

Legal Advice

Over the past several decades, lawsuits against professionals such as doctors, lawyers, accountants, psychologists, and engineers for malpractice have continued to escalate to the point that such professionals need malpractice insurance and seek, through their trade groups, to have protective legislation enacted. But what about the clergy? Can they also be sued for malpractice? The answer is a qualified "yes." Each year there are a number of reported cases involving claims for clergy malpractice throughout the country, some resulting in money damages being assessed against the church leader and their church.

Most jurisdictions no longer have absolute immunity for the actions of clergy, and so there are no prohibitions against initiating a lawsuit. As a basic concept, clergy malpractice is related to a lack of professional skill and the failure to exercise reasonable professional care directed against the claimant seeking such services. It is based upon what the clergyman did or did not do as compared to what a reasonable and prudent clergyman would have done or not done under the same set of circumstances. While there may be a number of circumstances where the issue may arise, a review of the reported cases suggests that there are certain recurring situations that give rise to these claims, which are as follows:

1. Pastoral counseling

A woman who is having marital problems goes to her church for counseling. Over the course of time, she divulges intimate information to the pastor who is counseling her and begins to seek comfort from him. The pastor ends up having sexual relations with her or is alleged to have sex with her. The woman feels betrayed and complains to the pastor's governing body, or files a lawsuit. Interestingly enough, it appears that in many such cases the pastor admits to the improper conduct. A variation on this situation is where a female youth seeks counseling and ends up having sexual contact with the pastor, sometimes after several years have elapsed and she has reached adulthood.

2. Clergy privilege

Most clergy understand that communications made to them by a person seeking spiritual help or guidance are confidential and privileged. All jurisdictions recognize this privilege and hold that a clergyman may not be compelled to disclose what was divulged to him. Malpractice claims have been asserted for

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violating that privilege. Again, one of the more common situations where this has occurred is in the pastoral counseling setting. A spouse admits to his pastor, in the counseling session, that he/she is being unfaithful to the other spouse. The pastor tells his staff and the information gets back to the other spouse.

In one recently reported case, the pastor was counseling a husband and wife who were having marital difficulties in separate sessions. In his session, the husband admitted to having had extramarital affairs. The pastor informed the wife of this fact in her session and offered this as a reason as to why she should abandon the marriage and have sex with the pastor, which she did!

3. Failure to warn

In these lines of reported cases, the pastor learns of information, either through counseling or otherwise in their capacity as a pastor, that a church member is a danger to himself or to others, but fails to warn anyone or to force that person to get help. This person goes on to commit suicide, kill someone or cause harm to others.

As a general rule, the courts are rejecting the idea that there is a claim for clergy malpractice, by that name. They find that there is no law recognizing such a distinct claim and that there is no fiduciary relationship between the pastor and the claimant, meaning the law does not require the pastor to exercise any greater care to the claimant than they would to a stranger. However, some courts are finding that there is such a claim and that there is a special or fiduciary relationship that requires the pastor to exercise reasonable care. The more common approach appears to be that the court does not recognize a claim for malpractice, but does allow other claims to proceed that are independent torts such as assault, defamation, misappropriation of funds, fraud, or any other crime or tort that might apply.

In a New Jersey case that recognized clergy malpractice as a viable separate claim, a woman was allowed to sue a pastor, the church, and the district denomination for claims related to sexual abuse she had suffered while she was in counseling with the pastor. She did not sue for assault. The court observed that this woman was in a vulnerable position, and that the pastor knew this, but used his position to induce her into sexual conduct. The court found that the essence of a fiduciary duty is that one party places trust and confidence in another who is in a dominant or superior position. The court observed that courts in Texas, North Carolina and Colorado had also recognized claims for clergy malpractice. The New Jersey court ruled that all that was required to be shown

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was the woman trusted and sought counseling from the pastor, and the pastor violated that trust.

If clergy malpractice is a recognized claim in your jurisdiction, it might be something that can or should be covered under the church insurance policy. Many policies make exclusions for intentional misconduct. Clergy malpractice could be pleaded as a negligent, not intentional action.

Does your jurisdiction recognize clergy malpractice, and, if so, is it covered under the church's insurance? What policies and procedures does your church have in place to remove or restrict the potential for such a claim? Many of the claims described in the reported cases could have been prevented with proper planning. Even if your church is ultimately found not liable for such malpractice, the loss in terms of money spent to defend the case, distraction and loss of purpose, and damage to reputation can be enormous and far-reaching.

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