

CLERGY MALPRACTICE: SUING MINISTERS, PASTORS, AND PRIESTS FOR UNGODLY COUNSELING

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I. INTRODUCTION

Professional therapists and clergy members frequently counsel troubled individuals. While therapists have faced a tremendous increase in the number of successful civil lawsuits commenced by patients and victims of violence by patients,¹ members of the clergy are the only professionals who successfully have avoided liability for malpractice.² This is surprising because emotionally disturbed individuals are often dangerous to the public and to themselves.

To date, only a handful of cases involving clerical malpractice have been reported.³ Clerical counselors have avoided liability because many peo-

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1. For recent discussions of this topic, see Comment, *The Tarasoff Progeny: Creating a Weaponless Policeman with a "Deep Pocket"*, 15 CAP. U.L. REV. 699 (1986); Note, *The Duty to Warn Third Parties: A Retrospective on Tarasoff*, 18 RUTGERS L.J. 145 (1986); Comment, *The Psychiatric Duty to Warn: Walking a Tightrope of Uncertainty*, 56 U. CIN. L. REV. 269 (1987); Casenote, *Cain v. Rijken: Creation of a Statutory Duty of Care to Protect Others from the Tortious Conduct of Third Parties*, 23 WILLAMETTE L. REV. 493 (1987); Freedman, *The Psychiatrist's Dilemma: Protect the Public or Safeguard Individual Liberty?*, 11 U. PUGET SOUND L. REV. 255 (1988).

2. Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. See BLACK'S LAW DICTIONARY 864 (5th ed. 1979).

3. See, e.g., *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987) (sexual impropriety leading to suicide); *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (deficient counseling leading to suicide); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (sexual impropriety with advisee); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct.

ple feel it is morally wrong to sue a clergy member and because the first amendment's guarantee of freedom of religion⁴ is a substantial roadblock to a successful lawsuit. The courts that have dealt with this issue generally have taken the approach that a minister can be held liable for intentional wrongs, but not for mere negligence. Arguably, this approach inadequately protects troubled individuals and victims of violent actions by counseled individuals.

Increasing the accountability of clerical counselors may result in a more timely referral to professional therapists who may better serve disturbed individuals with therapeutic techniques and medications. Suicidal or violent individuals may be disserved by being counseled by clergy members who are frequently untrained in sophisticated therapeutic techniques and are unable to prescribe medications. On the other hand, an increase in civil liability may cause clergy members to stop or reduce counseling activities. This would deprive troubled individuals of receiving any assistance, because many individuals will not seek professional psychological counseling, which carries a social stigma as well as an hourly fee.

This Article first discusses reasons for insulating clergy members from liability. Next, it discusses reasons for imposing liability on clergy members who engage in counseling activities. The Article then discusses clergy liability for intentional torts. Finally, it discusses clergy liability for professional negligence.

II. REASONS FOR NOT IMPOSING LIABILITY ON CLERICAL COUNSELORS

Clerical counselors typically do not charge a fee for their services and are sincerely interested in helping disturbed individuals. Clergy members often counsel people who suffer from severe emotional problems, including marital problems, guilt problems, drug problems, family problems, and depression. People with these problems can be susceptible to committing suicide and other violent acts.

In order to effectively deal with these types of problems, people seeking help are encouraged to discuss all thoughts of aggression and violence.⁵ When thoughts are revealed to the counselor, he or she must decide if that person could perform violent acts, which is a difficult task. Even professional therapists are unable to accurately predict violent behavior.⁶ Few

App. 1987) (deficient counseling).

4. U.S. CONST. amend. I.

5. Note, *Psychotherapy and Griswold: Is Confidentiality a Privilege or a Right?*, 3 CONN. L. REV. 599, 604 (1971).

6. Tyrel, *Prediction of Dangerousness*, 34 MED. TRIAL TECH. Q. 24 (1987); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA L. REV. 379, 384 (1973). Justice Douglas has stated: "Predictions of dangerous behavior, no matter who makes

emotionally disturbed persons present a real risk of violence, and they often overemphasize violent thoughts during counseling sessions.⁷ However, a counselor can never be sure that a person will not carry out violent thoughts. The actions of the counselor, much like a therapist, are viewed after the fact with the benefit of hindsight. At that time, it is easy to allege that the clerical counselor should have foreseen and avoided the injury.

Another troublesome aspect of imposing liability on a clergy member is a clergy member typically does not have extensive psychotherapy training.⁸ While many clergy members do seek training in psychotherapy during their theological study, many others do not obtain this training. If professional therapists cannot predict future behavior, how can clergy members be expected to make such predictions? If the clergy is held civilly liable for errors in advising disturbed people, it is possible that this service soon will no longer be available to those who need help. If clergy members are held liable when someone harms himself or others, members of the clerical profession may react by attempting to protect themselves rather than by acting in the best interests of the disturbed person. This would impair effective treatment of disturbed persons.⁹

them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals." *Muriel v. Baltimore City Criminal Court*, 407 U.S. 355, 364 n.2 (1972) (Douglas, J., dissenting from a denial of certiorari).

7. B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW 227 (1972).

In a well-known New York study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision, (citation omitted) those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require re-transfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record. Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior. They are wrong more often than they are right. And they always err by overpredicting the dangerous behavior.

Id.

8. The Executive Director of the American Association of Pastoral Counselors, Mr. James Ewing, was quoted as saying: "Our concern is that there are a lot of ministers who aren't trained to handle their parishioners' psychotherapy." Woodward & Huck, *Next, Clerical Malpractice?*, NEWSWEEK, May 20, 1985, at 90.

9. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988). The court stated that clergy liability would:

undoubtedly result in deterring some ministers, priests, and rabbis from engaging in marriage counseling in order to avoid any potential liability for not conforming to standards applicable to licensed psychologists or licensed marriage therapists, or, at the very least, incline them to adjust their counseling method to standards applicable

Imposition of clerical liability may cause many members of the clergy to refuse to counsel severely disturbed individuals. This would be unfortunate. Many disturbed persons do not seek professional medical psychological assistance because of the stigma that our society attaches to psychological treatment.¹⁰ Disturbed individuals may view clerical help as socially acceptable, less intimidating, and therefore preferable to medical assistance. Clerical counseling should be fostered because it is probably helpful and rehabilitative in many cases.

Fear of ruinous civil liability may unnecessarily cause a counselor to issue a warning to the police or to a potential victim of a violent act by the counseled person.¹¹ This would constitute a breach of what the disturbed person believes to be a confidential relationship. If this relationship is breached and a clerical counselor issues a warning, the disturbed individual may become so frustrated and embarrassed that he or she may no longer seek counseling assistance.¹² The disturbed individual may even react violently to the disclosure when he or she would not have resorted to violence if no warning had been issued.¹³

The first amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."¹⁴ If our legal system chooses to impose malpractice liability on clerical counselors, then standards of care expected

to secular licensed counselors.

Id. at 290.

10. This argument has commonly been asserted for many years as a legitimate reason for narrowing the liability of psychotherapists. See generally Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 370 (1976). People who need psychological help often are afraid to seek it because they fear it will harm their reputation. See Fleming & Maximov, *The Therapist's Dilemma*, 62 CAL. L. REV. 1025 (1978).

Unlike the patient suffering an organic illness, a person in psychotherapy, by and large, visits his psychiatrist with the same secrecy that a man goes to a bawdy house.

The interests of the patient in nondisclosure become all the stronger when disclosure involves a psychiatric label which often encourages society to believe that the patient's behavior cannot be controlled.

Id. at 1050-51.

11. The California courts have set the primary precedents in duty to warn cases involving therapists. See *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *Thompson v. Alameda*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); see also *Brady v. Hopper*, 570 F. Supp. 1333 (D. Colo. 1983) (widely publicized duty to warn case against a therapist arising out of John Hinckley's 1981 attempted assassination of President Reagan).

12. In addition to giving up on counseling, the advisee may well commence a civil lawsuit against the clerical counselor for divulging confidential communications. *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

13. *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

14. U.S. CONST. amend. I.

of the clergy must be developed.¹⁵ However, defining competency and appropriate counseling activities would arguably defy longstanding policies of freedom of religion protected by the first amendment.¹⁶ Defining an appropriate standard of care is further complicated by the fact that there are hundreds of varying theologies and religious doctrines.¹⁷

The above factors present a strong argument for insulating clergy members from liability. However, there are a number of legitimate arguments for imposing liability on clergy members.

III. REASONS FOR IMPOSING LIABILITY ON CLERICAL COUNSELORS

When a disturbed person seeks assistance from a clergy member, that person may be on the brink of emotional disaster. A person who is severely troubled is in desperate need of help, and the wrong advice or an erroneous suggestion may cause a violent reaction.¹⁸ Only a professional therapist should deal with these situations. If a clerical person chooses to undertake counseling of a disturbed individual, perhaps he or she should be held responsible to the same extent that a therapist would be held liable.

As with all professionals, many clergy members are competent and provide an excellent service, while others lack training and expertise and may cause substantial harm. A blanket shield from liability protects incompetent counselors and may create a dangerous situation for disturbed people or an innocent public.¹⁹ Because of their background, clerical counselors are often unable to effectively deal with certain types of emotional problems. One issue that is particularly difficult for the clergy to deal with is homosexuality. Because of their religious background and biblical interpretations, many

15. Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 523 (1983).

16. In *Hester v. Barrett*, 723 S.W.2d 544 (Mo. Ct. App. 1987), the court in discussing the tort theory of clerical malpractice stated:

[A] theory of malpractice is defined in terms of the duty to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of the profession. It is a theory of tort, therefore, which presupposes that every cleric owes the same duty of care, whatever the religious order which granted ordination, or the cleric serves, or the beliefs espoused. It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty "to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of the profession."

Id. at 553.

17. Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 AZ. ST. L.J. 213, 235.

18. *Weller, The Anatomy of Violence*, 137 NEW L.J. 858 (1987).

19. A complete shield from liability also may protect clergy members who engage in clearly improper activities such as sexual relations with advisees. See *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

clergy members are unable to accept the lifestyle of homosexuals.²⁰ Clerical counseling in this area may well be inadequate and dangerous.²¹

Unsuspecting victims of violent actions of disturbed people have a right to be protected. Many times only a therapist or a clerical counselor has the information and knowledge to provide that protection.²² Innocent victims often do not realize that they should be taking steps to protect themselves. Suicidal individuals also deserve to be protected from self-inflicted injuries.²³

Imposing liability on clergy members is one method of impressing on the clergy the importance of recognizing their own limitations. Severely disturbed persons should be referred to professional therapists as soon as possible. The most obvious limitation to clerical counseling is the clergy's inability to prescribe proper medications. Clerical counselors often do not understand the benefits and effects of using medication to treat psychological problems.²⁴ Severe depression can be effectively treated by professional therapists who combine therapy with medications.²⁵ The disturbed person who can improve with medication is done a great disservice by a clerical counselor who fails to refer the individual to a professional therapist.

