



Google™ Custom Search

[Table of Contents for this issue.](#)

- [Home](#)
- [Current Issue](#)
- [Archives](#)
- [Book Reviews](#)
- [Subscriptions](#)
- [Advertise](#)
- [Contact Us](#)
- [Store](#)
- [EJ International Editions](#)
- [Text-Only View](#)

Enrichment International Editions

Albanian	Bengali	Croatian
Czech	French	German
Hindi	Hungarian	Malayalam
Portuguese	Romanian	Russian
Spanish	Tamil	Ukrainian

[Donate to this project.](#)

The Counselor and the Law:

A Guide to Legal and Ethical Practice

Any church that offers counseling services or is considering doing so needs to consider the following important legal and ethical concerns.

By Richard R. Hammar

Most churches offer some form of counseling services. The most common example is a pastor counseling church members. But many churches do more. Some employ a staff member who is a licensed psychologist or counselor, while others use unlicensed laypersons with little if any professional training. Some churches limit these services to members of the congregation, while others target the general public and promote their counseling ministry in the local media and telephone directory.

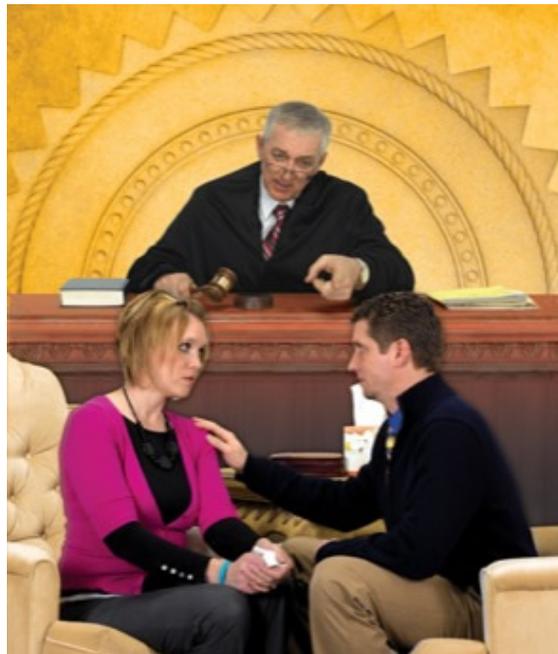
Counseling ministries provide an excellent and needed service, and represent a point of contact with the community. However, there are a number of important legal concerns that any church that offers such services, or that is considering doing so needs to consider. I summarize the more important concerns in this article.

SIGNIFICANT LEGAL ISSUES

(1) Negligent counseling

Negligent counseling is a legal risk associated with lay counseling programs. This risk can arise in a number of ways. Some persons may claim lay counseling aggravated rather than helped their emotional problems. Others may claim that lay counselors have a legal duty to refer suicidal persons to medical professionals having the authority to involuntarily commit such persons, and that they are responsible for the suicide of a counselee they did not refer.

In 1988, the California Supreme Court ruled that "nontherapist clergy" do not have a duty to refer suicidal persons to medical professionals. *Nally v. Grace Community Church, 253 Cal. Rptr. 97 (1988)*. However, the court emphasized that its ruling applied only to clergy who are not licensed therapists. Courts in many other states have followed this ruling. The key point is this: There is no assurance that lay counselors working on behalf of a church share the significant protection from



[Order Printed Issues](#)

Spanish
View Revista de enriquecimiento (EJ Spanish site)

Women In Ministry THE NETWORK
A Called Community of Women
VISIT NOW!

[Join us on Facebook](#)

[Download Free App](#)

enrichment journal e-newsletter
TOOLS OF THE TRADE
[SUBSCRIBE NOW!](#)

Artículos en español para mujeres en el ministerio

Order *Managing the Local Church/Leadership* CD.

Order Paraclete CD

All 29 years of the out-of-print Paraclete magazine. Excellent source of Pentecostal themes and issues, theological articles on the work and ministry of the Holy Spirit, and sermon and Bible study material. Fully searchable subject/author index.





Order *Advance* CD

Long out of print but fondly remembered, *Advance* magazine blessed thousands of A/G ministers. Now the entire *Advance* archives — 30 years of information and inspiration, helps, and history — is available on CD.

liability enjoyed by nontherapist clergy counselors. This is so whether or not the lay counselors are licensed counselors or psychologists under state law.

(2) Child abuse reporting

Counselors often receive allegations of child abuse from counselees. It is imperative for church leaders to be familiar with their state's child abuse reporting statute and ensure that all counselors are aware of their reporting obligations, if any, under state law. Keep in mind that states frequently amend these statutes, so the church needs to obtain updated copies at least annually.

Licensed and lay counselors are mandatory child abuse reporters in most states. Pastors who provide counseling services are mandatory reporters in many states, but may be excused from a legal duty to report with respect to information they obtain in the course of a conversation protected by the clergy-penitent privilege. Again, familiarity with state law is imperative.

