BREACH OF FIDUCIARY DUTY—OPENING THE DOOR FOR SUCCESSFUL LITIGATION AGAINST CLERGY AND THE CHURCH.

As many recent news stories have made apparent, suits against clergy and church entities have become more prevalent, or at least more publicized. Many of these suits are a result of sexual abuse in the Catholic Church. "[C]lergy accused of pedophilia have garnered considerable press attention and the ire of the general public."[1] As stated in a recent news article, "[t]housands of adults—nearly 550 in Boston alone, with more to come—have filed suit [against the Catholic Church] over abuse they say occurred when they were boys and girls."[2]

The publicity received by church sexual abuse cases has greatly increased the public awareness of this issue. However, while the media has publicized the facts involved in many of these cases, there has been little attention paid by the media to the First Amendment implications that these cases raise.[3]

Tied to the rise of sexual abuse cases against the Church, cases dealing with pastoral counseling have also been on the rise. Within the past decade, the frequency of lawsuits arising out of pastoral counseling has risen dramatically.[4] Often these arise out of a sexual relationship that was entered into between a clergy member and a parishioner during the course of the counseling relationship. Although sexual abuse of children has been the most publicized example of these improper sexual relationships, there are numerous examples where the basis of

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[1] Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 2 (1996).
[2] Fred Bayles, Cathy Lynn Grossman & Martin Kasindorf, *Priest Scandal Snowballs: Boston Case Starts a Chain Reaction,* DETROIT NEWS, Dec. 26, 2002.
[3] Scott C. Idleman, *Tort Liability: Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000).
[4] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997),* 71 TEMP. L. REV. 743, 743 (1998).

the suit is a sexual relationship that was entered into between a clergy member and an adult woman who was seeking counseling for marital difficulties.[5]

When a parishioner brings a civil suit against a clergy member or against a church entity based on pastoral counseling, he or she routinely asserts claims of clergy malpractice and breach of fiduciary duty.[6] This paper will be primarily focused upon the claims of clergy malpractice and breach of fiduciary duty and the use of the First Amendment as a bar to those claims. While no court has yet recognized a claim for clergy malpractice, numerous courts have allowed claims for breach of fiduciary duty.

The first part of this article will briefly discuss the First Amendment as a bar to suits against church entities and clergy. The second part of this article will focus more in-depth on the claim of clergy malpractice as a basis for a suit. The third part of this article will focus on the claim of breach of fiduciary duty. The fourth part of the part will contain my analysis of these claims and the decisions of courts that have dealt with clergy malpractice and breach of fiduciary duty.

The First Amendment's Bar to Tort Actions Against the Clergy and Church Entities

Any tort action against a clergy member or church entity will inevitably implicate the First Amendment of the United States Constitution. Although the First Amendment will act as a bar to adjudication in many cases, it is not always a bar, and should not be read as barring every tort suit against clergy members or church entities. Before moving into the specific tort claims of clergy malpractice and breach of fiduciary duty, it is important to first generally discuss the First Amendment implications of suits against clergy and church entities.

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[5] *Doe v. Evans*, 2002 WL 389877 (Fla. 2002)

[6] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997),* 71 TEMP L. REV. 743, 744 (1998).

A consequence of this Nation's fundamental belief in the separation of church and state is that, under most circumstances, the First and Fourteenth Amendments preclude civil courts from adjudicating church fights that require extensive inquiry into matters of ecclesiastical cognizance.[7] "The First Amendment language that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…' historically has stood for the strict prohibition of governmental interference in ecclesiastical matters."[8] "A 'spirit of freedom for religious organizations, an independence from secular control or manipulation in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine' is reflected in the Supreme Court's decisions."[9]

"Only on rare occasions where there exists a compelling government interest in regulation of public, health, safety, and general welfare will courts venture into ecclesiastical matters."[10] "Such incursions have been cautiously made so as not to interfere with the doctrinal beliefs and internal decisions of the religious society."[11] Courts may not decide issues involving religious doctrine, belief, discipline, faith or custom.[12] "[T]he Free Exercise Clause protects religious relationships, including the counseling relationship between a minister and his or her parishioner, primarily by preventing the judicial resolution of ecclesiastical disputes turning on matters of religious doctrine or practice."[13] "Thus the law is clear: civil courts are barred by the First Amendment from determining ecclesiastical questions."[14]

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[7] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-11 (1976).
[8] *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) *citing to* U.S. CONST. amend. I.
[9] *Id. quoting Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).
[10] *Id.*
[11] *Id.* at 493.
[12] Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM. L. REV. 193, 196 (1994).
[13] *Sanders v. Casa View Baptist Church*, 134 F.2d 331, 336 (5th Cir. 1998).
[14] *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).

However, the First Amendment does not categorically insulate religious relationships from judicial scrutiny.[15] Courts have repeatedly stressed the well-established principle that, although there is an absolute freedom to believe, the freedom to act upon those religious beliefs is limited, and needs to be limited for the protection of the public.[16] Conduct remains subject to regulation for the protection of society.[17] This government regulation can include both statutory law and court action through civil lawsuits.[18]

The First Amendment has not been interpreted to mean that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation.[19] Nor has it "been applied so as to confer a right to anyone to threaten the public safety, regardless of any religious motivation."[20] The First Amendment does not "shield clerical misconduct from criminal prosecution, nor has it been invoked to shield clerical misconduct from liability for intentional tortuous conduct."[21] If it is demonstrated that the conduct at issue was rooted in religious beliefs, then the court must determine whether the law regulating the conduct is neutral both on its face and in its purpose.[22] The regulation is proper if the court applies neutral principles of law to regulate the conduct.

"The United States Supreme Court has not yet resolved the issue of whether the First Amendment protects a religious institution from liability when a church employee engages in tortuous conduct against a third-party, whether it arises from sexual assault and battery of a

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[15] *Sanders*, 134 F.2d at 335 (5th Cir. 1998).
[16] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997)*, 71 TEMP. L. REV. 743, 744 (1998).
[17] Zanita E. Fenton, ARTICLE: Faith in Justice, Fiduciaries, Malpractice & Sexual Abuse by Clergy, 8 MICH. J. GENDER & L. 45, 70.
[18] *Malicki v. Doe*, 814 So.2d 347, page 6
[19] *Smith*, 494 U.S. 872, 882
[20] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 500; 705 N.Y.S.2d 661 (2000) *citing to Employment Div., Dept. of Human Resources v. Smith,* 494 U.S. 872, 879-90.
[21] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 500; 705 N.Y.S.2d 661 (2000).
[22] *Malicki v. Doe*, 814 So.2d 347 (Fla. 2002).

minor or an adult…or whether it arises in the context of adult counseling."[23] "Substantial authority in both state and federal courts concludes that the right to religious freedom and autonomy protected by the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution based on a claim that a clergy member engaged in tortuous conduct such as sexual assault and battery in the course of his or her relationship with a parishioner."[24] "These courts conclude that there is no impermissible interpretation of religious doctrine because the courts are applying a neutral principal of generally applicable tort law."[25] "Moreover, it has been asserted that a contrary holding actually places a church or its clergy in a preferred position of being immune from tort liability solely because of religion, which in itself would have the impermissible effect of recognizing a religion in violation of the Establishment Clause."[26]

"On the other hand, there is contrary authority from some states and federal courts that concludes that any tort claim against a religious institution founded on negligent hiring or supervision or breach of fiduciary duty is barred because the adjudication of the tort dispute would necessarily involve an examination of the religious institution's method of hiring, supervising, and disciplining its clergy, thus interfering with its religious autonomy."[27] These courts reason that the evaluation of these claims would impermissibly interfere with the right of the church to determine standards governing the relationship between the church and it clergy.[28]

Therefore, while the First Amendment is an impediment to courts freely adjudicating civil matters involving church entities and their clergy, it is not a bar in all cases. Generally,

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[23] *Id.* at 357.
[24] *Malicki v. Doe*, 814 So.2d 347, 358 (Fla. 2002).
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.

courts may not interpret church laws, policies or practices in a manner that will limit the church's ability to fully practice its religion or be guided by its religious principles.[29] However, this does not prevent courts from addressing church-related disputes, provided the court refrains from considering doctrinal matter and resolves the dispute solely on neutral principles.[30] For the protection of society it is important that courts be given some leeway in deciding civil matters involving churches and their clergy.

