor's office. *Id.*

81. The Restatement (Second) of Torts imposes the following analogous standard of care on psychiatrists:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

RESTATEMENT (SECOND) OF TORTS § 299A (1965).

82. Note, *supra* note 54, at 235.

83. See Comment, *supra* note 54, at 518, 523.

84. See Bergman, *supra* note 73, at 59.

1. The Secular Standard

The first standard proposed, one which is identical to the standard imposed on psychiatrists and psychologists, is impractical and violative of constitutional protections. As Rabbi Ben Zion Bergman notes, "[t]he same level of competence and professional knowledge cannot be expected from the clergyman as can be expected from the psychiatrist, whose education and training is more intensively specialized."⁸⁵ Since the training of the clergy varies from that of licensed psychologists, so must the standard of care.

In order to determine if a psychiatrist has violated the standard of care, comparisons are made between the alleged offender and established therapists, focusing on fundamental techniques and principles.⁸⁶ However, since members of the clergy often do not follow conventional secular counseling models or practice similar techniques, the proposed standard breaks down. The vast diversity within the religious community makes a comparison of accepted religious techniques virtually impossible, even to the point of identifying an acceptable standard.⁸⁷ Since the fundamental concepts of the clergyman-counselor are foundationally religious in nature, the courts cannot scrutinize their validity without facing constitutional bars. Consequently, a secular standard cannot be imposed because of the inherent difficulty in evaluating an alleged offender's conduct using secular criteria *and* because the content and methodology are beyond the scope of judicial review.

2. The Denominationally Specific Standard

A second proposed standard of care is based on the accepted care demonstrated by other members of the clergy within the sect and the scope of training in the community.⁸⁸ In order for this standard of care to be imposed, the courts would be required to investigate and identify the religious doctrinal stance of a member of the clergy in order to compare his conduct with the conduct of those in the community who profess similar beliefs. Once a comparison group was identified, the courts would need to evaluate to what extent, if any, the alleged offender had violated the standard.⁸⁹

In order to assess liability based on a denominationally specific standard of care, the courts would be forced to violate established judicial precedent in the course of their inquiries.⁹⁰ By examining doc-

85. *Id.* at 62.

86. *See* Note, *supra* note 54, at 235.

87. *Id.*

88. Complaint at 4, *Nally v. Grace Community Church of the Valley*, No. NCC-18668-B (Cal. Super. Ct., Los Angeles County, 1980).

89. *See* Comment, *supra* note 69, at 524.

90. *See supra* note 45 and accompanying text.

trinal areas for the purpose of identifying a comparison group, and later determining if a violation existed, the court would be overstepping the boundaries established by the first amendment free exercise clause.⁹¹ Since such a violation is inevitable, a denominationally specific standard is unworkable.

3. The State of the Art Standard

A third proposed standard of care, that which is based on the state of the art of psychotherapy, is a corollary to the secular standard. It advocates that as the knowledge and understanding of psychological principles and therapeutic methods and concepts increases and improves, so should the quality of counseling offered by the clergy.⁹² Just as the standard of care for the medical professional does not remain stagnant, neither should the standard for the clergy engaged in religious counseling.⁹³ Thus, the clergy would be required to have elemental psychological knowledge,⁹⁴ and by implication, an awareness of emerging psychological trends and patterns.

The state of the art standard, however, is premised on the principle that there is an integral relationship between secular and religious counseling. However, in light of the significant differences in content and underlying premises between religious and secular counseling, such is not the case.⁹⁵ The clergy cannot be expected to maintain a continuing familiarity with developments in the field of psychology just as psychologists cannot be expected to maintain an awareness of emerging variations in religious thought. In addition, even if a member of the clergy was aware of the state of the art in psychological developments, he would have no reason to incorporate it into his content or methodology unless it conformed to his basic religious philosophy. Consequently, a state of the art standard would force a member of the clergy to adopt principles and methods which would conflict with his doctrinal stance. As a result, the state of the art standard of care is not a plausible solution.

Liability requires a violation of a standard of care and an accompanying duty to maintain that standard. The mere imposition of a duty without a valid standard is fruitless, because a standard does not au-

91. See *supra* notes 39-54 and accompanying text.

92. See Bergman, *supra* note 73, at 59.

93. *Id.*

94. *Id.* at 61.

