

Church Autonomy *after the* Scandal

by Nathan A. Adams, IV ©2007¹

AT THE START OF THIS DECADE, disclosures of sexual misconduct by clergy against parishioners and, most egregiously, children rocked the Catholic Church, ultimately leading to substantial asset sales and the first-ever bankruptcies of Catholic dioceses.² But the problem and now its legal consequences are influencing all religious institutions. The Church Autonomy Doctrine barred many tort claims against religious institutions; however, in the wake of the scandal, it has rapidly receded; therefore, it is more important than ever for religious institutions to adopt sound risk avoidance policies and practices pertaining to employees, volunteers, and especially counselors.

Simply put, the Church Autonomy Doctrine (also known as the Ecclesiastical Abstention Doctrine) traditionally deprived the courts of jurisdiction over disputes impinging upon matters of faith, morals, church polity, and ecclesiasti-

cal relationships. With roots in the Free Exercise Clause and, more squarely, Establishment Clause of the First Amendment to the United States Constitution, the Church Autonomy Doctrine was intended to act like a structural restraint on government's exercise of power to ensure respect for separate spheres of sovereignty and competence. It was to prevent the state from adjudicating or regulating the ways in which communities of faith are organized and how they select their leaders and orthodoxy.³

In *Watson v. Jones*,⁴ the U.S. Supreme Court announced the Church Autonomy Doctrine by distinguishing the English common law. Lord Eldon's Rule, as it was called, enabled the courts to inquire which party to an ecclesiastical dispute "bore the true standard of faith in the church organization." In contrast, the U.S. Supreme Court held, "The law knows no heresy."⁵ It required civil courts to accept the decision of the highest church judicatory as authoritative, because the courts were

not to be supposed "as competent in the ecclesiastical law and religious faith...."⁶

The *Watson* line of cases forked into several lines of precedent, including, for example, minister misconduct, property dispute,⁷ and parishioner discipline cases.⁸ In the minister misconduct cases, the Church Autonomy Doctrine generally precluded courts from inquiring into the employment relationship between a church and its ministers, because ministers are the "life blood" of the organized church and "chief instrument by which the church seeks to fulfill its purpose."⁹ It was thought that ruling on these matters necessarily touched on matters of "prime ecclesiastical concern."¹⁰ No longer.

At one time, the Church Autonomy Doctrine barred nearly every type of claim arising from the church-minister relationship, including contract and quasi-contract claims, such as breach of contract,¹¹ promissory estoppel,¹² and covenants of good faith and fair dealing;¹³

This article originally appeared in The Ledger, a professional journal of the National Association of Church Business Administration. Reprinted by permission. ©2007 NACBA www.nacba.net (800) 898-8085

tort claims such as negligence,¹⁴ negligent hiring, supervision and retention,¹⁵ emotional distress,¹⁶ defamation,¹⁷ interference with contractual relations,¹⁸ invasion of privacy,¹⁹ and wrongful discharge;²⁰ statutory claims such as whistleblower²¹ and discrimination cases;²² and claims for breach of fiduciary duty.²³ Although denominated differently, these claims were frequently treated as clergy malpractice claims in disguise, which necessarily impinge upon matters of religious orthodoxy and require secular courts to interpret the religious institution's law (such as Canon Law), policies, and practices.²⁴ Moreover, the Doctrine applied not only to ordained ministers, but also principals of religious schools,²⁵ religion professors,²⁶ parochial teachers,²⁷ organists,²⁸ music directors,²⁹ computer programmers,³⁰ non-ordained pastors,³¹ and directors of parachurch ministries.³²

Historically, three tests have been utilized to identify ministers subject to the Church Autonomy Doctrine: (1) the functional test, inquiring whether the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or participation in religious ritual, and worship;³³ (2) the intermediary test, inquiring whether the employee serves as an intermediary between the church and its congregation;³⁴ or (3) the pastoral importance test, inquiring whether the employee's position is important to the spiritual and pastoral mission of the church.³⁵

In the wake of the sex scandal, the Church Autonomy Doctrine may still bar claims involving intra-church disputes as between a minister and his church or denomination, but the Doctrine is not as effective a shield against inter-church disputes as between parishioners and their church. In Florida, for example, whereas the Doctrine still bars claims brought by ministers against religious institutions,³⁶ it no longer bars parishioners from asserting claims for negligent hiring and supervision, breach of fiduciary duty, outrageous conduct, invasion of privacy, and defamation.³⁷ Of particular con-

cern, a fiduciary duty may arise in Florida now between a religious institution and beneficiary, even without a personal relationship and irrespective of the degree of control the institution exercises over the fiduciary.³⁸ With few exceptions, the Church Autonomy Doctrine has also receded in other states.³⁹