Clergy Malpractice

Clergy malpractice is a cause of action routinely raised in civil actions against churches and their clergy. Clergy malpractice first received measurable scholarly attention with the case of *Nally v. Grace Community Church of the Valley,*[31] where the cause of action initially appeared.[32] In *Nally*, the parents of a twenty-four-year-old man brought a wrongful death action against Grace Community Church of the Valley after their son, Kenneth Nally, committed suicide.[33]

Kenneth Nally, a member of Grace Community Church of the Valley, had participated in the Defendants' pastoral counseling programs prior to his death.[34] The Defendants held themselves out as "pastoral counselors able to deal with a variety of problems—not as professional, medical or psychiatric counselors."[35]

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[29] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).
[30] *Jones v. Wolf,* 443 U.S. 595, 604 (1989).
[31] *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 763 P.2d 948 (1988).
[32] Zanita E. Fenton, *Faith in Justice, Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 47 (2001).
[33] *Id.* at 47-48.
[34] *Nally,* 47 Cal.3d at 283.
[35] *Id*.

On March 11, 1978, Nally first attempted to take his life.[36] After this first suicide attempt, Pastors MacArthur and Rea, from Grace Community Church of the Valley, visited Nally at the hospital.[37] At the hospital, Nally "separately told both pastors that he was sorry he did not succeed in committing suicide."[38] Neither of the Pastors informed the hospital staff of Nally's "death wish."[39]

Eleven days before successfully committing suicide, Nally met with Pastor Thomson, another Pastor from the Church, for spiritual counseling.[40] During that counseling session, Nally asked Pastor Thomson "whether Christians who commit suicide would nonetheless be saved."[41] Thomson told Nally that "a person who is once saved is always saved", but that "it would be wrong to be thinking in such terms."[42]

The Plaintiffs, Nally's parents, based their wrongful death action on clergy malpractice.[43] They alleged that Defendants' conduct in counseling Nally was outrageous because "they taught or otherwise imbued Nally, whom they knew to be depressed and having entertained suicidal thoughts, with the notion that if he had accepted Jesus Christ as his personal savior, he would still be accepted to heaven if he committed suicide."[44] Additionally, the plaintiffs argued that Nally's statements to Pastors Rea and MacArthur, were "hidden dangers, " and that the Pastors should have warned the hospital staff that Nally was contemplating another suicide attempt.[45]

The California Supreme Court held that a duty should not be imposed on clergy when engaging in spiritual counseling, stating that "the secular state is not equipped to ascertain the

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[36] *Id*. at 285.
[37] *Id*. at 286.
[38] *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 286, 763 P.2d 948 (1988).
[39] *Id.* at 286.
[40] *Id*. at 286.
[41] *Id.* at 286.
[42] *Id*. at 286.
[43] *Id.* at 287.
[44] *Id*. at 288.
[45] *Id*. at 296.

competence of counseling when performed by those affiliated with religious organizations."[46]

The Court went on to state that:

> Because of the differing theological views espoused by the myriad of religions in our state and practiced by the 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 a particular denomination or ecclesiastical teachings of the religious entity.[47]

Following *Nally,* no American Court has allowed a claim for clergy malpractice to go forward.[48] These Courts state that a claim of clergy malpractice would require a determination of the duties owed by a member of the clergy to a parishioner.[49] Allowing a claim for clergy malpractice would cause courts to attempt to define the duty of care owed by a clergy member to a parishioner and would foster an excessive entanglement with religion. "Because the judiciary must abstain from ecclesiastical disputes involving questions of doctrine or practice, state courts have rejected uniformly claims for clergy malpractice"[50]

As stated by the New Jersey Supreme Court in *F.G. v. MacDonell,*[51] Clergy malpractice is not an appropriate form of relief to recover against clergy members for sexual misconduct occurring when a clergy member is providing counseling to a parishioner, since such a claim requires the definition of a relevant standard of care as a matter of particular church beliefs and practices, which would restrain the free exercise of religion.[52] Defining such standards forces the court to investigate and review the skill, training, and standards required of clergy members in

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[46] *Id.* at 298.
[47] *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 299, 763 P.2d 948 (Cal. 1988).
[48] *Langford v. Roman Catholic Diocese of Brooklyn,* 271 A.D.2d 494; 705 N.Y.S.2d 661, 662 (2000)
[49] *Id.* at 662.
[50] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 337 (5th Cir. 1998).
[51] *F.G. v. MacDonell,* 150 N.J. 550, 696 A.2d 697 (N.J. 1997).
[52] *Id.*

different religions, denominations, and sects.[53] Undertaking such a task causes courts to become heavily entangled in religious doctrine and practice.[54]

When defined as a requirement to exercise the skill and knowledge of members of the profession, an action for clergy malpractice is incompatible with the separation of church and state.[55] "Thus, as [numerous courts] have correctly concluded, to recognize a claim for clergy malpractice would require courts to identify and apply the teachings of a particular faith, thereby making the judiciary responsible for determining what conduct and beliefs are part of a particular religion."[56] "It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric…performed within the level of expertise expected of a similar professional following his calling, or practicing his profession within the community."[57]

Many Courts have used this same reasoning to bar claims of breach of fiduciary duty as well. While some courts have found that a claim for clergy malpractice and breach of fiduciary duty are separate and distinct claims, allowing plaintiffs to recover for breach of fiduciary duty, other courts have found that the two claims are indistinguishable and have not allowed recovery for either claim.[58]

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[53] *Id.*
[54] Paul A. Clark, *Clergy Malpractice After F.G. v. MacDonell and Sanders v. Casa View Baptist Church,* 22 AM. J. TRIAL ADVOC. 229, 231 (1998).
[55] Zanita E. Fenton, *Faith in Justice, Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 55 (2001).
[56] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 337 (5th Cir. 1998).
[57] *Schmidt v. Bishop,* 779 F. Supp. 321, 327 (N.Y.S.2d 1991).
[58] *See Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822-23 (Mich Ct. App. 1999), the court held that the claim of breach of fiduciary duty against a pastor for engaging in a sexual relationship with parishioner during the course of a pastoral counseling was tantamount to impermissible clergy malpractice claim. *See also Schmidt v. Bishop*, 779 F.Supp. 321, 325-26 (S.D.N.Y. 1991), the court held that the First Amendment barred a child's breach of fiduciary duty claim against pastor.

Breach of Fiduciary Duty Claim

In contrast to clergy malpractice, several parishioners have brought successful claims for breach of fiduciary duty.[59] The theory underlying this claim is that the clergy-parishioner counseling relationship, while not a professional relationship, places the clergy member in the position of fiduciary and imposes a duty upon him to refrain from inappropriate behavior.[60]

A fiduciary is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking."[61] For a fiduciary relationship to exist, there must be an "interaction that creates trust and reliance," allowing one party to occupy a superior position to another.[62] Inherent in this definition is an imbalance of power between the parties.[63] It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed.[64] The pattern that emerges is one where courts will extend the protection of fiduciary law to relationships whenever their prime characteristic is that "the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party."[65]

"Historically, fiduciary relationships include: trustee to beneficiary; guardian to ward; attorney to client; executor to legatees or beneficiaries; partner to partner; corporate directors or officers to the corporation; majority shareholders to other shareholders; and bailor to bailee.