95. See *supra* notes 9-13 and accompanying text.

tomatically emerge from a previously imposed duty.⁹⁶ Thus, for a clergyman to face civil accountability and potential liability, a standard of care must exist which is neither secular in nature, denominationally specific, or related to the state of the art.

V. THE POLICY QUESTION

Buried within the clergy malpractice controversy is a strong policy consideration regarding what negative, chilling effect such a cause of action will have on the clergy and church's ministry to its parishioners. This policy concern surfaces in two specific areas: the issuance of insurance and the alteration of the clergy-penitent privilege.

A survey conducted in 1981 indicated that eighteen percent of all members of the clergy were threatened or actually sued in connection with their ministry.⁹⁷ Opponents of clergy malpractice would argue that with such a high frequency of litigation and potential liability, the mere theory underlying clergy malpractice would automatically have a chilling effect on churches and the clergy. Proponents of the theory, recognizing that possibility, advise the clergy to follow the lead of other professionals and obtain malpractice insurance.⁹⁸ Unlike medical or legal malpractice insurance premiums, clergy malpractice insurance is relatively inexpensive and highly cost effective.⁹⁹ This type of insurance could eliminate potentially catastrophic financial consequences for an individual member of the clergy or small church, yet provide a resource for successful plaintiffs.

A second policy matter, related to the insurance facet, involves the clergy-penitent privilege as codified in the California statutes.¹⁰⁰ If a member of the clergy is insured, he has a duty to cooperate with the

96. See Comment, *supra* note 54, at 517-18.

97. L. Gumper, Legal Issues in the Practice of Ministry 13, 14 (1981).

98. *Id.*

99. In 1984, \$300,000 worth of liability coverage cost the average member of the clergy about \$25.00 per year. John Cleary, secretary/general counsel for Church Mutual Insurance Company, stated that the reason the premium was so low was that the insurer does not expect to pay any verdicts. The real expense would be only in the area of legal fees associated with providing a defense. Ranii, *supra* note 28, at 30.

Frank Mostowski, marketing manager of Western World Insurance, has stated that most clergy insurance claims rarely result in payments of over a few hundred dollars and that the expense ordinarily involved is in providing a defense rather than an award or settlement. Breecher, *supra* note 75, at 13.

100. The privilege is held by both the penitent and the member of the clergy. With regard to the penitent, the privilege states, "Subject to section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege." CAL. EVID. CODE § 1033 (West 1966).

The clergy member's privilege parallels that of the penitent, and provides that, "[s]ubject to section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential privilege if he claims the privilege." *Id.* § 1034.

insurer in defense of the litigation.¹⁰¹ Consequently, the member of the clergy would be forced to disclose information and impressions gained during a counseling session and testify if called as a witness at trial.

Historically, the legislature has recognized the societal need for penitents to be able to confess matters to the clergy without fear that such matters will ever be openly disclosed.¹⁰² Some argue that the same is true of a counseling setting in which a parishioner discloses matters to a member of the clergy with the intent of finding moral healing.¹⁰³ The injection of exceptions into the privilege rule would hinder the effectiveness of the religious counselor while subjecting the counselee to the fear that his revelations may some day appear in court documents.¹⁰⁴

The clergy-penitent privilege concern is specious for two reasons. First, once the penitent files a legal action against a member of the clergy, the privilege is implicitly waived.¹⁰⁵ It would be inconsistent to allow a penitent plaintiff to file suit and expect a member of the clergy to sacrifice his defense by invoking the privilege.¹⁰⁶ While secrecy as to confidential statements should be maintained whenever possible,¹⁰⁷ the privilege is an option that can be invoked to avoid certain testimony; it is not an automatic bar to the introduction of such testimony.¹⁰⁸ Consequently, the clergy-penitent privilege and the traditional secrecy associated with confessions is threatened only when litigation ensues. In order for the plaintiff to assert his legal rights, he must be willing to sacrifice his right to confidentiality. While it may place the parishioner in a quandry as to priorities, the

101. *Valladao v. Fireman's Fund Indem. Co.*, 13 Cal. 2d 322, 89 P.2d 643 (1939).