Several states have enacted laws authorizing victims of child abuse to sue mandatory reporters who were aware of the abuse but who chose not to report it. For example, a minor who is being abused by a stepparent learns that a church counselor was aware of the abuse but did not report it. The minor may sue the counselor (and the church) arguing that the failure to report the abuse aggravated the injury. The statute of limitations on such claims does not even begin to run out until the minor reaches the age of majority, meaning that contingent liability for such claims can persist for many years. Further, many states have enacted laws suspending the statute of limitations until an adult survivor of child abuse "discovers" that he or she was injured by the abuse. This can extend the statute of limitations for a significant amount of time.

It is essential that the church apprise any counselors of his or her legal obligations under state law with respect to this important issue.

(3) Seduction of counselees

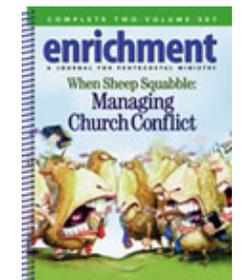
There have been a number of lawsuits over the past few years brought by women who were seduced or sexually assaulted by male clergy and mental health professionals. Often the misconduct occurred or started in the course of counseling sessions. As much as we would like to deny it, private counseling sessions involving dependent or emotionally vulnerable persons can present unique and sometimes formidable temptations. If the counselor initiated inappropriate sexual contacts, there can be substantial damage to the victim and the victim's family. But this is not all. The costs of such behavior often devastate the counselor as well, and lead to criminal charges, loss of professional credentials, future unemployability, and unavailability of any insurance coverage for either a legal defense or payment of damages. Clearly, churches must take steps to reduce or eliminate this risk.

But there is another risk associated with counseling — the risk of false accusations of inappropriate behavior. Unfortunately, in some cases persons seeking a legal settlement or pursuing some other ulterior motive bring false accusations against counselors. It is imperative for counselors to recognize that a false accusation can be as devastating as a true one.

Because of the unique temptations that counseling can present, and the possibility of false accusations, pastors and others who engage in counseling need to take "defensive measures."

(4) Confidentiality

Another important consideration in church counseling is the concept of confidentiality. Counselees can sue counselors (and the church) if counselors intentionally or inadvertently disclose confidential information to third parties. Obviously, this can occur in several ways — for example, the counselor directly communicates the information, or the counselor's counseling notes are accessible to church staff. Churches need to strictly admonish counselors to maintain the confidences shared with them. The one exception relates to child abuse reporting. A legal duty to report known or reasonably



Order
Conflict Management
Two Volume Set

suspected cases of child abuse generally overrides the duty to maintain confidences (at least for persons who are required to report under state law).

(5) Negligent hiring

The church needs to carefully screen any candidate for a counseling position to ensure, as much as possible, the suitability of the person for a counseling ministry. The screening process needs to include contacts with former churches with which the person has been affiliated or in which he or she has worked in a counseling capacity, an appropriate screening form, and communication with a number of references. Of course, the church needs to note these contacts in writing and place them in a confidential file. In some cases, the church needs to consider a criminal records check; for example, if an individual the church is considering for a counseling position has no background, or there are unsubstantiated allegations involving prior misconduct. The important consideration is: counselees can sue the church for injuries inflicted by a lay counselee if the church either knew or should have known of a dangerous propensity of the counselor.

Victims of clergy sexual misconduct have sued churches on the ground they failed to do an adequate job of screening the minister at the time he or she was hired. Churches wanting to lower this risk will develop screening procedures for clergy applicants.

(6) Negligent supervision

The church needs to consider adopting mechanisms to ensure that appropriately trained and licensed mental health professionals supervise unlicensed lay counselors. (See the article in this issue, "The Caring Church: Equipping Laity for Pastoral Care and Counseling" by Pablo Polischuk.)

The church needs to also develop a counseling policy setting forth standards on such issues as suicidal counselees, counselees threatening harm to others, counselees who confess to criminal activities, and counselees who are child abusers. Unlicensed lay counselors need to understand clearly their responsibilities with regard to these kinds of crises. In most cases they need to be advised to refer crisis cases immediately to a designated licensed mental health professional. Of course, this does not mean that the church counselor must sever all ties with the individual. Quite to the contrary, the spiritual counseling offered by the church counselor may continue simultaneously with the counseling provided by the licensed professional.

It is also important for the counseling policy to prohibit lay counselors from engaging in controversial therapies such as "repressed memories" and diagnosis and treatment of multiple personality disorders.