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[59] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997)*, 71 TEMP. L. REV. 743, 744.
[60] *Id.* at 744.
[61] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997),* 71 TEMP. L. REV. 743, 751 *citing to Destafano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988).
[62] *Id.* at 753.
[63] *Id.* at 762.
[64] Zanita E. Fenton, *Faith in Justice, Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 62 (2001).
[65] Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1, 41 (1996).

Some courts have found fiduciary relationships between physicians and their patients, social workers and their charges; and between ministers and parishioners.[66]

Although cases that have allowed breach of fiduciary duty claims in relationships between parishioners and churches or their clergyman, clearly have no historical basis in the law of agency, and there is no professional relationship that typically exists between these parties,[67] some courts have been willing to find a fiduciary relationship. While the clergy-parishioner relationship is not, per se, fiduciary, the interaction that occurs between these parties creates trust and reliance, establishing the basis for a confidential relationship that can become fiduciary in nature.[68] As with any breach of fiduciary duty claim, in the pastoral counselor context, a parishioner must show the existence of a fiduciary relationship, an attendant fiduciary duty, and that the duty was breached.[69]

Some State and Federal Courts have rejected both the fiduciary duty theory and the clergy malpractice theory as a means of recovery for counselees injured by the sexual misconduct of their clergy.[70] Other courts have denied clergy malpractice claims, but allowed claims based on breach of fiduciary duty, reasoning that a breach of fiduciary duty involves a betrayal of trust and does not require a professional relationship or a professional standard of care—two criteria of a clergy malpractice action cited by courts as reasons for denial of clergy malpractice causes of action.[71] Courts allowing fiduciary duty actions to proceed find that the combination of the position of trust held by the clergy, exacerbated by the counseling

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[66] *Id.* at 40.
[67] 7 Colo. Prac., Personal Injury Torts and Insurance § 25.14 (2d ed.).
[68] *Moses v. Diocese of Colo.,* 863 P.2d 310 (Colo. 1993).
[69] 7 Colo. Prac., Personal Injury Torts and Insurance § 25.14 (2d ed.).
[70] Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1, 37-38 (1996).
[71] *Id.*

relationship, meant that the clergy, who were in a superior position to the counselees, assumed a duty to act in good faith, and then breached that duty.[72]

In *Dausch v. Rykse,*[73] the Seventh Circuit affirmed the dismissal of a breach of fiduciary duty claim against a clergy member. Linda Dausch, a member of the congregation of the Knox Presbyterian Church, sought counseling from her church's pastor, Reverend Greg Rykse.[74] Dausch alleged in her complaint that the church and the Reverend had a duty to provide psychological counseling to members of the congregation, which would include Dausch.[75] However, according to Dausch's complaint, Rykse "engaged in dangerous and improper counseling relations with Plaintiff, which included engaging in sexual contact during the course of psychotherapy with Plaintiff, an emotionally dependent patient."[76]

Dausch claimed that the counseling relationship between herself and Rykse started after a coordinator at the Church had called her to inquire why she was not attending church and recommended that she seek counseling from Rykse.[77] Dausch further claimed that Rykse had told her that she needed secular counseling, not religious, and that he could provide that for her, and that it was included in his job description at the church.[78] Dausch attended counseling sessions with Rykse from January 1988 until May 1990.[79] Dausch claimed that during her counseling sessions, Rykse had stated that "religion does not apply here."[80] "[O]n June 14, 1998, Rykse allegedly gave Dausch an ultimatum: "I have been giving to you, and I need something back for my services. You must give back to me or I will not work with you

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[72] Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship,* 74 DENV. U. L. REV. 1, 37-38 (1996).
[73] *Dausch v. Rykse,* 52 F.3d 1425 (7th Cir. 1994).
[74] *Id.* at 1427 (7th Cir. 1994).
[75] *Id*.
[76] *Id*.
[77] *Id.* at 1428.
[78] *Id*.
[79] *Id*.
[80] *Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994).

anymore."[81] " From that point until the end of Dausch's counseling sessions with Rykse, the therapy sessions began with sexual relations [between Dausch and] Rykse."[82]

In answering Dausch's claim of professional negligence, the Court of Appeals found that the District Court's holding that the claim for professional malpractice should not be allowed was correct, because it was actually a claim for clergy malpractice which was not a recognized cause of action in the state of Illinois.[83] Additionally, the court stated that "the allegation of fiduciary duty was simply an elliptical way to state a clergy malpractice claim, a cause of action that it had already held to be not recognized in Illinois."[84]

In *Sanders v. Casa View Baptist Church*,[85] the Fifth Circuit permitted a claim for breach of fiduciary against a church and its minister.[86] In *Sanders,* Robyn Sanders and Lisa Mullanix, brought suit against their employer, Casa View Baptist Church (CVBC), and one of it ministers Shelby Baucum.[87] The claims against Baucum were that he had committed malpractice and breached his fiduciary duties as a marriage counselor by, "among other things, encouraging and consummating a sexual relationship with each plaintiff."[88]

"In 1998, CVBC hired Baucum to be its Minister of Education and Administration (MEA).[89] As the MEA, Baucum understood that his duties did not include counseling and that he was not part of spiritual counseling staff that the church provided to its members.[90] Regardless of this knowledge, in December 1990, Baucum began providing marriage counseling to Mullanix, a member of CVBC.[91] In February 1991, CVBC hired Sanders as a secretary for

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[81] *Id*.
[82] *Id*.
[83] *Id.*
[84] *Id.* at 1429.
[85] 134 F.3d 331 (5th Cir. 1998).
[86] *Id*.
[87] *Id.* at 333.
[88] *Id.* at 334.
[89] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 334 (5th Cir. 1998).
[90] *Id.* at 334.

Baucum and she also began seeing him for marital counseling.[92] Baucum had represented to both of these women that "he was qualified by education and experience to provide marital counseling."[93] They both believed that he was authorized by the church to provide marital counseling.[94] The jury found that through these actions, Baucum had "entered into fiduciary relationships with the Plaintiffs because he acquired influence and gained their trust and confidence during the course of these separate counseling relationships."[95]

"At trial the Plaintiffs presented evidence that Baucum had breached his duties as a marriage counselor, not only by expressing love and affection for each of them and encouraging them both to express these feelings for him, but also by engaging in sexual intercourse with each of them on numerous occasions."[96] "They also presented evidence that Baucum breached his fiduciary duties…by disclosing their confidences, including intimate details of their marriages and sexual histories."[97]

"Although Baucum testified that he sometimes discussed scripture in his counseling sessions with Mullanix and Sanders, the jury found that the counseling he provided was "essentially secular" in nature."[98] In appealing the jury's decision, Baucum argued that the First Amendment precluded judicial review of certain ecclesiastical disputes, and that "his secular misconduct as the plaintiffs' counselor was not actionable because it occurred within two inherently ecclesiastical, rather than purely secular counseling relationships.[99] He also argued

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[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id.*
[96] *Id*.
[97] *Id*.
[98] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 334 (5th Cir. 1998).
[99] *Id.* at 335.

that he should be entitled to judgment because the plaintiffs' claims "were in essence noncognizable claims of clergy malpractice."[100]

In disagreeing with Baucum's assertions in his appeal, the Court of Appeals stated that "[t]he First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships."[101] They stated that "Baucum's contention that the Free Exercise Clause prohibits the judiciary from reviewing the conduct of those involved in relationships that are not purely secular in nature might, if adopted, foster the development of some important spiritual relationships by eliminating the possibility of civil or criminal liability for participating members of the clergy, the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in society."[102]

The Court of Appeals continued by stating "that the First Amendment's respect for religious relationships does not require a minister's counseling relationship with a parishioner to be purely secular in order for a court to review the propriety of the conduct occurring within that relationship."[103] "Instead, the Free Exercise Clause protects religious relationships, including the counseling relationship between a minister and his or her parishioner, primarily by preventing the judicial resolution of ecclesiastical disputes turning on matters of religious doctrine or

