CURRENT LEGAL TOPICS IN THE CHURCH

Selected Scriptural Passages:

Matthew 5:21-26, 38-47 (3 Ne. 12:38-45)
D&C 58:21-22
D&C 134:4, 7, 9-10
D&C 42:88-93

Selected Reading Material:

United States Constitution, First Amendment.

JOHN C. BUSH AND WILLIAM HAROLD TIEMANN, THE RIGHT TO SILENCE, (3rd ed. 1989).

Carl H.Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1 (1986).

Fred L. Kuhlmann, *Communications to Clergymen–When Are They Privileged?*, 2 VAL. U. L. REV.265 (1968).

Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends, [no author listed], Annotation, 71 A.L.R. 3d 794 (1976).

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV 1409 (1990).

Seward Reese, *Confidential Communications To The Clergy*, 24 OHIO ST. L.J. 55 (1963).

Arthur Gross Schaefer and Darren Levine, *No Sanctuary From the Law: Legal Issues Facing Clergy*, 30 Loy. L.A. L. Rev. 177 (1996).

Rian Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment As Defense to Tort Liability*, 93 A.L.R. FED. 754 (1989).

Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege–The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967).

Leonard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 146 REG. U. L. REV. 145 (2000).

Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

Notes and Commentary:

Section A: The Sanctity of the Clergy-Penitent Privilege

- *What is the purpose of the clergy-penitent privilege*?

- *What is the theological basis for the confidentiality of a confession*? *Do the laws described here protect what the theology requires?*

- *What should be the role of the government in protecting the confidentiality of the confession*? *Do the laws recited here fulfill that role?*

1. Public Policy Reasons for Recognizing the Clergy Privilege: Why is the clergy-penitent privilege important in our society?

Reading Excerpts:

Trammel v. United States, 445 U.S. 40, 51 (1980)

"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."

People v. Phillips, N.Y.Ct. Gen. Sess. (1938) (printed in Privileged Communications to Clergymen, 1 Cath. Lawyer 199, 207 (1955).

"Secrecy is the essence of penance. The sinner will not confess if the veil of secrecy is removed.

2. Codification of the Clergy-Penitent Privilege: Is the clergy-penitent privilege a creature only of the common law, or has it been codified?

Almost all states now have codified clergy/penitent privileges. The definition of clergy and the definition of penitential communication vary greatly from state to state.

Georgia Code Ann. 24-9-22

"Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communications in any court."

New Jersey Statute Ann. 2A:84A-23

"Any communication made in confidence to a cleric in the cleric's professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which the cleric belongs or of the religion which the cleric professes, shall be privileged. Privileged communications shall include confessions and other communications made in confidence between and among the cleric and individuals, couples, families or groups in the exercise of the cleric's professional or spiritual counseling role."

Utah Code Ann. 78-24-8(3)

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

> A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs."

12 Vermont Statutes Ann. ' 1607

"A priest or minister of the gospel shall not be permitted to testify in court to statements made to him by a person under the sanctity of a religious confessional."

3. What types of communications are protected by the privilege?

As stated above, the type of communication which is protected varies greatly from state to state.

Arizona Criminal Code 13-4062

"A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional capacity, in the course of discipline enjoined by the church to which he belongs." (emphasis added)

California Evidence Code 1032

"As used in this article,–penitential communication' means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret." (emphasis added)

Utah Rule of Evidence 503

"A person has a privilege to disclose and to prevent another from disclosing any confidential communication to a cleric in the cleric's religious capacity and necessary and proper to enable the cleric to discharge the

functions of the cleric's office according to the usual course of practice or discipline. A communication is –confidential' if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." (emphasis added)

Ellis v. United States, 922 F. Supp. 539 (D. Utah 1996). "A communication to LDS Church officials regarding a drowning accident involving church members was not a communication for doctrinal, spiritual, or religious purposes, but was a communication to impart information and report an event. The church leaders did not receive the communication within their religious role as clerics, but as clerics performing an executive function. Therefore, the communication was not privileged."