In dissent, some justices continue to worry about excessive entanglement with religion and embroilment in establishing the training, skill, and standards applicable for members of the clergy.⁴⁰ "To determine that a church negligently installed or transferred a particular pastor is effectively to override the church's prior decision in this regard and to impermissibly dictate the church's or its congregation's decision-making in the future; and it interferes with a church's freedom to interact with its own clergy."⁴¹ It may also "result in an endorsement of religion 'by approving one model for church hiring, ordination, and retention of clergy.'"⁴²

Bucking the trend, one court observed, "it is arguable that in fashioning a 'reasonable religious organization' standard for the [Buddhist] temple, there is danger that standard would vary, for example, from a 'reasonable Protestant' standard, a 'reasonable Catholic' standard, a 'reasonable Jewish' standard, or a 'reasonable Islamic' standard."⁴³ The effect of weakening the Church Autonomy Doctrine may have the most severe implications for religious counseling programs.⁴⁴ Already, courts have begun to inquire whether pastoral counseling is essentially secular in order to decide whether counselees may state a claim for negligent counseling against religious organizations.⁴⁵

Table 1 shows how courts in some states are now willing to resolve breach of fiduciary duty and negligence claims, using so-called "neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy."⁴⁶ Practically, this means that courts

TABLE 1: FIDUCIARY DUTY AND NEGLIGENCE CLAIMS ALLOWED AGAINST RELIGIOUS INSTITUTIONS

State	Breach Fiduciary Duty	Negligent Hiring, Retention, Supervision, Misrepresentation
Arizona	–	Yes
California	No	Yes
Colorado	Yes	Split
Florida	Yes	Yes
Georgia	–	Yes
Illinois	Yes	Yes
Massachusetts	No	Yes
Michigan	–	Yes
Minnesota	No	No
Mississippi	Yes	Yes
Missouri	No	No
New York	No	Split
North Carolina	Split	Yes
Texas	No	Yes
Vermont	–	Yes
Washington (Adults only)	No	No

Author

Nathan A. Adams, IV, is Senior Counsel with Holland & Knight, LLP, and the primary contact for its national Religious Institutions practice.

He can be reached at nathan.adams@hklaw.com.




will now allow parishioners to “focus on whether [the Church defendants] reasonably should have foreseen the risk of harm to third parties”⁴⁷ and to demonstrate a relationship of special trust or confidence in a minister that he or she violated.⁴⁸ The same is likely to be true for non-ordained ministers protected by the Church Autonomy Doctrine.⁴⁹

Consequently, after the scandal, there are some critical steps for religious institutions to undertake in consultation with legal counsel, some of which will seem less natural for non-hierarchical or seeker-oriented religious institutions, but all of which can be adapted to a religious institution’s governance model without sacrificing doctrine. At a minimum, religious institutions may want to consider the following:

- Declare a *theology of ministry* (in human resource and other documents), which expansively identifies ministers (who are subject to the Church Autonomy Doctrine) including ordained and lay persons involved in ministry and how each importantly contributes to the institution’s religious mission;
- Establish an *internal disciplinary system* with basic due process and appellate rights, potentially incorporating alternative dispute resolution methods which must be exhausted prior to litigation;
- Conduct a *thorough background investigation* on all persons under consideration to perform ministry (including volunteers), especially ministry to

vulnerable populations, such as children, counselees, the disabled, and the elderly; and

- Implement rigorous *religious counseling protocols*.

The sex scandal should be a lesson to every religious organization to be cautious about hiring, retention, and supervision, volunteer recruitment, and counseling. A clearly articulated theology of ministry, together with comprehensive rules of internal discipline, governance, and counseling, and careful screening, will protect the public and the religious institutions themselves by maximizing the protection still available under the Church Autonomy Doctrine and ensuring safe and quality programming that will attract more members, rather than repel them in anguish and outrage. 

