

Counseling and the Law

Hi. My name is Brian DeCook. Welcome to this session titled Counseling and the Law. In this session, we'll examine the topic of counseling, some of the legal issues that exist when a church provides counseling services. The contents of this lecture should not be construed as legal advice or relied upon as legal advice in any given factual situation. The material covered in this lecture is a summary overview of the topics covered. If you find yourself in a situation where the material in this lecture is at issue, you should consult a local attorney competent in this area of the law.

Many churches offer some form of counseling services. The most common example is the counseling of church members by a pastor. Some churches offer lay-counseling services. Some limit these services to members of the church while others target the general public and promote their counseling services as an outreach ministry. Of the churches that provide counseling services, some use counselors or psychologists that are licensed by the state. Other use unlicensed lay counselors who may have varying degrees of training and sometimes little, if any, professional training.

It is my intention in this session to identify the legal issues that should be considered by any church that offers counseling services or intends to do so in the future. Here are some of the risks associated with providing counseling services. For pastors, there's the issue of potential clergy malpractice and sexual misconduct. For pastors and lay counselors, there are these additional risks involved: negligent counseling, child abuse reporting, seduction of counselees, confidentiality, negligent hiring, negligent supervision, and thieves. I'll briefly discuss each of these risks and then offer some risk management policies and procedures that can be implemented to reduce the risk of liability in these areas.

Two risks that pastors face when counseling are clergy malpractice and sexual misconduct. Most courts have rejected clergy malpractice as a basis for liability. However, a few courts have recognized this cause of action for pastors who engage in sexual misconduct whether with an adult or minor or if they engage in non-religious counseling for which they're not qualified. Malpractice is generally defined as a failure to exercise an accepted degree of skill and the performance of professional duties that results in injury to another.

When a pastor holds himself out as a counselor and engages in non-religious counseling, the standard of care will be determined by the accepted degree of skill and the performance of professional duties as a non-religious counselor, not as a pastor. Therefore when pastors engage in non-spiritual

counseling form which they have not been trained, they'll be held to a legal standard of competence for that of a trained counselor. This increases the risk for liability. Accordingly, pastors should only provide counseling in areas where they have been trained and have sufficient knowledge and expertise to counsel others.

When someone seeks your counsel in an area of life or concerning issues that you have little or no experience or training, the prudent course of conduct is to refer that individual to someone who can provide competent counseling. This will reduce the risk of being sued for negligent counseling. Many ministers that provide counseling services have been sued for engaging in sexual misconduct. Many of these cases involve sexual contact between male clergy and females they are counseling. Typically, after the misconduct occurs, the woman later sues the pastor for the intentional affliction of emotional distress, assault, battery, and/or sexual harassment. In some cases, criminal liability may exist if there is a state law that criminalizes sexual contact between a pastor and a counselee.

Sexual misconduct has also occurred in cases involving lay counselors that seduced or sexually assaulted female counselees. Private counseling sessions involving dependent or emotionally vulnerable persons can present unique and powerful temptation. If inappropriate sexual contacts are initiated, substantial damage to the victim, the victim's family, and the church can occur.

Another risk associated with counseling is the risk of false accusations of inappropriate behavior. False claims are brought by people interested in seeking a legal settlement or other motive. Counselors must be wise as serpents yet harmless as doves. We'll talk about strategies to protect against some of these risks later in this session.

Child abuse reporting is another risk associated with counseling. Counselors sometimes receive allegations of abuse from the people that they counsel because every state has an active mandatory child abuse reporting law. It is essential that anyone who provides counseling services be aware of their state's requirements and whether they have a legal duty to report alleged abuse. We will cover child protection in more detail in the next session of this course.

Another risk associated with counseling is the importance of confidentiality. Because I covered confidentiality in the previous session, I will not address this topic in detail here only other than to bring it to your attention as another area of risk for legal exposure in the area of counseling.

Negligent hiring and negligent supervision are the last two risks related to counseling services that we'll discuss in this session. Negligent hiring occurs when an employer, in this case a church, fails to

adequately screen candidates for counseling positions. The church can be sued for injuries inflicted upon a counselee by a lay counselor if the church knew or should have known of a dangerous propensity of that lay counselor. Background checks, documented screening processes, and reference checks will protect the church against the negligent hiring claim.

Negligent supervision occurs when a church fails to adequately supervise unlicensed lay counselors. Churches with counseling program should adopt policies that set forth standards for high risk situations like suicide threats, threats of harm to others, confession of criminal activity and confessions of child abuse.

These are some of the more frequent types of legal claims that can arise in a church counseling environment. But this list is by no means exhaustive. Let's turn our attention to a number of steps that can be taken to reduce the risk of these claims and enhance the benefits received by those receiving counseling services.

First let's talk about measures that can be taken to reduce the risk of sexual misconduct and false accusations. There are a number of steps the church can take to protect the integrity of its counseling services in this area. First is the third-person rule. Third-person rule means that no male counsels a female unless a third person is present. A second protection is to have women counsel women. The remaining four on this list are environmental steps that can be taken to protect against and put a hedge of protection up for the pastor and the counseling services.

Windows so that there is never a time when the counselor and the counselee are beyond the sight of others. Keeping doors open if there are no windows to the office where the counseling is taking place. These two items—open doors and windows—it is important to recognize that if there's no one else in the office who's observing or overhearing, will be no benefit if it's just the counselor and the counselee in the office. In that case, there should be the third-person rule. Telephone counseling is another way to protect against allegations of inappropriate contact, and the installation of video cameras is another measure that can be taken.

There are other risk management strategies that can reduce the risk of liability for counseling services. Adopt the counseling policy that clearly communicates the scope and limitations of the counseling ministry. Avoid controversial therapies such as age regression therapy or multiple personality disorder therapy.

Third is adopt a referral policy that clearly sets the boundaries for when situations will be referred to a professional counselor. Fourth, verify whether the church's insurance policy covers counseling services. Fifth, use disclaimer and release forms for counselees to sign that acknowledge that the lay counselor is not acting as an agent of the church and is not acting under the control or supervision of the church.

I hope that this rather cursory review of the risks associated with church counseling services provided you with information to consider for your own and your church's protection as you pursue God's calling on your life. If you develop a counseling ministry at your church that goes beyond spiritual counseling, I encourage you to consult with a competent attorney who can assist you in setting up policies and risk management activities that will serve you well as you pursue your calling to serve and equip the body of Christ.