4. LDS Clergy Are Covered by the Clergy-Penitent Privilege.

State v. Cox, 742 P.2d 694 (Or. App. 1986)

"It is undisputed that Beck was a member of a religious denomination. He was also a >stake president,' with the responsibility for supervising three congregations or >wards.' He testified at a pretrial hearing that stake presidents are accustomed to hearing >confessions':

> >On the local level there are four individuals who I guess you say serve as confessors in that comparison to the Catholic Church. And that is the bishop and the three members of the stake presidency. I'm one of those members.'

He also testified that, as a Mormon minister, he had a duty under the discipline of the church, not to disclose confidential communications made to him. Under the circumstances, we conclude that Beck was a >member of the clergy,' within the meaning of [Oregon's clergy privilege statute]."

Scott v. Hammock, 133 F.R.D. 610, 612-613 (D. Ut. 1990).

"[T]here is no dispute that an LDS Church bishop is a clergyman within the meaning of the Utah Statute. .... [W]hether a bishop or stake president, as the case may be, such person would, in the context of this case, be a person to whom a religious communication would be privileged if the circumstances otherwise allow. The standard is whether, under the doctrines of the church, the official to whom a communication is made is expected to accept and keep confidential communications from members of the church. The LDS Church ... has presented an excerpt from its *Handbook of Instructions* which confirms the role and duties of a bishop or stake president to receive and keep confidential a communication of the church member."

Scott v. Hammock, 870 P.2d 947, 955-56 (Utah 1994). Even non-penitential communications between an LDS cleric and a Church member are privileged.

5. Communications Up and Down the Line by LDS Clergy Retain Their Privilege.

Scott v. Hammock, 133 F.R.D. 610, 619 (D. Ut. 1990) "The clergy privilege protects intra-faith communications regarding a clergy-privileged communication from one ecclesiastical officer to another for the purposes of carrying out church discipline."

6. In some states, members of the clergy hold the privilege themselves, independent of any waiver by the penitent.

California Evidence Code 1033 and 1034

1033: "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."

1034: "Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege."

New Jersey Statutes 2A:84Aa-23

"The privilege accorded to communications under this rule shall belong to both the cleric and the person or persons making the

communication and shall be subject to waiver only under the following circumstances:

(1) both the person or persons making the communication and the cleric consent to the waiver of the privilege; or

(2) the privileged communication pertains to a future criminal act, in which case, the cleric alone may, but is not required to, waive the privilege."

Mockaitis v. Harcleroad, 104 F.3d 1522, 1530-31 (9th Cir. 1997). [warden had surreptitiously tape recorded a prisoner's confession]

"No question exists that [the warden] has substantially burdened Father Mockaitis's exercise of religion as understood in the First Amendment. Father Mockaitis was exercising his religion in a priestly function. He was seeking to participate in the Sacrament of Penance understood by the Catholic Church to be a means by which God forgives the sins of a repentant sinner and restores the sinner to life in God's grace. .... When the prosecutor asserts the right to tape the sacrament he not only intrudes upon the confession taped but threatens the security of any participation in the sacrament by penitents in the jail; he invades their free exercise of religion and doing so makes it impossible for Father Mockaitis to minister the sacrament to those who seek it in jail."

"A substantial burden is imposed on [the Archbishop's] free exercise of religion as the responsible head of the Archdiocese of Portland by the intrusion into the Sacrament of Penance by officials of the state.... Archbishop George has justifiable grounds for fearing that without a declaratory judgment and an injunction in this case the administration of the Sacrament of Penance for which he is responsible in his archdiocese will be made odious by the intrusion of law enforcement officers."

See also **Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L.R. 171 (1998).**

7. Clergy Privilege Also Protects Documents Related to Penitential Communications and to Church Disciplinary Councils.

Hadnot v. Shaw, 826 P.2d 978, 989 (Okla. 1992).

"Initially parishioners sought discovery by interrogatories and requests for production of writings, Church records, and reports pertaining to their expulsion [from LDS Church membership]."