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[100] *Id*.
[101] *Id.* at 335-36.
[102] *Id.* at 336.
[103] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 334 (5th Cir. 1998). The statement was a response by the Court to Baucum's argument that the Fourth Circuit in *Dausch* had required that the counseling would have to be purely secular for a claim to go forward.

practice."[104] The Court said that First Amendment difficulties posed by a clergy malpractice claim were not present because in this case the plaintiffs' claims were for malpractice by a marriage counselor and breach of fiduciary duties were not derived from religious doctrine.[105]

The Court stated that their decision was consistent with the Seventh Circuit's *Dausch* decision because the jury in *Sanders* had been instructed that the primary relationship between a minister and a parishioner is not a fiduciary one, and that Baucum could not be held liable for breaching his fiduciary duties unless he acquired and abused influence and betrayed confidences learned in a relationship of trust.[106] The jury found that "Baucum held himself out as possessing the education and experience of a professional marriage counselor, his counseling activities with the plaintiffs were judged, not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances."[107] In contrast, in *Dausch* the Plaintiff asserted that her pastor was her fiduciary, not because of his conduct as her counselor, but simply because of her status as a member of the congregation seeking counseling and his status as her pastor and counselor.[108] The Court concluded that for Defendant Baucum to invoke the protection of the First Amendment, he would have had to assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief.[109]

In *Moses v. Diocese of Colorado,*[110] the Supreme Court of Colorado affirmed the trial court's judgment holding a Bishop and Episcopal Diocese directly liable for a breach of fiduciary

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[104] *Id.* at 336.
[105] *Id.* at 337.
[106] *Id.* at 334.
[107] *Id.* at 337.
[108] *Id*.
[109] *Sanders v. Casa View Baptist Church,* 134 F.3d 331, 334 (5th Cir. 1998).
[110] *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993).

duty. The *Moses* decision arose out of a suit by Mary Moses Tenantry (Tenantry) against the Episcopal Diocese of Colorado and Bishop William Frey for breach of fiduciary duties.[111] Tenantry, who had been a parishioner at two Episcopal Churches in Denver, sought counseling from Father Paul Robinson who was an assistant priest at one of the churches where Tenantry was a parishioner.[112] Tenantry had sought counseling from Father Robinson to discuss her fear that she was responsible for the cerebral palsy that afflicted her youngest child.[113] Prior to entering into the counseling with Father Robinson, Tenantry had a long history of mental illness.[114] "While counseling and advising Tenantry, Father Robinson entered into a sexual relationship with her that included multiple acts of both fellatio and cunnilingus."[115] When Tenantry's relationship with Father Robinson ended, she suffered a relapse and aggravation of her mental illness.[116]

After finding out about the affair between Tenantry and Robinson, Tenantry's husband met with Bishop Frey, Father Robinson's superior, to discuss the affair and to ask the Bishop to take care of the matter.[117] Tenantry met with the Bishop after her husband.[118] At the meeting, Tenantry described her past to Bishop Frey and explained that she had an intimate relationship with Father Robinson.[119] Tenantry discussed her fear of not having salvation because of her acts and Bishop Frey granted her absolution.[120] Bishop Frey told her not to talk about the relationship with anyone except her husband.[121] Later, Tenantry had a chance meeting with

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[111] *Id.* at 314.
[112] *Id.*
[113] *Id.* at 316.
[114] *Id.* at 314.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 318.
[118] *Id.*
[119] *Moses v. Diocese of Colorado,* 863 P.2d 310, 318 (Colo. 1993).
[120] *Id.* at 318.
[121] *Id.*

Father Robinson at a local hospital. After that meeting, her marriage ended in divorce and her mental health deteriorated.[122] The jury found that Bishop Frey and the Diocese breached their fiduciary duties to the Tenantry.[123]

The Colorado Supreme Court stated that a decision in this case would not require a reading of the Constitution and Canons of the Protestant Episcopal Church or any other documents of church governance.[124] The Court went on to say that "[b]ecause the facts of this case do not require interpreting or weighing church doctrine and neutral principles of law can be applied, the First Amendment is not a defense against Tenantry's claims.[125]

The Defendants in *Moses* attempted to get the Colorado Supreme Court to overrule prior Colorado law and find that breach of fiduciary duty was akin to clergy malpractice.[126] However, the Court stated that breach of fiduciary duty and clergy malpractice are not identical claims and involve different elements.[127] The Court concluded that there was sufficient evidence to allow the jury to find that a fiduciary duty existed between Bishop Frey the Diocese and Tenantry and that the breach of the fiduciary duty caused Tenantry's injuries.[128]

In *F.G. v. MacDonell*,[129] the Supreme Court of New Jersey allowed a claim for of breach of fiduciary duty against a clergy member. That Court held that a claim of breach of a fiduciary duty could be maintained against a cleric for sexual misconduct during the course of counseling

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[122] *Id.* at 314.
[123] *Id*.
[124] *Id.* at 321.
[125] *Id*.
[126] *Moses v. Diocese of Colorado,* 863 P.2d 310, 322 (Colo. 1993), the defendant was trying to get the court to overrule *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).
[127] *Id.* at 321.
[128] *Id*.
[129] *F.G. v. MacDonell,* 150 N.J. 550, 696 A.2d 697 (N.J. 1997).

a parishioner.[130] In so holding, the court reasoned that the First Amendment protection does not extend to the inappropriate actions of clergymen entrusted with the counseling of parishioners.[131]

The Plaintiff, F.G., was a parishioner at All Saints Episcopal Church in Bergenfield, New Jersey.[132] F.G. sought counseling from Defendant, Reverend Alex MacDonnell, the rector at All Saints Episcopal Church.[133] F.G. alleged that during the course of these counseling sessions, Reverend MacDonnell preyed upon her vulnerability and seduced her into a sexual relationship.[134]

F.G. sought recovery against MacDonnell for breach of fiduciary duty.[135] In concluding that F.G. could recover on her breach of fiduciary duty claim, the New Jersey Supreme Court stated that "[a]n action for breach of a clergyman's fiduciary duty permits the parishioner to recover monetary damages without running the risk of entanglement with the free exercise of religion."[136] The Court went on to state that "[u]nlike an action for clergy malpractice, an action for breach of fiduciary duty does not require establishing a standard of care and its breach."[137] "Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor."[138] "A violation of that trust constitutes a breach of the duty."[139]

The Court of Appeals of Oregon has also found that the First Amendment does not act as a shield to liability for breach of fiduciary duty in *Erickson v. Christenson.*[140] In *Erickson*, a pastor established a relationship with one of his parishioners in 1970 when she was thirteen years

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[130] *Id.*
[131] *Id.*
[132] *Id.* at 556.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 555.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989)

old. According to Erickson, her pastor, Christenson, had coerced and manipulated her to have sexual relations with him.[141]

The Court in *Erickson* briefly discussed Christenson's argument that Erickson's breach of fiduciary duty claim was actually a claim for clergy malpractice. The court noted that a claim for breach of fiduciary relationship is different from a claim of clergy malpractice.[142] Second, because Erickson's claims were not premised on Christenson's position as a pastor, but rather on the relationship of trust and confidence that developed during counseling, the court allowed Erickson's claim for breach of fiduciary duty.[143]

Another Oregon case, *C.B. v. Grammond,*[144] a case brought in the United States District Court for the District of Oregon, found that an action for breach of fiduciary duty could be maintained. The Plaintiff, designated as CB, was a parishioner of the defendants, the Archdiocese of Portland in Oregon.[145] CB alleged through his complaint that Maurice Grammond, a Roman Catholic priest who was employed by the Archdiocese of Portland in Oregon, sexually abused him during the period of time that he served as an alter boy.[146] One of the claims brought by CB was for breach of fiduciary duty.[147] The suit was originally brought in State court and removed to the Federal District Court.[148]

The District Court quickly disposed of the argument that the First Amendment should bar the breach of fiduciary duty claim by stating that the court had "already discussed a claim for

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *C.B. v. Grammond*, 2001 U.S. Dist. LEXIS 23621 (Dist Ct. of OR. 2001).
[145] *C.B. v. Grammond*, 2001 U.S. Dist. LEXIS 23621, 2 (Dist Ct. of OR. 2001).
[146] *Id.*
[147] *Id.*
[148] *Id.*

breach of fiduciary duty and found that such a claim does not implicate First Amendment rights."[149]

A recent Florida Supreme Court decision allowed a breach of fiduciary duty suit in a case dealing with marital counseling by a clergyman.[150] In *Doe v.* Evans, Jane Doe brought a suit against William Dunbar Evans III, the Church of the Holy Redeemer, Inc., the Diocese of Southeast Florida, Inc., and Calvin O. Schofield, Jr., a bishop at the Diocese. The claim arose out of a marital counseling relationship between Doe and Evans that lasted for several months.