Endnotes

- 1 Nathan A. Adams, IV, Ph.D., M.A., Esq. is Senior Counsel with Holland & Knight, LLP and the primary contact for its national Religious Institutions practice. www.hklaw.com/Biographies/Expanded-Bio.asp?ID=69090.
- 2 See, e.g., *5th U.S. Catholic Diocese Files for Bankruptcy in Action Bishop Says is 'Not a Cop Out,'* Catholic Online www.catholic.org (Feb. 28, 2007).
- 3 See Ira C. Lupu and Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. Rev. 1789, 1815 (2004).
- 4 80 U.S. (13 Wall.) 679 (1871).
- 5 *Id.* at 728.
- 6 *Id.* at 729.
- 7 See, e.g., *id.*; St. Mark Coptic Orthodox Church v. Tanios, 213 Ill. App. 3d 700, 575 N.E. 2d 283 (1991).
- 8 See, e.g., O'Connor v. Diocese of Honolulu, 885 P. 2d 261 (Hawaii 1994).
- 9 McClure v. The Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).
- 10 McClure, 460 F.2d at 559.
- 11 See, e.g., Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997); Lewis v. Seventh-day Adventists, 978 F.2d 940, 942-43 (6th Cir. 1992); Minker v. Baltimore Annual Conf. of United Meth. Church, 894 F.2d 1354, 1358, 1360 (D.C. Cir. 1990); Sanders v. Casa View Baptist Church, 898 F.Supp. 1169, 1182 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 161 (1998); Knuth v. Lutheran Church Mo. Synod, 643 F. Supp. 444, 449 (D.Kan. 1986); Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 683-84 (Ill. App. 4 Dist. 1994); Basich v. Bd. of Pensions, 540 N.W.2d 82 (Minn. App. 1995), *cert. denied*, 519 U.S. 810 (1996); Olson v. Luther Mem. Church, 1996 WL 70102 (Minn.App. 1996); Pearson v. Church

of God, 458 S.E.2d 68 (S.C. App. 1995), *aff'd*, 478 S.E.2d 849 (S.C. 1996); Hafner v. Lutheran Church-Mo. Synod, 616 F. Supp. 735 (N.D. Ind. 1985); Gosche v. Calvert High School, 997 F. Supp. 867 (N.D. Ohio 1998); Black v. Snyder, 471 N.W. 2d 715, 720 (Minn. Ct. App. 1991); Marshall v. Munro, 845 P.2d 424, 429 (Alaska 1993); United Meth. Church v. White, 571 A. 2d 790, 796-97 (D.C. 1990); Black v. St. Bernadette Cong. of Appleton, 360 N.W.2d 550, 552 (Wis. 1984); Madsen v. Erwin, 481 N.E. 2d 1160 (Mass. 1985); Goodman v. Temple Shir Ami, 712 So. 2d 775 (Fla. 3d DCA 1998); *but see* Elmora Hebrew Ctr., Inc. v. Fishman, 593 A. 2d 724, 729-31 (N.J. 1991); Reardon v. Lemoyne, 454 A. 2d 428, 432-33 (N.H. 1982); Gipe v. Superior Court, 124 Cal.App. 3d 617, 628, 177 Cal. Rptr. 590, 595; Kupperman v. Cong. Nusach Sfard, 39 Misc. 2d 107, 240 N.Y.S.2d 315 (N.Y. Sup. 1963).