"The Free Exercise Clause prohibits civil courts from inquiring into any phase of ecclesiastical decisionmaking–its merits as well as procedure. Internal ecclesiastical procedure need not meet any "*constitutional concept of due process"*. This is so because the church's judicature *rests solely on consent which in turn is anchored on the ecclesiastical respondent's church affiliation.* Because *religious judicature is immune from any civil inquest*, it is also protected from intrusion by discovery. The church's immunity from disclosure rests neither on a statute nor a code or evidence. Rather its shield is of a *constitutional dimension*. It is founded on the Free Exercise Clause's prohibition against secular re-examination of merits and procedure in ecclesiastical judicature. In sum, if a matter lies within ecclesiastical cognizance, the church stands protected from any interference by the Free Exercise Clause." [emphasis in original]

Scott v. Hammock, 133 F.R.D. 610, 619 (D. Utah 1990).

"It is appreciated that the communication in this case [i.e., internal LDS Church documents] is different than one that involves a declaration by the church member to an assemblage of church officials. In this case, the communication was passed vertically from one religious authority up to another within the church hierarchy. Such communication was necessary as a part of the church sanction process and in carrying out church discipline. The need for the privilege to follow the communication in such circumstances is obvious and appropriate. Otherwise, the privilege would be destroyed and the confidence abridged. Therefore, the repeating of the defendant's [i.e., the penitent's] statement and its communication to superior religious authorities must be

deemed cloaked with confidentiality and privileged from forced disclosure."

Corsie v. Campanalonga, 721 A.2d 733 (N.J. App. 1998). Communications in a vicar's files made by a priest in confidence to a vicar were protected by the cleric-penitent privilege, but not every document contained in the file was necessarily privileged.

***See also*:**
Nicholas Cafardi*, Discovering the Secret Archives: Evidentiary Privileges for Church Records*, 10 J. L. & RELIGION *95* (1993/94).

Jeffrey Hunter Moon*, Protection Against the Discovery of Disclosure of Church Documents and Records*, 39 –ATH. LAW. 27 (1999).

8. Civil Liability for Breach of the Clergy-Penitent Privilege

Alexander v. Culp, 705 N.E.2d 378 (Ohio App. 1997). Allowing an ordinary negligence action, alleging harm stemming from the clergy person's sharing of confidential information gained in marriage counseling, to proceed against the clergy person.

"R.C. 2317.02(C) prohibits clergy from testifying concerning information confidentially communicated during religious counseling. Appellant did not allege that Reverend Culp testified in court concerning his affairs. The statute does not prohibit a minister from disclosing confidential information outside legal proceedings. The legislature did not intend R.C. 2317.02 to protect persons against disclosures outside legal proceedings. R.C. 2317.02 does not create a statutory negligence cause of action in this case. ...."

"In the case of a clergy member, there is no statute akin to R.C. 4731.22 [physician's licence could be revoked for disclosure of confidential patient information], prohibiting the disclosure of confidential information. . . . There is no statute upon which to base an action for statutory negligence in this case." A Even if this action is deemed a clergy malpractice action, the Supreme Court has not disallowed such an action. Public policy supports an action for breach of confidentiality by a minister. There is a public policy in favor of encouraging a person to seek religious counseling. People expect their disclosures to clergy members to be kept confidential. Such a policy is expressed in RC 2317.02, although this statute does not create statutory negligence. Whether a particular case interferes with First Amendment freedoms can be determined on a case-by-case basis." [citations omitted]

Hester v. Barnett, 723 S.W.2d 544, 554 (Mo. Ct. App. 1987).

"While the [clergy privilege] statute no doubt means to encourage an effective relationship between the spiritual advisor and the communicant, the enactment has no effect beyond its actual terms. . . . There is no intimation that [the statute] intends any effect beyond a judicial proceeding B let alone a cause of action for the breach. The privilege, moreover, was not known at common law, and hence the pleading cannot be understood to invoke any tort principle of that system of law to validate a[n] ... action for its breach. . . . The tradition that a spiritual advisor does not divulge communications received in that capacity, moreover, even if a tenet of >ministerial ethics'. . ., describes a moral, not a legal duty. In the absence of a legal duty, a breach of a moral duty does not suffice to invest tort liability."