102. The penitential communication protected by the clergy-penitent privilege is defined: "As used in this article, 'penitential communication' means a communication made in confidence, in the presence of no third persons so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church is authorized to hear such communications." CAL. EVID. CODE § 1032 (West 1966).

103. Ericsson, *supra* note 8, at 173-74.

104. *Id.*

105. Bergman, *supra* note 73, at 65. Section 912 of the California Evidence Code supports this contention where it states that "[c]onsent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." CAL. EVID. CODE § 912 (West Supp. 1986). By filing a lawsuit, the plaintiff would inherently disclose the nature of the communication.

106. Bergman, *supra* note 73, at 65.

107. R. HAMMAR, PASTOR, CHURCH & LAW 74 (1983).

108. *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

decision is no different than that faced in a doctor-patient or attorney-client adversary confrontation.¹⁰⁹

Second, the clergy-penitent privilege does not apply to counseling situations such as the one underlying the *Nally* case. California statutes and courts recognize that the privilege should apply only when the penitent has a need to confess certain crimes or sins in order to avoid temporal or eternal punishment as contained in the church's dogma.¹¹⁰ A confession or disclosure made outside of the recognized confessional format is not protected by any established privilege. Consequently, a clergy-penitent privilege is neither threatened or eroded within the scope of a clergy malpractice cause of action.

Since a member of the clergy is insurable and the clergy-penitent privilege is not affected by the introduction of a clergy malpractice cause of action, social policy should not be a major concern. It may seem facially abhorrent that a member of the clergy could act in such a manner to warrant civil liability. However, in light of society's usual perception of a clergy member as a good and just individual, an offsetting social concern and policy is reflected in the protection of those individuals who are counseled.

VI. THE PRACTICAL SOLUTION

With the rapid movement of fundamentalist churches into the area of emotional counseling comes the increased perception among parishioners of competency on the part of the clergy¹¹¹ — a perception often fostered by the members of the clergy themselves through commercial advertising¹¹² and word-of-mouth. By implication, these members of the clergy have elevated themselves to a new level of competence, skill, or knowledge,¹¹³ thereby making themselves sus-

109. See Ericsson, *supra* note 8.

110. Consistent with the language of California Evidence Code section 1032, courts have restricted the usage of the clergy-penitent privilege to confessions of wrongdoing which would warrant discipline in the absence of a confession.

In *Simrin v. Simrin*, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965), the court refused to recognize the clergy-penitent privilege in a counseling context. The plaintiff husband wanted to modify the custody provision of the impending divorce decree. The defendant wife called the couple's rabbi as a witness, since he had previously acted as a marriage counselor on their behalf. The court ruled that the communication to the rabbi was not privileged since the clergy-penitent privilege is limited to "confessions in the course of discipline enjoined by the church. It would wrench the language of the statute to hold that it applies to communications made to a religious or spiritual advisor acting as a marriage counselor." *Id.* at 94, 43 Cal. Rptr. at 378-79.

Consequently, it is doubtful that a clergy-penitent privilege could be raised in the course of a clergy malpractice suit. See generally Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

111. Girdner, *To Err Is Human*, CAL. LAW., Aug. 1985, at 21.

112. Grace Community Church of the Valley advertised its counseling ministry in the yellow pages. Girdner, *supra* note 20, at 6, col. 3.

113. See *supra* note 75.

ceptible to the imposition of a duty owed to their counselees.

Assuming a duty can be imposed, civil accountability necessitates the adoption of a practical standard which protects both the clergy and parishioner. The standard, in order not to conflict with first amendment provisions, must be *neutral* on its face, thereby avoiding judicial scrutiny of the religious doctrines or tenets of any particular group or individual. It is proposed that a three pronged standard of care be implemented by which a member of the clergy can be evaluated. In order for liability to be assessed, only one of the three prongs need be violated. In addition, in order to avoid the denominationally specific problem involving identification of a comparison group, the three prongs should focus not on the degree to which the member of the clergy violated the standards, but whether any violation occurred at all.

At the outset, it is essential to establish when this standard of care can be imposed. As Ericsson notes, counseling may occur in a variety of different situations and last an extended or very brief period of time.¹¹⁴ The threshold test must be two part in nature: objective and subjective.