A legitimate argument can be made that the imposition of liability on clerical counselors would *not* violate the first amendment.²⁶ Since 1940, the Supreme Court has determined that the free exercise clause of the first amendment embraces two concepts: freedom to believe and freedom to act.²⁷

20. Note, *Church Employment and the First Amendment: The Protected Employer and the Vulnerable Employee*, 51 Mo. L. Rev. 911 (1986).

21. Case Comment, *Free Exercise Clause Permits Church to Fire Homosexual Employee*—Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985), 20 SUFFOLK U.L. REV. 119 (1986).

22. Note, *Duty to Warn Versus Duty to Maintain Confidentiality: Conflicting Demands on Mental Health Professionals*, 20 SUFFOLK U.L. REV. 579, 608 (1986).

23. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (a young man who had suffered from depression and had previously attempted suicide was allegedly counseled by his pastor that suicide in some cases was appropriate).

24. Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICK. L. REV. 223, 229 (1987); Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47 (1981).

25. Epstein, *Legal Liability for Medical Innovation*, 8 CARDOZO L. REV. 1139 (1987).

26. In Handley v. Richards, 518 So. 2d 682, 685 (Ala. 1987), the court states:

The intentional torts of a cleric are already actionable, however, even though incidents of religious practice and belief. Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975); Carrieri v. Bush, 69 Wash.2d 536, 419 P.2d 132 (1966). See also Radecki v. Schuckardt, 50 Ohio App.2d 92, 361 N.E.2d 543 (1976). Liability for such conduct does not clash with the free exercise clause of the first amendment because conduct albeit promoted by religious belief is subject to regulation for the protection of society. That is the clear sense of Cantwell v. State of Connecticut, 310 U.S. 296 (1940).

Id.

27. Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14

The Court has consistently held that the first is absolute but the second is not.²⁸ The Court has held that overt acts prompted by religious beliefs are not free from government regulation where the actions pose some substantial threat to public safety.²⁹

The imposition of liability on clerical counselors presents sensitive issues of morality and legal responsibility. An analysis of the existing case law indicates that the courts are presently more responsive to intentional tort claims than claims of professional negligence.

IV. LIABILITY OF CLERGY FOR INTENTIONAL TORTS

Civil intentional tort lawsuits arising from personal activities and clerical duties have been taken against ministers, pastors, and priests. The allegations of impropriety frequently involve sexual activities with advisees or church members and the tort claims typically include outrageous conduct or the intentional infliction of emotional distress.³⁰

A recent example of an intentional tort lawsuit involving sexual improprieties by a priest is *Destefano v. Grabrian*.³¹ In that 1988 Colorado case, a Catholic priest was counseling a husband and wife for marital problems.³² The priest allegedly entered into an adulterous relationship with the wife.³³

PEPPERDINE L. REV. 137, 143 (1986); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

28. In *Cantwell v. Connecticut*, the Court stated:

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Id. at 303.

29. *U.S. v. O'Brien*, 391 U.S. 367 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963).

30. The elements of a cause of action based on an intentional infliction of emotional distress theory are: (1) outrageous conduct by the defendant; (2) intention to cause, or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of emotional distress. *Agarwal v. Johnson*, 25 Cal. 3d 932, ___, 603 P.2d 58, 66, 160 Cal. Rptr. 141, 149 (1979).

Restatement (Second) of Torts section 46 (1965) states: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

31. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

32. *Id.* at 278. Mr. and Mrs. Destefano were both members of the Catholic faith and the defendant was their parish priest. *Id.*

33. It is interesting to note in this case that the plaintiff, Mr. Destefano, initially sued his wife, the priest, and the diocese. *Id.* at 277. Mrs. Destefano filed a cross claim against the priest

The marriage ended in divorce and the husband sued the priest and the church diocese for the intentional infliction of emotional distress, outrageous conduct, and breach of fiduciary duty.³⁴ The priest and the diocese argued that a member of the clergy is immune from any liability for harm caused by his counseling by virtue of the first amendment.³⁵ The first amendment to the United States Constitution protects religious freedom and prohibits any "law respecting the establishment of religion, or prohibiting the free exercise thereof."³⁶

The court in *Grabrian* noted that there is only a limited freedom to act upon religious beliefs as compared to an absolute freedom of belief. The court further stated that "[i]n the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact part of the belief and practices of the religious group."³⁷ Sexual activity by a priest was, not surprisingly, held to be outside the practices or beliefs of the Catholic church. Therefore, the court held that the first amendment did not shield the priest from civil liability for an intentional tort.³⁸ The court stated:

Members of the clergy cannot, in all circumstances, use the shield of the first amendment as protection and as a basis for immunity from civil suit. When the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of his religion, he cannot avail himself of the protection afforded by the first amendment.³⁹

The court reversed a lower court dismissal and determined that factual questions existed concerning claims against the priest based on outrageous conduct and breach of fiduciary duty.⁴⁰

Another example of alleged improper sexual activity appears in *Handley v. Richards*.⁴¹ In *Handley* a minister was sued in an unusual wrongful

asserting a number of tort theories. *Id.* Apparently Mr. and Mrs. Destefano reconciled, as Mr. Destefano's claims against Mrs. Destefano were voluntarily dismissed. *Id.* at 275. The cross claims asserted by Mrs. Destefano remained and were very important in the final outcome of the case. *Id.* at 275.

34. *Id.* at 288-89. The husband also asserted a claim of negligence, which is discussed below. See *infra* text accompanying note 100-05.