Lightman v. Flaum, 736 N.Y.S.2d 300, 304-05 (N.Y.App. 2001).

Congregant brought action against two rabbis asserting breach of fiduciary duty and other claims based on disclosures made by rabbis in connection with divorce proceeding.

"We find a distinction between confidential information under the rules and regulations that govern secular professionals and information cloaked by an evidence privilege under the CPLR. This difference demonstrates that statutory privileges are not themselves the sources of fiduciary duties but are merely reflections of the public policy of this State to proscribe the introduction into evidence of certain confidential information absent the permission of or waiver by a declarant."

"The clergy and the other classes of professionals specified in CPLR article 45 are also fundamentally different with respect to the extent of State regulation of their

professional practices. Individuals employed in other fields subject to statutory privileges derive their authority to practice from the State.... In contrast, clerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant spiritual counseling relationship. This explains plaintiff's inability to identify a source of defendants' alleged duty of confidentiality independent of CPLR 4505."

"[T]he prospect of conducting a trial to determine whether a cleric's disclosure is in accord with religious tenets has troubling constitutional implications. To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place fact-finders in the inappropriate role of deciding whether religious law has been violated."

"Guided by these well-settled principles and in the absence of a statute, regulation or other source delineating the scope and nature of the alleged fiduciary duty, we view the CPLR 4505 privilege in the manner intended by the Legislature–as a rule of evidence and not as the basis of a private cause of action.... [W]e hold that, as a matter of law, CPLR 4505Bdirected at the admissibility of evidence–does not give rise to a cause of action for breach of a fiduciary duty involving the disclosure of oral communications between a congregant and a cleric."

***See also*: Lori R. Metz and Linda M. Bolduan, *Clergy Person's Breach of Confidentiality: Is It Actionable in Tort?*, THE BRIEF 24 (Winter 1999).**

Section B: The Apparent Conflict Between Child Abuse Reporting Statutes and the Clergy Privilege

Some states list clergy as mandatory reporters of child abuse, and provide no exception for confessions or confidential communications. The conflict between a duty to church and God versus a duty to the state is well-explicated in the following law review articles:

William A. Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis*, 21 COL. J.LAW. SOC. PROB. 1 (1987).

Danny R. Jeilleux, Annotation, *Validity, Construction and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782 (1989).

Kathryn Keegan, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031 (1986).

Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987).
Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1 (1991).

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

Section C: When is a Lay Member a Legal Representative of the Church?

***Reutkemeier v. Nolte*,** 161 N.W.2d 190 (Iowa 1917). Court held that a church governing body [a "Session" made up of church Elders] was clergy for the purposes of receiving a confession, and members of the Session could not be required to testify about that confession. The case holds that a church may decide who its clergy are.

Section D: Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA)

1. The Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. 2000bb, passed in 1993, provides that "the compelling interest test as set forth in prior Federal court rulings [pre-*Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests", and "restore[d] the compelling interest test and ... guarantee[d] its application in all

cases where free exercise of religion is substantially burdened by the government."

2. *City of Boerne v. Flores*, 521 U.S. 507 (1997) held RFRA unconstitutional as applied to the states.

3. Subsequently, courts have held RFRA constitutional as applied to the federal government. *In re Young*, 141 F.3d 854, 863 (8th Cir. 1998) (holding RFRA constitutional as applied to federal law).

4. In 2000 Congress passed the Religious Land Use and Institutionalized Persons Act, (RLUIPA) 42 U.S.C.A. 2000cc, which provides:

   "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:

   (A) is in furtherance of a compelling governmental interest; and

   (B) is the least restrictive means of furthering that compelling governmental interest."