Doe's Complaint asserted that part of Evans' duties as pastor included providing counseling and spiritual advice to parishioners having marital difficulties.[151] The Complaint was premised on the fact that during the course of this marital counseling, Evans instituted a personal relationship and became involved with Doe in a romantic manner.[152] Doe claimed that none of the defendants' conduct was motivated by sincerely held religious beliefs.[153] She alleged that the Defendants assumed a fiduciary duty to her by directly soliciting her trust and confidence. Evans then breached that duty by becoming romantically involved with her and by failing to adequately keep Doe's interests paramount, and the Church Defendants allegedly breached their duty because they were aware early on in the counseling process that Evans was abusing his position of trust and failed to protect Doe.[154]

In *Doe*, the Florida Supreme Court stated that "a fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation."[155] The Court also stated that "one

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[149] *C.B. v. Grammond*, 2001 U.S. Dist. LEXIS 23621, 12 (Dist Ct. of OR. 2001).
[150] *Doe v. Evans*, 2002 WL 389877 (Fla. 2002)
[151] *Id.* at 1.
[152] *Id.* at 1.
[153] *Id* at 1.
[154] *Id.*
[155] *Id.*

standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."[156] The Court went on to "hold that when a church, through its clergy, holds itself out as qualified to engage in marital counseling and a counseling relationship arises, that relationship between the church and the counselee is one that may be characterized as fiduciary in nature."[157]

The *Doe* Court stated that they agreed with the reasoning of courts that have determined that the evaluation of whether a fiduciary relationship arose and whether a religious organization breached this duty does not require an adjudication of religious doctrine or beliefs.[158] The Court stated that "allowing Doe's claim to be adjudicated in a secular court neither infringes upon nor restricts the religious practices of the Church Defendants and thus does not constitute a Free Exercise Clause violation."[159] The Court continued stating that "Doe's breach of fiduciary duty claim is governed by neutral law principles of general application."[160]

Generally the cases that have rejected the cause of action for breach of fiduciary duty have chose not to distinguish between the cause of action for breach of fiduciary duty and that for clergy malpractice; furthermore, those courts have determined that either cause of action would impermissibly entangle courts in religious matters.[161]

In *Schieffer v. Catholic Archdiocese of Omaha*[162] the Supreme Court of Nebraska held that the First Amendment barred an adult parishioner who engaged in a sexual relationship with a priest during the course of pastoral counseling from bringing a breach of fiduciary duty

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[156] *Id.*
[157] *Id.*
[158] *Id.* at 5.
[159] *Id.*
[160] *Id.*
[161] Zanita E. Fenton, *ARTICLE: Faith in Justice, Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 50 (2001).
[162] *Schieffer v. Catholic Archdiocese of Omaha* , 244 Neb. 715, 508 N.W.2d 907, 911-13 (1993).

claim.[163] In 1979, Schieffer began seeing Lange for counseling regarding family matters.[164] Lange was Schieffer's parish priest and "spiritual leader."[165] During the course of pastoral counseling, "Lange made sexual advances toward [Schieffer] that continued for a period of 3 years."[166] In 1982, Lange and Schieffer began a sexual relationship that continued approximately seven years.[167] At all relevant times, Lange was an employee of the Archdiocese.[168] One of the claims brought by the Plaintiff was for breach of fiduciary duty.[169]

Schieffer alleged that Lange had a fiduciary obligation to her to refrain from doing anything that might harm her relationship with her husband and children, "in light of Lange's continuing duty to exercise reasonable care."[170] In *Schieffer*, the Nebraska Supreme Court decided to follow the reasoning in *Schmidt v. Bishop*, in finding that a claim of breach of fiduciary duty was similar to a claim for clergy malpractice and would create many constitutional difficulties with regard to defining a standard of care.[171]

Schmidt v. Bishop[172] is a case from the District Court for the Southern District of New York. When Schmidt was twelve years old she began receiving counseling from Reverend Joseph Bishop. Shortly after the counseling relationship began, Schmidt and Bishop entered into a sexual relationship. To justify his conduct, Bishop told Schmidt that "the relationship was

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[163] *Id.*
[164] *Id.* at 716.
[165] *Id.*
[166] *Id.* at 717.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 718.
[170] *Id.* at 720.
[171] *Id.* at 720-21.
[172] 779 F. Supp. 321, 324 (N.Y.S.D. 1991)

special and acceptable in the eyes of the lord." This relationship continued until Schmidt was forty years old.[173]

The District Court began by examining the nature of fiduciary relationship. In reconciling the potentially broad nature of the relationship, the court reasoned that, although "it is clear that not every confidential relationship…involves…a "fiduciary relationship;" the concept of fiduciary also comprehends informal relations."[174] The court subsequently reasoned that a fiduciary duty claim was essentially an allegation of "clergy malpractice."[175] The court concluded that defining or articulating the scope of the duty owed by clergy, under either a clergy malpractice claim or breach of fiduciary duty claim, raises constitutional difficulties that a court may not address.[176]

In *Teadt v. Lutheran Church Missouri Synod,*[177] the Michigan Court of Appeals held that a claim of breach of fiduciary duty against a pastor for a sexual relationship with a parishioner during the course of pastoral counseling was tantamount to impermissible clergy malpractice. *Teadt* raised a question of first impression in Michigan regarding whether to recognize a cause of action for breach of fiduciary duty against a member of the clergy who engaged in a sexual relationship with a parishioner.[178]

The case arose out a relationship between Linda Teadt and Robert Garbisch that lasted from late 1989 until the fall of 1994.[179] Garbisch was the pastor of the defendant St. John's church during the period of the relationship.[180] Teadt's relationship with Garbisch began when

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[173] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997)*, 71 TEMP. L. REV. 743, 748 (1998).
[174] *Id.* at 748.
[175] *Id*.
[176] *Id.* at 748-49.
[177] *Teadt v. Lutheran Church Missouri Synod* , 237 Mich. App. 567, 578; 603 N.W.2d 816 (1999).
[178] *Teadt v. Lutheran Church Missouri Synod,* 237 Mich. App. 567, 569; 603 N.W.2d 816 (1999).
[179] *Id.* at 569.
[180] *Id*.

he visited her at home before surgery on her lower back.[181] Garbisch assumed the role of pastoral counselor and attempted to help Teadt with several personal difficulties that she faced.[182] At some later point, Teadt and Garbisch engaged in a sexual relationship.[183] Garbisch claimed that the sexual relationship was consensual, however, Teadt claimed that "Garbisch began making sexual advances toward her and that when she protested, he misled her with his distorted views of Christian morality, which confused [her] because of Garbisch's superior status as pastor of her church."[184]

Although a cause of action for breach of fiduciary duty had not been recognized in Michigan in the context of a counseling relationship between a clergyman and a parishioner, Teadt argued that Michigan should adopt the reasoning of *F.G. v. MacDonell.*[185] However, the Michigan Court of Appeals reasoned that "[Teadt's] allegations that Garbisch misused his superior position as her pastor and counselor in order to achieve a sexual relationship with her [revealed] that the gist of [her] action [was] in fact clergy malpractice."[186] The Court went on to say a claim for clergy malpractice is not recognized in Michigan, as it has not been recognized by any United States Court.[187]

Although, Teadt urged the Michigan Court of Appeals to follow jurisdictions that have made a distinction between breach of fiduciary duty and clergy malpractice and find that a claim for breach of fiduciary duty should be allowed, the Court chose to follow the reasoning in

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[181] *Id*.
[182] *Id.* at 570.
[183] *Id*.
[184] *Id.* at 570-71.
[185] *Id.* at 574.
[186] *Id.* at 578.
[187] *Id*.