35. Destefano v. Grabrian, 763 P.2d at 283.

36. *Id.*; see also U.S. CONST. amend. I.

37. Destefano v. Grabrian, 763 P.2d at 283. The court also stated:

Marital counseling by a cleric presents difficult questions because it often incorporates both religious counseling and secular counseling. While we agree that spiritual counseling, including marital counseling by a priest, may implicate first amendment rights, we are not convinced that the allegations in Edna's crossclaim permit Grabrian to assert a free exercise clause defense.

Id.

38. *Id.* at 284.

39. *Id.*

40. *Id.* at 290.

41. *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987).

death lawsuit. Mr. and Mrs. Handley were experiencing marital problems and went to their minister for marital counseling.⁴² Allegedly, the minister became deeply involved in a sexual affair with Mrs. Handley while the counseling continued.⁴³ The husband apparently learned that his wife was seeking a divorce and he committed suicide by hanging himself.⁴⁴ The wife subsequently married the minister.⁴⁵ The husband's estate commenced a wrongful death lawsuit against the minister and the former wife.⁴⁶ The estate sought a recovery under the intentional tort theory of outrageous conduct.⁴⁷ The court noted that intentional torts of a minister can be actionable, but the court without analysis concluded that the estate of the husband had failed to state facts that showed the minister was guilty of outrageous conduct.⁴⁸

Clergy members have faced significant numbers of lawsuits involving allegations of homosexual activities with children⁴⁹ and lawsuits involving allegations of child abuse.⁵⁰ Cases that involve inappropriate sexual relationships by clergy members may very well result in successful lawsuits. The more difficult cases arise when the clerical counselor intends to be helpful, but fails in the attempt.

In 1987 the Missouri Court of Appeals decided *Hester v. Barnett*.⁵¹ In *Hester* a Baptist minister engaged in family counseling with the plaintiffs. The plaintiffs confided in the minister that they were beset with disciplinary

42. *Id.* at 683.

43. *Id.* The concurring opinion states:

Plaintiff alleges that while defendant James B. Richards was counseling Bobby Glenn Handley and Brenda Handley Richards, defendant James B. Richards and defendant Brenda Handley Richards were deeply involved in a sexual affair, and that as the marriage counseling continued, Brenda Handley Richards was attempting to procure a divorce from Bobby Glenn Handley. The plaintiff claims that the emotional toll of this marital tribulation combined with the deceitful manner of the counseling by James B. Richards caused Bobby Glenn Handley to take his life, and the deceased's death resulted as a "proximate consequence of the outrageous conduct of the defendant, James B. Richards"

Id.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* The plaintiff also asserted a claim of clergy malpractice. *Id.* Clergy malpractice claims will be discussed below. See *infra* note 59-113 and accompanying text.

48. *Handley v. Richards*, 518 So. 2d at 687.

49. O'Brien, *Pedophilia: The Legal Predicament of Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91 (1988).

50. Comment, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MAR. L. REV. 1031 (1986); Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987); Note, *Texas' Clergyman Penitent Privilege and the Duty to Report Suspected Child Abuse*, 38 BAYLOR L. REV. 231 (1986).

51. *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

and behavioral problems with their three children.⁵² Plaintiffs alleged that the minister had assured them that any communication with the minister would be kept in the strictest confidence.⁵³ The minister allegedly divulged the confidential communications from the family to the church deacons and members of the community.⁵⁴ It was also alleged that the minister falsely accused the parents of child abuse and other illegal activities from the pulpit, in letters, and in the church bulletin.⁵⁵ The plaintiffs alleged the following intentional tort theories against the minister: defamation, alienation of affections, intentional infliction of emotional distress, invasion of privacy, and interference with contract rights.⁵⁶ The trial court dismissed the entire lawsuit.⁵⁷ On appeal, the dismissal was reversed on all intentional tort theories except the intentional infliction of emotional distress.⁵⁸

The cases involving clergy liability consistently seem to hold that a clerical counselor can be held liable for intentional torts. Most courts hold that freedom of religion principles do not shield the clergy from liability for intentional wrongs. The growing number of cases that have taken this approach indicate that the clergy is accountable for intentional wrongdoing. The more difficult issue is whether members of the clergy should be held responsible for acts of negligence.

V. PROFESSIONAL NEGLIGENCE CLAIMS AGAINST CLERGY MEMBERS

What if a clerical counselor does not intend to harm an advisee and the counselor does not engage in outrageous conduct, yet an advisee is harmed or harms another? Should a clerical counselor be liable? To date, no court in the United States has held a clerical counselor liable on a negligence or a malpractice claim.⁵⁹ Most other professionals are held accountable for unreasonable conduct, even if there is no intent to harm.⁶⁰ In our litigious society the professional negligence theory will be repeatedly asserted against clergy members. Perhaps the imposition of negligence liability would better serve the interests of individuals and society.

In order to recover on a professional malpractice or negligence theory, the four elements of a negligence cause of action must be established: the

52. *Id.* at 550.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 549.

58. *Id.* at 564.

59. *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988). The court in *Destefano* stated: "To date, no court has acknowledged the existence of such a tort. . . . [T]he claim for clergy malpractice is not supported by precedent and raises serious first amendment issues. . . . We do not recognize the claim of 'clergy malpractice.'"