From an objective perspective, religious counseling which is subject to liability must be structured with the intent of moving toward an identifiable goal recognized by both the clergy and counselee alike. As a result, courts could determine whether a member of the clergy was engaged in religious counseling based on observable activities consistent with a secular counterpart.

The subjective part of the test would involve how each participant perceived the experience. A five minute phone call to a member of the clergy by a distressed parishioner may constitute religious counseling if such a relationship had been previously established. The same five minute call by a nonparishioner might not constitute counseling depending on how the parties viewed their relationship at the time of the conversation. Thus, in order for liability to be considered, both the objective and subjective facets of the threshold test must be satisfied so as to determine whether the alleged malpractice occurred in a counseling setting.

The first prong of the standard of care must include the area of testing and diagnosis. Since the religious counselor's secular counterpart is subject to malpractice litigation when he fails to test and diag-

114. See *supra* notes 65-67 and accompanying text.

nose a counselee,¹¹⁵ it is logical to establish a similar standard for the clergy as it is neither burdensome nor inherently violative of any religious beliefs. For those members of the clergy not previously trained in testing and diagnostic procedures, seminars are periodically conducted to familiarize them with the administration, usage and interpretation of accepted diagnostic tools.¹¹⁶ (When usage of accepted standardized tests is not possible, the counselee can be referred to a local counseling facility for the sole purpose of testing and diagnosis.) As one author notes, a tenable argument can be made that members of the clergy can reasonably be expected to have certain basic skills in rough diagnostic screening.¹¹⁷ For a member of the clergy to attempt to counsel a parishioner without identification of his problems is not only irresponsible, but deceptive. How the clergy member interprets the diagnostic results and develops a counseling plan is irrelevant as long as the counselor is conscious of the emotional and psychological problems facing the counselee.

A second prong of the standard of care must include, as advocated by Rabbi Bergman, the issue of referrals.¹¹⁸ If a member of the clergy recognizes that the severity of the counselee's problems is beyond his or her level of skill, training, or experience, he or she should refer the counselee to a qualified professional. Just as a general medical practitioner is obliged to send a patient to a specialist, so should a member of the clergy refer a counselee to a secular specialist when the counselee's problems are beyond his or her level of competence.¹¹⁹

An objection is raised by the opponents of the referral concept who argue that the clergy has a mandate to protect those under its care

115. Rothblatt & Leroy, *Avoiding Psychiatric Malpractice*, 9 CAL. W.L. REV. 260 (1973).

116. Seminars in the usage of diagnostic and evaluative testing are periodically conducted throughout the United States by such organizations as Christian Marriage Enrichment. See mailer from Christian Marriage Enrichment (1986)(advertising seminars in the use of the Taylor-Johnson Temperment Analysis Test).

Of the tests available, some are self scoring such as Taylor-Johnson Temperment Analysis which is used to identify tempermental characteristics and potential problems. R. TAYLOR & L. MORRISON, TAYLOR-JOHNSON TEMPERMENT ANALYSIS MANUAL (1977). Others, like Prepare-MC, are scored by the originators, the results of which are used to identify problems and conflicts within personal relationships. D. OLSEN, D. FOURNIER & J. DRUCKMAN, PREPARE-MC (1986).

The more sophisticated tests such as the MMPI are normally beyond the capabilities of the average member of the clergy, as they require a clinical background in interpreting and identifying psychotic personality traits. MINNESOTA MULTIPHASIC PERSONALITY INVENTORY (1966).

117. L. Gumper, *supra* note 97, at 19.

118. Bergman, *supra* note 73, at 63-64.

119. Of significance, this prong of the standard was met in *Nally* when Pastor MacArthur and his associates repeatedly encouraged Kenneth Nally to consult with professional counselors. *Nally*, 204 Cal. Rptr. at 314-15. See *supra* note 7.

from professional counsel which might undermine their faith.¹²⁰ It is argued that courts should not force the clergy and churches to refer their troubled parishioners to professionals who may be hostile to the members' faith.¹²¹ This argument, while somewhat plausible, has three fatal flaws.