Langford v. Roman Catholic Diocese of Brooklyn, and decided not to recognize a breach of fiduciary duty claim.[188]

In *Langford v. Roman Catholic Diocese of Brooklyn,*[189] the Supreme Court of New York, Kings County held that a parishioner could not maintain a civil action against a priest for breach of fiduciary duty, occurring when the priest allegedly seduced her.[190] On Appeal, the Supreme Court of New York, Appellate Division, Second Department, affirmed the lower court's decision.[191]

Langford, arose out of a suit by a parishioner (Susan Langford) against Monsignor Nicholas Sivillo.[192] "The relationship between Sivillo and [Langford] commenced in 1989 when, after being diagnosed with multiple sclerosis, [Langford] looked to God for direction."[193] "Feeling fearful, hopeless, and suicidal, Langford turned to her parish church, the Defendant Our Lady of Hope, for direction and counseling regarding the effects of her disease."[194] "In February 1989 she first spoke with the Defendant, Monsignor Nicholas Sivillo."[195] After that point, Sivillo visited Langford's home where he counseled her and "consoled her with assurances that he would beseech the Lord to fill her with peace."[196] "When [Langford's] condition went into remission, [she] believed that it was due to Sivillo's prayers."[197] "While the relationship between Sivillo and [Langford] initially involved spiritual counseling, it later evolved to include a sexual component."[198] "Convinced that Sivillo was indeed her lifeline without whose

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[188] *Teadt v. Lutheran Church Missouri Synod,* 237 Mich. App. 567, 579-80; 603 N.W.2d 816 (1999).
[189] *Langford v. Roman Catholic Diocese of New York,* 677 N.Y.S.2d 436 (1998).
[190] *Langford v. Roman Catholic Diocese of New York,* 677 N.Y.S.2d 436 (1998).
[191] *Id*.
[192] *Id*.
[193] *Id.* at 495.
[194] *Id.* at 497.
[195] *Id.*
[196] *Id*.
[197] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 495; 705 N.Y.S.2d 661 (2000).
[198] *Id.*

counseling her physical condition would certainly regress, Langford succumbed to his advances and began to have sexual intercourse with him."[199] In 1992, Langford began to see a secular therapist who eventually determined that Sivillo had manipulated and used her.[200]

The court in *Langford* stated that "[t]he cause of action alleging that Sivillo negligently handled the counseling relationship in fact stated a claim for malpractice."[201] "As such, it was properly dismissed because any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion."[202]

The court went on to say that "the cause of action labeled one to recover damages for breach of fiduciary duty, was clearly that Sivillo was guilty of clergy malpractice."[203] They said that since Langford had sought religious and spiritual counseling from Sivillo, "any breach of Sivillo's fiduciary duties can only be construed as clergy malpractice, since it would clearly require a determination concerning Sivillo's duties as a member of the clergy offering religious counseling to [Langford]."[204] The court concluded that any "recognition of a cause of action to recover damages for breach of fiduciary duty…would require the courts to "venture into forbidden ecclesiastical terrain.'"[205]

In *Langford,* Judge Miller, concurring in part and dissenting in part with the Majority's decision asserted that the cause of action for breach of fiduciary duty should be allowed.[206] Judge Miller stated "while a claim of clergy malpractice may require a court to examine ecclesiastical doctrine, a claim of breach of fiduciary duty raises secular issues, which can be

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[199] *Id.* at 498.
[200] *Id.* at 495.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*.
[205] *Id*.
[206] *Id.* at 496.

adjudicated using neutral principals of law."[207] "Using neutral principles of law, premised upon neutral facts, a court can allow a jury to determine that Sivillo acquired influence over Langford by virtue of his role as an established religious leader, that he abused his influence and her trust by demanding a sexual relationship while warning her that only he prevented her physical condition from severely deteriorating."[208] "These findings would require no inquiry into the doctrine of the Catholic Church and would thus not violate the First Amendment."[209] "It has not been, and cannot be claimed that a religious entity is immunized by the First Amendment from liability resulting from tortuous conduct."[210] Judge Miller concluded by stating that "[t]he hallmark of fiduciary duty—an imbalance of power between the parties, is especially manifest in the relationship between priest and parishioner."[211]

In *H.R.B v. J.L.G.,*[212] the Missouri Court of Appeals held that the First Amendment barred a child victim of sexual abuse by a priest from bringing a breach of fiduciary duty claim against the priest, church official, and church. Plaintiff, H.R.B., and his wife, filed a suit alleging that when the plaintiff was a thirteen-year-old student at a school run by the Catholic Church, he suffered various instances of sexual abuse by defendant J.L.G., a Roman Catholic priest employed by the church.[213] Plaintiffs alleged that the defendant "gained the trust and confidence of the Plaintiff by holding himself out as a teacher, counselor and qualified parish priest and alleged his actions constituted a breach of his fiduciary duties."[214]

The Missouri Court of Appeals stated that "Missouri Courts have not addressed whether clergy and religious organizations can be held civilly liable in actions for breach of fiduciary

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[207] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 501; 705 N.Y.S.2d 661 (2000).
[208] *Id.* at 504.
[209] *Id*.
[210] *Id.*
[211] *Id*.
[212] *H.R.B. v. J.L.G,* 913 S.W.2d 92, 98-99 (Mo.Ct.App. 1995).
[213] *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 94 (Mo.Ct.App. 1995).
[214] *Id.* at 97.

duty with respect to sexual misconduct of clergy."[215] The Court went on to say that "[our] review of the law in other jurisdictions compels us to conclude such actions should not be recognized, as they will inevitably entangle civil courts in religious matters."[216]

The Court continued its opinion by discussing the cases that have recognized the breach of fiduciary duty claim,[217] stating that "[t]hese cases reasoned that if the tortuous behavior of the cleric was not religiously motivated, could be evaluated by means of "neutral principles" applicable to clergy and lay persons alike, and did not require inquiry into the tenets and beliefs of the particular cleric's faith, the First Amendment was not a defense to such actions."[218] The Court then discussed the cases that have rejected the cause of action,[219] stating that "[i]n those cases, the courts held that analyzing and defining the scope of fiduciary duty owed persons by their clergy (assuming pastoral relationships were "fiduciary") would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which 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, [t]his is as unconstitutional as it is impossible [because] it fosters excessive entanglement with religion."[220]

The Missouri Court of Appeals concluded that it was aligning itself with the jurisdictions that have refused to recognize breach of fiduciary duty actions against clergy for sexual

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[215] *Id.* at 98.
[216] *Id*.
[217] The Court stated that the cause of action was recognized in *Jones by Jones v. Trane*, 153 Misc. 2d 822, 591 N.Y.S.2d 927, 931 (Sup. 1992), *Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993), *Destafano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988), and *Erickson v. Christenson*, 99 Ore. App. 104, 781 P.2d 383, 386 (Or.App. 1989).
[218] *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Court of Appeals of Missouri, Eastern District, Division Three 1995).
[219] The Court stated that the cause of action had been rejected in *Schmidt v. Bishop,* 779 F. Supp. 321, 325-26 (S.D.N.Y. 1991), *Dausch v. Rykse,* 52 F.3d 1425, 1438 (7th Cir. 1994), and *Schieffer v. Catholic Archdiocese of Omaha,* 244 Neb. 715, 508 N.W.2d 907, 912 (Neb. 1993).
[220] *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Court of Appeals of Missouri, Eastern District, Division Three 1995).

misconduct.[221] The Court stated that there are other causes of action available to the plaintiff "which do not require the trial court to determine whether the defendant breached his trusted and confidential relationship with the plaintiff…[and that] religion was not merely incidental to plaintiff's relationship with defendant…it was the foundation of it."[222]

In *Hawkins v. Trinity Baptist Church,*[223] the Texas Court of Appeals declined to recognize a breach of fiduciary duty claim against a pastor for sexual relationship with an adult parishioner during the course of marital counseling because of concerns towards treading upon the Free Exercise Clause.