60. *Professional Negligence. Police Misconduct. Dental Negligence. Lawyer Liability. Liability of City Counsel Members. Clergy Negligence.* 22 TRIAL 32-59 (1986).

existence of a duty,⁶¹ breach of the duty of care,⁶² proximate cause,⁶³ and damages.⁶⁴ Professional malpractice is the failure to use the degree of skill and learning ordinarily used under the same or similar circumstances by members of that profession.⁶⁵ It is important to note that a clerical counselor is not expected to act in the same manner as a professional therapist. The actions of the clerical counselor would be measured against the actions of a reasonably prudent clerical counselor under the circumstances.⁶⁶

The most widely publicized case⁶⁷ to date involving a lawsuit against a minister is the California case of *Nally v. Grace Community Church of the Valley*.⁶⁸ The *Nally* case has been heard by two separate trial courts and has been reviewed twice by both the California Court of Appeals⁶⁹ and the California Supreme Court, over a period of eight years.⁷⁰ In *Nally* a lawsuit was commenced by parents against a church and its pastors for the alleged wrongful death of their son, who committed suicide after counseling by the

61. RESTATEMENT (SECOND) OF TORTS § 328A (1979); W. PROSSER & W. KEETON, THE LAW OF TORTS, § 30, at 164 (5th ed. 1984).

62. RESTATEMENT (SECOND) OF TORTS § 328A (1979); W. PROSSER & W. KEETON, *supra* note 61, § 30, at 164.

63. RESTATEMENT (SECOND) OF TORTS § 328A (1979); W. PROSSER & W. KEETON, *supra* note 61, § 30, at 165.

64. W. PROSSER & W. KEETON, *supra* note 61, § 30, at 165.

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

66. *Id.* comment e.

67. Woodward & Huck, *Next, Clerical Malpractice?*, NEWSWEEK, May 20, 1985, at 90; *Suing the Minister for Malpractice*, U.S. NEWS & WORLD REPORT, June 13, 1988, at 60.

The *Nally* case stirred concern over insurance coverages of the clergy and religious organizations:

Insurance executives point to the case as the reason for an entirely new type of policy: Clergy-malpractice insurance. Churches all along have bought general-liability policies in case a church bus wrecks or a visitor slips on a stairway. But now, many congregations are purchasing malpractice policies to protect ministers who counsel parishioners. Such insurance is currently cheap—as little as \$50 per year for \$500,000 coverage—but Robert Plunk, president of Preferred Risk Mutual Insurance Company, says the rise in premiums will be “dramatic” if the Nallys win. Costs will go even higher if churches decide they need coverage for persons other than pastors, such as lay counselors and chaperones who supervise teenagers. Some churches already are asking lay volunteers to provide their own insurance.

Id.

68. *Nally v. Grace Community Church of the Valley*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *rev'd*, 47 Cal. 3d 278, 763 P.2d 527, 253 Cal. Rptr. 97 (1988), *cert. denied* 109 S. Ct. 1644 (1989).

69. *Nally v. Grace Community Church of the Valley*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984) (ordered not published); *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987).

70. The first time this case came before the California Supreme Court, the court decertified the Court of Appeals decision and ordered the opinion be published without official status. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (en banc).

pastors.⁷¹ The son experienced psychological problems, primarily depression, after losing his girlfriend.⁷² The son then converted from the Catholic faith to Protestantism and became a communicant of the Grace Community Church, a fundamentalist sect.⁷³ The son counseled with the pastors of his new church and discussed family problems as well as his problems with his former girlfriend.⁷⁴ The son's depression deepened and he saw a physician who prescribed antidepressant medication.⁷⁵ The son then attempted suicide, and was hospitalized.⁷⁶ He stayed at the home of one of the pastors after his release from the hospital.⁷⁷ The son refused to keep psychiatric appointments because he believed psychiatrists were not Christians and would not be able to help him.⁷⁸ Shortly thereafter, he committed suicide.⁷⁹

The parents brought suit against the church and pastors based on several theories, including negligence and the intentional infliction of emotional distress.⁸⁰ The trial court granted summary judgment in favor of the church and the pastors, but the California Court of Appeals reversed.⁸¹ The supreme court denied review, depublished the opinion, and returned the case to the trial court.⁸² The trial court in *Nally II* granted nonsuit, which was again reversed by the court of appeals.⁸³ The Supreme Court of California

71. *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d at ____, 204 Cal. Rptr. at 309.

72. *Id.* at ____, 204 Cal. Rptr. at 313.

73. *Id.* at ____, 204 Cal. Rptr. at 310.

74. *Id.* at ____, 204 Cal. Rptr. at 314.

75. *Id.*

76. *Id.* at ____, 204 Cal. Rptr. at 309.

77. *Id.*

78. *Id.*

79. *Id.* The plaintiffs also alleged that the pastors were negligent:

Plaintiffs also introduced a declaration of a psychiatrist who, having reviewed the testimony elicited in various depositions taken in this litigation, stated that it was his opinion that Kenneth Nally suffered from severe mental illness prior to his death and that defendants increased Kenneth Nally's despair and anguish, thereby causing him to commit suicide.

Id. at ____, 204 Cal. Rptr. at 305.

One of the defendant pastors had supplied the Nally youth with a tape on suicide, which the parent argued encouraged suicide. The tape stated:

In fact, suicide is one of the ways the Lord takes home a disobedient believer. We read that in the Bible. That death is one of the ways that the Lord deals with us. . . . And suicide for a believer is the Lord saying, 'Okay, come on home. Can't use you anymore on earth. If you're not going to deal with those things in your life, come on home.'

Id. at ____, 204 Cal. Rptr. at 305.

80. *Id.* at ____, 204 Cal. Rptr. at 304-05.

81. *Id.* at ____, 204 Cal. Rptr. at 309.