First, the member of the clergy, like his professional counterpart, should be developing a network of individuals or agencies to which there can be referral of potential clients. While it is unlikely that any secular professional will track the clergy's doctrinal stance exactly, priorities must be considered as to the value of the therapeutic assistance provided by a secular professional. Even if the professional differs in theological bias from the clergy, the counselees will still be able to avail themselves of the spiritual ministries of the church, should they desire. By obtaining psychological and emotional counseling in a secular setting, one is not automatically barred from seeking spiritual counseling.

Second, assuming the clergy for whatever reason was unable to provide the counselee with adequate attention, the counselee would still be in the same position of seeking assistance from a secular professional, even if that counselor did not adhere to the same religious tenets as the member of the clergy.

Third, the member of the clergy could be creating a greater danger and risk to the counselee by failure to make a necessary referral. While the member of the clergy may be preserving the counselee's faith, the clergy member may be forcing the counselee to sacrifice his or her emotional and psychological well being. Consequently, a standard of care based on referrals is essential.

The third and final prong of the standard of care must include the area of training. The second count of the *Nally* complaint, alleging negligence, stated that Grace Community Church and John MacArthur failed to provide "the proper level of psychological training and background on the part of lay counselors."¹²² In light of first amendment provisions, however, the trial court could not inquire into areas of training which touched upon religious or doctrinal matters.

The Supreme Court has already established that trial courts cannot investigate religious matters even for the purpose of establishing a comparison class to which the alleged offender may be evaluated.¹²³

120. See Ericsson, *supra* note 8, at 175.

121. *Id.*

122. *Nally*, 204 Cal. Rptr. at 310. See *supra* note 7.

123. See *supra* notes 88-91 and accompanying text.

With the increase in religious counseling and restrictions on time, many members of the clergy refer counselees to their lay counselors. Consequently, the clergy must be expected to train associates, or lay counselors, in the area of testing or diagnosis in order to recognize and identify the counselee's problems. In addition, they must be trained to know how and when to make a referral.

In *Nally*, the court focused attention away from the area of training as the facts, in spite of the allegations, indicated that numerous attempts were made by lay counselors to refer Kenneth Nally to professional counselors.¹²⁴ While it is assumed that the clergy would train associates as to counseling fundamentals in terms of content and methodology, the scope of such training is beyond judicial review.

For a member of the clergy, therefore, to protect himself from civil liability from professional malpractice in the area of counseling, he must be able to identify a counselee's problems, refer him to others should it become necessary, and train those associated with him so as to meet these minimal standards. In essence, the standard of care is established independent of a secular counterpart, a religious comparison group, or a state of the art standard. By means of the three prong standard, the member of the clergy is not evaluated on doctrinal grounds or religious perspectives but on a *neutral* ground easily susceptible to scrutiny by the judicial system.

VII. CONCLUSION

A clergy malpractice cause of action was theorized to impose civil liability upon the clergy for acts or omissions related to spiritual counseling. As more unregulated and unlicensed members of the clergy devote more time to this avenue of ministry without the training and background required of secular professionals, the likelihood of injury and damage to a parishioner and counselee will increase. As a result, it is necessary to impose civil accountability upon members of the clergy who represent themselves as religious counselors. The basis of any accountability, however, must reside within the limited scope of judicial review — namely that which is *neutral* in nature. Consequently, a three prong standard of care has been proposed which includes testing, referring, and training. The violation of any of these prongs should lead to civil liability.

While it may be advantageous to create a cause of action to protect the parishioner who seeks counsel from his pastor, it must be recognized that the clergy and church also require protection from an onslaught of costly litigation. Counselees must be barred from filing

124. *Nally*, 204 Cal. Rptr. at 314-15. See *supra* note 7.

lawsuits based on deficient methodology or content, for to do so would require an invasion of the religious arena by the judicial system, thereby curtailing an essential facet of society. A balancing approach can be better achieved by protecting not only the counselee, but the church, by the adoption of the three pronged standard of care. In so doing, it would protect the church from unnecessary scrutiny and preserve its impact on society.

An imposition of civil accountability upon members of the clergy will probably not result in a dramatic rise in either litigation or the usage of disclaimer signs. Instead, civil accountability will generate a new respectability for members of the clergy and churches engaged in a spiritual counseling outreach. The imposition of a necessary evil may emerge into a blessing for not only the counselee, but the clergy alike.

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