5. Since RLUIPA's enactment, churches have used it to successfully defeat discriminatory zoning laws and practices:

   Dilaura v. Ann Arbor Charter Township, 2002 WL 273774 (6th. Cir. 2002);

   Murphy v. Zoning Commission of the Town of New Milford, 148 F.Supp.2d 173 (D. Conn. 2001).

Section E: The First Amendment in Tort Litigation Settings

— *What should the Church's over-all purpose be in engaging in litigation? Should such an over-all purpose exist? What other purposes might the Church's engaging in litigation serve?*

— *What kinds of litigation strategies further that purpose or other purposes the Church might have? What kinds hinder it?*

— *Should the Church be more or less likely to settle overall as compared to the average litigant?*

— *In what kinds of litigation will Church policy and doctrine not be relevant? How might they be relevant in the kinds of disputes mentioned in section E.2?*

— *What social policies might animate the First Amendment results described here?*

1. The All-Important Question: Will Adjudication of Plaintiffs' Claims Require a Judge or Jury to Infringe Upon or Delve Into Religious Doctrine?

A. Establishment Clause History:

Watson v. Jones, 80 U.S. (13 Wall) 679 (1871) - church property dispute. "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest ... church judicatories ... the legal tribunals must accept such decisions as final, and as binding on them."***Kedroff v. St. Nicholas Cathedral***, 344 U.S. 94 (1952) – "ejectment action for control of church. Churches must have the "power to decide for themselves, free from state interference, matters of ... faith and doctrine."

Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) - church property dispute. "Civil courts can never >engage in the forbidden process of interpreting and weighing church doctrine' because that would >unconstitutionally' inject the civil courts into substantive ecclesiastical matters."

Serbian Eastern Orthodox Diocese v. Milovojevich, 426 U.S. 696 (1976) - defrocking of bishop. "It is the essence of religious faith that ecclesiastical decisions are to be accepted as matters of faith whether or not rational or measurable by objective criteria."

Jones v. Wolf, 443 U.S. 595 (1979) - church property dispute. First Amendment bars courts from undertaking "an analysis or examination of ecclesiastical policy or doctrine in settling [civil] disputes."

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) - National Labor Relations Board could not exercise jurisdiction over lay faculty members at church-operated schools. "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."

Sliding Scale: Incidental Impact v. Direct Review Easy Examples: Church automobile safety manual vs. breach of duty to "feed my sheep"

Breach of a duty to "feed my sheep" types of cases:

Anderson v. Worldwide Church of God, 661 F. Supp. 1400 (D. Minn. 1987). First Amendment barred claims based on church's allegedly fraudulent representations that the world was coming to an end.

McElroy v. Guilfoyle, 589 A.2d 1083 (N.J. Super 1990). Suspended priest's action against diocese for breach of alleged promise to pay priest's legal fees barred.

Smith v. Tilton, 3 S.W.3d 77 (Tx. App. 1999). Judicial scrutiny of TV evangelist's promises of miracle cures barred, **but not** claims based on representation in church's dun letter to widow that husband made $100 pledge to church two months after his death, which court held was not a representation of religious faith and belief, and could proceed. ***Foreign Mission Board v. Wade***, 409 S.E.2d 144 (Va. 1991). Mission Board did not have contractual duty to protect missionary's wife and children from his unlawful actions.

Church automobile safety manual types of cases:

Statement of the General Rule: *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991). "Defendants concede, as they must, that tort claims can be maintained against clergy for such behavior as negligent operation of the Sunday School van, and other misconduct not within the purview of the First Amendment, because unrelated to the religious efforts of a cleric."

Harder example: *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991). "Any effort by this court to instruct the trial jury as to the duty of care which a clergyman should exercise would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion."

B. Free Exercise Clause

How the Free Exercise Clause Applies to a tort action between private parties:
Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), *aff'd* 185 F. 3d 873 (10th Cir. 1999). A[T]he [District] Court finds that Plaintiff's negligent hiring claim would violate both the Free Exercise and Establishment Clauses.... For this Court to insert itself into the process by which priests are chosen would substantially burden these defendants' free exercise of a crucial power to control the future of the church and therefore constitute interference with the practice of their religion."