- 12 See, e.g., Lewis, *supra*; Gosche, *supra*; Olson, *supra*; United Meth. Church v. White, 571 A.2d 790 (D.C. 1990) (implied contract).
- 13 See, e.g., Bell, *supra*; Himaka v. Buddhist Churches of Am., 917 F.Supp. 698 (N.D. Cal. 1995); White, *supra*; Olson, *supra*; Miller v. Catholic Diocese, 728 P.2d 794 (Mont. 1986).
- 14 See, e.g., Southeastern Conf. Ass'n of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842 (Fla. 4th DCA 2003); *but see* Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468 (8th Cir. 1993).
- 15 See, e.g., Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996); Olson, *supra*; Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995); Gibson v. Brewer, 952 S.W. 2d 239 (Mo. 1997); L.L.N. v. Clauder, 563 N.W. 2d 434, 440-41 (Wis. 1997); Swanson v. Roman Cath. Bishop of Portland, 692 A. 2d 441 (Me. 1997); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); Roman Catholic Bishop of San Diego v. Superior Court, 42 Cal.App.4th 1556, 50 Cal. Rptr. 2d 399 (Cal.Ct. App. 4th Dist. 1996); Germain v. Pullman Baptist Church, 980 P. 2d 809 (Wash. App. 1999); *but see* Kenneth R. v. Roman Cath. Diocese of Brooklyn, 229 A.D.2d 159 (N.Y.App. Div. 2d Dept. 1997); Winkler v. Rocky Mountain Conf. of the United Meth. Church, 923 P. 2d 152, 156 (Col. App. 1995), *cert. denied*, 519 U.S. 1093 (1997); Bladen v. First Presbyterian Church, 857 P. 2d 789, 797 (Okla. 1993).
- 16 For intentional infliction of emotion distress, see, e.g., Van Osdol, *supra*; Hutchison, 789 F.2d 392, 395-96 (6th Cir. 1986), *supra*, 479 U.S. 885 (1986); Bell, *supra*; Lewis, *supra*; Korean Pres. Church v. Lee, 880 P. 2d 565 (Wash. Ct. App. 1994); Murphy v. I.S.K. Con. Of New England, Inc., 409 Mass. 842, 853-54 (1991); Gosche, *supra*; Geraci v. Eckankar, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995); Olson, *supra*; *but see* Drevlov, *supra*. For negligent infliction of emotional distress, see, e.g., Olson, *supra*.
- 17 Hutchison, *supra*; Farley v. Wis. Evangelical Lutheran Synod, 821 F.Supp. 1286, 1290 (D. Minn. 1993); Seymour Klagsbrun v. Va'Ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732 (D.N.J. 1999); Yaggie v. Indiana-Kentucky Synod Lutheran Church, 860 F.Supp. 1194 (W.D.Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995); Black, *supra*; McManus v. Taylor, 521 So.2d 449, 451 (La. App. 4 Cir. 1988); Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc., 714 N.E.2d 253 (Ind. App. 1999); Olson, *supra*; Downs v. Roman Catholic Archbishop, 683 A.2d 808 (Md.Ct.Spec.App. 1996); Jackson v. Presbytery of Susquehanna Valley, 697 N.Y.S.2d 26 (N.Y.App. 1st Dept. 1999); Natal v. Christian Missionary Alliance, 1988 WL 159169 (D.P.R. Dec. 15, 1988), *aff'd*, 878 F. 2d 1575 (1st Cir. 1989); Schoenhals v. Mains,