(7) Fees

Some churches charge a prescribed fee for counseling services. Are such fees deductible as charitable contributions to the church? The answer is no. The Supreme Court has ruled that prescribed payments for prescribed services are never deductible as charitable contributions. *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989). If the counseling is provided free as a ministry of the church, voluntary payments made by counselees to the church probably could be deducted as charitable contributions. However, if the church establishes or even "recommends" a prescribed fee, the IRS would not recognize such payments as tax deductible. To be deductible, the payments must in fact be voluntary, the counseling services must be available to all without a fixed or suggested charge, and those unable to pay must receive the same consideration as those who are able to pay for the counseling services.

RISK MANAGEMENT

Churches can implement a number of risk-management strategies to reduce the risk of liability associated with pastoral or lay counseling. These include the following:

Reducing the risk of sexual misconduct and false accusations

Churches have adopted a number of precautions to reduce the risk of sexual misconduct by pastoral and lay counselors. These precautions also reduce the risk associated with false accusations. Consider the following:

(1) The third person rule

One effective way to deal with these risks is to adopt a policy prohibiting any male minister or counselor on staff from counseling privately with an unaccompanied female (i.e., opposite sex counseling) unless a third person is present. The third person may be the minister's or counselor's spouse, another minister on staff, or a mature and trusted church employee (preferably female).

Key point. *Does the presence of a third person negate the "clergy-penitent" privilege for clergy counselors, meaning that either the pastor or counselee can be compelled to answer questions in a court of law regarding the communications? Not necessarily. In some states, the privilege applies so long as no one other than persons "in furtherance of the communication" are present. It is possible that a court would conclude that a third person who is present during a pastoral counseling session as a matter of church policy is present "in furtherance of the communication." As a result, the privilege may be preserved. Further, some courts have ruled that the clergy-penitent privilege is not negated by the presence of a guard during pastoral counseling with prison inmates if the guard's presence is required by law or prison policy. A court may reach the same conclusion in the context of a church policy mandating the presence of a third person during "opposite sex" pastoral counseling sessions.*

Key point. Even if the privilege is negated by the presence of a third person, this risk must be weighed against the reduced risk that will occur.

Key point. Some churches that have a ministry to the deaf use a deaf member to serve as the third person. Such a person is ideal, for he or she can observe the entire session but does not apprehend what is said.

Key point. There have been no reported cases involving a claim of sexual seduction of a male counselee by a female counselor. As a result, churches using female counselors are reducing their risks significantly. Of course, there remains the possibility of a male counselee making unfounded accusations against a female counselor, and as a result churches using female counselees may want to consider adopting the same precautions that apply to male counselors.

(2) Women counsel women

Since the vast majority of cases of inappropriate sexual behavior involve male counselors and female counselees, churches can significantly reduce their risk by using women to counsel women.

(3) Other measures

Churches have implemented a number of other measures to reduce the risk of sexual misconduct, or false claims of sexual misconduct, during pastoral or lay counseling sessions. These include one or more of the following:

- **Windows.** Installing a window in the pastor's office making all counseling sessions clearly visible to office staff. Of course, such a precaution is effective only if other staff members are present and visible throughout the counseling session. This means that the church needs to implement a policy limiting counseling sessions to office hours when other staff are present and visible.
- **Open doors.** Some counselors conduct counseling sessions in a room with an open door so office staff can clearly see the counselor or counselee. Of course, such a precaution is effective only if other staff members are present and visible

throughout the counseling session. This means that the church needs to implement a policy limiting counseling sessions to office hours when other staff are present and visible.

- Telephone counseling. Many smaller churches have no other staff present and visible in the church office during counseling sessions. Some of these churches limit opposite sex counseling sessions to those involving a third person or those that are conducted by telephone.
- Video cameras. Some churches have installed a video camera (without audio) in the office where counseling occurs. The video can be transmitted to a monitor in another location in the church where a church employee can observe. Or, the camera can simply record the entire session. If sessions are recorded, the church needs to retain the tapes indefinitely, or until two designated church members review them and prepare a written summary stating whether or not they observed any inappropriate acts. These reviewers can perform this review in fast forward mode so that it does not take long.
- Boundaries. Many courts have recognized the psychological principle of “transference.” To illustrate, one court defined transference as “a phenomenon that occurs that is similar to a state of dependency in which the client begins to project the roles and relationships and the images and experiences that they have had with other people previously in their life, especially other significant people such as mother, father, brothers, sisters, early teachers and adult models, upon the therapist.”¹ Another court defined transference as “a process whereby a patient undergoing psychotherapy for a mental or emotional disturbance (particularly a female patient being treated by a male psychotherapist) develops such overwhelming feelings of warmth, trust, and dependency towards the therapist that she is deprived of the will to resist any sexual overtures he might make.”² Similarly, another court observed, “Transference is the term used by psychiatrists and psychologists to denote a patient’s emotional reaction to a therapist and is generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient’s past. ... Transference is crucial to the therapeutic process because the patient unconsciously attributes to the psychiatrist or analyst those feelings that he may have repressed towards his own parents. ... [I]t is through the creation, experiencing and resolution of these feelings that [the patient] becomes well. ... Understanding of transference forms a basic part of the psychoanalytic technique.”³