Lundman v. McKown, 530 N.W.2d 807, 816 (Mn. App. 1995). Christian Science Church's espousal of spiritual treatment entitled to substantial free exercise protection, precluding imposition of punitive damages in wrongful death action arising from death of child who was treated only through spiritual means; punitive damages could not be imposed on church to force it to abandon teaching its central tenet.

Historic use of Free Exercise Clause to defend against tort litigation:

The long-standing test: Strict Scrutiny

Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F. 2d 1354, 1356-58 (D.C. Cir. 1990). Maintenance of minister's age discrimination suit against his church would violate free exercise clause.

Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1167-69 (4th Cir. 1985). Sexual and racial discrimination suit by woman denied pastoral position barred by Free Exercise Clause.

Impact of *Employment Div., Dept. of Human Res. V. Smith*, 494 U.S. 872 (1990): **Is the standard really generally applicable and neutral?**

Case-by-case determination or system?

Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 537-38 (1993). Court struck down ordinance enacted in response to practice of animal sacrifice required by the Santeria religion. A[I]n circumstances in which individual exemptions from a general requirement are available, the government >may not refuse to extend that system to cases of "religious hardship" without compelling reason.' Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." [quoting *E.D.D. v. Smith*, 494 U.S. at 884]

Exceptions for others?

Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3rd Cir. 1999). Mandating religious exemption from police department no-beard policy because "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny").

For a good discussion of this issue in a landmark designation setting, *see* Laura S. Nelson, *Remove Not the Ancient Landmark; Legal Protection for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 Cardozo L. Rev. 721, 740-749 (1999).

2. Specific Application of First Amendment Defenses

A. Wrongful Excommunication and Shunning

Paul v. Watchtower Bible & Tract Society, 819 F.2d 875 (9th Cir. 1987). Because Jehovah's Witness Church was entitled to the constitutionally protected privilege under the Free Exercise clause to engage in the practice of "shunning" former members, a shunned member could not prevail on tort actions arising from "shunning". "Churches are afforded great latitude when they impose discipline on members or former members."

Glass v. First United Pentacostal Church of DeRidder, 676 So.2d 724 (La. App. 1996). Disfellowshipped members' tort claims dismissed for lack of subject matter jurisdiction.

Schoenhals v. Mains, 504 N.W.2d 233 (Mn. App. 1993). Church members' action against pastor and church to recover for defamation in connection with termination of their membership in the church barred by Establishment Clause.

Rasmussen v. Bennett, 741 P.2d 755 (Mt. 1987). In the absence of any allegation of malice, statements made by church officials in disfellowshipping church members were privileged.

Guinn v. The Church of Collinsville, 775 P.2d 766 (Okla. 1989). Church's disciplinary actions against member of church congregation prior to her withdrawal from the church were shielded from judicial scrutiny by Free Exercise clause.

B. Defamation

Hutchison v. Thomas, 789 F.2d 392, 393-96 (6th Cir. 1986). Affirming dismissal of defamation-related wrongful-termination claim on First Amendment grounds.

Farley v. Wisconsin Evangelical Lutheran Synod, 821 F. Supp. 1286 (D. Minn. 1993). Court lacked jurisdiction on First Amendment grounds to adjudicate minister's action

against church organization for defamation, as resolution would require consideration of ecclesiastical matters.

Cimijotti v. Paulsen, 230 F. Supp. 39 (N.E. Iowa 1964). Husband's defamation action against wife and others based on statements they made to priests during wife's attempt to obtain church sanction for separate maintenance and divorce were absolutely privileged under the First Amendment.

Rasmussen v. Bennett, 741 P.2d 755 (Mt. 1987). Statements made by church officials that plaintiffs had married each other in violation of church doctrine were based on ecclesiastical doctrine and thus protected by the Free Exercise clause.

C. Clergy Malpractice

Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991). AAny effort by this court to instruct the trial jury as to the duty of care which a clergyman should exercise would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion."