- 504 N.W.2d 233, 236 (Minn.App. 1993); McManus v. Taylor, 521 So. 2d 449, 451 (La. Ct. App. 1988); Goodman, *supra*; but see Drevlow, *supra*.
- 18 See, e.g., Van Osdol, *supra*; Bell, *supra*; Olson, *supra*.
- 19 See, e.g., Gosche, *supra*; but see Guinn v. Church of Christ, 775 P. 2d 766 (Okla. 1989).
- 20 See, e.g., Bell, *supra*; Sanders, *supra*; Olson, *supra*; Natal, *supra*; Madsen, *supra*; but see Hemphill v. Zion Hope Prim. Baptist Church, Inc., 447 So. 2d 976 (Fla. 1st DCA 1984).
- 21 See, e.g., Olson, *supra*; Archdiocese of Miami, Inc. v. Minagorri, 2007 WL 756106 (Fla. 3d DCA 2007).
- 22 See, e.g., Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (Title VII and §§ 1985 and 1986); Powell v. Stafford, 859 F.Supp. 1343 (D. Colo. 1994 (age discrimination)); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) (§§ 1981, 1983, 1985, and 1986 claims); Rayburn v. Gen'l Conf. of Seventh-day Adventists, 772 F.2d 1164, 1167-71 (4th Cir. 1985) (gender and race discrimination); McClure, 460 F.2d 553 (5th Cir. 1972) (gender discrimination); Combs v. Central Tex. Annual Conf. of the United Meth. Church, 173 F.3d 343 (5th Cir. 1999) (gender discrimination); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (gender discrimination); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (religious discrimination); Young v. Northern Ill. Conf. of United Meth. Church, 21 F.3d 184 (7th Cir. 1994) (sex and race discrimination); Clapper v. Chesapeake Conf. of Seventh-Day Adventists, 166 F.3d 1208, 1998 WL 904528 (4th Cir. 1998), cert. denied, 119 S. Ct. 2021 (1999) (age and race discrimination); Starkman v. Evans, 18 F. Supp. 2d 630 (E.D. La. 1998) (disability discrimination); Himaka, *supra* (retaliation); EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (gender discrimination); Van Osdol, *supra* (gender discrimination and retaliation); Walker v. First Orthodox Pres. Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. 1980) (sexual orientation claim); Lewis v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979) (sexual orientation claim); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich.App. 1988).
- 23 See, e.g., Dausch v. Ryske, 52 F.3d 1425, 1438 (7th Cir. 1994); Schmidt v. Bishop, 779 F. Supp. 321, 325-26 (S.D.N.Y. 1991); Vogt, *supra*; Amato v. Greenquist, 679 N.E. 2d 446 (Ill. Ct. App. 1st Dist., 3d Div. 1997); H.R.B. v. J.L.G., 913 S. W. 2d 92 (Mo. Ct. App. 1995); Schieffer v. Cath. Archdiocese of Omaha, 508 N.W. 2d 907, 911-12 (Neb. 1993); Bladen, 857 P. 2d at 795.
- 24 Almost every American court presented with a claim for clergy malpractice; i.e., a claim that requires civil authorities to apply objective standards to clergy counseling, has rejected the claim on grounds of ecclesiastical immunity.
- 25 See, e.g., Minagorri, *supra*; Sabatino v. St. Aloysius Parish, 288 N.J. Super. 233 (App. Div. 1996); but see Nigrelli v. Catholic Bishop of Chicago, 1991 WL 36712 (N.D. Ill. 1991).
- 26 EEOC v. Catholic Univ., 83 F.3d 455, 461-63 (D.C. Cir. 1996) (professor of canon law/nun); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. Unit A 1981) (non-ordained Baptist seminary faculty); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (assistant professor of psychology); Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) (applicant for associate professor of theology); but see Ritter v. Mt. St. Mary's College, 814 F.2d 986, 988 n.1 (4th Cir.), cert. denied, 484 U.S. 913 (1987), overruled on other grounds, Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) (professor).
- 27 Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Clapper, *supra*; Little, *supra*; Gosche, *supra*; Bollard v. Cal. Province of the Soc'y of Jesus, 1998 WL 273011 (N.D. Cal. 1998); Gabriel, *supra*; Black, *supra*; Miller v. Cath. Diocese of Great Falls, 728 P.2d 794 (Mont. 1986); Dolter v. Whalert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980); Lewis, *supra*; but see Geary v. Visitation of Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir.), cert. denied, 498 U.S. 846 (1990); Gancy v. Allen Christian Sch., 995 F. Supp. 340 (E.D. N.Y. 1998); Guinan v. Roman Cath. Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998); Grotke v. Canisius High Sch. of Buffalo, 1992 WL 535400 (W.D. N.Y. 1992).
- 28 Assemany, *supra*; Walker, *supra*.
- 29 See, e.g., Starkman, *supra*; Diocese of Raleigh, *supra*; Assemany, *supra*; Bryce, *supra*.
- 30 Geraci v. Eckankar, 526 N.W. 2d 391 (Minn. App. 1995).
- 31 See, e.g., Bryce, *supra*; Rayburn, *supra*; Southwestern Baptist Theological Seminary, *supra*; Combs, *supra*; Assemany, *supra*; Downs, *supra*; Scharon v. St. Lukes Episcopal Pres. Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (hospital chaplain).
- 32 Bell, *supra*.
- 33 See Diocese of Raleigh, 213 F.3d at 801.
- 34 See Southwestern Baptist Theological Seminary, 651 F.2d at 283.