Pastoral and lay counselors are often tempted to engage in inappropriate sexual contact with a counselee because of unfamiliarity with this phenomenon. They misinterpret transference as affection, and fail to engage in antitransference precautions that reduce the risk of inappropriate physical or emotional bonding. These precautions can include one or more of the following: (1) require a third person to be present for any counseling occurring off of church premises; (2) allow one-on-one counseling on church premises only during office hours if other staff members are present and visible; (3) limit counseling sessions to 45 minutes; and (4) permit no more than five counseling sessions with the same person during a calendar year.

Key point. Churches that adopt any of these other measures must recognize that they are not reducing risk as much as if they applied the “third person rule” or required women to counsel women. It is imperative that churches adopting these lesser measures incorporate them into official church policy and strictly monitor them to prevent any deviations. Remember, windows or open doors are of no value if a counseling session extends beyond normal office hours and the church staff leaves.

OTHER RISKS

Another significant risk of lay counseling, when unlicensed counselors are used, is negligence in selecting and using a counselor with little if

any formal training. Churches can reduce this risk by adopting a number of risk management strategies. Consider the following:

(1) Counseling policy

Churches that use unlicensed lay counselors need to prepare a suitable brochure or statement clearly communicating to each counselee that the church considers counseling to be an essential aspect of its ministry, and that it is important for persons seeking counseling to recognize certain legal considerations that apply in the context of counseling. These may include many considerations, including the fact the counselee understands and agrees that counseling is provided on the basis of the following conditions:

- The counselors are engaged solely in spiritual counseling based on their understanding of the Bible, and they are not engaged in the practice of psychology, professional counseling, or psychotherapy.
- State law may require a counselor to report allegations of child abuse to civil authorities.
- Statements made in confidence to a pastor in the course of counseling ordinarily are "privileged," meaning that neither the counselee nor the pastor can be compelled to disclose in a court of law any statements made in the course of the counseling. However, the presence of a third party during a counseling session may jeopardize the privilege, since the counseling may no longer be considered "confidential." To illustrate, statements made in the course of pastoral counseling may not be privileged if a counselee brings a friend along to the counseling session.
- Any statements made in confidence in the course of counseling will be kept in strict confidence by the counselor. As noted above, the duty to maintain confidences may not apply in the context of child abuse. Further, the counselor may reserve the right to disclose confidential information in specified situations (such as threats of suicide, or an intent to harm another person).

(2) Avoid controversial therapies

Churches need to instruct counselors to avoid any controversial counseling techniques that have been associated in recent years with staggering levels of liability (such as age regression therapy or multiple personality disorders).

(3) Referrals

Counselors need to have a clear understanding of those cases that need to be referred to a professional counselor.

Tip. When referring counselees to a professional counselor, it is important to avoid endorsing the counselor. Simply inform the counselee that the counselor is state licensed (as a counselor, psychologist, or psychiatrist), and has satisfactorily served a number of other members of the congregation.

(4) Insurance

Does the counselor have counseling insurance? If so, what are the coverage amounts? What exclusions exist? These are questions that need to be addressed prior to the time the counselor begins counseling. Also check to see if the church's liability insurance policy covers the counseling activities.

(5) Legal agreement

Consider executing a legal agreement with the counselor that expresses the conditions of the arrangement.

(6) Disclaimer

Have every counselee sign a form acknowledging that the counselor is not acting as an agent or representative of the church, and that the counselor is not acting under the control or supervision of the church.

(7) Use of the term counselor

It is unlawful in most states for unlicensed persons to use the terms counselor or counseling in connection with their services. Pastors who engage in counseling of church members in the course of performing their pastoral duties are exempted from this limitation, but lay counselors generally are not even though they are working in a church.



RICHARD R. HAMMAR, LL.M, CPA, serves as legal counsel to the Assemblies of God, and is editor of the *Church Law and Tax Report* newsletter. He has written more than 50 books on church legal and tax issues, including the third edition of *Pastor, Church and Law*.

Notes

1. *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990).
2. *Alpharetta First United Methodist Church v. Stewart*, 473 S.E.2d 532 (Ga. App. 1996).
3. *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993).

Enrichment Journal
1445 Boonville Ave., Springfield, MO 65802
Email: enrichmentjournal@ag.org
Phone: 417-862-2781, ext. 4095
To subscribe by phone: 1-800-641-4310

Copyright 2015 The General Council of the Assemblies of God
1445 North Boonville Ave., Springfield, MO 65802 • Telephone: 417-862-2781

[Terms of Use](#) [Privacy Policy](#)