Hawkins arose out of suit by Mark and Larinda Hawkins against Trinity Baptist Church and Reverend Darrell Wait.[224] In June 1996 Larinda, a longtime member of Trinity, was hired by Trinity as the church secretary.[225] In January 1997, she began visiting with Wait, the pastor at Trinity, about marital problems she was having with her husband, Mark.[226] These meetings grew into regular sessions that took place three times per week.[227]

At the end of April or early 1997, Wait invited Larinda to come to his private residence while his wife was out of town.[228] "At this meeting, Wait told Larinda he did not understand the act of oral sex she had described performing on her husband, Mark. He asked her to perform it on him so he would understand."[229] Larinda told Wait that "she did not like performing this act but acceded to Wait's request and performed it on him."[230]

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[221] *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Court of Appeals of Missouri, Eastern District, Division Three 1995).
[222] *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Court of Appeals of Missouri, Eastern District, Division Three 1995).
[223] *Hawkins v. Trinity Baptist Church,* 30 S.W.3d 446, 453 (Texas.Ct.App. 2000).
[224] *Id.*
[225] *Id.* at 448.
[226] *Id*.
[227] *Id*.
[228] *Id*.
[229] *Id.*
[230] *Id.* at 449.

Later in May, during a counseling session with Wait, Mark admitted that he had an affair.[231] The next day Wait informed Larinda of Mark's admission; she then confronted Mark with this information and moved out of their marital home.[232] After that, Wait and Larinda had sexual intercourse on two occasions.[233] Finally, Mark informed another minister at the church about the inappropriate sexual relationship between Larinda and Wait, after which Wait resigned from his position as pastor of Trinity.[234]

Larinda and Mark filed suit against Wait and Trinity alleging among other things, breach of fiduciary relationship on the part of Wait.[235] The Texas Court of Appeals stated that Mark and Larinda had "failed to cite any Texas authority establishing that Texas recognizes a fiduciary relationship between a pastor and [church] member."[236] The Court cited Judge Ripple's opinion in *Dausch v. Rykes*[237] as support for its holding that Texas should not recognize a cause of action for breach of fiduciary duty, the Court said that "[t]he judge aptly explained the concern invoked by the creation of such a cause of action as follows:

> 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 [the pastor'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.[238]

The Court concluded by stating that "[l]ike Illinois, Texas recognizes no cause of action for clergy malpractice."[239] "Given our concerns toward treading upon the Free Exercise

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[231] *Hawkins v. Trinity Baptist Church,* 30 S.W.3d 446, 449 (Texas.Ct.App. 2000).
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] *Id*.
[236] *Id*.
[237] 52 F.3d 1425 (7th Cir. 1994)
[238] *Hawkins v. Trinity Baptist Church,* 30 S.W.3d 446, 453 (Texas.Ct.App. 2000).
[239] *Hawkins v. Trinity Baptist Church,* 30 S.W.3d 446, 453 (Texas.Ct.App. 2000).

Clause of the First Amendment, we decline to determine that the pastor-member relationship in this case established a fiduciary duty."[240]

Analysis

Although some courts have summarily dismissed breach of fiduciary duty claims, when raised against clergy members or church entities, as tantamount to clergy malpractice claims, this analysis, while simple, is incorrect. Courts should distinguish between the claims of clergy malpractice and breach of fiduciary duty and recognize that the First Amendment problems that arise from defining a standard for clergy malpractice are not always present when adjudicating a claim for breach of fiduciary duty.

As stated previously, the First Amendment does offer some protection to clergy members and church entities; however, it should not be seen as a complete bar to tort claims against religious leaders or organizations. First, the United States Supreme Court has long recognized that although the First Amendment does offer absolute protection for belief, the same absolute protection does not exist for conduct.[241] If it is demonstrated that the conduct at issue was rooted in religious beliefs, then the court must determine whether the law regulating the conduct is neutral both on its face and in its purpose.[242] An individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. The regulation is proper if the court applies neutral principles of law to regulate the conduct.

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[240] *Id*.
[241] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997)*, 71 TEMP. L. REV. 743, 744 (1998).
[242] *Malicki v. Doe*, 814 So.2d 347 (Fla. 2002).

Courts must avoid becoming heavily entangled in religious doctrine and practice when adjudicating claims against clergy or church entities. A claim for clergy malpractice would require a court to define a professional standard by which a clergy member's conduct could be measured. To recover for a claim of clergy malpractice, it would be necessary for the plaintiff to assert a professional standard of care followed by other clerics in the community.[243] Defining such standards forces the court to investigate and review the skill, training, and standards required of clergy members in different religions, denominations, and sects.[244] Furthermore, defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.[245] Undertaking such a task causes courts to become heavily entangled in religious doctrine and practice.[246] For that very reason it is clear that a claim for clergy malpractice must fall.

"While a claim of clergy malpractice may require a court to examine ecclesiastical doctrine, a claim of breach of fiduciary duty raises secular issues, which can be adjudicated using neutral principals of law."[247] Unlike a claim for clergy malpractice, a claim for breach of fiduciary duty does not necessarily require a court to become heavily entangled in religious doctrine and practice.

In analyzing a breach of breach of fiduciary duty claim, it is important to recognize that a clergy-parishioner relationship, when a counseling relationship is entered into between the parties, can be fiduciary. For a fiduciary relationship to exist, there must be an "interaction that creates trust and reliance," allowing one party to occupy a superior position to another.[248] A

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[243] *Schmidt v. Bishop,* 779 F.Supp. 321, 327-28 (S.D.N.Y.1991).
[244] *Id.*
[245] *Schmidt v. Bishop,* 779 F.Supp. 321, 327-28 (S.D.N.Y.1991).
[246] Paul A. Clark, *Clergy Malpractice After F.G. v. MacDonell and Sanders v. Casa View Baptist Church,* 22 AM. J. TRIAL ADVOC. 229, 231 (1998).
[247] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 501; 705 N.Y.S.2d 661 (2000).
[248] *Id.* at 753.

fiduciary is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking."[249] Trust and confidence are vital to the counseling relationship between parishioner and pastor, and the pastor accepts fiduciary responsibilities by accepting a parishioner for counseling.[250]

Even though a fiduciary duty usually arises in the context of the management of money, this is not necessary for the imposition of a fiduciary duty.[251] Numerous courts have allowed fiduciary relationships to exist outside of the context of the management of money or property. Aside from the numerous courts listed above that have imposed a fiduciary duty on clergy members, a social worker has also been found to be a fiduciary to a client.[252] Additionally, non-physician mental health counselors have been held to have fiduciary relationships with their patients.[253] Fiduciary duties have also been found between family members,[254] and unmarried cohabitants.[255] Although a clergy-parishioner counseling relationship is not traditionally viewed as a fiduciary relationship, the nature of the relationship, and strong public policy supports the imposition of fiduciary duties in some circumstances.