- 35 See Bryce, 121 F. Supp. 2d at 1339.
- 36 Archdiocese of Miami, Inc. v. Miagorri, 2007 WL 756106 (Fla. 3d DCA 2007); Dennis, 862 So. 2d at 844.
- 37 See Doe v. Evans, 814 So. 2d 370 (Fla. 2002) (parishioner's claim against church, diocese, and bishop for the alleged sexual misconduct of a reverend; surveying cases addressing negligent supervision claims and the First Amendment); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (adults and minors alleging that priest fondled, molested, touched, abused, sexually assaulted and/or battered the parishioners on the premises of the church); Rapp v. Jews for Jesus, Inc., 944 So. 2d 460 (Fla. 4th DCA 2006); Elders v. United Methodist Church, 793 So. 2d 1038 (Fla. 3d DCA 2001) (negligence); Carnesi v. Ferry Pass United Meth. Church, 826 So. 2d 954 (Fla. 2002), quashing, 770 So. 2d 1286 (Fla. 1st DCA 2000).
- 38 Evans, 814 So. 2d at 375.
- 39 Compare Mabus v. St. James Episcopal Church, 884 So. 2d 747 (Miss. 2004) (breach of fiduciary duty and fraudulent concealment); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss. 2005) (negligent hiring, assignment and retention, breach of fiduciary duty, fraud, fraudulent concealment, conspiracy to conceal, negligent infliction of emotional distress, negligent misrepresentation, loss of consortium); Richelle v. Roman Catholic Archbishop, 106 Cal.App.4th 257, 130 Cal. Rptr 2d 601 (Cal. App. 1st Dist. 2003) (breach of confidential relationship); Rashedi v. Gen. Bd. of Church of Nazarene, 203 Ariz. 320, 54 P.3d 349 (Ariz. App. Div. 1, Dept. B 2003) (negligent hiring, supervision and employment); *respondent superior*; and intentional infliction of emotional distress); Doe v. Norwich Roman Catholic Diocese Corp., 268 F. Supp. 2d 139, 146 (D. Conn. 2003) (negligent supervision and employment); Fortin v. Roman Catholic Bishop of Portland, 871 A. 2d 1208 (Me. 2005) (breach of fiduciary duty); Larry v. Geoghan, Case No. 990371, 2000 WL 1473579 (Mass. Super June 28, 2000) (negligence); C.B. v. Evangelical Lutheran Church in Am., 726 N.W. 2d 127, 137 (Minn. App. 2007) (respondent superior); Enderle v. Trautman Case, No. CIV. 13-01-22, 2001 WL 1820145 (D.N.D. Dec. 3, 2001) (breach of fiduciary duty, negligent retention, negligent supervision); Doe v. Archdiocese of Cincinnati, 167 Ohio App. 3d 488, 855 N.E. 2d 894, 900 (Ohio App. 1 Dist. 2006) (negligent infliction of emotional distress, negligent supervision, negligent retention); Hodges v. Kleinwood Church of Christ, Case No. 01-98-00384-CV, 2000 WL 994337, at *3 (Tex. App.-Hous. (1 Dist.) July 20, 2000) (negligent hire, fire, and supervision); Doe v. Archdiocese of Milwaukee, 284 Wis. 2d 307, 700 N.W. 2d 180 (Wis. 2005) (negligent supervision, fiduciary fraud, and breach of fiduciary duty recognized against church but rejected) *with* Arlinghaus v. Gellenstein, 115 S.W.3d 351 (Ky. App. 2003) (no cause of action for intentional interference with marital relation by priest); Mars v. Diocese of Rochester, 196 Misc. 2d 349, 763 N.Y.S. 2d 885 (N.Y. Sup. Ct. 2003) ("Any attempt by the court to define standards and rules under which a priest is retained or supervised necessarily and impermissibly involves the court in church doctrine..."); Wende v. United Methodist Church, 6 A.D. 3d 1047, 1050, 776 N.Y.S. 2d 390 (N.Y. Sup. Ct. 2004) ("there is no meaningful analytical distinction between a cause of action for breach of fiduciary duty by a cleric and one for clergy malpractice."); Hodges, 2000 WL 994337, at *3 (no cause of action for breach of fiduciary duty); SHC v. Lu, 113 Wash. App. 511, 54 P.3d 174 (Wash. App. Div. 1 2002) (no cause of action for breach of fiduciary duty, negligent pastoral counseling, negligent retention and supervision, or business invitee).
- 40 Malicki, 814 So. 2d 347. 367 (Harding, J., dissenting).
- 41 *Id.*
- 42 *Id.* See also Lupu and Tuttle, *supra* note 3, at 1845.
- 43 SHC v. Lu, 54 P.3d at 179.
- 44 Doe, 814 So. 2d 370, 381 (Wells, J., dissenting).
- 45 See CJC v. Corp. of Catholic Bishop of Yakima, 138 Wash. 2d 699, 728, 985 P.2d 262 (1999) (*citing* Sanders v. Casa View Baptist Church, 134 F.3d 331, 336 (5th Cir. 1998), cert. denied, 525 U.S. 868 (1998)); Destefano v. Grabrian, 763 P.2d at 285 n. 10 (comparing views of authors about whether pastoral counseling is essentially secular or solely a religious activity). Cf. Bladen, 857 P.2d at 797 ("Once a court enters the realm of trying to define the nature of advice a minister should give a parishioner serious First Amendment issues are implicated.")
- 46 See Jones v. Wolf, 443 U.S. 595, 602-04 (1979).
- 47 Malicki, 814 So. 2d at 364.
- 48 See Mabus, *supra*.
- 49 See Archdiocese of Miami, Inc. v. Minagorri, Case No. 3D06-3015, 2007 WL 756106 (Fla. 3d DCA March 14, 2007) (doctrine barred parochial school principal's whistleblower claim).