82. See *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, ____, 240 Cal. Rptr. 215, 222 (1987).

83. *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d at ____, 240 Cal. Rptr. at 219.

reversed the court of appeals, holding in favor of the ministers and the church.⁸⁴

The California Court of Appeals was clearly more sympathetic to the plaintiffs' claims, while the California Supreme Court was protective of religious counselors. The court of appeals held that nontherapist counselors—both religious and secular—have a duty to refer suicidal persons to psychiatrists or psychotherapists qualified to prevent suicides.⁸⁵ The court also specifically stated that the imposition of a negligence standard of care on pastoral counselors did not impinge on the free exercise of religion guaranteed by the first amendment.⁸⁶ The court found a compelling interest in the preservation of life, which justified a narrowly tailored burden on religious expression established by the imposition of liability for negligent counseling.⁸⁷

The California Supreme Court was not persuaded by the court of appeals' argument. The court narrowed the *Nally* case down to the issue of whether a "nontherapist counselor" has a duty to refer persons to licensed professionals once suicide is foreseeable.⁸⁸ The court determined that there was no duty running from the clerical counselors to the advisee, and therefore the ministers and the church were not liable for the suicide of Mr. Nally.⁸⁹ The court noted that under traditional tort law principles, there is no duty to prevent foreseeable suicides unless there is a special relationship

84. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988). The United States Supreme Court denied review. *Nally v. Grace Community Church of the Valley*, 109 S. Ct. 1644 (1989).

85. *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d at ___, 240 Cal. Rptr. at 227 (1987). The court stated:

However, once they have diagnosed the individual counselee as a foreseeable suicide they do have the ability to refer the person to those who do have the authority and the expertise to prevent suicides. Accordingly, the minimal standard of care a nontherapist owes to a counselee he diagnoses as suicidal is to take steps to place him in the hands of those to whom society has given the authority and who by education and experience are in the best position to prevent the suicidal individual from succeeding in killing himself.

Id.

86. *Id.* at ___, 240 Cal. Rptr. at 230.

87. *Id.* at ___, 240 Cal. Rptr. at 237. The court stated:

We have no difficulty holding California has a compelling interest in preventing its citizens from committing suicide. Society has a profound interest in preserving life and preventing death. Thus we treat murder as the most serious of crimes. Yet suicide has the same end result—the premature death of a healthy human being. Not surprisingly, therefore, we find government firmly committed to the prevention of suicide.

Id. at ___, 240 Cal. Rptr. at 234-35.

88. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d at 284, 763 P.2d at 949-50, 253 Cal. Rptr. at 99.

89. *Id.* at 305, 763 P.2d at 956, 253 Cal. Rptr. at 113.

between the suicidal person and the defendant.⁹⁰ The court cited two cases involving in-house patients and noted that a hospital has a duty to act reasonably in avoiding suicides by patients because a special relationship exists in that situation.⁹¹ The court refused to extend liability to nontherapist counselors such as clergy members. Reasoning that the imposition of liability on the clergy would have a deleterious effect on counseling in general, the court stated:

Imposition of a duty to refer Nally necessarily would imply a general duty on all nontherapists to refer all potentially suicidal individuals to licensed medical practitioners.

One can argue that it is foreseeable that if a nontherapist counselor fails to refer a potentially suicidal individual to professional, licensed therapeutic care, the individual may commit suicide. While under some circumstances counselors may conclude that referring a client to a psychiatrist is prudent and necessary, our past decisions teach that it is inappropriate to impose a duty to refer—which may stifle all gratuitous or religious counseling—based on foreseeability alone. Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm.⁹²

The court was concerned that a duty to refer would deter persons who most need help from seeking treatment out of fear of involuntary commitment as a result of private disclosures.⁹³ Finally, the court noted that if it did recognize a duty, then an appropriate standard of care would have to be established to measure performance.⁹⁴ The court was not prepared to attempt that difficult task.⁹⁵

The *Nally* case certainly creates a substantial obstacle for plaintiffs seeking to recover on a clergy malpractice theory. California is a leading state in evolving tort law. However, future plaintiffs in nonsuicide cases

90. *Id.* at 294, 763 P.2d at 956, 253 Cal. Rptr. at 105.

91. *Id.* at 294, 763 P.2d at 956, 253 Cal. Rptr. at 106 (citing *Meier v. Ross Gen. Hosp.*, 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968); *Vistica v. Presbyterian Hosp.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967)).

92. *Id.* at 298, 763 P.2d at 959, 253 Cal. Rptr. at 108.

93. *Id.* at 299, 763 P.2d at 959, 253 Cal. Rptr. at 109.

94. *Id.*

95. *Id.* at 298, 763 P.2d at 960, 253 Cal. Rptr. at 109. The court stated:

Even assuming that workable standards of care could be established in the present case, an additional difficulty arises in attempting to identify with precision those to whom the duty should apply. Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.

should be quick to point out that *Nally* involved a suicide, which is always difficult to predict and prevent. Future plaintiffs may also rely on the persuasive concurring opinion of Justice Kaufman.⁹⁶ While the majority opinion ruled that no duty existed, Justice Kaufman asserted that the pastors owed a duty of care to the plaintiffs.⁹⁷ Justice Kaufman asserted that imposing a duty of care on the pastors would not violate first amendment free exercise rights.⁹⁸ Justice Kaufman concurred with the majority because he felt that the pastors had met their duty of care by encouraging Nally to see and cooperate with psychiatrists.⁹⁹ If the approach in Justice Kaufman's concurrence of recognizing a duty of care is followed in other states, the plaintiffs' chances of avoiding summary judgment will improve, thereby allowing plaintiffs to reach the jury for a factual determination of whether the duty of care had been satisfied.