Teadt v. St. John's Evangelical Lutheran Church, 603 N.W.2d 816 (Mich. App. 1999). A[T]he claim of clergy malpractice has been universally rejected by courts in the United States."

Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 204 (Ut. 2001). "[C]ourts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment. These courts have generally held that a determination of such claims would necessarily entangle the courts in the examination of religious doctrine, practice, or church polity–an inquiry that we have already explained is prohibited by the Establishment Clause."

D. Breach of Fiduciary Duty

Dausch v. Rykse, 52 F.3d 1425, 1438 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part, joined by Coffee, J., concurring):

"If the court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and to evaluate Rykse's conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the Free Exercise Clause."

Brown v. Pearson**,** 483 S.E.2d 477, 484-85 (S.C. App. 1997).

"Although Reverend Pearson was the superintendent of the Conference district in which Appellants' church was located, and in that position was the direct and indirect recipient of Appellants' charges, his mere occupation of the position of superintendent did not create a fiduciary relationship with these Appellants."

"Neither did the mere expectation on the part of Appellants that Reverend Pearson and the Conference would take action on their complaints create any such relationship. The steps taken unilaterally by the Appellants do not constitute an attempt on their part to establish the relationship alleged, and there is no evidence that Respondents accepted or induced any special, fiduciary bond with any of the Appellants under these facts in any event. The facts establish that Respondents never occupied a position in this matter in which they purported to act only in Appellants' interests. Rather, Respondents' obvious intentions and obligations were to take into account the positions on both sides of the issues involved."

Turner v. The Church of Jesus Christ of Latter-day Saints, 18 S.W.3d 877, 897 (Tx. App. 2000).

"In their causes of action for fraud and breach of fiduciary duty**,** the Turners [Turner was a missionary] claim a confidential relationship existed between Turner and the Church, creating a fiduciary duty by the Church to Turner, and leaving the Church obligated to disclose information to Turner. Determination of the existence of a confidential or fiduciary relationship requires

examination of the relationship between the parties."

"All of [the facts cited by Turner] involve either religious doctrine and practices or the internal policies of the Church. Thus, determination of whether a confidential or fiduciary relationship exists would require the courts to interpret religious doctrine, practices, and the internal policies of the Church. Making such an examination of the relationship between the Church and its missionaries would necessarily involve excessive entanglement by the government in the Church in violation of the Establishment Clause. Accordingly, we conclude that the Turners' claims that a confidential or fiduciary relationship exists between the Church and Turner are barred by the First Amendment." [citations omitted]

For cases allowing such claims, see:

Martinelli v. Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999):

"To the extent that the jury did consider religious teachings and tenets, moreover, it did so to determine not their validity but whether, as a matter of fact, Martinelli's following of the teachings and belief in the tenets gave rise to a fiduciary relationship between Martinelli and the Diocese. The First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters. See, e.g., Jones v. Wolf, 443 U.S. 595, 603, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (court permitted to decide issue as to church property even though it required court to examine religious documents). Although "First Amendment values are plainly jeopardized when ... litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice," Presbyterian Church v. Hull Church, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), neither the district court nor we have made any decision for or against any religious doctrine or practice. The Diocese points to no disputed religious issue which the jury or the district judge in this case was asked to resolve."

Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993).

Doe v. Evans, 814 So.2d 370 (Fla. 2002).

Malicki v. Doe, 814 So.2d 347 (Fla. 2002).

E. <u>Vicarious Liability Claims</u>

Wood v. Benedictine Society of Alabama, Inc., 530 So.2d 801 (Al. 1988). Plaintiff injured by priest who damaged abortion clinic sued priest, bishop and abbot as masters of priest, and clerical order to which priest belonged; court held that the relationship between the priest and clerical order was ecclesiastical and did not necessarily create a legal master/servant or principal/agent relationship.