Apparent from the cases discussed previously, claims against clergy members or church entities for breach of fiduciary duties, generally arise out of a counseling relationship. These relationships are inherently fiduciary. Even without examining the cases listed above, it should be apparent, that the central characteristics of a fiduciary relationship exist in the pastoral counseling relationship. When a parishioner seeks counseling from his or her clergy, the trust

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[249] Lindsay Rosen, *RECENT DECISION: CONSTITUTIONAL LAW – In Bad Faith: Breach of Fiduciary Duty By the Clergy – F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997),* 71 TEMP. L. REV. 743, 751 *citing to Destafano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988).
[250] *F.G. v. MacDonell*, 150 N.J. 550 (1997).
[251] *Stevenson v. Johnson*, 32 Va. Cir. 157, 159 (1993)
[252] *Horak v. Biris,* 130 Ill. App. 3d 140 (1985).
[253] *Eckhardt v. Charter Hosp. of Alburquerque*, 953 P.2d 722, 727-28 (N.M. Ct. App. 1997).
[254] *Swenson v. Wintercorn,* 234 N.E.2d 91, 97 (Ill. App. Ct. 1968).
[255] *Sullivan v. Rooney,* 533 N.E.2d 1372, 1374 (Mass. 1989).

and reliance placed upon the clergy member is innate. The imbalance of power between the parties is even more apparent between a cleric and parishioner, than between other mental-health care counselors and their patients. As stated by Judge Miller in *Langford v. Roman Catholic Diocese of New York,* "[t]he hallmark of fiduciary duty—an imbalance of power between the parties, is especially manifest in the relationship between a priest and parishioner."[256]

While a fiduciary relationship can be established between a clergy member and parishioner, in order to recover for a breach of fiduciary duty claim a parishioner must also establish an attendant fiduciary duty, and that the duty was breached.[257] A fiduciary's obligations to the dependent party include the duty of loyalty and the duty to exercise reasonable skill and care, and thus the fiduciary is liable for harm resulting from breach of the duties imposed by the existence of such a relationship.[258] It is establishing a fiduciary duty and breach of that duty that causes problems for many courts.

As shown above, various courts have chosen to alleviate these problems by simply finding that allowing a breach of fiduciary duty claim would require that the court create a reasonable clergy standard by which the clergy member's conduct could be evaluated. This allows the court to dismiss the claim as tantamount to an impermissible clergy malpractice claim, a claim universally rejected as violating the First Amendment. By doing so, the courts are able to free themselves from the detailed discussion of any difficult First Amendment issues.

While the analysis of courts that have summarily dismissed breach of fiduciary duty claims as tantamount to clergy malpractice may be weak, the analysis of courts finding that a breach of fiduciary duty claim can be maintained against a clergy member has not been much better. Many of these courts have gotten around any First Amendment problems by ignoring any

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[256] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 496; 705 N.Y.S.2d 661 (2000).
[257] 7 Colo. Prac., Personal Injury Torts and Insurance § 25.14 (2d ed.).
[258] *F.G. v. MacDonell*, 150 N.J. 550 (1997).

religious component of the pastoral counseling relationship, choosing instead to evaluate the actions of the pastor-counselor based on a standard of care defined by secular counselors.

This was the approach followed by the Fifth Circuit in *Sanders v. Casa View Baptist Church*.[259] In that case the Court allowed a claim for breach of fiduciary duty against a clergy member, stating that the claim was proper because the jury found that "Baucum (the pastor) held himself out as possessing the education and experience of a professional marriage counselor, [and they judged] his counseling activities with the plaintiffs not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances."[260] The Fifth Circuit decided the case by comparing the clergy member's actions to a professional marriage counselor standard, without addressing any differences between a religious counselor and a secular counselor.

However, this strained analysis is not necessary. Courts faced with cases in which a clergy member enters into a sexual relationship with a parishioner during the course of pastoral counseling could evaluate the claim as a conflict of interest case, without fear of having to evaluate church doctrine or ignoring the differences between a pastoral counselor and a secular counselor. "Persons occupying a fiduciary relationship towards others are not permitted to assume positions which bring their private interests into conflict with the interests of those to whom they owe the fiduciary duty."[261] The fiduciary is under a duty to act for the benefit of the other party, not for his or her own self-interest. The fiduciary owes a duty of loyalty to the other person. Evaluating these cases by looking at whether the fiduciary acted in his or her own self-

[259] 134 F.3d 331 (5th Cir. 1998).
[260] *Id.* at 337.
[261] *Young v. Bradley*, 142 F.2d 658, 661 (6th Cir. 1944).

interests, and not in the interests of the person in the inferior position, the parishioner, would not require a court to evaluate religious matters or church doctrine.

In the case of a clergy member entering into sexual relations with a parishioner, the analysis is straightforward. When the cleric enters into a sexual relationship with the parishioner, it is clearly not in the parishioner's best interests. The sexual relationship is often the cause of future mental problems for the parishioner, and when it occurs while the parishioner is married it routinely causes the break up of the marriage. It should also be apparent that the clergy member is entering into the sexual relationship for his or her own sexual gratification, not for the best interests of the parishioner. This conflict allows the court to find a breach of fiduciary duty without resorting to an evaluation of the church doctrine.

The court is only required to evaluate whether the clergy member has acted in his or her own interests or the interests of the parishioner. That the relationship is one that involves an authority or adherent of a religion is only relevant to the nature of the power differential in establishing the fiduciary character of the relationship. The court will only need to determine whether there was a relationship in which there was an interaction of trust and reliance from which one of the parties was under a duty to act for the benefit of another, and failed to do so—this does not require an examination of religious tenets or beliefs, but rather an examination of the individual relationship between the parties. Therefore, a court will not have to become entangled in a religion when examining whether there was a breach of fiduciary duty.

Additionally, strong public policy supports the imposition of fiduciary duties upon clergy members who undertake to counsel their parishioners. Exemplified by the enumerated cases above, many of the claims arise from a clergy member taking sexual advantage of a parishioner. When a parishioner seeks counseling from a cleric, they are generally very vulnerable, and trust

that the parishioner has their best interests in mind. Additionally, the parishioner may be even more vulnerable when seeking counseling from a cleric, as opposed to a secular counselor, because the cleric may have additional authority over the parishioner due to his or her position as a religious leader. The government has a strong interest in protecting society from such heinous actions and not allowing the First Amendment to be used as a shield from liability for neutral and generally applicable tort law. There is no reason to exempt a clergy member from law that would protect the same parishioner if a secular counselor committed similar acts.

Conclusion

While some courts have continued to hold that breach of fiduciary duty claims against churches and their clergy are identical to impermissible clergy malpractice claims, there are differences between the claims. While clergy malpractice has been universally rejected, numerous courts have pointed out that breach of fiduciary duty claims do not raise the same First Amendment issues. Adjudication of a breach of fiduciary duty claim only requires a court to use pre-existing secular standards of care to which all fiduciaries are held.[262] Therefore, courts faced with the question of whether to allow a claim for breach of fiduciary duty should not hastily conclude that the claim is indistinguishable from clergy malpractice, instead these courts should find that clergy malpractice and breach of fiduciary duty are distinguishable and find that while the First Amendment is an automatic bar to the former, it is not necessarily a bar to the latter.

As these claims continue to be filed at higher rates throughout the country, it is important that courts nationwide begin to develop an analysis that will allow recovery for parishioners who have suffered grievous harm. An appropriate breach of fiduciary duty analysis will allow courts to adjudicate these claims without running the risk of violating the First Amendment.

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[262] *Langford v. Roman Catholic Diocese of New York*, 271 A.D.2d 494, 503; 705 N.Y.S.2d 661 (2000) *quoting Martinelli v. Bridgeport R. C. Diocesan Corp.,* 10 F. Supp.2d 138, 146 (D. Conn. 1998).