In *Destefano v. Grabrian*,¹⁰⁰ the priest was sued on a negligence theory for engaging in an adulterous sexual relationship with a woman that he was counseling for marital problems.¹⁰¹ Even though the facts suggest that it would not have been difficult to find that this activity was not reasonable under the circumstances, the court chose to uphold the lower court's dismissal of the negligence claim. It appears that the court did not want to be the first to recognize a clergy malpractice claim, stating:

Since Grabrian is a Catholic priest, the malpractice claim alleged by

96. *Id.* at 113, 763 P.2d at 964, 253 Cal. Rptr. at 113.

97. *Id.* Justice Kaufman stated:

In view of the majority's suggestion that a nontherapist counselor who holds himself out as competent to treat a suicidal person owes a duty of care to that person, I am baffled as to the basis or the *necessity* of the majority's broad conclusion that "nontherapist counselors in general" do *not* owe such a duty. The evidence in the record, viewed—as the law requires—in plaintiffs' favor, demonstrates that defendants (1) expressly held themselves out as fully competent to deal with the most severe psychological disorders, including major depression with suicidal symptoms, (2) developed a close counseling relationship with Kenneth Nally for that very purpose, and (3) realized that Nally's suicide was at the very least a possibility. Thus, the evidence was more than sufficient, in my view, to trigger a minimal duty of care to Nally.

Id. at 306, 763 P.2d at 964, 253 Cal. Rptr. at 113.

98. *Id.* at 313, 763 P.2d at 969, 253 Cal. Rptr. at 118. Justice Kaufman stated:

Finally, it is urged that the imposition of a duty of care on defendants would unconstitutionally burden their First Amendment right to the free exercise of religion. There is no merit to this contention.

While the First Amendment bars the government from "prohibiting the free exercise of religion," religiously motivated conduct "remains subject to regulation for the protection of society."

Id. (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)); *accord Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988).

99. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d at 314, 736 P.2d at 970, 253 Cal. Rptr. at 119.

100. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

101. *Id.* at 278.

Edna falls within the realm of "clergy malpractice." To date, no court has acknowledged the existence of such a tort. Since the claim for clergy malpractice is not supported by precedent and raises serious first amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of "clergy malpractice."¹⁰²

It is important to note that Colorado had enacted legislation that imposed penalties on psychologists who engaged in sexual intimacies with their patients.¹⁰³ This legislation specifically excluded actions of clerical counselors so long as the cleric did not hold himself out as a psychologist.¹⁰⁴ The court felt that this legislation supported its decision not to recognize the tort of clergy malpractice.¹⁰⁵

102. *Id.* at 285.

103. *Id.* at 285-86. Regarding Colorado state statutes, the court stated:

The General Assembly has enacted legislation which imposes penalties against psychologists who are engaged in sexual intimacies with their patients or clients. Section 12-43-111(1), 5 C.R.S. (1985), provides:

The [Colorado state board of psychologist examiners] has the power to deny, revoke, suspend, or refuse to renew any license, or to place on probation a licensee, upon proof that such person . . . (1) Has maintained relationships with clients that are likely to impair his professional judgment or increase the risk of client exploitation, such as treating employees, supervisees, close colleagues, or relatives, or having sexual intimacies with clients

However, the legislature has expressly evinced an intent to exclude religious ministers, priests, and rabbis from the statutory scheme which imposes liability upon psychologists for malpractice. Section 12-43-114(10), 5 C.R.S. (1985), states that:

Nothing in this article shall restrict a duly ordained minister, priest, or rabbi from carrying out his ministerial responsibilities while functioning in his ministerial capacity within a recognized religious organization and serving the spiritual needs of its constituency, provided he does not hold himself out to the public by any title or description incorporating the words "psychologist," "psychological," "psychology," or other term implying training, experience, or expertise in psychology.

The legislative intent of the General Assembly is even more pronounced in the 1988 enactment relating to penalties against mental health professionals and marriage and family therapists who engage in sexual intimacies with their clients or patients. The 1988 statute states that: "any person engaged in the practice of religious ministry shall not be required to comply with the provisions of this article," so long as such person does not hold himself out to the public by such titles as "psychologist," "licensed marriage and family therapist," or "licensed professional counselor," unless the person has been licensed pursuant to the state regulatory scheme.

Id. Section 12-43-111(1)(l) was repealed and reenacted in 1988 as section 12-43-704(1)(i).

104. See COLO. REV. STAT. § 12-43-215 to -216 (1990).

105. *Destefano v. Grabrian*, 763 P.2d at 286. The Colorado court stated: "Since the General Assembly has shown an intent to exclude religious counselors from the liability provisions of the statute creating liability for mental health professionals, we conclude that Edna's second claim for relief was properly dismissed." *Id.*

While no court has imposed negligence liability on a clergy member, the imposition of malpractice liability arguably would impress on clerical counselors the importance of timely referral. The definition of the required standard of care has been the primary block to the imposition of malpractice liability on the clergy.¹⁰⁶ Courts have consistently indicated that this tort theory would inevitably involve the courts in defining competence, training, methodology, and content of the pastoral function to determine whether the cleric breached the required duty of care under the circumstances.¹⁰⁷ The fear is that the determination of whether the standard of care has been breached would violate the first amendment free exercise protections. The fact that there are hundreds of varying theologies and doctrines further complicates the issue of defining an appropriate standard of care.¹⁰⁸

On the other hand, the beauty of the tort of negligence is the ability of the theory to adapt to a multitude of different situations by using the objective reasonable person standard. Reliance on a jury's ability to make fact determinations has generally been deemed appropriate in many difficult and complex cases.¹⁰⁹ Juries can be instructed to consider the religious practices

106. *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

107. *Id.* at 553. The court stated:

It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty "to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of the profession."