Stevens v. Roman Catholic Bishop of Fresno, 123 Cal.Rptr. 171 (Cal. App. 1975). In wrongful death action brought against priest and corporation sole following automobile collision, court held that priest was agent of corporation sole and was acting within scope of agency at the time of the collision.

Trinity Lutheran Church v. Miller, 451 N.E. 2d 1099 (In. App. 1983). In a suit by a driver to recover for injuries sustained when auto driven by church member delivering cookies struck him, court held that evidence supported findings that member subjected himself to control of church, and that he was acting within scope of employment when accident occurred, and church was liable.

Brillhard v. Scheier, 758 P.2d 219 (Ks. 1988). In an action brought by a motorist injured when struck by a car driven by pastor, court held that pastor, while engaged in activity within his own discretion and control, was an independent contractor and his negligence could not be imputed to the diocese, even if the activity might benefit the diocese.

F. <u>Negligent Hiring / Selection / Retention</u>

Ropollo v. Moore, 644 So.2d 206 (La. App. 1994). Negligent supervision claims barred by First Amendment.

Swanson v. Roman Catholic Bishop, 692 A.2d 441 (Me. 1997). Claims of negligent selection, training and supervision dismissed on First Amendment Grounds.

Germain v. Pullman Baptist Church, 980 P.2d 809, 815 (Wa. App. 1999). Negligent supervision claims against church, all of whose members must act by majority rule to discharge minister, barred by First Amendment. "The determination of whether to impose liability on a church where the authority is so diffused would require the court to consider and interpret the church's laws and constitution. To do so would violate the First Amendment...."

L.L.N. v. Clauder, 563 N.W.2d 434 (Wisc. 1997). First Amendment prohibits negligent supervision claim.

Pritzlaff v. Archdiocese of Milwaukee, 533 N.W. 2d 780 (Wisc. 1995). First Amendment barred action against archdiocese for negligence in hiring, retaining, training, or supervising priest.

But see Malicki v. Doe, 814 So.2d 347 (Fla. 2002):

> "In this case, the Church Defendants do not claim that the underlying acts of its priest in committing sexual assault and battery was governed by sincerely held religious beliefs or practices. Nor do they claim that the reason they failed to exercise control over Malicki was because of sincerely held religious beliefs or practices. Therefore, it appears that the Free Exercise Clause is not implicated in this case because the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief. Moreover, even assuming an "incidental effect of burdening a particular religious practice," the parishioners' cause of action for negligent hiring and supervision is not barred because it is based on neutral application of principles of tort law. See Lukumi Babalu Aye, 508 U.S. at 531, 113 S.Ct. 2217.

Through neutral application of principles of tort law, we thus give no greater or lesser deference to tortious conduct committed on third parties by religious organizations than we do to tortious conduct committed on third parties by non- religious entities. For example, Florida courts, as well as courts in other jurisdictions, have applied neutral principles of tort law to religious institutions in premises liability cases."

G. Employment

Landmark LDS Church Case [pre-*Smith*]:

Corporation of the Presiding Bishop v. Amos**,** 483 U.S. 327, 339-40 (1987) Individual who had lost job after losing temple recommend brought action against Church for religious discrimination. Court held that applying religious exemption to Title VII's prohibition against religious discrimination in employment to secular non-profit activities of a religious organization was constitutional:

"To dispose of appellee's equal protection argument, it suffices to hold–as we do now–' 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."

"It cannot be seriously contended that ' 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case."

Post-*Smith* Cases:
Coombs v. Central Texas Annual Conference**,** 173 F.3d 343 (5th Cir. 1999). Female clergy member's Title VII claims barred by Free Exercise Clause.

Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997). Ordained minister's suit for various tort causes of action barred because they involved ecclesiastical dispute beyond the reach of civil courts.

E.E.O.C. v. Catholic Univ. of America, 83 F.3d 455 (D.C. Cir. 1996). Two-year investigation by EEOC of Catholic nun's Title VII sex discrimination claim constituted impermissible entanglement under Establishment Clause.

Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994)**.** First Amendment prohibits review of Title VII claims by probationary minister.