The problems of having the legal system define and enforce an appropriate standard of care are discussed and compared with therapist obligations in Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213, 235 (1985):

Conversely, if [pastoral counseling] can be defined as primarily secular, then analogies may be drawn to the psychiatric field in defining the proper duty and standard of care. The standards of care applicable to psychiatrists, however, may not be sufficient to define a pastoral counseling standard of care. For example, the standard of care for psychiatry can be derived by comparing established therapies, noting the points of agreement or similarity regarding techniques or fundamental precepts. Where the established schools of thought are relatively few, this might be accomplished with relative ease. In the religious milieu of pastoral counseling, where there are hundreds of varying theologies and doctrines, such analysis would be practically impossible. Thus, the diversity of religious belief systems could make it impossible to define a general standard with sufficient precision to measure conduct. Further, if the courts were to accept a denominationally specific standard of care, the courts would be required to examine the faith tenets and theology of the defendant cleric's sect both to establish the standard and to determine whether the defendant had strayed from it. In so doing, the courts would be determining matters at the very core of religion, which is prohibited by the first amendment.

Id.

108. Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213, 235 (1985).

109. *J-u-r-y Spells Justice*, 22 TRIAL 84 (July 1986); Zuckerman, *Law, Fact or Justice?*,

involved and can make a determination as to whether the clergy member has acted reasonably under the circumstances.¹¹⁰

Professional malpractice lawsuits against therapists also present difficulties in defining the appropriate standard of care.¹¹¹ Because dealing with psychological problems is not an exact science, there are widely diversified acceptable techniques and there is a lack of consensus as to what is appropriate treatment.¹¹² This difficulty has not stopped our legal system from judging the competency of therapists' activities.¹¹³ Perhaps our legal system can similarly decide the adequacy of clerical counseling.

VI. CONCLUSION

Several factors suggest that clergy members should be protected from broad liability. Defining the appropriate legal responsibilities of a clergy member is a difficult task. Most clerical counselors have noble intentions and desire to help people. The clerical counselor typically does not receive payment for his services and frequently the cleric does not have extensive psychotherapy training. It is difficult to predict the future actions of troubled individuals.

On the other hand, many negligent attorneys,¹¹⁴ doctors,¹¹⁵ architects,¹¹⁶ dentists,¹¹⁷ therapists,¹¹⁸ and engineers¹¹⁹ also have noble intentions initially,

66 B.U.L. REV. 487 (1986).

110. See *supra* note 97.

111. See *supra* note 1. Note, *Statutes Limiting Mental Health Professionals' Liability for the Violent Acts of Their Patients*, 64 IND. L.J. 391 (1989).

112. Even under similar circumstances, there is little consensus among therapists as to what steps should be taken. The chances of a second psychiatrist agreeing with the diagnosis and treatment of the first psychiatrist are about fifty percent. For this reason, it has been asserted that the traditional standard of care is inappropriate when dealing with psychological problems. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 701 (1974).

113. See *supra* note 1.

114. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DE PAUL L. REV. 41 (1986); Cohen, Honig, Levenson & Traficanti, *Professional Liability: Common Malpractice Dilemmas Currently Confronting Attorneys and Accountants*, 73 MASS. L. REV. 18 (1988); Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209 (1986); Comment, *Legal Malpractice Through the Chrystal Ball*, 10 S.U.L. REV. 263 (1984).

115. Nye, Gifford, Webb, & Dewar, *The Causes of the Medical Malpractice Crisis: An Analysis of Claims, Data, and Insurance Company Finances*, 76 GEO. L.J. 1495 (1988); Grady, *Why are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U.L. REV. 293 (1988).

116. Note, *Architectural Malpractice: Toward An Equitable Rule for Determining When the Statute of Limitations Begins to Run*, 16 FORDHAM URB. L.J. 509 (1987); Schmauder, *Liability of the Architect-Engineer for Construction Contracts*, 16 PUB. CONT. L.J. 365 (1987).

117. Cohen, *Monetary Damages in Dental-Injury Cases*, 25 TRIAL 80 (1989); Gittleman, *Dental Negligence*, 22 TRIAL 40 (July 1986).

118. See *supra* note 1.

but subsequently harm other individuals. Our legal system has had no trouble imposing liability upon these professionals. Perhaps the time has come to make clerical counselors accountable for their actions. Society may be served best by treating clergy like other professionals. Our legal system to date may have underestimated the ability of the tort system to achieve a just result in a clerical malpractice situation. Malpractice liability would only result if the cleric has failed to act as a reasonable professional under the circumstances. If a clergy member has failed to meet this requirement, then he is not worthy of protection from liability.

Persons who suffer from severe depression or other serious disorders often need professional medical assistance if they are to overcome their problems. Clerical counselors who insist on counseling these individuals are not acting in the best interests of the troubled individual or that of society in general. Requiring clergy to act reasonably under the circumstances does not unduly interfere with religious freedom nor does it place an unreasonable expectation on the clergy.

119. Peck & Hoch, *Engineers' Liability: State of the Art Considerations in Defining Standard of Care*, 23 TRIAL 42 (Feb. 1987); Groff, *Legal Considerations for Architects and Engineers: Avoiding the Pitfalls*, 41 WASH. ST. B. NEWS 17 (1987).

